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JUL 29 1991

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 RICKY LEWIS, :  
 :  
 Respondent. :  
 :  
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Case No. 77,551

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Respondent was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Petitioner, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level, will be referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

The sentencing guidelines do not call for the multiplication of legal constraint point by the number of new offenses committed while a person is under such constraint.

## ARGUMENT

### ISSUE I

POINTS FOR LEGAL CONSTRAINT SHOULD ONLY BE SCORED ONCE FOR EACH SENTENCING EVENT REGARDLESS OF THE NUMBER OF NEW OFFENSES COMMITTED WHILE SUCH CONSTRAINT WAS IMPOSED.

Recently, the issue of multiplying legal constraint points on the guidelines scoresheet by the number of new offenses committed while a defendant was under such restraint has been addressed by several of Florida's District Court of Appeals resulting in conflict in the manner in which the issue was decided. The Fifth District Court of appeal in Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), held that the multiplication of such point was permissible. The Fourth District Court of Appeal agreed with this decision in Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990). This question was later certified to this Court by the Fifth District Court of Appeal in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990).

The First, Second and Third District Courts of Appeal have taken the contrary position and have concluded that legal constraint points should not be multiplied by the number of new offenses committed. Sellers v. State, 16 F.L.W. D921 (Fla. 1st DCA 4/3/91); Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA 2/1/91); Scott v. State, 16 F.L.W. D356 (Fla. 2d DCA 2/1/91); Worley v. State, 16 F.L.W. 354 (Fla. 2d DCA 2/1/91) and Cabrera v. State, 16 F.L.W. D898 (Fla. 3d DCA 4/2/91).

Assuming arguendo that ambiguity exists concerning the scoring of legal constraint points the rule of lenity and strict construction precluded the application of a multiplier. any ambiguity that may have existed is clarified by the petition of the sentencing guideline commission to this Court to allow the amendment of the committee notes to Florida Rule of Criminal Procedure 3.701(d)(6). Florida Rule of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. 3/7/91). As the Petitioner notes, in the petition, the commission requests that the committee note to Rule 3.701(d)(6) be amended to reflect the fact that the commission never intended multiple scoring of legal constraint points for each new offense. The rule itself does not provide for the application of a multiplier when assessing legal constraint point. The use of such a multiplier will result in disproportionate sentences which is in direct contrast to the uniformity in sentencing, purpose of the guidelines themselves. Florida Rule of Criminal Procedure 3.701(d) and Florida Rule of Criminal Procedure 3.988, prescribe the sentencing procedures to be utilized under the sentencing guidelines. What conditions constitute legal status under the guidelines are spelled out in section (d)(6) of Florida Rule of Criminal Procedure, but nowhere in the Rule or in the Rule committee notes is the use of a multiplier for legal status points ever mentioned.

One guidelines scoresheet must be used for each defendant and all of his offenses pending before the trial court for sentencing. Fla. R. Crim. P. 3.701(d)(1). In that vain, nine

scoresheets representative of the sentencing categories were created under Florida Rule of Criminal Procedure 3.988. Each of the nine scoresheets provide for the use of a multiplier in the area of primary and additional offenses, and prior record. The multiplier is applied where more than four offenses of the same degree exist in any of the categories. Fla. R. Crim. P. 3.988. The use of a multiplier for legal constraint is not included under Florida Rule of Criminal Procedure 3.988.

It could be argued that there is not a multiplier for victim injury represented on the scoresheets, but injury to each victim is considered when computing the guidelines score, as evidence that a multiplier does not always need to appear on the face of the scoresheet to reflect legislative intent. However, under Florida rule of Criminal Procedure 3.701(d)(7) the Rule specifically states that victim injury shall be scored for each victim physically injured during the criminal transaction. Thus, there is patent authority for the use of a multiplier in instances where several victims are injured during one episode, also it becomes clear that had the sentencing commission wished to create a multiplier for legal constraint status the commission could have included the multiplier in Florida Rule of Criminal Procedure 3.701. The absence of a reference to such a multiplier under either rule of criminal procedure is indicative that the commission did not intend for such a process to be utilized.

The Petitioner suggests that a person who commits more than one offense while under legal should be penalized more harshly



by using the multiplier, than a person who commits only one offense. There is, however, a flaw in this logic. A person demonstrates his lack of ability or desire to comply with such restraint if he commits one or three new offenses. The purpose of legal constraint points is to punish or enhance the sentence based upon this lack of compliance, a factor which need only be assessed once. In addition, a person who commits several new offenses does receive a harsher sentence than a person who commits only one. Each of those new offenses are calculated into the guidelines and are part and parcel of the sentence ultimately received.

The decisions of the First, Second and Third District Courts of Appeal are correct in their ultimate conclusions that multipliers should not be applied when assessing legal constraint points. Thus, the decision of the Second District Court of Appeals in Lewis, should be affirmed.

CONCLUSION

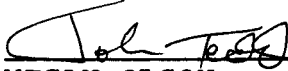
Based on the foregoing arguments and authorities this Court should hold that legal constraint points should not be multiplied and should uphold the decision in Lewis.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Brenda S. Taylor, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 20<sup>th</sup> day of July, 1991.

Respectfully submitted,

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