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AUG 7 1991

CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA


STATE OF FLORIDA, :
Petitioner, :
vs. :
MATTHEW KENNY, :
Respondent. :
_____ :

Case No. 77,611

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Respondent was the Appellee in the Second District of Appeal and the defendant in the trial court. Petitioner, the State of Florida, was the Appellant in the Second District Court of Appeal. Despite a thorough search of Florida Law Weekly and Southern Reporter Second Series, and the use of Westlaw, the Appellee was unable to find a published citation for State v. Kenny, No. 90-02325 (Fla. 2d DCA March 1, 1991).

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.

The First, Second, and Third District Courts of Appeal have held 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 April 3, 1991); Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991); Scott v. State, 574 So.2d 247 (Fla. 2d DCA 1991); Worley v. State, 573 So.2d 1023 (Fla. 2d DCA 1991); Cabrera v. State, 576 So.2d 1358 (Fla. 3d DCA 1991). The Fourth and Fifth Districts have taken the contrary position and concluded that multiplication of legal constraint points was permissible. Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1991); Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990); Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989). Based on the plain language of Florida Rules of Evidence 3.701 and 3.988, and the rule of lenity and strict construction, this court should adopt the position of the First, Second, and Third Districts, and affirm the Second District's decision in State v. Kenny, No. 90-02325 (Fla. 2d DCA March 1, 1991).

Florida Rules of Criminal Procedure 3.701 and 3.988, do not require the use of a multiplier nor do they contain language susceptible of a different construction. These rules set forth the

procedures to be utilized under the sentencing guidelines. What conditions constitute legal status under the guidelines are spelled out in 3.701(d)(6), but nowhere in the rule or in the rule committee notes is the use of a multiplier for legal status points ever mentioned.

Additionally, there is persuasive evidence that the commission which formulated the sentencing guidelines intended defendants' legal status to be scored only once. In Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So.2d 1307 (Fla. 1991), the commission requests that the committee note to Rule 3.701(d)(6) be amended to reflect the fact that the commission never intended to allow multiple scoring of legal constraint points for each new offense. While this court held that only the legislature could approve this amendment, this court stated it agreed with the intent of the proposed change. Id at 1308-1309. Rule 3.701 contains language expressly authorizing multipliers for primary offenses, additional offenses, prior record, and victim injury. The rule was amended in 1990 to provide multipliers for victim injury for several scoresheets but no multipliers were added to the scoresheets for the legal status category. In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines), 566 So.2d 770 (Fla. 1990). Therefore, it should be presumed there was no intent for the use of a multiplier for the legal status category.

Even assuming that ambiguity exists concerning the scoring of legal constraint points, the rule of lenity and strict

construction preclude the application of a multiplier. Section 775.021(1), Florida Statutes (1989) provides "[t]he 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." Strict construction requires that nothing that is not clearly and intelligently described in a statute's very words, as well as manifestly intended by the legislature, is to be considered within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken. Lewis v. State, 574 So.2d at 246. In Lewis, the Second District applied the rule of lenity and strict construction to the sentencing guidelines rules and statutes and correctly concluded that a multiplier may not be used with legal constraint to arrive at a recommended guidelines sentence. Id. This court should do the same.

The Petitioner suggests that a person who commits more than one offense while under legal constraint 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 one hundred 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 use of a multiplier for legal constraint points would result in disproportionate sentences conflicting with the ultimate purpose of the guidelines, uniformity in sentencing.

The decisions of the First, Second and Third District Courts of Appeal correctly conclude that multipliers should not be applied when assessing legal constraint points. Thus, the decision of the Second District Court of Appeals in Kenny, should be affirmed.

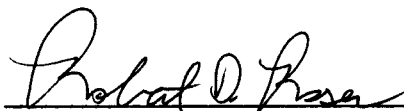
CONCLUSION

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 Kenny.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to David R. Gemmer, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 5th day of August, 1991.

Respectfully submitted,



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