047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-VS-

CASE NO. 77,699

SABRINA MICHELLE MAXWELL,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLES T. FAIRCLOTH, JR.
ASSISTANT ATTORNEY GENERAL
ATTORNEY NO. 878936

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050

COUNSEL FOR PETITIONER

TOPICAL INDEX

TABLE OF CITATIONS

OTHER AUTHORITIES

OTHER AUTHORITIES (Cont'd)

SUMMARY OF ARGUMENT

Multiple violations of probation are a sufficient reason to justify a departure from the recommended guidelines sentence of more than one cell. Since the conflict between the districts on this issue and the issue's origin in this Court's prior decisions are fully discussed in both parties briefs on the merits, Petitioner will confine this Reply to addressing the policy arguments raised by Respondent in her brief on the merits.

The principles of the guidelines, when applied to the present case, show that departure from the guidelines is appropriate for multiple violations of probation. Departures are not rare, extraordinary events in sentencing under the present statute and rule.

The rule creating the one cell "bump" for sentencing violators of probation or community control has not proven satisfactory. The dissatisfaction of sentencing courts with the rule is shown by the repeated appeals and attempts to depart.

The prior holdings of this Court regarding the use of multiple violations of probation as a reason to depart are increasingly suspect in the face of the lessened standards for departure. The central point on sentencing for violation of probation or community control is that the offender has already been convicted of an offense.

Double-dipping is not an appropriate reason to disallow courts from departing from the guidelines for violations of probation or community control. The rules explicitly allow double-dipping, albeit of only one cell. Further, the use of multiple violations as a reason to depart is not designating the violation a criminal offense. A reason to depart has never been required to be a criminal offense.

The application of the reasons this Court has previously used to disallow departure for violations of probation or community control to the present case only emphasizes the impolitic nature of these restrictions on judicial discretion. The long and checkered criminal history of Respondent is certainly a reasonable justification for a departure from the guidelines.

Petitioner is not asking this Court to make violation of probation or community control a criminal offense. Petitioner is merely asking this Court to place the threshold for departure back where it belongs; a reasonable justification stamdard in line with the statute and rule.

The standard for departures from the sentencing guidelines, as well as uniformity in sentencing, has been eroded by changes in both the statute governing departures as well as the rule. Now both only require reasonable justification for departure, not clear and convincing reasons. This Court has

previously applied the rule's language to departure sentences for violations and should apply it once again. This Court's decision in the present case should reflect the lowered standard for departure sentences as do the statute and the rules. This court should reverse the First District's decision in the present case and affirm the departure sentence given Respondent for multiple violations of probation and community control.

ARGUMENT

ISSUE

MULTIPLE VIOLATIONS OF PROBATION ARE A SUFFICIENT REASON TO JUSTIFY A DEPARTURE FROM THE RECOMMENDED GUIDELINES SENTENCE OF MORE THAN ONE CELL.

This case, as Respondent states, presents the issue of whether a trial court can exceed the one-cell "bump" authorized by Rule 3.701(d)(14) because the defendant had multiple violations of her probation or community control. The conflict between the various districts on this issue and the issue's origin in this Court's previous decisions concerning guidelines departures are fully discussed in both parties' briefs on the merits. Therefore, Petitioner will confine this Reply to addressing the policy arguments raised by Respondent in her brief on the merits.

Respondent first addresses the history of the sentencing guidelines and their application to violators of probation and community control (RBM 6-8). Respondent discusses the purpose of the sentencing guidelines as set out in Fla.R.Crim.P. 3.701(b); "The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision making process." Respondent does not mention, however, the principles behind the guidelines which also are listed in the Rule. These principles are set forth, in pertinent part, as:

b. Statement of Purpose. . .

* * *

2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.

3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.

4. The severity of the sanction should increase with the length and nature of the offender's criminal history.

* * *

6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made where circumstances or factors reasonably justify the aggravation or mitigation of the sentence. The level of proof necessary to establish facts supporting a departure from a sentence under the guidelines is a preponderance of the evidence.

7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

These principles are binding on the sentencing court. Fla.R.Crim.P. 3.701(b), Committee Note. These principles should also be used by this Court in making its decision in the present case. The primary purpose of sentencing is to punish the offender. Rule 3.701(b)(2). Respondent would use her multiple violations of probation and community control as a reason why she should not be punished any more than if she was being sentenced for her original offenses on her first violation of probation.

The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense. Rule 3.701(b)(3). The circumstances surrounding the Respondent's offense in the present case are her repeated, multiple violations of the court's sentencing orders after she was first placed on probation.

The severity of the sanction should increase with the length and nature of the offender's criminal history. Rule 3.701(b)(4). Respondent's long and varied criminal history, extending through probation, community control, extended community control, and modified community control gives ample reason that the departure sentence given her was a reasonable and justifiable increase of the sanction.

Departures from the sentencing guidelines shall be made where circumstances or factors reasonably justify the

aggravation of the sentence. Rule 3.701(b)(6). The circumstances and factors surrounding Respondent's repeated and uncaring violations of every alternative sentence the trial court gave her more than reasonably justifies the court's aggravation of her sentence. This principle, as well as Rule 3.701(d)(11), sets the standard for departure that this Court should apply in ruling on this issue.

Because the capacities of correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence. Rule 3.701(b)(7). The court that sentenced Respondent tried its best to follow this principle. It tried sentencing Respondent to probation, to community control, to extended community control, and to modified community control. The court tried every less-restrictive sentence at its disposal. But when Respondent's criminal history, violations and contempt for the court's less-restrictive sentences reached a point where it was obvious that the sentences were not fulfilling the purpose set out in Rule 3.701(b)(2) of punishing the offender, the court then decided to depart from the guidelines. The court felt, properly felt, that Respondent's history of violations and offenses reasonably justified the departure sentence. This

Court should apply these principles and hold that it did justify the departure.

Respondent, after setting out the purpose of the sentencing guidelines, states that a necessary corollary to that axiom is that sentencing departures should be rare, extraordinary events, and affirmatively discouraged, citing **Hendrix v. State,** 475 So.2d 1218 (Fla. 1985). The changes made to the guidelines since this Court's decision in **Hendrix** symbolize the very issue this brief concerns. What this Court in **Hendrix** said was:

> Departures from the guidelines are permitted, but judges must explain departures in writing and may depart only for reasons that are "clear and convincing." Fla.R.Crim.P. 3.701(b)(6), d(11). Moreover, the guidelines direct that departures "should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence." Fla.R.Crim.P. 3.701(d)(11). Therefore, while the rule does not eliminate judicial discretion in sentencing, as respondent argues, it does seek to discourage departures from the guidelines.

Hendrix, supra, 475 So.2d at 1220.

The very standards **Hendrix** cites as a basis for stating that departures are discouraged have been removed from the guidelines and replaced with standards that allow wide discretion on a sentencing court's part. The "clear and convincing reasons" standard for departure previously found in

Rule 3.701(b)(6) and d(11) has been lessened to where departures may be made when "circumstances or factors reasonably justify the aggravation or mitigation of the sentence," Fla.R.Crim.P. 3.701(b)(6). Rule 3.701(d)(11) now states: "Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors which reasonably justify aggravating or mitigating the sentence."

In short, while Rule 3.701(d)(11) still holds that departures should be avoided, Respondent's statement that departures should be rare, extraordinary events and are affirmatively discouraged is overblown. The thrust of sentencing review since **Hendrix** has been to lessen the requirements for departure, as Respondent notes (RBM 8, fn. 2), and to increase the discretion allowed the sentencing court to depart.

As Respondent also notes, the original rules applied to probationers, but it soon became evident that the standards needed some modification (RBM 6). The problem, succinctly stated, was that an offender who repeatedly violated his probation could receive nothing more than more probation for his violations. This problem led to the creation of Fla.R.Crim.P. 3.701(d)(14), which at present states:

> 14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may

> be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

This rule allowed a sentencing court some discretion in sentencing a probation violator. It created the "bump"; the one cell increase allowed for sentencing an offender after revoking his probation or community control. The rule on its face allows a court to increase a sentence by to the next higher cell without requiring the entry of a reason for departure. However, contrary to Respondent's assertion, this rule has not proven satisfactory. The evidence of whether the rule is satisfactory is not found in the lack of legislative reform of the rule as Respondent would have it, but in the response of those most affected by the rule; the sentencing courts. Their response has been to try, to repeatedly try, to find some reason for departures greater than the bump that this Court will find acceptable. This appeal is only the latest in a long string of trial courts' attempts to find a valid reason to depart from the guidelines when sentencing an offender for multiple, repeated violations of probation or community control. The rule is plainly not satisfactory or it would not have generated the conflict between the district, the repeated appeals, or for that matter this appeal. See, e.g., **Williams v. State,** 568 So.2d 1276 (Fla. 2d DCA 1990); **Teer v. State,** 557 So.2d 911 (Fla. 1st DCA 1990); **Maxwell v. State,** 16 F.L.W. D644 (Fla. 1st DCA March 7, 1991) (the instant case).

Respondent next discusses this Court's treatment of the issue of departure for multiple violations of probation. As Respondent states, this Court's initial consideration of the issue occurred in **Adams v. State,** 490 So.2d 53 (Fla. 1986). However, this Court's consideration did not arrive in a "peculiar" way. This Court simply held that it was refusing to accept jurisdiction in the case because it saw nothing wrong with the trial court departing from the guidelines because of the defendant's multiple violations of probation. **Id.** As Petitioner discussed in its brief on the merits, there is nothing wrong or peculiar with departing from the guidelines for multiple violations of probation. This is even made more clear by considering this Court's decisions since **Adams** in light of the changes to Sec. 921.001, Fla.Stat. (1989), and the Rules.

In **State v. Pentaude,** 500 So.2d 526 (Fla. 1987), this Court held:

> By no means, however, does the rule even purport to completely limit the trial court's discretion in sentencing when compelling clear and convincing reasons call for departure beyond the next cell. The trial judge has discretion to so depart based upon the character of the violation, the number of conditions violated, the number of times he has been placed on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

Id., 500 So.2d at 528.

This Court of course receded from **Pentaude** in **Lambert v. State**, 545 So.2d 838 (Fla. 1989). However, the majority opinion in **Lambert** made no mention of either Rule 3.701(d)(14) or **Adams, supra**. Only Justice Overton's dissent recognized the inherent limitation of the Rule contained in the majority opinion. The **Lambert** majority analyzed the nature of probation violations under the guidelines in order to reach its holding. That holding, however, when placed against the lessened standards for departure is increasingly suspect.

Fla.R.Crim.P. 3.701(d)(11) mandates that reasons for deviating from the guidelines cannot include factors relating to the instant offense for which convictions have not been obtained. The Committee Note to the rule states that a court is prohibited from considering offenses for which the offender has not been convicted. However, the note continues that other factors, consistent and not in conflict with the statement of purpose, may be considered and utilized by the sentencing judge (to depart from the guidelines).

While Petitioner acknowledges that this Court has consistently required prior convictions for guidelines departure in original sentencing, **Lambert**, supra, at 841 and cases cited, it does not agree that the policy considerations that mandate conviction prior to departure at an original sentencing are equally applicable to sentencing following probation violation. Id. The whole point of departure for violation of probation or

community control is that the offender has already been convicted of an offense.

The sentencing court has already exercised its discretion and sentenced the offender to an alternative sentence other than incarceration. Now the offender, having been given a second chance to show she can abide by the terms of his probation, is back before the court after having been arrested for a criminal offense. The court is now sentencing the offender not for the new offense, for which she has not yet been convicted, but for the violation of her probation.

A standard requirement of probation in Florida is for the probationer to live and remain at liberty without violating any law. The standard probation order, including the order in the present case, continues that a conviction in a court of law shall not be necessary in order for such a violation to constitute a violation of the offender's probation (Appendix A, subsection 5). If an offender may plead to an original offense in a plea bargain, there seems to be no reason that he or she may not waive conviction as a prerequisite for violation in a duly entered alternative sentence. Once again, the whole point of departure for probation violation is that there has already been a conviction. The offender has been given a second chance and has proved that the court cannot expect him to abide by the court's orders. It is therefore reasonable and justified that the court depart from the guidelines and sentence the offender to an enhanced sentence.

This Court's opinion in **Lambert** continues that "to add status points due to legal constraint and to simultaneously depart based upon probation violation constitutes double-dipping." **Id.** 545 So.2d at 841. Petitioner on this issue would point out that Rule 3.701(d)(14) explicitly allows a double-dip, without requiring entry of any reason at all. The double-dip is limited to one cell, true, but a double-dip it is, nonetheless. The real issue then is not whether a court can double-dip, since the Rules allow it, but how deep the dip may be. Respondent would limit it to the one cell bump allowed by the guidelines, while Petitioner contends that a court may depart from the guidelines altogether.

This Court's second reason in **Lambert** for not allowing departure was that a "violation of probation is not an independent offense punishable at law in Florida. . .If departure based upon probation violation were to be approved, the court unilaterally would be designating probation violation as something other than what the legislature intended." **Id.**, at 841. Respondent states the holding as courts exceed their jurisdiction when they use probation violations to justify a departure sentence (RBM 10). However, as Petitioner pointed out in its brief on the merits, the Legislature 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 as a victim's excessive physical or

emotional trauma caused by a defendant, Sec. 921.001(7), Fla.Stat. (1989), or when a defendant's prior record indicates an escalating pattern of criminal conduct, Sec. 921.001(8), Fla.Stat. (1989). 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), Fla. Stat. (1989). The Legislature has at no time required departure to be based upon an offense. This Court may well be designating probation violation as something the Legislature never intended; a reason that cannot be used to depart. The standard the Legislature set for departure is only "circumstances or factors that reasonably justify the aggravation of the sentence," a very low threshold. This Court's prior decisions, including its affirmance of **Lambert, supra,** in **Ree v. State,** 565 So.2d 1329 (Fla. 1990), have unilaterally raised that threshold and should be revisited.

Respondent next contends that the justifications for not allowing departure for probation violations that appear in **Lambert** apply equally well in the present case (RBM 11). Petitioner contends that the application of these justifications to the present case only emphasizes the impolitic nature of these restrictions on a sentencing court's discretion.

The trial court in the present case first placed Respondent 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. Respondent 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. In the face of the record, it is understandable that the trial court felt that a departure was reasonably justified and to keep Respondent on probation or community control was an exercise in futility.

Respondent contends that not being able to depart does not mean the court could have done nothing to "get her attention." According to Respondent, the court could have given her the harshest prison sentence available in the next higher guideline cell. While that is true, it is also true that Respondent's long and checkered history through the criminal justice system is a circumstance or factor that reasonably justifies an enhanced sentence. Whether that sentence enhancement should be limited to only one cell or should depart from the guidelines altogether is the subject of this appeal. That an enhanced sentence is a reasonable response to

Respondent's incorrigibility is agreed by both sides in this appeal. The only issue is how much of an enhancement is permitted by law. If departures are permissible for circumstances and factors that reasonably justify an aggravation of a sentence, then Respondent's history of ignoring the court's sentences certainly justifies the departure sentence in the present case.

Respondent's "most compelling argument" against allowing sentencing departures for probation violations is the rhetorical question "if courts of this state do not have the power to make one violation of probation a criminal offense then how does it acquire that power when the defendant has committed several violations?" (RBM 12). This exemplifies Respondent's misunderstanding of what Petitioner is asking this Court to do. Petitioner is not asking this Court to declare probation violation a crime; that is the Legislature's job. But at no time has there ever been any requirement that a basis for departure be a crime. A basis for departure must only be a circumstance or factor that reasonably justifies the departure, Sec. 921.001(5), Fla. Stat. (1989), such as a long history of continued violations of probation or community control. No one, least of all Petitioner, is asking this Court to create any criminal offense. Petitioner is merely asking this Court to place the threshold for departure back where it belongs; a reasonable justification standard in line with the statute and the Rules.

Respondent's final argument reaches the heart of this matter. Respondent states "if multiple reasons can justify multi-cell departures then the fundamental justification for the guidelines sentencing uniformity will have been significantly eroded, at least in cases involving probation violations." (RBM 13). The very point Petitioner wishes to make in this Reply is that this erosion has already occurred. The standard for departure is no longer "clear and convincing" as it was in **Hendrix, supra,** or **Pentaude, supra.** The statute on departures now requires only circumstances or factors which reasonably justify aggravation or mitigation of the sentence. Sec. 921.001(5), Fla.Stat. (1989). The Rule on departures now requires only the same justification in order to enhance the sentence. Fla.R.Crim.P. 3.701(d)(11). This Court should require only the same justification.

This court applied the text of Rule 3.701(d)(11) to probation violations in **Lambert, supra,** 545 So.2d at 841, and should apply it again today. The standard for departure has been lowered, thus eroding uniformity in sentencing. The Legislatue made the decision to lower the standard, the Rules now reflect the lowered standard and this Court's decision in the present case should reflect the lower standard. This Court should reverse the First District's decision in the present case, adopt the Second District's reasoning in **Brown v. State,** 559 So.2d 412 (Fla. 2d DCA 1990) and **Williams v. State,** 568

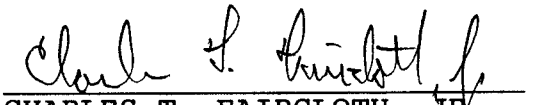
So.2d 1276 (Fla. 2d DCA 1990), and affirm the departure sentence.

CONCLUSION

For the reasons set forth above, this Court should reverse the First District's opinion in the present case and affirm the Respondent's departure sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

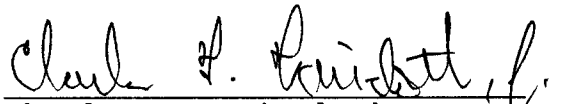


CHARLES T. FAIRCLOTH, JR.
Assistant Attorney General
Attorney No. 878936
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

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 18th day of June 1991.



Charles T. Faircloth, Jr.
Assistant Attorney General