IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-VS-

CASE NO. 77,699

SABRINA MICHELLE MAXWELL,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the State. Respondent, SABRINA MICHELLE MAXWELL, the defendant in the trial court and appellant below, will be referred to in this brief as Maxwell. References to the record on appeal will be noted by he symbol "R"; references to the appendix will be noted by the symbol "A". All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

The State appeals the First District's decision in **Maxwell v. State,** 16 F.L.W. D654 (Fla. 1st DCA March 7, 1991), which dealt with the trial court using Maxwell's multiple violations of probation as a reason to depart from the sentencing guidelines.

In 1987, Maxwell pled no contest to two counts of grand theft and was sentenced to five years of concurrent probation. (A 1). In November of 1988, Maxwell was charged with violating her probation by issuing worthless checks. As a result of the violation, Maxwell's probation was modified in January 1989 and she was placed on one year of community control to be followed by the balance of her probation. (A 1).

Maxwell's probation officer filed another violation report in April 1989 because of Maxwell's positive urinalysis report reflecting the use of cocaine. In May 1989 Maxwell was charged with another violation in that she failed to remain confined to her approved residence. (A 1). Maxwell's community control was modified in July 1989 and extended for a period of two years. In September 1989, Maxwell's probation officer filed another violation affidavit charging her with testing positive for the use of cocaine. (A 1). The court below held an evidentiary hearing in December 1989, at which Maxwell pled

guilty to violating the terms and conditions of her community control. Her community control was revoked at that time. However, in January 1990 the court reinstated Maxwell's community control. (A 1).

In February 1990, Maxwell was again charged with violating her community control by failing to comply with instructions, failing to remain confined to her residence, failing to pay restitution, failing to pay court costs and failing to submit to urinalysis. (A 1). Maxwell pled no contest to these latter violations, and the court based its departure sentence of five years on these violations. (A 1). The five year sentence exceeded the one-cell increase authorized the Fla.R.Crim.P. 3.701(d)14 of either community control or 12 TO 30 months of incarceration. (A 1).

Because of its previous decision in **Teer v. State,** 557 So.2d 910 (Fla. 1st DCA 1990), and this Court's opinions in **Lambert v. State,** 545 So.2d 842 (Fla. 1989), and **Ree v. State,** 565 So.2d 1329 (Fla. 1990), the First District vacated the departure sentence imposed by the trial court and remanded for resentencing within the guidelines range one-cell increase authorized by Fla.R.Crim.P. 3.701(d)14. (A 3). However, the First District acknowledged and certified conflict with **Williams v. State,** 568 So.2d 1276 (Fla. 2d DCA 1990) (second violation

sufficient to depart)[1] , and **Brown v. State,** 559 So.2d 412 (Fla. 2d DCA 1990), in which the Second District held that multiple violations of probation is a valid reason for departure from the sentencing guidelines. (A 3).

The State timely filed its notice to invoke this Court's discretionary jurisdiction, and this brief on the merits follows.

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[1] **Williams** was argued before this Court in February 1991 and is awaiting entry of an opinion. The question certified in **Williams** is dispositive of the present case.

SUMMARY OF ARGUMENT

This case once again brings the confused state of Florida's sentencing guidelines before this Court. The issue here is whether multiple violations of probation are a sufficient reason for a trial court to depart from the sentencing guidelines and sentence a defendant to a period of incarceration greater than the one cell guidelines increase (the "bump") permitted by the rules. The First District Court of Appeal certified conflict with other districts on this issue in **Maxwell v. State,** 16 F.L.W. D654 (Fla. 1st DCA March 7, 1991), the present case. (A 1-3).

The issue and conflict in the present case are brought about by a trilogy of this Court's decisions; **Adams, Lambert** and **Ree.** In sum, **Adams** apparently approves the use of multiple violations of probation as a reason to depart, while **Lambert** and **Ree** apparently disapprove the use. Neither **Lambert** nor **Ree** explicitly overrule **Adams.** However, contrary to the First District's opinion in the present case, **Lambert** and **Ree** do not impoliticly overrule Adams either.

The First District's opinion first discusses **Adams**, where this Court held valid the trial court departure from the guidelines in sentencing the defendant for probation violations. The First District then took up this Court's decision in **Lambert,** mad four years after **Adams.** This Court in **Lambert** held that

factors related to violation of probation or community control could not be used as grounds for departure. However, the concerns this Court expressed in **Lambert** are not part of the present case. There is no "double dipping" or improper designation of a probation violation in the present case.

The First District also states that the **Pentaude** case, explicitly receded from by **Lambert**, is not materially different from **Adams**, so **Adams** has also been rejected. The First District is mistaken. **Adams** is alive and well. **Pentaude** was concerned with the character of the underlying offense, while **Adams** was concerned with the number of probation violations. The two cases do not share a rationale.

Not allowing a trial court to depart from the guidelines for a defendant's multiple violations of probation discourages trial courts from using alternative sentencing. A trial court will not use its discretion to alternatively sentence a defendant if the trial court knows that after all alternatives are tried it cannot impose a significant punishment on a recalcitrant defendant. If this Court wishes to encourage use of alternative sentencing, it will allow a trial court to depart from the guidelines for a defendant's multiple violations of probation or community control.

A trial court using multiple violations as a reason to depart is not designating the violation as something the Legislature did not intend. The Legislature merely specified that a departure sentence must be based upon circumstances or factors which reasonably justify the aggravation of the sentence. Maxwell's repeated and continuous violations of her probation reasonably justify the trial court's departure in sentencing her.

The First District next discusses **Ree.** In **Ree,** this Court held that the trial court erred in imposing any departure sentence for probation violation exceeding the one cell increase permitted by the guidelines, citing **Lambert** and its associated cases. However, **Lambert** and its associated cases only deal with single incidents of violation. Further, the rationale expressed in **Ree** for this Court's holding in **Lambert** simply does not apply in Maxwell's case. She was not sentenced for another offense, but for repeatedly and continuously violating her probation and community control. The trial court did not double dip when it sentenced Maxwell, it departed from the guidelines. A violation need not be a substantive offense for a trial court to use it as a reason to depart from the guidelines. In fact, the Legislature has specifically approved a reason to depart that is not a substantive offense; victim trauma. This court should reverse the First District's opinion in **Maxwell** and affirm the departure sentence.

ARGUMENT

ISSUE

WHETHER MULTIPLE VIOLATIONS OF PROBATION ARE A SUFFICIENT REASON FOR A DEPARTURE SENTENCE GREATER THAN A ONE CELL GUIDELINES INCREASE.

This case once again brings the confused State of Florida's sentencing guidelines before this Court. The issue this case brings forward is whether multiple violations of probation are a sufficient reason for a trial court to depart from the sentencing guidelines and sentence a defendant to a period of incarceration greater than the one cell guidelines increase (the "bump") permitted by Fla.R.Crim.P. 3.701(d)14. The First District Court of Appeal certified conflict with other districts on this issue in **Maxwell v. State,** 16 F.L.W. D654 (Fla. 1st DCA March 7, 1991), the present case.

The issue and conflict in the present case are brought about by a trilogy of this Court's decisions: **Adams v. State,** 490 So.2d 53 (Fla.1986); **Lambert v. State,** 545 So.2d 842 (Fla. 1989); and **Ree v. State,** 565 So.2d 1329 (Fla. 1990). In sum, **Adams** apparently approves the use of multiple violations of probation as a reason to depart, while **Lambert** and **Ree** apparently disapprove the use. Neither **Lambert** nor **Ree** explicitly overrule **Adams.** However, contrary to the First

District's opinion in the present case, **Lambert** and **Ree** do not implicitly overrule **Adams** either. This Court should adopt the rationale of **Williams v. State,** 568 So.2d 1276 (Fla. 2d DCA 1990), and **Brown v. State,** 559 So.2d 412 (Fla. 2d DCA 1990), and reverse the First District's conflicting decision in the present case.

The First District in its **Maxwell** opinion thoroughly discussed the trilogy of cases, beginning with **Adams.** According to the First District, the trial court in **Adams, supra,** departed from the sentencing guidelines when it sentenced the defendant upon her second violation of probation. The trial court set out the reason for the departure as; "Defendant was previously placed on probation and has twice been found to have violated the terms of her probation." The Fifth District affirmed the sentence. **Adams v. State,** 474 So.2d 908 (Fla. 5th DCA 1984). This Court then dismissed Adams' jurisdictional petition for review of the Fifth District's opinion, holding the reason for departure was amply supported by the record and was valid, that Adams' sentence was below the statutory maximum, and that Adams had shown no abuse of discretion on the trial court's part, (e.s.), **Adams,** 490 So.2d at 54. This Court also provided a footnote on the validity of the sentence which listed two prior Fifth District opinions on the validity of violations of probation as a reason to depart. **Id.,** fn. 2. (A 3).

The First District next took up this Court's decision in **Lambert, supra.** Four years after the **Adams** opinion this Court issued its opinion in **Lambert.** This Court framed the issue in **Lambert** as whether factors related to violation of probation or community control can be used as grounds for departing from the sentencing guidelines. This Court concluded the factors could not support departure. **Lambert,** 545 So.2d 839.

The facts of **Lambert** were that the defendant was serving a sentence of community control when he struck his girlfriend and her son with a knife or fork. He was charged with violating his probation for both acts. The trial court found Lambert guilty of the violations, revoked his community control and sentenced him to concurrent sentences of five and fifteen years on the original charges leading to his sentence of community control. The guidelines sentence for the offenses was twelve to thirty months, including the one cell increase for violation of community control. **Id.** The Fourth District affirmed the departure sentence, relying on **State v. Pentaude,** 500 So.2d 526 (Fla. 1987). **Lambert,** 545 So.2d at 840. This Court in **Pentaude** ruled that where an offense constituting violation of probation is sufficiently egregious, Fla.R.Crim.P. 3.701(d)14 cannot be read as limiting departure to a single cell. **Id.**

This Court quashed the district court's decision, stating that:

> If new offenses constituting a probation violation are to be used as grounds for departure when sentencing for the original offense, prior conviction on the new offenses is required [by Fla.R.Crim.P. 3.701(d)11 since] [p]olicy considerations that mandate conviction prior to departure at an original sentencing are equally applicable to sentencing following probation violation.

Lambert, 545 So.2d at 841.

This Court continued that even if the defendant had been convicted of the new offense constituting the violation, such offense could still not be used as a reason to depart, for two reasons. **Id.** First, such a departure would conflict with **Hendrix v. State**, 475 So.2d 1218 (Fla. 1985), where a defendant is sentenced simultaneously for both the original and the new offenses. **Hendrix** held that departure may not be based upon factors already weighed in arriving at the presumptive sentence. **Lambert**, 545 So.2d at 841. Since a single scoresheet is used during simultaneous sentencing, and status points are added because the new offense was committed while the defendant was under legal constraint, to add the points and also depart on the violation would be "double dipping," according to this Court. **Id.**

Second, according to this Court (and quoted in **Maxwell**), a violation of probation is not itself an independent offense punishable at law in Florida. This Court reasoned that the Legislature has addressed the issue and declined to create a separate offense punishable with extended prison terms. If departure based upon probation violation were to be approved, the courts would be designating probation violation as something other than what the Legislature intended. This Court then held that factors related to violation of probation or community control cannot be used as grounds for departure. **Lambert**, 545 So.2d at 842. (A 2).

As the First District notes in **Maxwell**, neither the **Lambert** majority opinion nor either dissent mention **Adams**, **supra**. (A 2). However, according to the First District, they find no basis for discerning a material difference between the holdings in **Adams** and **Lambert**. While the violations of certain community control conditions in Adams were based on conduct that did not constitute criminal offenses, other violations certainly did. Rather, the First District says, as they read **Adams**, its holdings was essentially based on the same rationale as was **Pentaude, supra**. Since **Lambert** receded from **Pentaude**, the First District finds it exceedingly difficult to attribute any surviving vitality to **Adams** after this Court's opinion in **Lambert**. (A 2). The First District is mistaken. **Adams** is alive and well.

Adams is alive because its holding is not based on the same rationale as **Pentaude**. This Court in **Pentaude** agreed with the First District that:

> [W]here a trial judge finds that the underlying reasons for violation of probation (as opposed to the mere fact of violation) are more than a minor infraction and are sufficiently egregious, he is entitled to depart from the presumptive guidelines range and impose an appropriate sentence within the statutory limit.

Pentaude, 500 So.2d at 528.

Lambert, supra, of course receded from **Pentaude**. But as the quote shows, **Pentaude** was concerned with using the character of the underlying offense, and reason for the violation, as a reason to depart. An underlying offense that was a major infraction, that was sufficiently egregious, was approved by this Court in **Pentaude** as a reason to depart from the guidelines. **Lambert** subsequently disapproved this reasoning.

But **Adams** is not based on the character of the offense or violation. It instead is based upon the number of violations of probation. **Adams**, 490 So.2d at 54. In **Adams**, the trial court sentenced the defendant to a departure sentence for two violations of probation and this Court approved. **Id.** Maxwell violated her probation and community control nine times, including the last five times the trial court used to depart.

(R 115-116, A 1). This number of violations is a valid reason to depart. **Adams, supra.**

Lambert, supra, expressed two reasons why violations of probation should not be used as a reason to depart; a departure cannot be based on a factor already weighed in arriving at the presumptive sentence, and a departure sentence for a violation of probation would be designating probation violation as something other than what the legislature intended. **Lambert,** 545 So.2d at 841-842. Neither one of these reasons apply to Maxwell' situation.

Maxwell's multiple violations were not used to arrive at her presumptive sentence; they were used as a reason to depart from her presumptive sentence. The trial court did not "double dip." The trial court was tired of Maxwell's continuous, repeated violations of both her probation and her community control. As the trial court said, to impose a guidelines sentence on Maxwell would be a further mockery of the (criminal justice) system. (R 10). There is no reason for a trial court to be required to treat a defendant who continually and repeatedly violates her probation the same as a defendant who violates her probation only once. While departure sentences are discouraged, departure is a fitting punishment for someone who has repeatedly shown she cannot abide by the dictates of the court and its prior alternative sentences.

Further, this Court requiring such equal treatment discourages trial courts from using alternative sentencing. It handcuffs a trial court, forcing the court to reduce its use of alternative methods of sentencing such as probation, community control, or drug rehabilitation (all of which the trial court tried with Maxwell). Limiting departure for multiple violations such as Maxwell's leads to a defendant who continually violates her probation receiving next to no punishment for her continued contempt of her sentence. It makes a mockery of alternative means of sentencing. A trial court will not use its discretion to alternatively sentence a defendant if the court knows that after all alternatives have been tried it cannot impose a significant punishment. Under the First District's opinion in **Maxwell**, the trial court allowing Maxwell to live outside the prison system barred the court from imposing a significant punishment for her continued disregard of her sentence. If this Court wishes to encourage alternative sentencing, it will allow a trial court to punish continued repeated violation of an alternative sentence by departing from the guidelines.

The second reason in **Lambert** for not allowing factors relating to probation and community control to be used as reasons for departure was that the use would be designating probation violation as something the Legislature did not intend it to be (a reason to depart). The Legislature, however, has

never designated any specific, exclusive list of factors as reasons to depart. The Legislature has provided that certain factors may be used to depart, such a victim's excessive physical or emotional trauma caused by a defendant, Sec. 921.001(7), F.S. (1989), or when a defendant's prior record indicates a escalating pattern of criminal conduct, Sec. 921.001(8), F.S. (1989). The Legislature did not, however, make these factors exclusive. In fact, the Legislature merely specified that a departure sentence must be based upon circumstances or factors which reasonably justify the aggravation of the sentence. Sec. 921.001(5), F.S. (1989).

The trial court first placed Maxwell on five years probation for her original offenses of two counts of grand theft. She violated her probation by passing worthless checks. The trial court placed her on community control for a year. She violated community control by using cocaine and failing to remain at her approved residence. The trial court modified her community control and extended it for two years. She violated her modified community control by using cocaine again. The trial court revoked her community control and then reinstated it. Maxwell then violated her extended and reinstated community control by failing to comply with instructions, failing to remain confined to her residence, failing to pay restitution, failing to pay court costs, and failing to submit to urinalysis.

If this long and checkered trip through the criminal justice system does not reasonably justify the trial court's aggravation of Maxwell's sentence the State frankly wonders if departure sentences have any purpose at all. **Lambert** does not overrule **Adams**, and Maxwell's extensive record of probation and community control violations more than justifies her departure sentence. This Court should reverse the First District's opinion in the present case and affirm Maxwell's departure sentence.

The First District in **Maxwell** next discusses this Court's opinion in **Ree, supra,** issued a year after the opinion in **Lambert**. In **Ree,** the defendant was alleged to have sexually battered two children during his probation. The trial court, which had withheld adjudication on Ree's original charges then revoked his probation, adjudicated him guilty of the original charges, and sentenced him to ten and one half years of incarceration, a six cell upward departure from the guidelines sentence. **Ree,** 565 So.2d at 1330. The reasons submitted for the departure by the Ree trial court included the victim's physical and emotional trauma, the fact the defendant was on probation for less than eight months before the sexual batteries, the egregious and severe character of the new offense, and the increasing severity of the defendant's criminal conduct. **Id.** The Fourth District found the first two reasons valid and supported by the record, reversed on the third, and

found the fourth reason for the departure unsupported by the record. **Id.** The district court then remanded for resentencing. On petition for rehearing, this Court held that the trial court erred in imposing any departure sentence for probation violation exceeding the one-cell increase permitted by the guidelines, citing **Lambert, supra,** and its associated cases of **State v. Tuthill,** 545 So.2d 850 (Fla. 1989) and **Franklin v. State,** 545 So.2d 851 (Fla. 1989) (emphasis in the original). **Ree,** 565 So.2d at 1331.

However, as the State pointed out in its answer brief below, **Lambert, Tuthill** and **Franklin** all deal with single incidents of violation of probation or community control. Maxwell was not sentenced for a single violation but for multiple, continued violations over a considerable period of time. Further, the rationale expressed in **Ree** for this Court's holding in **Lambert** simply does not apply in Maxwell's case.

This Court set out its rationale as, first, the guidelines do not permit departure based on an "offense" of which the defendant may eventually be acquitted. Maxwell was not sentenced to a departure sentence for another "offense," but for repeatedly and continuously violating the terms of her community control. Second, according to this Court, even if the defendant has been convicted of the offenses, departure is

equally impermissible because it constitutes double dipping. As the State showed above in its **Lambert** analysis, the trial court did not double dip when it sentenced Maxwell. Maxwell's violations were not used to arrive at a guidelines sentence for a nonexistent new offense, they were used to depart from the guidelines sentence because Maxwell would not obey any of her prior sentences.

Finally, according to this Court, violation of probation is not a substantive offense in Florida and cannot be the vehicle for departure under basic policies of the guidelines. A substantive offense, however, is not required for a trial court to depart from the guidelines; only circumstances or factors which reasonably justify the departure are required. Sec. 921.001(5), F.S. (1989). In fact, the Legislature has specifically approved a reason for departure that is not a substantive offense; the victim's excessive physical or emotional trauma. Sec. 921.001(7), F.S. (1989). The Legislature approved departure for this reason even if the victim's trauma was used in the calculation of the guidelines sentence. **Id.** The fact that violation of probation or community control is not a substantive offense in no way stops it from being used as a reason to depart. Under the circumstances of Maxwell's repeated and continuous violations of her probation and community control the trial court's departure

from the guidelines was justified. The basic policies of the guidelines are not disturbed when circumstances and factors which reasonably justify the departure are present as they are in Maxwell's case. The trial court did not err when it departed from the guidelines in sentencing Maxwell. This Court should adopt the Second District's reasoning in **Williams** and **Brown, supra,** reverse the First District's opinion in **Maxwell, supra,** and affirm the departure sentence.

CONCLUSION

For the reasons set forth above, the State requests this Honorable Court to adopt the reasoning of **Williams** and **Brown**, reverse the First District's opinion in the present case and affirm the trial court's departure sentence of Maxwell.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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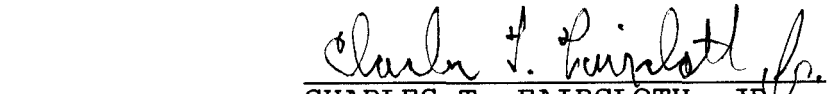

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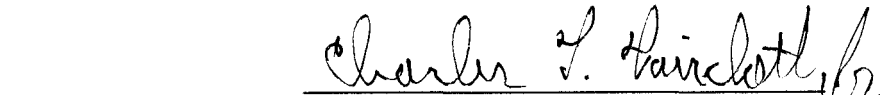
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been forwarded to David A. Davis, Assistant Public Defender, Fourth Floor North, Leon County Courthouse, 301 South Monroe Street, Tallahassee, FL 32301, via U. S. Mail, this 6th day of May 1991.



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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-VS- CASE NO. 77,699

SABRINA MICHELLE MAXWELL,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

APPENDIX

Brown 530 So.2d at 53. Therefore, we again certify the following question as one of great public importance:

DOES THE 1988 AMENDMENT OF SECTION 775.084, FLORIDA STATUTES, ALTERED THE SUPREME COURT'S RULING IN *BROWN*, HOLDING THAT THE LEGISLATURE INTENDED SENTENCING UNDER SECTION 775.084(4)(A) TO BE PERMISSIVE, RATHER THAN MANDATORY, AS STATED IN *DONALD?*

(THREADGILL and PARKER, JJ., Concur.)

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[1]A recommended guidelines sentence would have been seven - nine years; the permitted range would have been five and one-half - twelve years. Fla. R. Crim. P. 3.701.

* * *

Mental health—Involuntary commitment—Evidence insufficient that defendant posed real and present threat of harm to himself or others to support involuntary commitment—Need for treatment alone insufficient to commit individual

MICHAEL D. BRADEN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-2427. Opinion filed March 5, 1991. Appeal from the Circuit Court for Duval County, Frederick B. Tygart, Judge. Louis O. Frost, Jr., Public Defender; James T. Miller, Assistant Public Defender, Jacksonville, for appellant. Robert A. Butterworth, Attorney General; Kathleen E. Moore, Assistant Attorney General, for appellee.

(CAWTHON, S.J.) Appellant seeks reversal of an order for involuntary commitment. We reverse the order based on the insufficiency of evidence that appellant posed a real and substantial threat of harm to himself or others. To support a finding of involuntary placement, the evidence must establish that appellant posed a real and present threat of substantial harm to himself or others. *Welk v. State*, 542 So.2d 1343 (Fla. 1st DCA 1989). Even if other criteria for involuntary placement are met, a non-dangerous individual, capable of surviving safely in freedom by himself or with the help of others, should never be involuntarily committed. *In re Beverly*, 342 So.2d 481 (Fla. 1977); *Williams v. State*, 522 So.2d 983 (Fla. 1st DCA 1988). The mere need for treatment alone is insufficient to commit an individual. *Williams; Neff v. State*, 356 So.2d 901 (Fla. 1st DCA 1978).

The experts in the instant case, like the experts in *Welk v. State*, found the appellant at times verbally and physically aggressive towards others, unpredictable, and in need of a structured environment with supervision. However, just as the experts in *Welk*, the instant experts did not identify the serious nature of the injury that appellant would sustain if not incarcerated, and did not present any testimony of serious injuries as a result of past episodes. In the instant case, both appellant's psychologist and psychiatrist recommended that appellant be put in a voluntary residence program. They both testified that appellant did not need to be involuntarily placed in the state hospital. Appellant's history likewise establishes that appellant can survive safely outside of involuntary placement and will not be a threat to himself or others. Accordingly, the order of involuntary placement is reversed. (JOANOS and ZEHMER, JJ., CONCUR.)

* * *

Workers' compensation—Claimant seeking modification of pretrial stipulations on ground that they were based on fraud and misrepresentations by employer/carrier

SANDRA FROST, Appellant, v. WAIKIKI MOTEL and F.C.C.I., Appellees. 1st District. Case No. 90-00307. March 4, 1991.

ORDER

[Original Opinion at 15 F.L.W. D2801]

This Court's opinion dated November 13, 1990 is hereby withdrawn.

* * *

Criminal law—Sentencing—Guidelines—Departure—Multiple violations of probation invalid reason for departure beyond one-cell increase when imposing sentence upon revocation of probation—Conflict certified

SABRINA MICHELLE MAXWELL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-1536. Opinion filed March 7, 1991. An appeal from the Circuit Court for Bay County, Clinton Foster, Judge. Barbara M. Linthicum, Public Defender, and David A. Davis, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

(ZEHMER, J.) By this appeal we review a sentence of five years' imprisonment imposed upon a finding that appellant had violated certain conditions of her probation. The sentence exceeded the one-cell guidelines increase authorized by rule 3.701(d)14, Florida Rules of Criminal Procedure, when sentencing upon probation violations. The written reasons for departure are as follows:

1. In Case No. 87-0788 and 87-0795, the Defendant was charged with grand theft, each of which is a Third Degree Felony. The Defendant was originally sentenced to five years probation, concurrent.

2. In November of 1988, the Defendant was charged with violating the terms and conditions of her probation by issuing worthless checks, and the probation officer recommended that a warrant be issued and that it be held and not serve conditioned upon the Defendant's cooperation in attending the CrossRoads Recovery Center. As a result of that violation, on January 24, 1989, the Defendant's probation was modified and she was placed on one year of community control to be followed by the balance of her probation.

3. On April 19, 1989, another violation report was filed by her probation officer because of positive urinalysis test which reflected the use of cocaine. On the 28th day of May, 1989, the Defendant was charged with a further violation in that she failed to remain confined to her approved residence. On the 18th day of July, 1989, the Court modified the Community Control to extend Community Control for a period of two (2) years. On the 26th day of September, 1989, the Defendant's probation officer filed another violation affidavit charging the Defendant with testing positive for the use of cocaine. On December 1, 1989, an evidentiary hearing was held, at which time the Defendant plead guilty to violating the terms and conditions of her Community Control, which was at that time revoked. However, on January 17, 1990, the Court reinstated the Defendant's Community Control.

4. On February 14, 1990, the Defendant was again charged with violating the terms and conditions of her Community Control by failing to comply with instructions, failing to remain confined to her residence, failing to pay restitution, failing to pay court costs and failing to submit to urinalysis. Defendant has entered a plea of no contest to these violations, and it is on these violations that results in the departure sentence.

Maxwell contends that the sentence imposed is contrary to the Florida Supreme Court decisions in *Lambert v. State*, 545 So. 2d 842 (Fla. 1989), and *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), because it must be limited to the one-cell increase as provided in rule 3.701(d)(14) under those decisions. In the instant case, the one-cell increase allows either community control or imprisonment within the range of 12 to 30 months. The state responds that the departure sentence is valid under the supreme court's decision in *Adams v. State*, 490 So. 2d 53 (Fla. 1986). The state would distinguish *Lambert* and *Ree* on the ground that those cases involved one or two prior violations of probation while the instant case involves multiple prior violations of probation.

This trilogy of supreme court decisions has caused considerable confusion regarding the authority of trial courts to impose a departure sentence in excess of the one-cell increase upon a defendant's violation of probation or community control. The several district courts of appeal have reached divergent views on this issue. This confusion has, in turn, contributed to a large

number of criminal appeals on this issue. Obviously, the supreme court, not this court, must ultimately resolve this confused state of affairs; however, for whatever benefit it may provide to the supreme court, we now state the rationale for our view and certify the question to the supreme court.

In *Adams v. State*, 490 So. 2d 53 (Fla. 1986), at sentencing upon the defendant's second violation of her probation, the trial court departed from the recommended sentence of any nonstate prison sanction and sentenced her to two consecutive four-year terms of imprisonment. The court set forth the following reason for this departure sentence: "Defendant was previously placed on probation and has *twice* been found to have violated the terms of her probation." The fifth district affirmed this sentence on the authority of *Whitlock v. State*, 458 So. 2d 888 (Fla. 5th DCA 1984), and *Albritton v. State*, 458 So. 2d 320 (Fla. 5th DCA 1984). *Adams v. State*, 474 So. 2d 908 (Fla. 5th DCA 1984). The supreme court dismissed the defendant's jurisdictional petition for review of the fifth district's decision, finding no conflict with its opinion quashing the fifth district's decision in *Albritton*.[1] The *Adams* opinion seemingly approved the use of two or more violations of probation as a valid basis for a departure sentence in excess of the one-cell increase authorized by the rule based on the following explanation in a footnote:

> The fifth district has held that violating probation can be used to bump a sentence to the next single higher cell, but that further departure must be supported by another reason or reasons, *Boldes v. State*, 475 So. 2d 1356 (Fla. 5th DCA 1985), and, also that multiple probation violations can support a departure of more than one cell. *Riggins v. State*, 477 So. 2d 663 (Fla. 5th DCA 1985).

490 So. 2d at 54 n.2.

Four years later the supreme court in *Lambert* stated that the issue before it was "whether factors related to violation of probation or community control can be used as grounds for departing from the sentencing guidelines" and held that these factors could not be so used. 545 So. 2d at 839. The material facts were that Lambert, while serving a sentence of community control, was charged with violating his probation for striking his girlfriend several times with a fork or knife during an argument and threatening to kill her. He was also charged with striking one of her sons with the same object. The trial court found Lambert guilty of these alleged violations, revoked his community control, and sentenced him to serve concurrent sentences of five and fifteen years on the original charges. The sentence so imposed exceeded the twelve to thirty months' imprisonment authorized under the one-cell increase guidelines sentence. The district court affirmed the trial court's departure sentence on the authority of *State v. Pentaude*, 500 So. 2d 526 (Fla. 1987).[2] The supreme court quashed the district court decision on the following rationale. The supreme court stated that, "If new offenses constituting a probation violation are to be used as grounds for departure when sentencing for the original offense, prior conviction on the new offenses is required" by provisions in rule 3.701(d)(11) because "Policy considerations that mandate conviction prior to departure at an original sentencing are equally applicable to sentencing following probation violation." 545 So. 2d at 841. The *Lambert* opinion further commented that even if the defendant had been convicted of the new offense constituting the probation or community control violation, such offense could not be used as a ground for departure for two reasons. First, where the defendant is sentenced simultaneously for both the original and the new offense, it would violate the court's holding in *Hendrix v. State*, 475 So. 2d 1218 (Fla. 1985), "that departure may not be based upon factors already weighed in arriving at the presumptive sentence." *Ibid.* The court noted that during simultaneous sentencing, a single scoresheet must be used for all offenses pending before the court, and that status points must be added because the new offense was committed while under legal restraint. Since these added points are used in calculating the presumptive sentence for all offenses disposed of under the score sheet, "To add status points due to legal restraint and to simultaneously depart based upon probation violation constitutes double-dipping." *Ibid.* The court's opinion then continues:

> Second, violation of probation is not itself an independent offense punishable at law in Florida. The legislature has addressed this issue and chosen to punish conduct underlying violation of probation by revocation of probation, conviction and sentencing for the new offense, addition of status points when sentencing for the new offense, and a one-cell bump-up when sentencing for the original offense. It has declined to create a separate offense punishable with extended prison terms. If departure based upon probation violation were to be approved, the courts unilaterally would be designating probation violation as something other than what the legislature intended. . . . Lambert . . . was impermissibly sentenced outside the guidelines where he received a twelve and one-half year departure for the original offenses based upon conduct for which there was no conviction. . . . Departures are to be affirmatively discouraged.
>
> Accordingly, we hold that factors related to violation of probation or community control cannot be used as grounds for departure. To the extent that this conflicts with our earlier ruling in *Pentaude*, we recede from our decision there.

545 So. 2d at 841-42.

Surprisingly, neither the supreme court's majority opinion nor either dissenting opinion made any reference to the earlier opinion in *Adams*. Parenthetically, we note that in *Adams*, although the defendant had been arrested for and had pleaded guilty to various charges of child abuse, petit theft, and possession of cannabis, revocation of community control was apparently based on allegations that Adams had violated certain conditions of community control "by failing to file reports and keep in contact with her supervisor, by falsifying reports (among other things, she never reported her arrests on the other charges), and by failing to perform the required days of community service." 490 So. 2d at 54 n.1. We find no basis for discerning a material distinction between the holdings in *Adams* and *Lambert*. While the violations of certain community control conditions in *Adams* were based on conduct that did not constitute criminal offenses, other violations certainly did. Rather, as we read *Adams*, its holding was essentially based on the same rationale as was *Pentaude*, so it is exceedingly difficult to attribute any surviving vitality to the *Adams* decision after *Lambert* receded from *Pentaude*.

About a year after issuing its decision in *Lambert*, the supreme court issued its opinion on rehearing in *Ree v. State*, 565 So. 2d 1329 (Fla. 1990). In *Ree* the defendant was alleged to have committed sexual batteries on two minor children during his term of probation. The trial court, which had withheld adjudication on Ree's original charges, revoked his probation, adjudicated him guilty of the initial charges, and sentenced him to imprisonment for ten and one-half years, a six-cell upward departure from the guidelines recommended sentence. Several reasons recited for departure were based on Ree's egregious misconduct during his term of probation. The supreme court held that reliance on such reasons was invalid, stating, "We recently have held 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. *Accord State v. Tuthill*, 545 So.2d 850, 851 (Fla. 1989); *Franklin v. State*, 545 So. 2d 851, 852-53 (Fla. 1989)." 565 So. 2d at 1331. Continuing, the court explained:

> The rationale for our holding in *Lambert* is, first, that the guidelines do not permit departure based on an "offense" of which the defendant may eventually be acquitted. *Lambert*, 545 So. 2d at [illegible] (citing Fla.R. Crim.P. 3.701(d)(11) & accompanying note). Second, even if the defendant has been convicted of the offense, departure is equally impermissible because it constitutes double dipping. The trial court is imposing a departure sentence for probation violation; simultaneously, the guidelines automatically aggravate the sentence for the separate offense that constituted the violation. *Id.* Finally, violation of probation is not a substantive offense in Florida and cannot be the vehicle for departure under basic policies of the guidelines. *Id.* at 841-42. Thus, the trial court erred in imposing *any* departure sentence greater than the one-cell upward increase permitted by *Lambert*.

Ibid. This interpretation of the *Lambert* holding leaves no room for any meaningful distinction between violations of probation or community control based on non-criminal offenses and on criminal offenses.[3] After *Ree* there is simply no basis for according any continued validity to *Adams*, even though the supreme court has not explicitly overturned it.

This court and the fifth district court of appeal have followed *Lambert* and *Ree* and disapproved departure sentences on revocation of probation or community control above the one-cell bump-up authorized in rule 3.701(d)14. *Teer v. State*, 557 So. 2d 911 (Fla. 1st DCA 1990); *Pringal v. State*, 564 So. 2d 285 (Fla. 5th DCA 1990); *Maddox v. State*, 553 So. 2d 1380, 1381 (Fla. 5th DCA 1989) (While two violations of probation for the same offense have been held to be a valid ground for departure in *Adams*, "we read the language in *Ree* to mean what it states and to encompass and eliminate the *Adams* exception (although the opinion in *Ree* does not cite or discuss *Adams*.)"). On the other hand, the second district court of appeal has reached a contrary decision by according continuing efficacy to *Adams*. *Williams v. State*, 568 So. 2d 1276 (Fla. 2d DCA 1990) (according to *Adams* a second violation of probation is a valid reason for departure, and the rule in *Ree* has not altered this established rule because the question of a departure sentence based on multiple violations of probation was neither presented to nor ruled upon by the supreme court in *Ree*; issue certified to the supreme court); *Brown v. State*, 559 So. 2d 412 (Fla. 2d DCA 1990) (multiple violations of probation is a valid reason to support a departure sentence).

We adhere to our decision on this issue in *Teer*, vacate the departure sentence imposed by the trial court, and remand for resentencing within the guidelines range one-cell increase authorized by rule 3.701(d)14. We certify direct conflict with the cited decisions of the second district court of appeal.

REVERSED AND REMANDED. (JOANOS, J., and CAWTHON, Senior Judge, CONCUR.)

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[1]Albritton v. State, 476 So. 2d 158 (Fla. 1985).

[2]In *Lambert* the supreme court characterized its decision in *Pentaude* as holding that "where an offense constituting violation of probation is sufficiently egregious, Florida Rule of Criminal Procedure 3.701(d)(14) cannot be read as limiting departure to a single cell." 545 So. 2d at 840.

[3]The *Franklin* decision cited in *Ree* states:

> Upon a violation of probation during a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. However, no further increase or departure is permitted for any reason.

545 So. 2d at 853.

* * *

Torts—Automobile accident—No entitlement to noneconomic damages where medical evidence failed to demonstrate permanent injury—Absence of evidence of economic damages resulting from accident—Error to fail to grant defense motion for directed verdict on issue of damages

WILLIE M. PEARSON, Appellant, v. CAROL GREGG, Appellee. 1st District. Case No. 90-1772. Opinion filed March 7, 1991. Appeal from the Circuit Court for Alachua County. Judge Nath Doughtie. Milton H. Baxley, II, Gainesville, for appellant. Robert A. Bush, Gainesville, for appellee.

(PER CURIAM.) Willie M. Pearson, the defendant below in a personal injury action arising from an automobile accident, appeals a jury verdict finding her guilty of negligence, and awarding the appellee $22,000 economic and noneconomic damages. We affirm the finding of negligence, but reverse the damage award. As a threshold matter the appellee was required to prove under §627.737(2)(b), Fla. Stat. that she had sustained a permanent injury within a reasonable degree of medical probability as a prerequisite to any recovery of noneconomic damages. The medical evidence adduced failed to satisfy this requirement. Further, there was no evidence to demonstrate appellee has or will sustain any economic damage as a result of the accident. Accordingly, the trial court erred in not granting the defense motion for directed verdict on the issues of damages, and the award is REVERSED. (NIMMONS, BARFIELD, and MINER, JJ., CONCUR.)

* * *

Workers' compensation—Award of interest and penalties on past attendant care benefits unauthorized—Sufficient evidence to support determination that notice was given to carrier of final hearing on benefits—No error in conducting hearing in absence of servicing agent or its representative—No error in retaining jurisdiction to award attorney's fees—Other attorney's fee issues not properly preserved for appeal

AREA REFRIGERATION & AIR CONDITIONING and INVESTORS INSURANCE HOLDING CORP., Appellants, v. ABE GLAZER, Appellee. 1st District. Case Nos. 90-1659, 2586. Opinion filed March 7, 1991. Appeal from an order of the Judge of Compensation Claims; Steven J. Johnson, Judge. Thomas H. McDonald and Theodore N. Goldstein of Rissman, Weisberg, Barrett & Hurt, Orlando, for appellants. C. Thomas Ferrara, Altamonte Springs, for appellee.

(PER CURIAM.) Area Refrigeration & Air Conditioning and Investors Insurance Holding Corp. (E/C) filed separate appeals from two orders of the judge of compensation claims (JCC); one order which awarded benefits and the other which grants attorney's fees to the claimant. The separate challenges which were filed have been consolidated for appeal. We are required to address three points on appeal: (1) Whether there is competent substantial evidence to support the JCC's finding that the employer's servicing agent received proper notice of the final hearing on benefits; (2) whether there is competent substantial evidence to support the JCC's awards of interest and penalties on past attendant-care benefits; (3) whether the JCC erred in the award of attorney's fees.

Claimant concedes that the award of interest and penalties on past attendant-care benefits is unauthorized. We reverse as to that issue without further discussion. *Williams v. Amex Chemical Corp.*, 543 So.2d 277 (Fla. 1st DCA 1990). We affirm as to issues I and III.

The record demonstrates that there was competent substantial evidence on which the hearing officer could have determined that notice was given to the carrier in accordance with the requirements of section 440.25(3)(a), Florida Statutes, and rule 4.080, Florida Workers' Compensation Rules of Procedure. *See Barbour v. Waterman*, 394 So.2d 517 (Fla. 1st DCA 1981). We, therefore, determine that the JCC did not err in conducting the hearing in the absence of the servicing agent or its representative.

The E/C also raises several issues concerning attorney's fees. We find that as to these issues (1) the JCC did not err in retaining jurisdiction to award attorney's fees, and (2) the other attorney's fee issues were not properly preserved for appeal.

We affirm in part, reverse in part, and remand with directions to enter a final order consistent with this opinion. (ERVIN, AL-