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PRELIMINARY STATEMENT

Petitioner, Patrick Carter, was the appellant in the Fourth District Court of Appeal and the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Respondent, the State of Florida, was the appellee in the appellate court and the prosecution in the trial court. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R"                      Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner, Patrick Carter, was found guilty after a non-jury trial in Circuit Court Case No. 89-801 of battery on a law enforcement officer, a third degree felony (R 60-62). On March 1, 1990, he was adjudged guilty of that offense, and of misdemeanor charges of resisting arrest without violence (Count I) and a violation of a county ordinance against carrying an open container of alcohol<sup>1</sup> (Count II) (R 108), to which he had earlier entered pleas of nolo contendere in Circuit Court Case No. 89-959<sup>2</sup> (R 105).

The same day, Mr. Carter was sentenced to serve consecutive terms of five years in prison for battery on a police officer (R 71), one year in jail for resisting arrest without violence (R 110), and sixty days in jail for the county ordinance violation (R 111). Although no written guidelines scoresheet is contained in the record of this appeal, Mr. Carter's sentences were imposed pursuant to the prosecutor's proffer that his guidelines sentence fell within the range of seven to nine years in prison (R 19), based on a triple assessment of points for being on legal constraint when he committed each of the three offenses for which he was being sentenced, including the two non-felonies (R 8-9). Mr. Carter's objection to this multiplication of legal constraint points, without which Mr. Carter's guidelines sentence recommendation would be three and a half years in prison (R 9), was rejected. The State further successfully argued that the trial

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<sup>1</sup>Martin County Ordinance 292.

<sup>2</sup>The resisting arrest charge was a lesser included offense of an escape originally charged in the information (R 91, 105).

court was required to impose the maximum consecutive sentence in each case in order to reach the guidelines-recommended sentence (R 30).

On direct appeal, the Fourth District Court of Appeal held that the trial court properly multiplied the legal constraint points for each offense committed while Mr. Carter was on legal constraint, including the two non-felonies. The appellate court further held that the trial court correctly imposed consecutive sentences to reach the maximum recommended guidelines sentence. Mr. Carter's sentence was reversed for resentencing or for the State to provide a guidelines scoresheet, however.<sup>3</sup>

This Court accepted jurisdiction of the instant cause on June 12, 1991.

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<sup>3</sup>On remand, Mr. Carter was resentenced pursuant to a written sentencing guidelines scoresheet to the same terms previously imposed.

### SUMMARY OF THE ARGUMENT

In arriving at a guidelines sentence, the scoresheet provides that a certain number of points are assessed for the defendant's status of being on legal constraint at the time he commits new offenses for which he is being sentenced. The trial court in the instant case multiplied the legal constraint points provided for in the scoresheet by the number of new offenses Mr. Carter committed while he was on probation. This was error, in the absence of any express language in the sentencing guidelines authorizing such multiplication.

The trial court erred in multiplying legal constraint points for a misdemeanor and county ordinance violation which were charged in a separate information from the felony for which Mr. Carter was also being sentenced, since the sentencing guidelines apply only to felonies.



## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN ASSESSING POINTS FOR BEING ON LEGAL CONSTRAINT FOR EACH OF THE SUBSTANTIVE OFFENSES FOR WHICH MR. CARTER WAS BEING SENTENCED.

In the present case, Mr. Carter's guidelines sentence was arrived at by scoring thirty-six legal constraint points for each of the three offenses for which he was being sentenced and which were committed while he was on probation (R 8-9). Mr. Carter's objection to this multiplication of the points for being on legal constraint was overruled. This was error.

"Legal status" is defined, for purposes of the sentencing guidelines, in R.Cr.P. 3.701(d)(6) as

Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

This definition does not set forth whether legal constraint points will be assessed against the primary offense only or also multiplied for any additional offenses at conviction also committed while the defendant was under constraint. In this regard, it is to be contrasted with, for instance, the victim injury category, as to which the guidelines are express:

7. Victim injury shall be scored for each victim physically injured during a criminal episode or transaction.

Moreover, only one numerical value is assigned to the "legal constraint" category in the sentencing guidelines, nor is there any

provision for a multiplier on the face of the scoresheet with respect to this factor. Thus, as pointed out by Judge Cowart in his dissenting opinion in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), the logical inference to be drawn from the way in which legal constraint points are set forth in the guidelines scoresheet is that "The emphasis is on the status, a continuing condition, and not on the offense which relates to a point in time with respect to the legal status." Id. at 1056. A defendant's

"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.

Id. at 1057.

In this, as in any sentencing issue, the absence of express authority for an enhancing interpretation of the statute requires that such an interpretation will not be indulged. E.g., Palmer v. State, 438 So.2d 1 (Fla. 1983) [imposition of consecutive mandatory minimum statutes upon multiple convictions of offenses involving the use of a firearm improper, where there was no express authority for denying defendant eligibility for parole for more than three years]. It is, after all, a fundamental rule of statutory construction that criminal statutes shall be strictly construed in favor of the person against whom a penalty is to be imposed. Perkins v. State, 576 So.2d 1310 (Fla. 1991); Ferguson v. State, 377 So.2d 709 (Fla. 1979).

As defined by the sentencing guidelines, legal constraint, therefore, is analogous to the provision for an increase of

sentence where the defendant has violated his probation. In such circumstances, the guidelines permit an enhancement of the defendant's presumptive sentence by one cell without the necessity of stating any reason for the departure. R.Cr.P. 3.701(d)(14). But where there are multiple violations of probation, the increase in sentence is still limited to a single cell, and the same is true no matter how many separate terms of probation are violated. Franklin v. State, 545 So.2d 851, 853 (1989).<sup>4</sup>

This conclusion is given support by the enormous impact the multiplication of legal constraint points can have on a defendant's guidelines sentencing recommendation, out of all proportion to either the nature of the new crimes committed or any of the other factors considered in arriving at a sentencing guidelines score. In Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991), for instance, the appellate court pointed out that "in order to obtain the same number of points without the legal status multiplier, the state would have had to present 411 first-degree felony convictions as additional offenses at conviction, or 41 such felonies as primary offenses in this case." More than half the points assessed against that defendant were the result of the multiplication of his legal constraint score. In the present case, too, the trial court's erroneous multiplication of the legal constraint points was alone responsible for a three-cell upward bump of Mr. Carter's guidelines

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<sup>4</sup>"Upon a violation of a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. However, no further increase or departure is permitted for any reason." Id.

sentence.<sup>5</sup> It is simply unreasonable to suppose that this single factor was intended by the legislature to have such an overwhelming effect on a defendant's ultimate guidelines sentencing score.

In Scott v. State, supra, and Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), the Second District Court of Appeal has agreed that the absence of express authorization either in the sentencing guidelines statutes or rules for the multiplication of legal constraint points precluded multiplying those points by the number of offenses committed by the defendant while he was on legal constraint. The appellate court found no evidence of any legislative intent that legal constraint points should be multiplied. This position has likewise been approved by the Third District Court of Appeal in Cabrera v. State, 16 F.L.W. D898 (Fla. 3d DCA April 2, 1991). The First District Court of Appeal in Sellars v. State, 16 F.L.W. D921 (Fla. 1st DCA April 3, 1991) has also aligned itself with the Second District Court of Appeal.

The Fifth District Court of Appeal has, however, held that a defendant is properly assessed points for being on legal constraint for each offense for which he is being sentenced and which was committed while he was on legal constraint. Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989). Walker is based upon Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), in which the Fifth District Court of Appeal stated that, in the absence of an express statement as to the intent of the guidelines framers, legal status points would be scored not just for the "primary 'offense" at

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<sup>5</sup>Had the legal constraint points been scored only once, Appellant's guidelines sentence would place him in the range of three and a half years in prison (R 9).

conviction, but also for any "additional" offenses on the score-sheet where the defendant was on probation at the time he committed them.

Gissinger and Walker, by assuming a more onerous application of the sentencing guidelines than is justified by their express terms, turn the applicable principle of statutory construction upon its head. This Court has itself recently warned that ambiguities in sentencing provisions may not be used to authorize a more severe sanction in the absence of a specific expression of legislative intent for such a result. Perkins v. State, supra. Thus, the reasoning of Gissinger and Walker is not persuasive, as observed in Sellars v. State, supra.

Indeed, in a legal memorandum, the director of the Sentencing Guidelines Commission has taken issue with the expansive reading of the guidelines relating to legal constraint scoring enunciated by the Fifth District Court of Appeal. Specifically, the director said:

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 on legal constraint. The scoring of multiple assessments of legal constraint 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.

(Petition for amendment of Florida Sentencing Guidelines, see, Appendix, emphasis added.) In ruling on this Petition, this Court held that the change to the sentencing guidelines proposed with

respect to the scoring of legal constraint points could not be made by it, but should be subjected to legislative review and approval. Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. March 7, 1991). In so holding, this Court observed:

With regard to the issues of victim impact and legal status offenses, the rules proposed by the Commission and adopted by the Legislature are admittedly and self-evidently vague. Yet this is the way they were proposed and adopted. We are in no position now to say, by judicial ukase, exactly what the Legislature did or did not intend at the time of adoption.

Id. at S199. Further, in a footnote to the opinion, this Court clarified:

Of course, if the Legislature approves the amendments, they then must be accorded the same legal status as any other express clarification of original legislative intent. Our opinion today is not meant to deny that the proposals in Appendix B are in fact a clarification, only to say that they will become a clarification only if and when the legislature approves them.

Id.

Certainly, it is proper to consider subsequent legislative amendments to determine the legislative intent in enacting a particular statute. Brooks v. State, 478 So.2d 1052 (Fla. 1985); Lowry v. Florida Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). While this Court has rejected the invitation of the Sentencing Guidelines Commission to adopt its commentary as the final word on the legislature's intent with respect to legal constraint scoring, the Commission's own understanding of the rules it was submitting for legislative approval must surely be given substantial weight in interpreting the ambiguity which this Court

itself recognized. The sentencing guidelines are, after all, the unique product of a joint operation between the judicial branch which, through the Commission, submits and recommends its provisions, and the legislature, which finally adopts them. What the Commission believes it is proposing must have some impact on how the proposal is presented and explained to the legislature and thus must infect the legislature's own view of the matter. The position of the Sentencing Guidelines Commission that it was never intended that legal constraint points were to be multiplied should therefore be accepted as evidence of the legislative intent at the time the guidelines were adopted.

Consequently, no clear legislative intent can be discerned to authorize the multiplication of legal constraint points for each new offense a defendant commits while on constraint. The Fourth District Court of Appeal was therefore in error to authorize such scoring in the present case. Mr. Carter's incorrectly scored guidelines sentence must be reversed, and this cause remanded with directions to resentence him after correcting his guidelines scoresheet to assess no more than thirty-six points for being on legal constraint at the time he committed the new offenses for which he was being sentenced.

POINT II

THE TRIAL COURT ERRED IN SCORING MR. CARTER'S MISDEMEANOR AND COUNTY ORDINANCE CONVICTIONS, CHARGED IN A SEPARATE INFORMATION FROM THE FELONY FOR WHICH HE WAS ALSO BEING SENTENCED, AND IN SCORING LEGAL CONSTRAINT POINTS FOR THOSE NON-FELONY OFFENSES.

In its oral discussions at the sentencing hearing concerning Mr. Carter's proposed guidelines sentence, the trial court agreed with the State that it would assess Mr. Carter points for being on legal constraint not just for the felony charge of battery on a police officer, but also for the misdemeanor of resisting arrest without violence and the county ordinance violation, which were separately charged in another information to which he had previously pled nolo contendere (R 8-9). The additional legal constraint points for the two non-felony offenses placed Mr. Carter in a higher guidelines cell (R 9), and the trial court sentenced him accordingly (R 34).

Even assuming that the legal constraint points were correctly multiplied for each new offense committed while Mr. Carter was on legal constraint, but see, Argument, Point I, supra, the trial court nevertheless committed reversible error in its calculation of Mr. Carter's guidelines score. For the trial court ignored the fact that the sentencing guidelines do not apply to misdemeanors. F.Cr.P. 3.701; Bordeaux v. State, 471 So.2d 1353, 1354 (Fla. 1st DCA 1985). Just as capital offenses are not subject to the sentencing guidelines, and are therefore not included in the scoresheet, e.g., Stuart v. State, 536 So.2d 363 (Fla. 2d DCA 1988), misdemeanor convictions are likewise excluded from the operation of the sentencing guidelines: there is simply no such



thing as a "guidelines sentence" for a misdemeanor -- and certainly not for a county ordinance violation either. Misdemeanors are thus excluded from certain guidelines calculations. For example, prior misdemeanor convictions may not be utilized in arriving at a point total for same-category offenses. Testerman v. State, 508 So.2d 562 (Fla. 2d DCA 1987); Bordeaux v. State, supra. See also, Wyche v. State, 576 So.2d 884 (Fla. 1st DCA 1991) [since habitual offender classification brings offense outside of guidelines, trial court erred in using offense for which defendant was found to be habitual offender as primary offense in computing guidelines score]. By the same reasoning, it is also error to score points for being on legal constraint for a misdemeanor conviction.

The Fourth District Court of Appeal rejected Mr. Carter's argument, based on the provision of the sentencing guidelines for scoring misdemeanors as "additional offenses" at conviction. And Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), which states the original rationale for allowing the multiplication of legal constraint points, see, Argument, Point I, supra, involved a misdemeanor conviction which was scored as an additional offense to the primary offense of aggravated child abuse, for which the defendant was on probation when he committed the misdemeanor. Gissinger does not appear to have considered the effect of the fact that one of the convictions was for a misdemeanor, however, relying instead upon a general statement of law that where a defendant is being sentenced for an additional crime as well as the offense for which he was on probation, points for being on legal constraint should be scored for all offenses for which he is being sentenced.

Id. at 1270. As explained, supra, however, that principle, properly stated, may be applied only to all felonies for which the defendant is being sentenced. This must be especially the case where the non-felonies were charged, as in the instant prosecution, in a separate information from the felony which is the trigger for guidelines sentencing, so that they were not properly included within the sentencing guidelines computation for the separate felony prosecution at all.

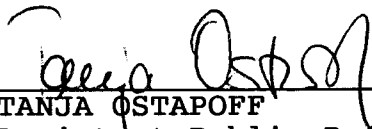
Since the argument herein made was not considered in Gis-singer, the holding of that case in no way precludes a different result in the present case. And because the Fourth District Court of Appeal did not consider the fact that the non-felonies below were charged in an information which ultimately had no felony charges contained within it, so that it was not subject to guidelines sentencing at all, the additional points scored on Mr. Carter's guidelines scoresheet for his resisting arrest conviction and open container violation must therefore be deleted from his guidelines score. Mr. Carter's sentence should be reversed and this cause remanded for resentencing with a corrected guidelines scoresheet.

CONCLUSION

Based on the foregoing argument and the authority cited, Mr. Carter requests that this Court reverse his sentence and remand this cause for resentencing after correcting his guidelines scoresheet.

Respectfully submitted,

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
301 N. Olive Avenue/9th Floor  
West Palm Beach, Florida 33401  
(407) 355-2150

  
\_\_\_\_\_  
TANJA OSTAPOFF  
Assistant Public Defender  
Florida Bar No. 224634

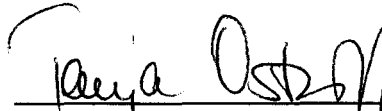
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOHN TIEDEMANN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 18<sup>th</sup> day of JUNE, 1991.

  
\_\_\_\_\_  
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to JOHN TIEDEMANN, ESQ., Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 18~~th~~ day of JUNE, 1991.



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TANJA OSTAPOFF  
Assistant Public Defender  
Florida Bar No. 224634

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

PATRICK CARTER,  
Petitioner,

vs.

CASE NO. 77,434

STATE OF FLORIDA,  
Respondent.

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P E T I T I O N E R ' S    A P P E N D I X

RICHARD L. JORANDBY  
Public Defender  
15th Judicial Circuit of Florida  
The Governmental Center/9th Floor  
301 North Olive Avenue  
West Palm Beach, Florida 33401  
(407) 355-2150

TANJA OSTAPOFF  
Assistant Public Defender  
Florida Bar No. 224634

Counsel for Petitioner