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FILED
SID J. WHITE
JUL 1 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOHN MOTEN, :

Petitioner, :

vs. : Case No. 78,086

STATE OF FLORIDA, :

Respondent. :

_____:

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

On May 22, 1987, the Petitioner, JOHN MOTEN, pled guilty to the charge of escape, a violation of section 944.40, Florida Statutes (1985) (case no. 87-4710) (R11-12). The Petitioner was sentenced to two years probation (R12). On February 22, 1989, the Petitioner was found to have violated his probation and his sentence was modified to three years probation (R26).

On June 28, 1989, the Petitioner pled guilty to delivery of cannabis, a violation of section 893.13(1)(a), Florida Statutes (1989) (case no. 89-7424) (R50-54). The trial court sentenced him to 18 months in prison with three consecutive years probation (R55-56). On November 8, 1989, the Petitioner pled guilty to violating his probation (R43, 60-61). He was sentenced to five years probation on case no. 89-7424 to run concurrent to five years probation on case no. 87-4710, both sentences to run consecutively to the Petitioner's prison sentence in case no. 89-16803 (R2, 36-37, 43, 60-61).

On July 19, 1990, the Petitioner pled guilty to violating his probation in cases 87-4710 and 89-7424 (R91-97). On July 31, 1990, he was sentenced to five years in prison on case no. 87-4710, and five consecutive years in prison on case no. 89-7424 (R41-42, 65-66). The recommended guidelines sentence was 12-30 months in prison or community control (R67-68). A permissible one-cell bump would have placed the Petitioner in the two and a half to three and a half year incarceration range.

The Petitioner filed a timely notice of appeal (R81-82). The Second District Court of Appeal affirmed the judgment and sentence of the trial court but certified to this court as a question of great public importance whether a second violation of probation constitutes a valid basis for a departure sentence beyond the one-cell departure provided in the sentencing guidelines. Moten v. State, 16 F.L.W. D1492 (Fla. 2d DCA May 31, 1991). The Petitioner filed a notice to invoke discretionary jurisdiction on June 5, 1991. On June 21, 1991, this court handed down an order postponing its decision on jurisdiction and ordering the Petitioner to file a merit brief.

SUMMARY OF THE ARGUMENT

By allowing the trial court to depart from a guideline sentence on a violation of probation, 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 MOTEN V. STATE, 16 F.L.W. D1492 (Fla. 2d DCA May 31 1991), CONFLICTS WITH OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA SUPREME COURT ON THE ISSUE OF ALLOWING GUIDELINE DEPARTURES ON VIOLATION OF PROBATION 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 -- 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. This Court has held, however, that multiple violations of probation and/or community control cannot be used as a reason to depart from the guidelines. In addition, this Court has held that trial courts cannot depart from the guidelines in a probation or community control violation case. 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,[1] 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

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[1] The new citation for Ree based on a motion for rehearing is 565 So.2d 1329 (Fla. 1990).

> 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.

The Second District Court of Appeal cited to Williams v. State, 568 So.2d 1276 (Fla. 2d DCA 1990), which allows a trial court to depart from the guidelines upon remand for resentencing upon a second violation of probation. 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, 565 So2d at 1331.

The policy argument in favor of upholding multiple violations of probation as a reason to depart is presumably that probationers who are given a second chance warrant more punishment than those who have had only one chance. This argument is unsound, because the amount of mercy shown initially does not logically correlate with the amount of punishment imposed later when the mercy is withdrawn. Twice as much mercy does not logically justify

twice as much punishment. The guidelines already provide for a one-cell increase in the recommended sentence for a violation of probation. If a court concludes that a first violation is not so egregious that it warrants incarceration, then it is inconsistent to say that this same non-egregious violation could warrant increasing the sentence to the statutory maximum when the court determines the amount of punishment to impose on a second violation. Such a rule would entice judges to offer probation to defendants twice and thereby gives them the rope to hang themselves.