4-7

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

MARIO ROA
Respondent

Case. No.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Roa was on probation for the near fatal beating of the teen aged daughter of family friends when she found him burglarizing their home. She was left with permanent brain damage and the threat of future deterioration of brain function. R96-97. He violated probation by failing a urinalysis for marijuana, but the violation was handled by probation officers by placing him in a drug education program. R94. In the second violation, he pled guilty to driving under the influence and driving with a suspended license. In preparation for a hearing on the violation, detectives wrote a letter stating Roa had offered substantial assistance in drug investigations. R49. Again, there appears to have been no formal adjudication on the probation violation, although Roa did plead guilty to the two charges. In a third violation, Roa was charged with kidnapping, carrying a concealed firearm, aggravated battery, and attempted murder. R44. Roa confronted Miss Brooks, his girlfriend, at a bar and took her to his car at gunpoint. A girlfriend of Brooks also got in the car, and, in a struggle, Roa's gun discharges and shoots out the windshield. Brooks' friend escaped, and Roa drove Brooks to a house. Brooks' mother comes to the house, and Roa points the gun at her. R44-45. However, the victims signed waivers of prosecution. R45. Brooks later said she waived prosecution because Roa was the father of her unborn child. R75. The trial judge converted Roa's probation to community control and modified the terms of supervision. R52-53.

Finally, Roa stormed into the bottle club where his common

law wife was entertaining another gentleman, and proceeded to yell at her, although he did not touch her. R75-76. He was, therefore, in a place where alcoholic beverages were served, at a time when he was supposed to be at home.

Judge Coe's departure order notes the severe trauma to the young girl in the underlying burglary/aggravated battery case, the marijuana violation, the kidnapping, assault, and attempted murder of Brooks and her mother, with the use of a gun, and the appearance at the bottle club. Based on these four separate incidents wherein conditions of probation or community control were violated, Judge Coe listed the following reasons for departure:

> 1. The defendant is not amenable to probation, because of the number of his violations of probation and community control.
> 2. The defendant is not amenable to probation because of the timing of these violations.
> 3. The defendant is extremely dangerous.

R34.

The second district reversed, ruling, inter alia, that while multiple probation violations was a valid reason for departure, citing to its decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), "Williams required at least two previous findings and sentences for violation of probation before the current violation before the court which permitted the upward departure [sic]." Roa v. State, No. 90-1201, slip op. at 4-5 (Fla. 2d DCA Jan. 16, 1991) (copy attached). The state seeks review in this court.

SUMMARY OF THE ARGUMENT

The decision below relies upon a case currently pending before this court. Williams. Further, the decision below directly and expressly conflicts with a decision from this court, Adams, approving departure for multiple probation violations which relies, in turn, upon a decision from the fifth district approving such departure under circumstances legally identical to those sub judice, i.e. departure for one prior adjudication of violation of probation. Conflict, therefore, also exists with the decision from the fifth district, Riggins.

ARGUMENT

THE DECISION BELOW RELIES ON A CASE CURRENTLY PENDING BEFORE THIS COURT, AND CONFLICTS WITH CASES FROM THIS COURT AND THE FIFTH DISTRICT

Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990), is currently pending before this court on the issue of whether multiple probation violations justify departure. Williams v. State, No. 75,919 (Fla., oral argument held Mar. 7, 1991).

The question certified in Williams is whether Adams v. State, 490 So.2d 53 (Fla. 1986), remains viable after Ree v. State, 14 F.L.W. 565, ___ So.2d ___ (Fla. Nov. 16, 1989) [amended on rehearing to render contemporaneous written reasons requirement prospective only, 15 F.L.W. S395 (Fla. July 19, 1990)], and Lambert v. State, 545 So.2d 838 (Fla. 1989).

Adams does not require that there be two or more prior adjudications of violation of probation before departure on the third or subsequent violation adjudication is valid. Although there were two prior adjudications in Adams and Williams, the Adams court, in concluding that departure for multiple violations of probation justified departure, wrote:

> 2. The fifth district has held . . . that multiple probation violations can support a departure of more than one cell. Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985).

Adams, 490 So.2d at 54, n.2.

Riggins v. State, 477 So.2d 663 (Fla. 5th DCA 1985), in turn, held that upward departure beyond the one-cell bump was appropriate after only one adjudicated violation of probation. Judge Dauksch wrote:

> Appellant was given six years probation in 1982 for burglary. In 1983 he violated his probation, was given 120 days jail time and continued on probation thereafter. He was before the trial court in this case because of his second violation of probation. The judge revoked the probation and departed from the recommended guideline sentence upwards three guideline cells rather than the one-cell departure allowed under Florida Rule of Criminal Procedure 3.701(d)(14). I agree it is a lawful departure because this is a twice-revoked probationer rather than a once-revoked probationer. . . .

Riggins, 477 So.2d at 665 (Dauksch, J., concurring specially) (emphasis added).

The instant case is legally indistinguishable from Riggins--a twice-revoked probationer, not a thrice-revoked probationer. Given that this court cited to Riggins with approval in its holding that multiple violations of probation justified departure in Adams, Williams, in relying on Adams, is read too narrowly if it is read to require triple revocation to justify departure.

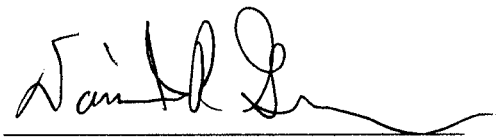
This court has a long-standing policy of accepting jurisdiction in cases involving the same issue as one already pending before this court. Even if Williams were no pending, the decisions in Adams and Riggins are in express and direct conflict with the decision sub judice, requiring this court to take jurisdiction to resolve the conflict.

CONCLUSION

Wherefore this court should take jurisdiction to ensure conformity with its forthcoming decision in Williams, and in the prior decisions in Adams and Riggins.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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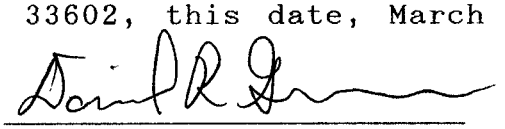
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Howard J. Shifke, 701 North Franklin Street, Tampa, Florida 33602, this date, March 13, 1991.



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