O.A. 9-3-91 047

IN THE SUPREME COURT OF FLORIDA

CLIFFORD DANIELS,

Petitioner,

v. CASE NO. 76,717

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ANNE Y. SWING
ASSISTANT ATTORNEY GENERAL
Florida Bar ID No. 299294
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

OF COUNSEL FOR RESPONDENT

/maj

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Issue II - The jury was properly instructed that the robbery defendants must have intended to temporarily or permanently deprive the victim of her property. The intent required for robbery, like that required for theft under the 1977 statute, is the intent to steal; and this Court has held the intent to temporarily deprive the victim sufficient under that standard. The intent of the robbery statute is derivative anyway. Theft of money and personal property by force is robbery. The specific intent comes from the lesser included offense of theft. The confusion stems from the fact that the underlying offense used to be larceny, which arguably did require permanent deprivation to have been intended. The cases suggesting that this is still required reflect the erroneous belief that the 1977 theft statute required that, and/or the lack of analysis of found in *dicta*.

The error would have been harmless in any event. The jury could not have found that anything other than permanent

deprivation was intended in this case. The victim's wallet was found in the bushes where the robbers had thrown it, and her money was gone. There was no indication whatever that the robbers expected her wallet to be returned, and they certainly did not intend for her to recover the money. Therefore, the nonstandard language did not bear on any question the jury actually had to decide. If it had been error, it would clearly have been harmless. Petitioner did not object, and the variant language was certainly not fundamental error. It was correct, but reversal would be improper in any event.

Issue III - Petitioner was properly sentenced. The offenses for which he was sentenced were unrelated and occurred at different times. The robbery was properly pending for sentencing the year before and would have been sentenced at that time but for Petitioner's own misconduct in absconding. The failure to report was not pending for sentencing at the same time. It had not even occurred. Had Petitioner appeared for the robbery sentencing when he should have, or been sentenced *in absentia* then, the consecutive sentences he received would have been proper under the guidelines, and he should not benefit from the different sequence of events brought about by his own misconduct.

Limiting Petitioner's sentence to what the guidelines would permit in a joint sentencing situation would ensure him a free ride on his prolonged failure to report. He had committed a substantive violation the year before and could have received twelve years under the guidelines then. That would still have

been the maximum the following year, despite the intervening violation. The fourteen years Petitioner actually received was not excessive to take this violation into account.

Petitioner's sentences are not governed by Lambert v. State, 545 So.2d 838 (Fla. 1989). The case has no application to these facts. It precludes double-dipping. It does not guarantee defendants free rides, and it says nothing about whether offenses that should have been sentenced separately, at two different times, can be treated as though they had been.

ARGUMENT

ISSUE I

TRIAL PROPERLY PROCEEDED IN PETITIONER'S ABSENCE.

Petitioner asserts that the trial court erred in proceeding with trial in his absence when he failed to return to the courtroom after jury selection. Petitioner does not deny that his absence was voluntary. In his view, it does not matter. Petitioner acknowledges the propriety of *concluding* a trial when the defendant voluntary absents himself during the presentation of evidence or such, but he suggests that it would not be proper to *commence* the proceedings in the absence of the defendant. Petitioner further suggests that his trial was *commenced* rather than concluded *in absentia* because he absconded before the jury was sworn. His appearance for trial when it was scheduled to begin and his presence throughout the jury selection are irrelevant in his view. His theory is incorrect.

Petitioner suggests that the extensive case law approving *in absentia* trials of defendants who voluntary waive the right to be present is largely inapplicable because most such cases involve absences that occurred after the jury was sworn. In actuality, it is quite clear that the trial court has the right to proceed with trial *in absentia* even when the defendant never appears at all, so long as the absence is voluntary and the circumstances of the particular case favor going forward with the trial rather

than rescheduling it. See e.g., United States v. Fernandez, 829 F.2d 363 (2d Cir. 1987); United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986), cert. denied, 479 U.S. 989, 93 L.Ed.2d 587, 107 S.Ct. 584 (1986); United States v. Schocket, 753 F.2d 336 (4th Cir. 1985); Brewer v. Raines, 670 F.2d 117 (9th Cir. 1982); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088, 47 L.Ed.2d 99, 96 S.Ct. 881 (1976); United States v. Tortora, 464 F.2d 1202 (2nd Cir. 1972), cert. denied, sub nom, Santor v. United States, 409 U.S. 1063, 34 L.Ed.2d 516, 93 S.Ct. 554 (1972).

The courts have recognized that defendants who fail to appear for trial should necessarily not be tried *in absentia* in every case. It depends on the circumstances. The court must consider various factors and determine whether the interests of all concerned would best be served by conducting the trial as scheduled or by postponing it. One factor that the courts virtually always consider is whether there are codefendants. If postponing the trial of the absconding defendant would delay the trial of one or more codefendants, or require two or more trials where one would suffice, trial *in absentia* is likely to be proper.

Another factor generally considered is the likelihood that the defendant will be available for trial at some later date in the near future if the trial is postponed. Other considerations often mentioned include the additional cost involved in rescheduling the trial or holding two trials, the inconvenience to the witnesses, and the likelihood that witnesses may disappear, be threatened, or remember events less clearly. When

the trial is expected to be lengthy and complex, a later trial is likely to be quite inconvenient and costly, which weighs in favor of trial *in absentia*, but that factor is not determinative. Petitioner acknowledges that the trial in Brewer lasted only two days and involved only one defendant. Other factors may be considered where they apply. In Sanchez, for example, the Second Circuit considered the overall conduct of the missing defendant. In Fernandez, the court considered it significant that steps had been taken to ensure that the jury did not hold the defendant's voluntary absence near the end of the trial against him.

In the instant case, trial proceedings could have begun in Petitioner's absence if he had never appeared at all. In the first place, there was a codefendant. (R 8) A defendant has no right to reschedule his own trial unilaterally to suit his convenience, and he has even less right to reschedule the trial of a codefendant, or to sever the cases and require two trials instead of one. In the second place, Petitioner would not have been available for trial after a brief postponement in any event. He absconded in November of 1986 and was not found and brought in until July of 1987. (R 1, 4, 204, 243 - 244)

The court certainly tried to find him and get him to the trial. Defense counsel spoke with Petitioner about his absence at least twice. (R 4 - 5; Supp. R 4) The bailiff spoke with him. (R 173 - 174, 203 - 204) The trial judge attempted to speak with him. (R 4, 16, 173 - 174, 202 - 203) The hospitals were all contacted to see if he had gone for treatment of the cut

he said he had received. (R 4 - 7, 16, 173 - 175, 202 - 203; Supp. R 3 - 7) A capias was issued, and an officer was sent out to bring him in. (R 5, 16, 192; Supp. R 15)

Petitioner was not prejudiced by the trial *in absentia*. The trial court was very conscious of the adverse effect his absence might have on the jury and took all reasonable steps to avoid that, including an instruction to the jury to disregard the absence, which both counsel were invited to help him draft. (R 5 - 7, 115 - 116, 122, 308; Supp. R 3 - 7)

Petitioner suggested on appeal that the victims' identifications of his photograph were questionable because the victims were not even sure what he looked like the night the robbery occurred. That is not the case. The victims described Petitioner and his clothing to the police at the time, they identified Petitioner that same night, and they had no reservations about their identifications of his photograph at trial. (R 22 - 23, 49 - 51, 70 - 71, 79 - 81, 91 - 92; Supp. R 10 - 13) Had Petitioner been able to delay his trial for an additional eight months or more by absconding, however, the identifications might in fact have been uncertain. This is obviously a factor weighing in favor of trial *in absentia*. The avoidance of that problem hardly constitutes unfair prejudice to Petitioner.

Under these circumstances, trial *in absentia* would have been proper even if Petitioner had absconded before the proceedings began, but that standard does not apply. Petitioner was present

began, but that standard does not apply. Petitioner was present when the proceedings began and throughout the entirety of the jury selection. Therefore, the only question was whether the court was entitled to *conclude* the proceedings in his absence, not whether the proceedings could have been *commenced* had he never appeared; and Petitioner does not seriously suggest that a trial, once begun, cannot generally proceed *in absentia*.

Petitioner suggests that his presence during the jury selection is of no consequence, that the trial does not begin until the jury is sworn, but this is incorrect. Petitioner acknowledges "*dicta*" to the contrary in State v. Melenedez, 244 So.2d 137 (Fla. 1941). The importance of jury selection in terms of the defendant's right to be present was clear in that case and it was not *dicta*.

Petitioner's argument was more directly addressed by the Second Circuit in Tortora, and the court determined that the propriety of trial *in absentia* did *not* depend upon the swearing of the jury. The court recognized the significance of that event in the context of double jeopardy, but saw no reason to give it similar weight in determining the propriety of an *in absentia* trial. As the court noted, the prohibition against double jeopardy ensures that defendants need not undergo the stress of a criminal trial repeatedly. The entire criminal process is stressful, the line has to be drawn somewhere, and the swearing of the jury has come to symbolize the attaching of jeopardy for that purpose. Other policies are involved *in absentia* trials, like

conserving funds and efforts, ensuring that trials are fair, that they occur while evidence and memories are fresh, and so forth. Such considerations are not logically related to the swearing of the jury and should not depend on the timing of that event.

Petitioner appeared when trial was scheduled to begin, and he remained for the entirety of the jury selection. When he failed to return for the rest of the proceedings, it was certainly in the court's discretion to proceed *in absentia*. However easy or difficult it might have been to postpone the trial had Petitioner never appeared in the first place, significant waste would have been unavoidable after jury selection. A new jury panel would have to have been brought in, the jury selection would have to have been done all over again, significant time and effort would have been wasted, costs would have been increased, and everyone involved would have been inconvenienced unnecessarily.

In actuality, however, the court's decision to proceed without Petitioner in this case was probably due in large part to a circumstance not generally present in such cases. Here, the court did not intend to conduct the trial *in absentia* at all. When proceedings were to resume on the second day, Petitioner was expected at any time. He had called and said that he had been attacked and had received a cut that was bleeding, but that he would be there shortly. The proceeding was delayed to give him time to get there. When he still did not arrive, the court was concerned with the effect a lengthy delay might have on the jury

and wanted to avoid creating hostility or speculation by calling their attention to the problem. (R 4 - 7)

The court thought that the best way to avoid undue focus on the problem was to go ahead, get started, and let Petitioner come in and sit down when he got there as though it were nothing unusual. (R 4 - 7) The court began proceedings accordingly, apologizing to the jury for the delay and suggesting that it was necessary because of problems in an unrelated case. (R 8)

Petitioner stayed in touch with the court thereafter throughout the trial, and he continued to indicate that he would soon be there. He was supposedly getting treatment for a cut, had blood on his clothes and needed to change, was waiting for a ride, and so forth. (R 4, 173 - 174, 203 - 204; Supp. R 4 - 5) The parties agreed on an instruction telling the jury to disregard Petitioner's absence, and that instruction was given. (R 4 - 7, 15 - 16, 122, 308; Supp. R 3 - 7) When the trial ended, the bailiff advised the court that he had just spoken with Petitioner and that he had again said he would be there soon. (R 174, 203 - 204)

The only one who could have known that Petitioner was not going to return to the courtroom was Petitioner himself, and he never told the court he was not coming. On the contrary, he kept saying that he would be there shortly. He knew that the trial was proceeding without him. Indeed, this would seem to have been precisely what he wanted, and he should not be heard to complain about it now.

ISSUE II

THE ROBBERY INSTRUCTION WAS CORRECT AS GIVEN, AND IT WAS HARMLESS ANYWAY.

Petitioner asserts that the trial judge erred by instructing the jury that robbery requires the intent to temporarily or permanently deprive the victim of her property. Petitioner argues that he has to have intended the deprivation to be permanent. That is incorrect for several reasons.

The robbery statute itself states no such requirement. It says nothing about intent and does not purport to require any kind of deprivation at all. It states that robbery is committed whenever "money or other property which can be the subject of larceny" is taken from it's owner by force or threat. §812.13, Florida Statutes (1985). The statute does not require the robbery to have been committed in the course of a larceny, only that the property taken be susceptible to larceny, which would generally mean an item of personal property. Forcing someone to deed over real property at gunpoint would be theft, but real property was not traditionally subject to larceny, and it is therefore doubtful that robbery could be charged.

On the other hand, grabbing jewelry or a purse and throwing it in the owner's face *would* be robbery under the language of the statute, even though robbery traditionally requires an underlying theft offense and therefore the specific intent necessary for theft. The Third District concluded that the specific intent requirement no longer existed in robbery, that the legislature

had prohibited taking property by force for any purpose. The question was certified. Bell v. State, 354 So. 2d 1266(Fla. 3d DCA 1978). This Court disagreed. Since the offense traditionally required specific intent, and there was no affirmative indication that the legislature intended to change the elements of the offense, the Court concluded that the requirement continued. Bell v. State, 394 So. 2d 979(Fla. 1981).

In setting out this certified question, the Third District noted in parenthesis, that the intent in question was the intent to deprive the owner of the property permanently, but this Court did not say so. On the contrary, the Court stated that the intent traditionally required for commonlaw robbery was "the intent to *deprive* the owner," and that the intent traditionally required for statutory robbery was "the intent to *steal*." Id. at 980 (emphasis added). Requiring some deprivation does not mean that permanent deprivation is required, and the intent to steal does not require that either. To "steal" is to "take (the property of another) without right or permission." American Heritage Dictionary, Second College Edition (1985). Thus, the intent to steal simply means the intent to take property in deliberate disregard of the owner's rights. Whether the thief plans to keep the property he steals or what he may plan to do with it afterwards is irrelevant. If the property is in fact recovered by the owner, it ceases to be stolen property, but it continues to be property that was stolen. If the offender returns it himself, it is property he stole and brought back.

This Court has so held. In State v. Dunmann, 427 So. 2d 166(Fla. 5th DCA 1983), the Court considered precisely this issue in the context of the omnibus theft statute, which was originally worded so as to require the intent "to deprive," before the legislature amended it in 1982 to specify that the intended deprivation could be temporary or permanent. §812.014, Florida Statutes (1977); Chapter 82-164 Laws of Florida(1982). Since larceny had been held to require the intent to deprive the owner *permanently*, some courts, including the Fifth District, thought the theft statute required this as well. They concluded that the joy-riding statute still applied where the offender arguably expected the vehicle he took to be recovered by the owner after he abandoned it. §812.041 Florida Statutes (1981). This Court disagreed. The Court found that the specific intent the theft statute required was "the intent to steal," and that the intent to *permanently* deprive the owner was *not* required. The joyriding statute was held to have been repealed by implication when the theft statute was enacted because such non-consensual "borrowing" became theft at that point like all other stealing. Id. at 167.

The specific intent requirement found to be traditional for robbery in Bell, and held to be implicit in the then new robbery statute, is precisely the same intent "to deprive" and/or "to steal" which the theft statute required at the time of Dunmann. Since that was held to mean the intent to deprive the owner *either* temporarily *or* permanently, the jury instruction challenged was entirely correct.

That conclusion is obvious for a second reason as well. As the Second District correctly noted, the robbery statute could not logically be interpreted to have a different intent requirement than that necessary to prove the underlying theft offense anyway, because the requirement is derivative. The reason the intent to steal is required for robbery in the first place is that a robbery is basically a forceable theft. If the offender is not trying to steal anything from the victim, it is not traditionally robbery. Therefore, to prove robbery, one must prove both the underlying theft and the force. Since the theft requires specific intent, that intent becomes an element of the robbery as well.

The schedule of lesser included offenses in the standard criminal jury instructions reflects this. Petit theft is shown as a catagory one offense necessarily included in any robbery charge, and various higher degree theft offenses are listed in catagory two. The jury can convict for robbery or for theft, depending upon whether or not they find that the property was taken by force or threat. That is the element which sets robbery apart from offenses involving mere stealing. When a vehicle is stolen at gunpoint, the fact that the offender may have expected the owner to get it back eventually certainly does not mean the jury can find theft but not robbery. It might make sense as a matter of policy to permit a robbery conviction in that circumstance, even if a pure theft conviction were improper, because the focus of robbery is the force and violence of the

taking. To require a more specific intent as to deprivation in a robbery than the underlying theft requires would be absurd.

If the robbery statute stated such a requirement, it might be up to the legislature to repeal it, but the statute says nothing which remotely suggests that. The intent requirement in that statute is inferred by the courts, and courts do not infer absurd requirements. Petitioner's argument that the legislature should have amended the robbery statute in 1982, when the theft statute was amended to make it clear that the deprivation intended in a robbery could be temporary, overlooks the fact that the robbery statute did not have any intent requirement to amend. That is stated only in the theft statute, which was in fact amended. When the theft is by force, and the property is of the right type, it is robbery.

If the robbery statute had stated that the force had to occur in a larceny, it would undoubtedly have been amended to specify a theft instead; but it only says that the property must be of a type which could be the subject of larceny, and that reference is still correct. If the reference to larceny were changed to theft in that context, the crime of robbery would cover conduct not traditionally considered to be robbery, because anything of value can be the subject of theft, including intangible property, real property, contract rights, and so forth. Using force to make someone destroy a will or the like is certainly criminal, but it is not traditionally robbery, and the requirement that the property taken be susceptible to larceny continues that distinction.

Petitioner suggests that requiring permanent deprivation to have been intended is necessary to prevent robbery convictions where offenders abandon the property and then resort to force to avoid capture. The argument is illogical, however, even assuming that such convictions would be undesirable, because there is no connection between the offender's intent at the time of the taking and any such later abandonment. A thief who leaves a store with merchandise he has not paid for almost certainly *intends* a permanent deprivation. The fact that he is pursued and abandons it in flight has nothing to do with his intent in taking it. The problem, if any, with charging robbery because of force used after such an abandonment is that the force is arguably not being used to accomplish a theft at all once the offender is no longer trying to take the property.

As the Second District noted, the case law arguably suggesting the interpretation of the robbery statute which Petitioner favors has largely been misinterpreted. In Bell, it is only the explanatory parenthetical the Third District included in certifying its question which indicates that the specific intent, if any, required in that case was the intent to permanently deprive the owner. This Court found that the intent traditionally required, which the statute was held to preserve, was simply the intent to deprive in some way, or to steal. 394 So. 2d at 980.

Even if the Court's affirmative answer to the certified question could be read as agreement that the specific intent at

issue in that case was the intent to deprive permanently, that would not mean that such intent was required for Petitioner's conviction here. The underlying theft offense in Bell was *larceny*. The robbery was expressly charged as having been committed in connection with a larceny, and the trial court was held to have erred by not instructing on larceny as a lesser included offense. Id. The Third District's opinion was issued in February of 1978, only a few months after the omnibus theft statute took effect. 354 So. 2d at 1266. The offense obviously occurred before that legislation merged larceny and other such crimes into the general offense of theft. §812.014(1) Florida Statutes(1977); Chapter 77-342, Laws of Florida (1977). This Court noted in Dunmann that larceny had been held to require intent to permanently deprive the owner of the property. 427 So. 2d 169. If the underlying, lesser included offense of larceny required that intent, it was logical to conclude that the robbery charge in that case did also.

The underlying offense in this case was *not* larceny. Larceny no longer exists. The lesser included offense was theft, and the intent to deprive the owner temporarily has always been sufficient to establish statutory theft. Dunmann, 427 So. 2d at 166. The contrary decision overruled in Dunmann in 1983 was from the Fifth District. At the time Green v. State, 414 So. 2d 1171(Fla 5th DCA 1982), rev. denied, 422 So. 2d 842(Fla. 1982), was decided, that district still believed that the theft statute, like the former larceny charge, had required the intent to

permanently deprive until its amendment in 1982, when the intended deprivation was stated as being either temporary or permanent. Chapter 82-164 Laws of Florida (1982). Therefore, it was altogether logical for that district to conclude that a robbery charge for the use of force in committing such a theft likewise required permanent deprivation. That conclusion in Green is *dicta* in any event as the Second District noted. The court found the information sufficient to charge robbery under either view of intent. The comment about permanent deprivation is simply a footnote.

This Court's comment in Dunmann that the enactment of the theft statute had no effect on the robbery statute was *dicta* as well. The Court's point was that the decision in Bell said nothing about the intent required by the theft statute, and that is clearly correct. As noted, the underlying offense in Bell was larceny, not theft, and *this* Court did not say that the intent to permanently deprive the owner was required anyway. An amendment or holding as to the greater offense, robbery, would not necessarily affect the lesser offense, theft, in any event; but the opposite does not logically follow when analyzed. Changing an element of theft without force would certainly affect the elements of theft with force, or robbery. There was no need for the Court to focus on this in Dunmann because the point was the lack of effect of robbery on theft, not the reverse, and the discussion was just explanatory anyway, which is obviously one reason that *dicta* is not given the weight of a holding.

Between its 1981 decision in Bell and its 1983 decision in Dunmann, this Court decided Steward v. State, 420 So. 2d 862(Fla. 1982), cert. denied, 460 U.S. 1103, 103 S. Ct. 1802, 76 L.Ed 366(1983). One of many issues raised in that capital appeal was the trial court's failure to instruct the jury that robbery required an intent to permanently deprive the owner. The Court found no grounds for reversal on that point or any other and affirmed. The Court accepted the defendant's argument that Bell required such an instruction, but there is no analysis or discussion of the point. There was no need for any, because it did not matter. There, as in the instant case, the defendant had made no objection at the time, and there was no evidence to suggest that only temporary deprivation was intended. Since the instruction could provide no basis for relief anyway, it's technical correctness was of no real significance to the case.

The Court may not have noted that the permanent deprivation requirement attributed to this Court in Bell was actually stated only by the Third District in its question, and likewise may not have noted that the underlying offense in Bell was larceny, not theft. The distinctions were not of clear importance prior to Dunmann, which was not decided by this Court until the following year. When Stewart was decided, most courts apparently thought that permanent deprivation had to have been intended for theft as well as for larceny, which would make it an element of robbery. If the intent aspect of the robbery instruction given in Stewart had been determinitive, the Court would undoubtedly have

analysised the matter in more depth, and the issue ultimately decided Dunmann might well have been addressed there first.

Respondent is aware of only two cases *after* Dunmann suggesting that robbery requires the intent to deprive the owner permanently. The first is Vaughn v. State, 460 So. 2d 505(Fla. 3d DCA 1984). That decision, like Stewart, does not turn on the question and shows no analysis of it. There, as in Stewart, the defendant had not objected, and the evidence did not suggest that temporary deprivation was intended anyway. The Third District just cited Stewart and Bell as requiring the intent to deprive permanently and went on to conclude that the conviction would nevertheless stand. Again, if the point had been crucial, the court might have considered the logical effect of the holding in Dunmann and reached a different conclusion.

The only case Respondent is aware of which actually turned on the question of temporary versus permanent deprivation in the context of robbery is the Second District's own decision in Hall v. State, 505 So. 2d 657(Fla. 2d DCA 1987), which the instant decision overrules. That conviction was reversed for failure to instruct the jury that permanent deprivation had to have been intended, and Vaughn was distinguished. The question of intent obviously merited more thorough consideration in that case than any of the others, but, as the Second District now notes, the analysis of apparent precedent was nevertheless too superficial, not enough attention was given to the underlying logic, and the holding was wrong. The decision in the instant case corects that error.

The issue was presumably addressed for that reason because it is not determinative here any more than it was in Stewart and Vaughn. In this case, like those, the error, if established, would not be reversible. The instruction was substantially correct, the reference to temporary deprivation was irrelevant on the facts, and Petitioner acknowledges that he did not object below.

The language in question was truly an "error" in the sense of a mistake. When the jury instructions were discussed, the judge indicated that, except for the instruction concerning Petitioner's absence, only standard instructions would be used. (R 120) The instructions that were given were in fact standard except for the challenged language in the robbery instruction. (R 151 - 167, 296 - 315) The intent was stated as the intent "to temporarily or permanently deprive" the victim of her property in both the written instructions and in the oral charge. (R 153, 299) Defense counsel did not object to the instruction when it was proposed or when it was given. The variation was presumably inadvertent since the judge intended to give only standard instructions, and the language could easily have been changed had Petitioner requested that at the time. The lack of an objection is hardly surprising, however, because the nonstandard language was of no importance whatever on the facts of the case.

Had Petitioner or his codefendant claimed that they just "borrowed" the victim's wallet to look at the pictures or whatever and intended to hand it back to her with the money still

in it, the nonstandard language would have been significant, but there was no evidence at all that the robbers intended for her property to be recovered. In fact, the evidence established precisely the opposite. The wallet taken at knife point was found in a bush, and the money was gone. (R 92 - 93; Initial Brief at 4)

Petitioner claimed that he wasn't involved in the robbery. He fit the victim's description and was found where the wallet was, but he said he had seen someone else drop it there. (R 92, 101; Initial Brief at 4) What the jury had to decide was whether Petitioner was one of the people who robbed the victim or just a bystander who was mistaken for one of the real robbers, and the nonstandard language in the jury instruction had nothing to do with that. Whoever the robbers were, their intent was not in question for they had already carried it out. They obviously intended to do what they did, take the money, discard the wallet, and not return either to the victim.

Since there was no indication whatever that the robbers intended to return the victim's property, and the money was gone from the wallet they abandoned, the question of whether or not forcible "borrowing" would constitute robbery was irrelevant. The jury's understanding of the law on that question was therefore meaningless, and the failure to advise the jury that permanent deprivation has to have been intended would have been harmless error if it had been error at all. The instruction could not have confused the jury on any point they needed to

consider. Therefore, the conviction would stand even if there had been a contemporaneous objection.

The situation is precisely like that addressed by this Court in Stewart and by the Third District in Vaughn. There was no objection, and there would have been no prejudice anyway. The Second District's decision in Waters v. State, 298 So.2d 208 (Fla. 2d DCA 1974) reached the same conclusion, although the defendant in that case had objected. The instruction in those cases, like the instruction challenged here, did not advise the jury that the defendant had to have intended a permanent deprivation. That instruction did not mention a "temporary" deprivation, but it did not require a "permanent" deprivation either, and the result is obviously the same. Even where the defendant has objected, the intent of the perpetrator has to have been a real issue in the case, or there is no prejudice. The distinction between errors in instructions that concern areas of real dispute and those that concern matters not really at issue in the particular case is discussed at length in Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149, 74 L.Ed.2d 998, 103 S.Ct. 793 (1983).

Petitioner acknowledges that the issue was the robbers' identity, not their intent, as they obviously intended to deprive the victim of at least her money permanently. He also acknowledges his lack of objection and notes that Stewart and State v. Delva, 16 F.L.W. S 186 (Fla. Feb. 21, 1991) preclude reversal in such circumstances. He suggests that the result

should be different because the court added a reference to "temporarily" rather than omitting a reference to "permanently," but the confusion, if any, would obviously be the same either way. In fact, there was no confusion. The instruction was correct as given, but it could have resulted in no prejudice anyway.

ISSUE III

CONSECUTIVE SENTENCES WERE APPROPRIATE IN THIS CASE.

Petitioner suggests that the consecutive sentences he received constitute an improper guidelines departure under Lambert v. State, 545 So.2d 838 (Fla. 1989), and its progeny. Petitioner is incorrect. The situation at issue in this case is virtually the opposite of that addressed in Lambert. Probation violations are involved, but that is the only similarity. The violations addressed in Lambert and like cases were substantive violations, some of which resulted in criminal convictions and some of which did not. The problem was one of "double dipping." Where there has been no conviction on the offense constituting the violation, there is no "offense" that will itself support a sentence. The violation can only be punished by increasing the defendant's sentence for the underlying crime, and that was the purpose of the one-cell bump provided at that time. Where a conviction has already been obtained on the subsequent offense, it appears on the scoresheet as a separate conviction, points are added for that, and additional points are given to take the defendant's probationary status into account.

The Court concluded that departing from the guidelines on the basis of something that the guidelines have already taken into account constitutes "double-dipping" and is improper for that reason. Under that logic, the sentences reversed in Lambert and similar cases were indeed improper, but the sentence at issue

here is not. The circumstances are not remotely analogous. The sentence Petitioner challenges here was not for a substantive violation. It was based on his failure to report. Furthermore, it certainly did not constitute "double dipping." Without it, the violation would not have been taken into account at all.

Petitioner was on probation for a drug offense when he committed the robbery at issue. (R 229-230). He had already violated it once and been sentenced to further probation. (R 237-238). After he absconded in the middle of his robbery trial, he did not report to his probation officer again. (R 191, 243). The robbery offense was pending for sentencing in November of 1986, when that trial ended, and Petitioner should have been sentenced at that time. (R 111, 179). In federal court at least, he could have been sentenced *in absentia*. See ,e.g., Brewer v. Raines, 670 F.2d 117 (9th Cir. 1982). On the other hand, there was no compelling reason for doing so. Petitioner's sentencing, unlike his trial, was easy to postpone since it affected no codefendants, witnesses, jurors, or the like. He could not start serving his sentence until he was found in any event, and it therefore made sense to defer his sentencing until that time as well, and permit him to be present.

Had Petitioner been sentenced when he should have been, the scoresheet for that sentencing would presumably have shown the same thing his actual scoresheet showed the following year, the robbery conviction and a violation of probation. The robbery had not been charged and established as a violation at the time

Petitioner absconded, but there is no reason to believe that it would not have been by the time he was sentenced if that had occurred at the proper time. The commission of the violation was clear from the conviction, and it would have made a difference in his sentence then. Therefore, it would undoubtedly have been established.

By the time Petitioner was found and sentenced on September 18, 1987, he had committed another violation entirely. He had broken off all contact with his probation officer. This violation was not related to the robbery either in fact, in time, or in concept. The robbery offense was pending for sentencing before this violation even occurred. When Petitioner finally appeared for sentencing in the robbery, however, he admitted the failure to report, putting that case before the court at the same time as the robbery that should have been sentenced the previous year. (R 188, 192, 200 - 207, 242)

The substantive violation resulting from the robbery, which also should have been sentenced the year before, still had not been taken into account in any sentencing. Establishing that violation for purposes of this sentencing would have been pointless because only one violation could be taken into account on the scoresheet in any event. The guidelines did not provide for any sentence beyond what Petitioner could receive for the robbery plus one violation, which is what he could have received the year before. The guidelines essentially guaranteed him a free ride on his total failure to report the following year.

That result would have been particularly unfortunate here, because it would have permitted Petitioner to benefit from his own misconduct. At the time that Petitioner was supposed to have been sentenced for the robbery, he had committed one violation for which he had not been sentenced, and that violation could have been taken into account under the guidelines. Any misconduct occurring after that should have been addressed in a later sentencing under a different scoresheet, and whatever sentence he received could presumably have run consecutively. Petitioner would in fact have been sentenced at the appropriate time but for his own misconduct in abscounding. (R 191 - 192)

To limit the court to a one-cell bump in sentencing Petitioner in such circumstances would be contrary to all judicial precepts of fairness and equity. Anyone convicted of an offense while on probation could abscond before sentencing, stay gone for any length of time, and commit any number of violations in the interim, without any risk of an increased sentence. Anyone who committed one probation violation of any kind could commit whatever additional violations he chose until he was sentenced. As long as he admitted the additional violations at or before the sentencing hearing, he would not risk adding a day to his sentence.

The "departure" complained of here was not a departure at all in the usual sense. The guidelines called for a sentence of seven to nine years, with a possible bump to twelve years. This is presumably what Petitioner could have received the year before

for the robbery offense and substantive violation alone.[1] He was sentenced to nine years for the robbery, which was within the guidelines without a bump. He was sentenced to five years on the drug offense for which he was on probation, which was also within the guidelines in and of itself. Petitioner's complaint is with the fact that the court made the sentences consecutive.

As the second of the two sentences Petitioner was ordered to serve, the five year sentence for the drug offense, will not be complete until Petitioner has been credited with fourteen years, it exceeds by two years the total of twelve years that the guidelines contemplated with the one cell bump then permitted. Presumably for this reason, the court characterized the second of the two sentences as a departure. It was not a typical departure, however, and the court did not treat it as such. One scoresheet was prepared, as required in typical joint sentencings, but, in all other respects, the offenses were treated as separate offenses being separately sentenced, even to the point of noting that one was a departure while the other was not.

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[1] A scoresheet developed in November of 1986 might actually have shown a different sentence because of some factor not here relevant. For example, Appellant might conceivably have been convicted of some offense that was overlooked initially but included on the later scoresheet, and the resulting sentence might be greater than the sentence calculated the year before for that reason, but such incidental variations have no bearing on the issues involved here.

Petitioner would submit that the offenses were properly treated as separate offenses being separately sentenced, because that is what should have occurred and would have occurred but for Petitioner's own misconduct in absconding. Respondent is unaware of any rule requiring an existing sentence to be taken into account in sentencing the same person for some unrelated offense that had not even occurred at the time of the original sentencing. That is the situation which should have existed here had Petitioner permitted the robbery to be sentenced when it should have been.

When joint sentencing is properly required, the total prison term is not to exceed the sentence shown on the combined scoresheet, of course. On the other hand, joint sentencing is only required when the offenses are pending for sentencing at the same time, and the offenses sentenced here were not properly pending for sentencing at the same time. When the robbery offense was properly pending for sentence, the probation violation had not even occurred. Therefore, the restrictions applicable to joint sentencings should not apply.

The consecutive sentences appealed were necessary if Petitioner's prolonged failure to report to his probation officer was to have any significance, and they are not contrary to the *spirit* of the guidelines at all. Had matters progressed in proper order, the guidelines would have permitted Petitioner to receive an even longer total sentence than he did receive for precisely the same conduct. If he had been sentenced for the robbery

conviction and substantive violation in 1986, he could have received twelve years. If he then failed to report at some later date, a different scoresheet would have been used, and his five-year sentence for the offense underlying that violation would have followed a twelve-year sentence rather than a nine-year sentence, making a total sentence of seventeen years for the conduct in question. The fourteen-year sentence he actually received for it is therefore less than the guidelines would have permitted had things proceeded in their proper order, and Petitioner's misconduct in absconding before sentencing should not be rewarded by reducing his sentence even further.

The sentences here challenged were within the spirit of the guidelines for a second reason as well. The guidelines contemplated a three-year increase in Petitioner's sentence for a violation of probation, a bump from nine to twelve years. In actuality, he committed two violations and only received an additional five years. When three years is an appropriate increase to take one violation of probation into account, an additional two years should be appropriate for a second violation.

The Lambert decision precludes double dipping. It does not guarantee defendants a free ride, and it should not be interpreted to do so here. Rather, the Court should affirm the consecutive sentences on the ground that joint sentencing was not required under the circumstances and there was therefore no real departure. If the sentence is deemed a departure in any sense, the Court should find it justified and proper on that basis.

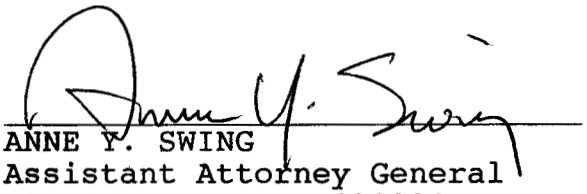
As Petitioner notes, the Second District's affirmance cited Williams v. State, 559 So. 2d 680(Fla. 2d DCA 1990) and Washington v. State, 564 So. 2d 168(Fla. 5th DCA 1990). Respondent, like Petitioner, is uncertain how Washington applies, but Williams and the other cases involving multiple violations now pending for review are analogous in one sense. At least some of them are presumably instances in which limiting the defendant's sentence to the guidelines recommendation plus a one-cell bump would not take all of the defendant's violations into account. Respondent would submit that the same rationale which *precludes* departure in cases like Lambert, where the offenses and violations are already taken into account in the recommended sentence, *supports* departure where they are not; that how many "breaks" a defendant deserves is not the only issue. Petitioner's sentences should be affirmed whatever the ruling in the Williams cases, however, because in this case, unlike those, the guidelines would have permitted an even greater sentence than Petitioner received but for the joint-sentencing limitation which never should have come into play.

CONCLUSION

For the reasons herein stated, the conviction and sentences should be affirmed, and the Second District's opinion should be approved.

Respectfully submitted,

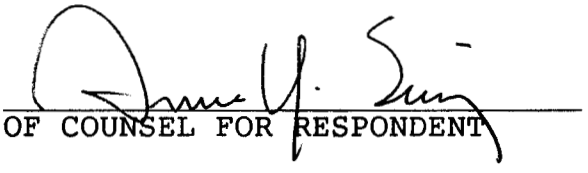
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ANNE Y. SWING
Assistant Attorney General
Florida Bar No: 299294
Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 4th day of June, 1991.



OF COUNSEL FOR RESPONDENT