

5-28

**FILED**

SID J. WHITE

MAY 6 1991

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

**SUPREME COURT OF FLORIDA**

MAJED SAL HACK,	*	
	*	Case No. 77,641
Petitioner,	*	
vs.	*	
STATE OF FLORIDA,	*	
	*	
Respondent.	*	
_____	*	

\* \* \*

**PETITIONER'S BRIEF ON THE MERITS**

\* \* \*

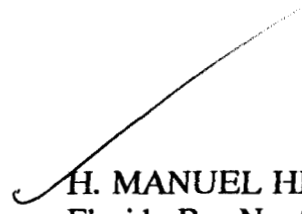
  
**H. MANUEL HERNANDEZ**  
 Florida Bar No. 0775843  
 195 Wekiva Springs Road, suite 329  
 Longwood, FL 32779  
 (407) 682-5553  
 Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
TABLE OF CITATIONS .....	iii
CASES .....	iii
STATUTES .....	iv
OTHER AUTHORITIES .....	iv
STATEMENT OF THE CASE AND FACTS .....	1
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT	
THE TRIAL COURT ERRED IN ASSESSING LEGAL CONSTRAINT POINTS FOR EACH OFFENSE PENDING FOR SENTENCING, AND COMMITTED WHILE UNDER LEGAL RESTRAINT, RESULTING IN A MUCH HIGHER GUIDELINE SENTENCE. ....	5
CONCLUSION .....	12
CERTIFICATE OF SERVICE .....	12
EXHIBITS .....	13

TABLE OF CITATIONS

CASES

Burke v. State, 475 So. 2d 252 (Fla. 5th DCA 1985) ..... 8

Cabrera v. State, \_\_\_ So. 2d \_\_\_, 16 F.L.W. D898  
(Fla. 3rd DCA April 2, 1991) ..... 6

Carawan v. State, 515, So. 2d 161 (Fla 1987) ..... 11

Carter v. State, 571 So. 2d 520 (Fla. 4th DCA 1990) ..... 6

First Fed. Sav. & Loan v. Dept. of Bus. Reg.,  
472 So. 2d 494, 495 (Fla. 5th DCA 1987) ..... 10

Florida Rules of Criminal Procedure Re:  
Sentencing Guidelines (Rules 3.701 and 3.988)  
\_\_\_ So. 2d \_\_\_, 16 FLW S198 (March 7, 1991) ..... 10

Flowers v. State, 567 F. 2d 1055 (5th DCA 1990) ..... 3

Gissingier v. State, 481 So. 2d 1269 (Fla 5th DCA 1986) ..... 6

Hoag v. State, 511 So. 2d 401 (Fla. 5th DCA 1987),  
rec. denied 518 So. 2d 1278 (Fla. 1987) ..... 8

Lewis v. State, 574 So. 2d 245 ..... 6

Miles v. State, 418 So. 2d 1070 (Fla. 5th DCA 1982) ..... 7

Scott v. State, 574 So. 2d 247 (Fla. 2nd DCA 1991) ..... 6

Sellers v. State, \_\_\_ So. 2d \_\_\_, 16 F.L.W. D291  
(Fla. 1st DCA April 3, 1991) ..... 6

State v. Crumley, 512 So. 2d 183, 184 (Fla. 1987) ..... 10

State v. Webb, 398 So. 2d 820 (Fla. 1981) ..... 11

Supreme Court Case No. 76,683 ..... 9

United States v. Bass, 404 U.S. 336, 347 (1971) ..... 10

Walker v. State, 546 So. 2d 764 (Fla 5th DCA 1989) ..... 5

## STATEMENT OF THE CASE AND FACTS

The Petitioner, Majed Sal Hack, was charged in three separate informations with various violations of Florida Law. The first information CR89-7838 and CR89-7851, was filed on October 2, 1989 and charged Hack with aggravated assault (§784.021(1)(a), Fla. Stat.), six counts of uttering and forgery (§831.02, Fla. Stat.), six counts of petit theft (§812.014, Fla. Stat.) and six counts of dealing in stolen property (§812.019, Fla. Stat.) (R-IV-32-34)<sup>1</sup> The second information, CR89-9901, was filed on October 25, 1989 and charged Hack with robbery (§812.13(2)(c), Fla. Stat.). (R-IV-52) The third information, CR89-9902, was filed on October 27, 1989, and charged Hack with Burglary of a conveyance (§810.02, Fla. Stat.) and grand theft third degree (§812.014, Fla. Stat.) (R-IV-55 to 56).

On March 2, 1990, Hack withdrew his plea of not guilty and in accordance with a written plea agreement (R-IV-95 to 96) entered pleas of nolo contendere to the only count in information CR-89-9901, and to count one of information CR89-9902. Hack also plead guilty to seven of the nineteen counts in information CR89-7838 and CR89-7851. (R-I-2 to 6; R-IV-97, 98, 99). During negotiations with the State Attorney's office, defense counsel and the Assistant State Attorney calculated Hack's sentencing guidelines as falling between three and a half to four and a half years imprisonment on the category three (robbery) score sheet, Fla. R. Crim. P.

---

<sup>1</sup>It should be noted that these latter eighteen counts were the result of the State Attorney's office "stacking" the charges against Hack by charging three separate violations of law for each stolen check. The prosecutor then insisted that Hack plea to six of the eighteen charges, greatly increasing the impact of the legal restraint multiplier.

3.988(c). (R-II-2 to 3). However, when the presentence investigation report was prepared, it was discovered that Hack was apparently on probation for a misdemeanor charge, and as such, in calculating his guidelines, the probation officer added seventeen points for each of the nine counts that Hack was convicted of, adding one hundred and fifty three points to Hack's guidelines scoresheet, and subjecting him to a sentence of between twelve to seventeen years imprisonment. (R-III-127) Upon discovering the drastic difference between the anticipated sentencing range and the sentencing range as calculated by the probation office, defense counsel moved for a continuance of the sentencing hearing originally set for April 9, 1990, which the Court below granted. (R-II-2 to 3, 6) the sentencing hearing was continued to April 17, 1990, when over petitioner's objections (R-III-16 to 19), Hack was sentenced to ten years imprisonment<sup>2</sup> followed by two years probation, with the court below using the guideline range resulting from multiply the legal constraint points by the number of charges the Petitioner was convicted of. (R-III-20 to 21)

On May 10, 1990 the Petitioner filed his notice of appeal of his sentence. (R-IV-130). On February 28, 1991 the Fifth District Court of Appeals, citing its decision in Flowers v. State, 567 F. 2d 1055 (5th DCA 1990) certified<sup>3</sup> to this Court the following question:

#### DO FLORIDA'S UNIFORM SENTENCING GUIDELINES

---

<sup>2</sup>The Court below had agreed prior to the hearing to sentence Hack to ten years which was below the guidelines recommended range, but within the permitted range. (R-III-6)

<sup>3</sup>A copy to the Fifth District Court of Appeals one page Per Curiam opinion is attached to the brief as Exhibit 1.

**REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED  
FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL  
CONSTRAINT?**

At present, Hack is incarcerated serving his sentence in this case. To date, Hack has served over a year and a half in prison. If the proper guideline sentence had been imposed, with gain time, Hack almost certainly would have already served his entire sentence in this case.

## SUMMARY OF THE ARGUMENT

The trial court erred in assessing legal constraint points for each offense pending for sentencing. Under the Rule of Lenity and Florida Law, penal statutes must be strictly construed. Nothing in the sentencing guidelines, the notes to the sentencing guidelines, or in the legislative history allows for such a multiplier when assessing points for legal constraint. The Sentencing Guidelines Commission has subsequently made clear that the commission never intended that such a multiplier be used when assessing legal constraint points, and this court has specifically agreed with the commission's position on this issue. Therefore, it was a violation of the petitioner's rights to use such a multiplier and Hack's sentence was illegal. The answer to the certified question in this case must be NO.

## ARGUMENT

### THE TRIAL COURT ERRED IN ASSESSING LEGAL CONSTRAINT POINTS FOR EACH OFFENSE PENDING FOR SENTENCING, AND COMMITTED WHILE UNDER LEGAL RESTRAINT, RESULTING IN A MUCH HIGHER GUIDELINE SENTENCE.

The petitioner's sentence was calculated using a category 3 (robbery) score sheet. Fla. R. Crim. P. 3.988(c). Under the legal constraint section of this scoresheet a defendant is assessed 17 points if he or she was under legal constraint at the time of conviction. Fla. R. Crim. P. 3.701(d)(6) Nowhere in the sentencing guidelines, or in the notes to the guidelines does it provide that the legal constraint points should be multiplied by the number of charges pending at sentencing as was done in this case. Had the trial court not used this legal constraint multiplier, Hack's total points, including 17 points for legal constraint, would have been 102 points, placing him in fifth cell, with a sentencing range of four and a half to five and a half years imprisonment. (R-IV-127 to 128) However, by multiplying the legal constraint points by the number of charges pending for sentencing, Hack's total points went up to 238, placing him in the ninth cell, with a sentencing range of between twelve to seventeen years imprisonment (Id.). Put Another way, Hack's sentencing range more than tripled as a result of the legal restraint multiplier.

The trial court based its decision to use the legal restraint multiplier on the Fifth District Court of Appeals holding in Walker v. State, 546 So. 2d 764 (Fla. 5th DCA 1989). In a three paragraph opinion, the Fifth District held in Walker that



assessment of legal constraint points is appropriate for each offense committed while under legal constraint and pending for sentencing. In so ruling, the Walker court relied on its earlier decision in Gissingier v. State, 481 So. 2d 1269 (Fla. 5th DCA 1986), which held that "[u]niformity is promoted and disparity in sentencing is avoided if a defendant is scored points for legal constraint as it applies to any offense for which he is being sentenced." Id., at 1270. After acknowledging the harsh result of using the Walker legal restraint multiplier, the trial court noted that it was bound by Walker "...notwithstanding what my feelings might be or sympathies might be as it relates to your argument in this case." (R-III-20)

The Fifth District Court of Appeals ruling in Walker was clearly wrong.<sup>4</sup> As stated earlier, nothing in the sentencing guidelines or the notes to the guidelines provides for the Walker legal constraint multiplier. However, it is clear that when the legislature intended that points be multiplied by the number of offenses or victims, it provided for such a result in a clear and straightforward manner. See, Fla. R. Crim. P. 3.701(d)(3) (determining primary offense in cases of multiple offenses); Fla. R. Crim. P. 3.701(d)(4) (additional offenses at conviction); Fla. R. Crim. P. 3.701(d)(5) (prior record), Fla. R. Crim. P. 3.701(d)(7) (victim injury). See also, Fla. R. Crim. P. 3.988 (Sentencing guideline forms-section I: number of primary offense

---

<sup>4</sup>Three other District Court of Appeals have ruled on this issue regarding legal constraint points, rejecting Walker and Flowers. See, Sellers v. State, \_\_ So. 2d \_\_, 16 F.L.W. D291 (Fla. 1st DCA April 3, 1991); Cabrera v. State, \_\_ So. 2d \_\_, 16 F.L.W. D898 (Fla. 3rd DCA April 2, 1991); Scott v. State, 574 So. 2d 247 (Fla. 2nd DCA 1991); Lewis v. State, 574 So. 2d 245. One District Court of Appeals has followed the Fifth District Court of Appeals Walker analysis. Carter v. State, 571 So. 2d 520 (Fla. 4th DCA 1990).

counts above 4; section II: number of additional offenses above 4; Section III: number of prior convictions above 4).

Additionally, on several of the scoresheet categories, the legislature has clearly provided for multipliers to enhance prior offenses. Specifically, on the category one scoresheet (murder, manslaughter), a multiplier is to be used for prior DUI convictions. Fla. R. Crim. P. 3.988(a)III. B. On the category three scoresheet (robbery) there is a provision for prior category three offenses. Fla. R. Crim. P. 3.988(c)III. B. On the category five scoresheet (burglary) there is a provision for prior category five offenses. Fla. R. Crim. P. 3.988(c)III. B. And finally, on the category six scoresheet (theft, forgery, fraud) there is a provision for prior convictions for category six offenses. Fla. R. Crim. P. 3.988(f)III. B. Nowhere in the guidelines or the committee notes is there such a provision for a legal status multiplier. The petitioner submits that the maxim "*expressio unius est exclusio alterius*" clearly applies here. Where the legislature has specifically provided for multipliers in so many other areas of the guidelines scoresheet, the absence of any multiplier in the legal constraint category must be assumed to be intentional.

As noted by Judge Cowart in his dissent in Flowers, supra, 567 So. 2d at 1056-58, 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. In his dissent Judge Cowart reviewed other cases that 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 Appeals 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 two 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 Appeals 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 Appeals held that giving three altered dollar bills to one person at one time constituted but one criminal act of uttering a forged instrument.

Applying the reasoning of these cases to the instant case, the focus of the legal constraint section on the guidelines scoresheet relates to a defendant's status as being under, or not being under, legal constraint, and not on the number of offenses that he or she 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.

This Court also has the benefit of knowing what the position of the Sentencing Guidelines Commission is with regard to this issue. In Supreme Court Case No. 76,683, the Florida Sentencing Guidelines Commission petitioned this Court for a revision to the sentencing guidelines<sup>5</sup>. Paragraphs eight through ten of this petition discuss the issue of assessing multiple legal constraint points. The commission has proposed amending the rule and a committee note to clarify the commission's intent with regard to this issue. The new rule will state:

*Legal status points are to be assessed where forms of legal constraint existed at the time of the commission of offenses scored as primary or additional offenses at conviction. Legal status points are to be assessed only once whether there are one or more offenses at conviction. (Emphasis added)*

The comment to this new rule states:

*The purpose of this revision is to clarify the original intent that legal constraint is a status consideration and is not to be considered a function of the number of offenses at conviction.*

---

<sup>5</sup>Pursuant to Section 90.202(6), Florida Statutes (1989) this Court may take judicial notice of a petition currently pending before this Court. For the convenience of the Court, the petition is attached to this brief as Exhibit 2.

In submitting these proposed amendments to the sentencing guidelines to this court, the Sentencing Guidelines Commission stated at paragraph eight of its petition, that:

*8. Recent case law has held that legal status points are not limited to a single assessment and can properly be assessed for each offense committed while the defendant was under legal constraint, regardless of the number of offenses at conviction. The scoring of multiple assessments of legal status points was never intended under the sentencing guidelines and disrupts the structure by which sentencing criteria are weighed. It is possible for legal status, when scored in multiple assessments, to routinely exceed the weight assigned to the offenses at conviction and prior record, contrary to the intent of the Commission.*

This Court has now adopted the Sentencing Guidelines Commission's recommended amendments to the Sentencing Guidelines on, among other things, the issue of legal constraint, forwarding the amendments to the legislature for action. See, Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988) \_\_\_ So. 2d \_\_\_, 16 FLW S198 (March 7, 1991) Thus, there can be no doubt now that the Walker multiplier has no basis in law.

Finally the law is clear as to be beyond per adventure, that penal statutes are to be strictly construed, and any ambiguity concerning a criminal statute should be resolved in favor of lenity. United States v. Bass, 404 U.S. 336, 347 (1971); State v. Crumley, 512 So. 2d 183, 184 (Fla. 1987); First Fed. Sav. & Loan v. Dept. of Bus. Reg., 472 So. 2d 494, 495 (Fla. 5th DCA 1987). This "Rule of Lenity" has been codified by the Florida legislature at section 775.021 of the Florida Statutes, which provides, in part, that:

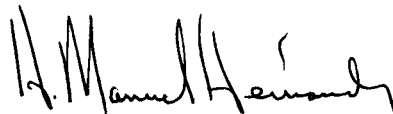
*The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused. (Emphasis added)*

In adopting the Sentencing Guidelines Commission's recommended amendments on legal constraint, and forwarding them to the legislative, this court concluded that "the rules [regarding legal constraint] proposed by the Commission and adopted by the legislature are admittedly and self-evidently vague." Florida Rules of Criminal Procedure Re: Sentencing Guidelines (3.701 and 3.988) supra, 16 F.L.W. at S199 As such, the "Rule of Lenity" applies, and any doubt must be resolved in favor of the accused. Id. Also, in interpreting a particular statute, courts are obligated to do so in a manner that will not provide for an absurd or unreasonable result. Carawan v. State, 515 So. 2d 161, 167 (Fla. 1987); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The decision in Walker clearly violated the Rule of Lenity, and provided for not only an unreasonable result, but as this case demonstrates, a particularly harsh result as well. Thus, it cannot stand.

CONCLUSION

THEREFORE, the Petitioner MAJED SAL HACK, respectfully requests that this Honorable Court 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. This case must be remanded with instructions to vacate Petitioner's sentences and remand for re-sentencing under a properly calculated scoresheet.

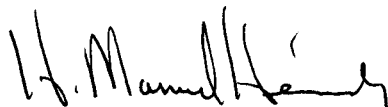
RESPECTFULLY SUBMITTED, this 3rd day of May of 1991.



H. MANUEL HERNANDEZ  
Counsel for Appellant  
Fla. Bar No. 0775843  
195 Wekiva Springs Road, Suite 329  
Longwood, Florida 32779  
(407) 682-5553

CERTIFICATE OF SERVICE

I hereby certify on this date a true and correct copy of this brief has been mailed to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL, 32114, and to Majed Sal Hack, DC# 138466, Hamilton Correctional Institution, P.O. Box 11360, Jasper, Florida 32852.



H. MANUEL HERNANDEZ