IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE OF FLORIDA,

Petitioner,

VS.

CASE NO.: 84,867
APPEAL NO.: 93-0304

JIMMY DALE LAMAR,

Respondent.

_____/

FILED
SID J. WHITE
JAN 23 1995
CLERK, SUPREME COURT
By _____
Deputy Clerk

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The Second District's opinions in Lamar, infra, and Grady, infra, should be adopted by this Honorable Court. Those opinions are consistent with the mandates of the probation statutes which require a probationer to be sentenced to any sentence that the court might have originally imposed upon revocation. See, §948.06 (1) Fla. Stat. (1991). The Second District's solution to the issue raised in Lamar is the most efficient and workable rule. This rule will aid the trial courts, litigants, and members of the bar by setting up a rule in an area where before there has been only uncertainty.

The first prong of the certified question should be answered in the affirmative, and the second prong in the negative.

ARGUMENT ON CERTIFIED QUESTION

Where a Defendant is sentenced at the same sentencing hearing for a new felony and a violation of probation grounded upon the new felony, is the trial court limited to a one cell increase from the original scoresheet under the sentencing guidelines for the violation of probation, pursuant to Grady v. State, 618 So.2d 341 (Fla. 2DCA 1993), or can the trial court impose the most severe sentencing scheme permissible as to both crimes as outlined in State v. Tito, 616 So.2d 39 (Fla. 1993)?

Comes now, the Respondent herein, Jimmy Dale Lamar, by and through Counsel, and submits to this Honorable Court that the decision of the District Court Of Appeal Of Florida, Second District, in Lamar v. State, 2DCA case number 93-00304 (Fla. 2DCA 1994) was correct, and therefore, should be adopted by this Honorable Court. The question certified to be of great public importance by the both the majority and dissent in Lamar should be answered by an affirmative statement by this Court that where a defendant is sentenced at the same sentencing hearing for a new felony and a violation of probation grounded upon the new felony, that the trial court is limited to a one cell increase from the original scoresheet under the sentencing guidelines for the violation of probation, pursuant to Grady v. State, 618 So.2d 341 (Fla. 2DCA 1993).

The case presently at bar before this Honorable Court is but one in a long line of cases brought before this Court, that as a goal seek only to clarify Florida law on the issue of how a probationer may be properly sentenced upon revocation of probation. See, Cook, Tito, Tripp, Williams, Stafford, Lambert, Ree, and

Peters, infra. The District Court Of Appeal Of Florida, Second District has done much to clarify the law with regard to resentencing a probationer in its opinions issued in Lamar, supra, and Grady, supra. This Honorable Court should acknowledge the merit of the Second District's opinions in Lamar and Grady and adopt that law in it's opinion in this case.

In the recent case of Cook v. State, 19 FLA. L. Weekly S608 (FSC Number 83,193 November 17, 1994) this Honorable Court espoused it's pronouncement of Florida law which tends to support the Second District's opinion in Lamar below. In Cook this Court held,

> "Accordingly, where a defendant is sentenced to prison to be followed by probation for multiple offenses, and ultimately violates that probation, that defendant's cumulative sentence may not exceed the guidelines range of the original scoresheet." See also Tripp v. State, 622 So.2d 941 (Fla. 1993)

In the present case the defendant was sentenced not to prison but to probation for sexual battery and after violating probation his cumulative sentence exceeded the guidelines range of the original scoresheet contrary to this Court's ruling in Tripp, supra.

As stated by the Second District in Lamar the Second District's opinion in Grady, supra, is supported by this Honorable Court's opinion in Williams v. State, 594 So.2d 273 (Fla. 1992). The defendant in Williams was placed on two (2) years probation for second degree grand theft in 1985. The following year the Court adjudicated him guilty of violating probation and restored him to probation for a three (3) year period. In 1987 the Court once again found him to be in violation of probation. On this occasion, the Court sentenced Williams to five (5) years in prison, a

departure from the presumptive guidelines range of community control or twelve (12) to thirty (30) months incarceration, including the one cell increase for violation of probation. The Court recited the multiple violations of probation as a basis for departure. In an en banc decision, the Second District affirmed the departure sentence, 559 So.2d 680. This Court in reversing Williams held that upon revocation of probation, the sentence for violation of probation is limited to an increase to the next higher cell on the sentencing guidelines for each violation of probation.

The stated purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the decision making process so as to eliminate unwanted variation in sentencing. See, Fla. R. Crim. P. 3.701 (b) See, also Tripp, supra. This Court has recognized that public policy does not favor allowing trial court judges to administer severe punishment not for an original crime, but for subsequent conduct that constitutes a violation of probation. In Williams this Court held that

> "however, the policy reasons underlying our opinions in Lambert and Ree persuade us to conclude that even multiple violations of probation should not be a valid basis for departure from the sentencing guidelines. To permit such a departure would have the effect of endorsing severe punishment not for the original crime but for the subsequent conduct that constitutes a violation of probation. Further, such a practice could lead to disproportionate results out of harmony with the spirit of the sentencing guidelines." at So.2d 274.

The result this Court has sought to prevent is exactly what occurred below when the respondent was resentenced after the revocation of his probation. Instead of a one cell bump on his

original scoresheet which would have allowed a maximum sentence of seven (7) years for the original sexual battery offense, the Respondent received the maximum statutory sentence which was fifteen (15) years in prison, based upon the new law violation scoresheet.

The opinions of the Second District in Lamar, and Grady, are consistent with applicable statutes. The institution of probation is a creature of statute. Created by the legislature, imposed and utilized by the judiciary, and executed by the executive. Chapter 948 of the Florida Statutes addresses itself solely to the entire realm of probation. §948.01(1) Fla. Stat. (1991) provides,

> "...Any court of the State... may at a time determined by the Court...hear and determine the question of the probation a defendant in a criminal case..."

Once on probation the statutes require the probationer to, "perform the terms and conditions of his probation." §948.04 (2) Fla. Stat. (1991)

Ultimately, not all probationer's stick to the straight and narrow path, but stray down the wrong road. In these cases the Courts are authorized to try and resentence probation violators. If the Court revokes probation it may sentence the violator to "any sentence which it might have originally imposed before placing the probationer or offender on probation or community control" §948.06 (1) Fla. Stat. (1991). The Second District's resentencing rule is in harmony with this very specific statute on point. Under Lambert and Grady the violating probationer must be resentenced within the parameters of the original permitted sentence. The original

guidelines would determine what could have been handed down in the beginning, and by statute still control resentencing after revocation of probation. See, §948.06(1), Fla. Stat. (1991)

Here, the Petitioner would have this Court ignore the pronouncement of the legislature on this creature of it's design. To do so would be to upset the separation of powers established under the Florida Constitution. It would be contrary to the applicable statutes for this Court to allow a probationer to be resentenced after revocation of probation to a sentence in which the new crime was factored in any way, other than a one cell bump in original guidelines. See, Lambert v. State, 545 So.2d 838 (Fla. 1989); Ree v. State, 565 So.2d 1329 (Fla. 1990).

Moreover in supporting and adopting the Second District's opinions in Lamar and Grady this Honorable Court should review and find merit with Justice Kogan's dissent in State v. Stafford, 593 So.2d 496 (Fla. 1992). Justice Kogan's opinion in Stafford appears to be the more efficient and workable opinion when applied to facts such as these before the Court, at p. 498. Justice Kogan's dissent can be easily reconciled with the Second District's opinion in Lamar below with one distinction. Justice Kogan advocated the use of two scoresheets in Stafford while the Second District does it a bit different. In Lamar the Court cited to Grady and held that the scoresheet which recommended the most severe sanction set the upper limit on the total guidelines sentence, but that the original guidelines scoresheet set the limit as to the resentencing on the previous charges included in the probation.

The Petitioner's reliance in it's initial brief on Peters v. State, 531 So.2d 121 (Fla. 1988) is misplaced. Peters was decided in 1988 long before this Court's more recent pronouncement of public policy in Williams, and Cook, supra. The Williams and Cook opinions indicate that this Court has receded from its opinion in Peters, at least in part.

Wherefore, the Respondent prays this Honorable Court adopt the opinions of the Second District below in Lamar and Grady, and answer the first prong of the certified question in the affirmative.

CONCLUSION

Wherefore, the Respondent prays this Honorable Court adopt the opinions of the Second District below in Lamar and Grady, and answer the first prong of the certified question in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to **RON NAPOLITANO, ESQUIRE**, Assistant Attorney General, at Westwood Center, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, **this the** 19th **day of January, 1995.**

Gary R. Gossett, Jr.

GARY R. GOSSETT, JR.