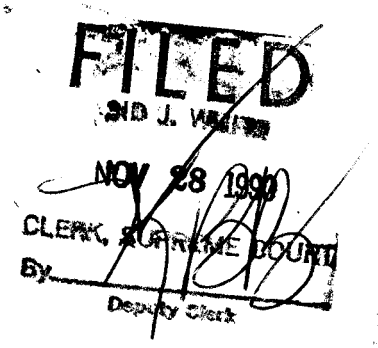

IN THE SUPREME COURT OF FLORIDA

WILLIE O. FLOWERS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 76,854

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

While on probation for a drug offense, Petitioner committed five additional substantive drug offenses. (R 30, 26, 27, 28) Petitioner entered a plea of guilty to three counts of sale of cocaine, two counts of possession of cocaine and the violation of probation. (R 70-72, 1-11) A guidelines scoresheet was prepared on which Petitioner was assessed seventy points for legal constraint. (R 16-18) Defense counsel objected to the scoring of multiple points for legal status at the time of the offense and argued that only 14 points rather than 70 points should be scored. (R 16-17) The trial judge approved the use of multiple points for legal constraint and sentenced Petitioner to an aggregate sentence of 5½ years in prison, followed by two years probation. (R 17-18, 18-19, 75-90)

Petitioner appealed his sentence and argued that it was improper to apply a multiplier to the legal constraint points. Adhering to a previous decision in Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), the 5th District Court of Appeal affirmed

Petitioner's sentence but certified to this Court the following question as being of great public importance:

> DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT?

Flowers v. State, 15 FLW D2552 (Fla. 5th DCA October 11, 1990).

Petitioner filed a timely petition to invoke discretionary jurisdiction on October 22, 1990. On October 30, 1990, this Court issued its briefing schedule.

SUMMARY OF ARGUMENT

The guidelines scoresheet provides that if a defendant is being sentenced for an offense which he committed while on probation, he is to be assessed points for being under legal constraint. There is no provision in the guidelines for applying multiple legal constraint points based on the number of offenses committed while on probation. The Fifth District Court of Appeal has in essence created a multiplier for legal constraint points which they had no authority to do. The answer to the certified question herein must be a resounding no.

ARGUMENT

FLORIDA'S UNIFORM SENTENCING SENTENCING GUIDELINES DO NOT PERMIT THAT LEGAL CONSTRAINT POINTS BE MULTIPLIED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT.

While on probation for a drug offense, Petitioner committed five additional drug offenses. Petitioner pled guilty to a violation of probation and the additional subsequent offense and a "Category seven: Drugs" scoresheet was prepared. Under the section for legal status at the time of the offense, Petitioner was given seventy points (five x 14). The effect of applying the multiplier to the legal constraint points was to increase Petitioner's recommended guidelines range from 4½ - 5½ years to 9 - 12 years in prison. On appeal, the Fifth District Court of Appeal affirmed the use of a multiplier for legal constraint points and certified to this Court the question of whether a multiplier is proper.

In Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), the defendant was serving probation for aggravated child abuse when he committed a new offense of resisting arrest with violence. In preparing the guidelines scoresheet, the aggravated child abuse offense was designated as the primary offense at conviction because it was the offense which when scored resulted in the most severe sanction. Fla.R.Crim.P. 3.701(d)(3). On appeal, Gissinger argued that legal constraint points should not have been scored because the defendant was not on probation for the primary offense. The Fifth District Court of Appeal rejected

the claim recognizing that the legal constraint provision did not clearly state whether "legal status at the time of the offense" referred to only the primary offense or to any offense at conviction. Despite the lack of clarity in the rule, when read in pari materia with the stated purpose of the guidelines to achieve uniformity in the sentencing, the Fifth District Court of Appeal concluded that legal status at the time of the offense should be scored for any offense for which the defendant is being sentenced, which was committed while under legal constraint. In Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), the Court took this logic one step further and created a legal status multiplier in those cases in which the defendant committed several offenses while on a single probation. The Fifth District Court of Appeal reaffirmed its holding in Walker in the instant case but certified the question to this Court. Petitioner submits that the Fifth District Court of Appeal had no authority to create such a multiplier.

The key issue to be decided by this Court is whether the legislature intended that a multiplier be applied when calculating legal constraint points. Petitioner asserts that the answer to this question is no. Initially, it must be noted that the guidelines scoresheet itself does not provide a mechanism for multiplying legal constraint points. In determining the legislative intent, one needs only to examine the legislature's treatment of similar scoresheet factors. For instance, the amended rule of victim injury points permits victim injury points for each injured victim and for each count in which victim injury is

an element of the offense. See Committee Note, Fla.R.Crim.P. 3.701(d)(7)(1987 and 1988 amendments). Indeed, this Court has amended the sentencing guidelines scoresheet and forms including form 3.988(g), Category seven: Drugs. In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines), 15 FLW S210 (Fla. April 10, 1990), revised on motion for clarification, 15 FLW S458 (Fla. September 6, 1990). The newly-approved guidelines form for category seven provides clearly on the face of the scoresheet a mechanism by which victim injury is multiplied by the number of victims. No such corresponding provision for multiplying legal status points appears on the face of the guidelines scoresheet.

Additionally, on several of the scoresheet categories, the legislature has clearly provided for multipliers to enhance prior offenses. Specifically, on the category one scoresheet, a multiplier is to be used for prior DUI convictions. On a category three scoresheet, there is a provision for prior category three offenses. On the category five scoresheet, there is a provision for prior category five offenses. And finally, on a category six scoresheet, there is a provision for prior convictions for category six offenses. Nowhere in the guidelines or the committee notes thereto is there such a provision for a legal status multiplier. Petitioner submits that the maximum "expressio unius est exclusio alterius" applies in the instant situation. Where the legislature has specifically provided for multipliers in other areas of the guidelines scoresheet, the absence of any multiplier in the legal status category must be assumed to be

intentional.

As noted by Judge Cowart in his dissent in the instant case, the focus of the legal constraint factor is the defendant's legal status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. Judge Cowart then gave other cases to illustrate by analogy what is intended in the legal constraint category.

In Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982) the defendant was charged in two separate cases with aggravated assault, released, and ordered to appear before the trial court at one time and one place for a pre-trial conference. When the defendant failed to appear on that date he was charged with two counts of willfully failing to appear for the pre-trial conference. On appeal, the Fifth District Court of Appeal reversed on conviction, rejecting the state's argument that the emphasis should be on each of the original criminal cases for which Miles failed to appear. Rather, the Court recognized that the essence of the charge was Miles' failure to appear which occurred but one time even though it related to to different cases.

In Hoag v. State, 511 So.2d 401 (Fla. 5th DCA 1987), rev. denied 518 So.2d 1278 (Fla. 1987) the defendant left the scene of an accident in which four persons were injured and one person was killed. Hoag was convicted of five counts of leaving the scene of an accident involving injuries or death. The Fifth District Court of Appeal reversed four of the convictions on the grounds that the focus of the criminal conduct was on leaving the

scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene, one time by the defendant.

Finally, in Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), rev. denied 484 So.2d 10 (Fla. 1986), the Fifth District Court of Appeal held that giving three altered dollars bills to one person at one time constituted but one criminal act of uttering a forged instrument.

Applying the logic of these cases to the instant case, the focus of factor four on the guidelines relates to a defendants status as being under, or not being under, legal constraint, and not on the number of offenses that he committed while on or under legal constraint.

By permitting a multiplier for legal constraint points, the Court in essence permits "double dipping". The offenses for which the accused is being sentenced are already scored as either primary offenses or additional offenses at conviction. However, the same offenses then are used to calculate multiple legal constraint points. Surely, the legislature never intended for such "double dipping". To allow this to occur is in essence to eviscerate the sentencing guidelines.

In summary, Petitioner argues that the guidelines do not permit points for legal constraint to be multiplied by the number of offenses for which the accused is being sentenced which were committed while he was on legal constraint. The concept of legal constraint points focuses solely on the defendant's status as being under or not being under legal constraint. The legisla-

ture never intended for a multiplier to be used in calculating legal constraint points. Therefore, this Court should answer the certified question in the negative. Consequently, Petitioner's sentence must be vacated and the cause remanded for sentencing under a corrected scoresheet.

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner urges this Honorable Court to answer the certified question in the negative and rule that in calculating legal constraint points, a court may not employ a multiplier based on the number of offenses committed while on legal constraint. The decision of the District Court must be quashed and the cause remanded with instructions to vacate Petitioner's sentence and remand for resentencing under a properly calculated scoresheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Willie O. Flowers, P.O. Box 692, Madison, FL 32340, this 26th day of November, 1990.

Michael S. Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIE O. FLOWERS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 76,854

A P P E N D I X

Flowers v. State,
15 FLW D2552 (Fla. 5th DCA October 11, 199)

District. Case No. 89-2187. Opinion filed October 11, 1990. Appeal from the Circuit Court for Brevard County, John Dean Moxley, Jr., Judge. James B. Gibson, Public Defender, and Christopher S. Quarles, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

(DAUKSCH, J.) This is an appeal from a denial of a motion filed under 3.800(a), Florida Rules of Criminal Procedure. We reverse the order and remand for a new hearing to have the court give the appellant full credit for all jail time served. Appellant had been given a split sentence; first a term of imprisonment, then probation. He served his incarceration, was placed on probation, violated it and was again put into prison. The sentencing judge failed to give him full credit for time served under the first part of his split sentence. *State v. Jones*, 327 So.2d 18 (Fla. 1976); *Martin v. State*, 525 So.2d 901 (Fla. 5th DCA 1988); *Freeman v. State*, 329 So.2d 413 (Fla. 4th DCA 1976).

SENTENCE VACATED; REMANDED. (SHARP, W., and COWART, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Question certified whether guidelines require that legal constraint points be assessed for each offense committed while under legal constraint

WILLIE OTIS FLOWERS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2304. Opinion filed October 11, 1990. Appeal from the Circuit Court for Brevard County, John Antoon, II, Judge. James B. Gibson, Public Defender, and Michael S. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David S. Morgan, Assistant Attorney General, Daytona Beach, for Appellee.

(GOSHORN, J.) Flowers appeals his sentence because points for "legal constraint" were awarded for each offense committed while on probation. We affirm. *Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989).

Flowers urges that our decision in *Miles v. State*, 418 So.2d 1070 (Fla. 5th DCA 1982) dictates we reconsider our opinion in *Walker* and reverse. We reject this contention because *Miles* involved a single offense, while both Walker and Flowers committed multiple offenses for which they were being sentenced. In our view, *Walker*'s construction of Rule 3.701, Florida Rules of Criminal Procedure promotes the goal of fairness and uniformity envisioned by the enactment of the sentencing guidelines.

Because we are aware that numerous appeals involving this interpretation are pending, we certify to the supreme court the following question as being of great public importance:

> DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT?

AFFIRMED. (HARRIS, J., concur. COWART, J., dissents with opinion.)

(COWART, J., dissenting.) This case involves the propriety of applying a multiplier to the "legal status" factor in computing a guidelines sentence under Florida Rule of Criminal Procedure 3.701d.6.

While on probation on an initial drug offense, the defendant committed five additional substantive drug offenses. His probation was revoked and he was sentenced on the initial offense and the five additional offenses. The six offenses were duly scored (on scoresheet 3.988(g) Category 7: Drugs) as either the primary offense (3.701d.3) or additional offenses at conviction (3.701d.4). However, instead of scoring 14 points for "IV. Legal status at time of offense" (3.701d.6), and perhaps increasing the sentence to the next higher cell (recommended or permitted guidelines range) for the revocation of probation as permitted by 3.701d.14., the sentencing court did not use the bump-up provision in 3.701d.14. but multiplied the 14 points permitted for legal status at time of offense (3.701d.6.) by 5 (representing each of the 5 additional offenses) for a total of 70 points.

This case involves an old but illusive problem involving factoring. The ambiguity is in determining if the intent is to weigh one, but not the other, factor or to weigh both factors separately or to weigh both factors together in some variable measure of their relationship, as by addition, subtraction, multiplication or division. Under the sentencing guidelines, the offenses (primary or additional) at conviction are weighed on the scoresheet as factors I. and II. (of 5 factors explicitly weighed on the face of the scoresheet) and by matrix, two variable aspects of the offenses are measured (number and degree of seriousness). Time is not weighed. *See* separate opinion in *Lipscomb v. State*, 15 F.L.W. D2227 (Fla. 5th DCA Sept. 6, 1990).

The defendant's prior criminal record is scored as factor III. and again by matrix, the offenses are weighed by number and seriousness.

Victim injury is scored as factor V. and here two varying aspects of this factor are weighed—the degree of physical injury and the number of victims. Rule 3.701d.7. expressly provides scoring for *each* victim physically injured.

However, under factor IV. "Legal status at time of offense," the scoring is strictly binary: (1) if the legal status of the defendant at the time of committing all offenses for which he is being sentenced was that he was under no restriction, he gets no points, but if, (2) at the time of committing any offense for which he is being sentenced, the defendant was under legal constraint, i.e., his legal status was within those defined in 3.701d.6., he receives the number of points provided on the appropriate scoresheet. Scoresheet 3.988(g) for Category 7: Drugs provides for 14 points for legal constraint. The number of points depends on which scoresheet is used and the appropriate scoresheet depends not on which offense was committed while the defendant was under a status of legal constraint, but depends on the primary offense defined in 3.701d.3. *See Gissinger v. State*, 481 So.2d 1269 (Fla. 5th DCA 1986).

When one factor to be considered in arriving at any conclusion is related by description or otherwise to some other factor, confusion can easily result from that relationship. When a circumstance involves two factors and one is mentioned incidentally as part of the description of the one factor to be weighed, the problem is somewhat like that of placing emphasis on the correct syllable of a word. Here the factor to be weighed is the defendant's legal status or legal constraint, and the phrase "at the time of offense" merely refers to the time of the relevant legal status or constraint. The emphasis is on the status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. There are other illustrations of what is, in substance, the same problem. *See, e.g., Miles v. State*, 418 So.2d 1070 (Fla. 5th DCA 1982). In each of two separate criminal cases, Miles was released and ordered to appear before the trial court at one time and one place. When he failed to appear, Miles was convicted of two counts of wilfully failing to appear. On appeal this court reversed one conviction. The State argued that the emphasis should be on each of the original criminal cases in which Miles failed to appear. This court disagreed. Recognizing that the essence of the charge was Miles' failure to appear which occurred but one time, although his appearance on that occasion related to two different matters, this court held that to be convicted twice under the same statutory offense as to the same factual event violated Miles' double jeopardy rights.

Similarly, in *Hoag v. State*, 511 So.2d 401 (Fla. 5th DCA 1987), *rev. denied*, 518 So.2d 1278 (Fla. 1987), the defendant left the scene of an accident in which four persons were injured and one person was killed. The defendant was convicted of five counts of leaving the scene of an accident involving injuries or death. Again the court found that while victim injury or death was an essential element of the offenses and there were four injured victims and one dead victim, nevertheless, the focus was on the leaving of a scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene one time by the defendant. Therefore, this court vacated four of the convictions.[1] In this vein of reasoning, factor IV. relates to the defendant's status as being under, or not being under, legal constraint, a coin with but two sides, and not on the number offenses that he committed while on or in a condition of legal constraint.

The number of offenses involved are adequately scored as an aspect of factors I. and II. (Primary and additional offenses at conviction) and should not be used as a multiplier factor or aspect of the defendant's legal status at the time of the offenses. His "legal status" is a simple concept—he either was, or was not, under legal constraint when he committed any offense for which he is being sentenced. The guidelines neither expressly nor by implication contemplate nor provide for multiplying the defendant's legal status score for each offense involved in the manner that each victim's injury is scored.

To the contrary, there is persuasive evidence that the intent of the authority formulating the sentencing guidelines intended that the defendant's legal status be scored, if at all, but once. The Florida Supreme Court has recently amended the sentencing guidelines scoresheet and forms, including Form 3.988(g), Category 7: Drugs. *In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines)*, 15 F.L.W. S210 (Fla. Apr. 12, 1990), *revised on Motion for Clarification*, 15 F.L.W. S458 (Fla. Sept. 6, 1990). These amendments reflect that "legal status" is scored once while "victim injury" is scored by the number of victims injured as shown in the amended form:

Rule 3.988(g)
Category 7: Drugs

IV. Legal Status at Time of Offense

Status	Points
No restrictions	0
Legal constraint	14
Total	____

V. Victim Injury (physical)

Degree of Injury		x Number =	Points
None	0	_____	_____
Slight	5	_____	_____
Moderate	10	_____	_____
Death or severe	15	_____	_____
		Total	_____

The court noted that the revised forms do not change the criteria used to calculate a guidelines sentence. Therefore, the amendments reflect the proper calculation of legal status then and now.

Common law criminal law concepts, incorporated into the criminal law of this country by the due process provisions of state and federal constitutions, dictate that all criminal law provisions relating to the determination of either guilt or penalty be construed strictly in favor of the accused and that all ambiguities be resolved in his favor. This constitutionally based concept, sometimes called a rule of lenity, is merely codified into section 775.021(1), Florida Statutes, and cannot be abolished merely by statutory amendment or repeal.

The defendant's sentence should be vacated and the cause remanded for sentencing under a guidelines scoresheet scoring the defendant only 14 points under factor IV. "Legal status at the time of offense."

[1]*See also* Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), *rev. denied*, 484 So.2d 10 (Fla. 1986), where this court held that giving three altered dollar bills to one person at one time constituted but one criminal act of uttering.

* * *

Criminal law—Sentencing—Habitual offender statute is not unconstitutional—Credit for time served is applicable to life sentence for purposes of calculating eligibility for parole—Jail time credit need not be applied to all consecutive sentences but must be applied to one—Credit must be applied to each of concurrent sentences

JONATHAN A. BELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-2570. Opinion filed October 11, 1990. Appeal from the Circuit Court for Orange County, Ted P. Coleman, Judge. James B. Gibson, Public Defender, and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Rebecca R. Wall, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Jonathan A. Bell appeals his adjudication as a habitual offender and the credit given for jail time served by him prior to sentencing. We affirm his adjudication but remand for credit to his sentence of a proper award of jail time credit in accordance with section 921.161, Florida Statutes (1987).

Bell argues that the habitual offender statute, section 775.084, Florida Statutes (1987), is unconstitutional. The constitutionality of this statute was upheld in *King v. State*, 557 So.2d 899 (Fla. 5th DCA), *rev. denied*, 564 So.2d 1086 (Fla. 1990).

Bell also claims that he was not fully credited with jail time in trial court case number 88-9821 in which he was convicted of armed robbery and aggravated assault, adjudged a habitual offender, and sentenced to life imprisonment for the armed robbery and to 10 years for the assault to be served consecutively to the life sentence. Bell was also convicted of armed robbery and simple assault, a misdemeanor, in trial court case number 89-2951. In that case, he was sentenced as a habitual offender to life imprisonment for the robbery with a concurrent sentence of 60 days time served for the misdemeanor assault. The sentence in the latter case was to be served consecutively to the sentence in case number 88-9821. Bell argues that he should also receive a 60-day credit for the armed robbery sentence in case number 89-2951 since the sentences in that case were to be served concurrently.

Credit is applicable to a life sentence for purposes of calculating eligibility for parole. *See Lemley v. State*, 362 So.2d 691 (Fla. 4th DCA 1978); *Sutton v. State*, 334 So.2d 628 (Fla. 4th DCA 1976); *see also Coleman v. State*, 326 So.2d 217 (Fla. 2d DCA 1976). Bell may also become eligible for conditional release under sections 921.001(11)(e) and 947.1405, Florida Statutes (1987), and credit may affect the calculation of an early release date.

Jail time credit need not be applied to all consecutive sentences but must be applied to one. When a defendant receives concurrent sentences, the credit must be applied to each of the concurrent sentences. *See Daniels v. State*, 491 So.2d 543 (Fla. 1986). Bell should be allowed credit for 60 days against the life sentence he is serving for the felony in case number 89-2951, but need not be given any credit for the sentences imposed in case number 88-9821. We affirm Bell's adjudication as a habitual offender but reverse and remand as to the credit given for time served.

AFFIRMED in part; REVERSED in part and REMANDED for proper award of credit. (DAUKSCH and SHARP, W., JJ., concur.)

* * *