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**FILED**

SID J. WHITE

**MAR 18 1991**

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HECTOR TRINIDAD, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 \_\_\_\_\_ :

Case No.

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

BRIEF OF PETITIONER ON JURISDICTION

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

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, HECTOR TRINIDAD, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The appendix to this brief contains a copy of the decision rendered February 22, 1991.

## STATEMENT OF THE CASE AND FACTS

On October 1, 1987, the State Attorney for the Twentieth Judicial Circuit for Lee County, Florida, filed an information charging the Appellant, HECTOR TRINIDAD, with aggravated child abuse, allegedly occurring between August and September 1987 in violation of section 827.03, Florida Statutes (1984) (R13).

The Appellant entered a plea of guilty to the charge and was placed on two years of community control followed by thirteen years of probation on January 29, 1988 (R18-21). An affidavit alleging the violation of community control was filed on October 10, 1988 (R24). The Appellant's probation was revoked and he was sentenced to a term of three years incarceration followed by ten years of probation (R28-29).

A second affidavit alleging the violation of the Appellant's probation was filed on September 28, 1989 (R34). A revocation hearing was held on December 12, 1989, and the Appellant was sentenced to a term of eight years incarceration with credit for time served (R2-10). The Appellant's applicable guidelines range was 2 1/2 - 3 1/2 years incarceration. The trial court's oral and written reason for the departure sentence imposed over the Appellant's objection, was his multiple violations of probation (R7-10).

Notice of Appeal was timely filed on January 9, 1990 (R41). On February 22, 1991, the Second District Court of Appeal issued a per curiam affirmed opinion referring to the case of Williams v. State, 559 So.2d 610 (Fla. 2d DCA 1990).

SUMMARY OF THE ARGUMENT

By allowing the trial court to depart from a guideline sentence on a violation of probation and community control case, the Second District Court of Appeal is conflicting with this Court and other district courts of appeal. This Court and other district courts of appeal have held that the guideline sentence with a one-cell bump up is all that is allowed once a defendant has been violated.

ARGUMENT

ISSUE

WHETHER THE DECISION IN TRINIDAD  
CONFLICTS WITH OTHER DISTRICT COURTS  
OF APPEAL AND THE FLORIDA SUPREME  
COURT ON THE ISSUE OF ALLOWING  
GUIDELINE DEPARTURES ON VIOLATION OF  
COMMUNITY CONTROL CASES?

From the facts of this case it is readily apparent that the Second District Court of Appeal is allowing trial courts to depart from guideline sentences based upon multiple violations of probation -- if written reasons are given -- on violation of probation and community control cases. It is doing so under the justification that several violations are a reason for a departure. In several cases the Second District Court of Appeal certified this practice to this Court with the following question:

Has the Supreme Court in Ree v. State,<sup>1</sup> 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 § 3.701(D)-(14), Fla. Stat. (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.

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<sup>1</sup> The new citation for Ree based on a motion for rehearing is 15 F.L.W. D395 (Fla. July 19, 1990).

The Second District Court of Appeal did refer to Williams in the per curiam affirmed opinion. The issue is that the Second District Court of Appeal is allowing for departures on violation of probation or community control cases. This policy has been rejected by this Court in Ree, supra, and Lambert, supra. 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, 15 F.L.W. at S396.

Because of the conflict with the Second District Court of Appeal's practice of allowing departures on violation cases and this Court and other District Court of Appeal's holdings that prohibit such a practice, and because this issue is already before this Court in Williams, et al., this Court should accept jurisdiction over Mr. Trinidad's case. See, Jollie v. State, 405 So.2d 418 (Fla. 1981).



CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and this Court and other district courts of appeal so as to invoke discretionary review.

APPENDIX

PAGE NO.

1. Second District Court of Appeal opinion  
filed February 22, 1991.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

HECTOR TRINIDAD,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

CASE NO. 90-00192

Opinion filed February 22, 1991.

Appeal from the Circuit  
Court for Lee County;  
James R. Thompson, Judge.

James Marion Moorman,  
Public Defender, and  
Megan Olson,  
Assistant Public Defender,  
Bartow, for Appellant.

Robert A. Butterworth,  
Attorney General, Tallahassee,  
and Donna A. Provonsha,  
Assistant Attorney General,  
Tampa, for Appellee.

PER CURIAM.

Affirmed. See Williams v. State, 559 So.2d 680  
(Fla. 2d DCA 1990).

SCHOONOVER, C.J., and PARKER and PATTERSON, JJ., Concur.

Received By  
FEB 22 1991  
Appellate Division  
Public Defenders Office

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14<sup>th</sup> day of March, 1991.

Respectfully submitted,

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