

FILED

SID J. WHITE

ARR ' 1 1991

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Deputy Clerk

STATE OF FLORIDA, :

Petitioner, :

vs. :

Case No. 77,611
Appeal Case No. 90-2325

MATTHEW KENNY, :

Respondent. :

_____ :

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

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

ROBERT D. ROSEN
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SUMMARY OF THE ARGUMENT

The Appellant believes the present case was correctly decided. However, the Appellant recognizes that the Second District's decision is in direct and express conflict with the decisions of other districts. Since this court has accepted jurisdiction in other cases involving the identical issue, the Appellant does not object to this court granting jurisdiction in the present case.

ARGUMENT

ISSUE

POINTS SHOULD NOT BE SCORED FOR
LEGAL CONSTRAINT FOR EVERY OFFENSE
COMMITTED WHILE UNDER LEGAL CON-
STRAINT.

In State v. Kenny, case no. 90-02325 (Fla. 2d DCA March 1, 1991), the Second District Court of Appeal affirmed the trial court's holding that legal constraint points should be calculated only once, and not multiplied by the number of new offenses included in the guideline scoresheet. The Appellant concedes that in one of the cases cited by the Second District, Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991), the Second District recognized a conflict with Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990), Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), and Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989). The Appellant also recognizes that this issue is pending before this court and therefore has no objection to the granting of jurisdiction in the present case. However, the Appellant points out that in Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. March 7, 1991), the Florida Sentencing Guidelines Commission notes that it never intended to allow multiple scoring of "legal status points" and it proposed changes in the rules to make this clear. While this court held that only the legislature could approve this clarification, this court stated it agreed with the intent of the proposed changes. Id at S199.

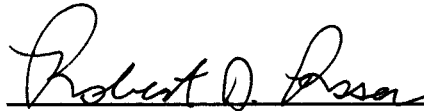
CONCLUSION

The Appellant believes the present case was correctly decided but since this court has already accepted jurisdiction in other cases with the identical issue, the Appellant has no objection to this court granting jurisdiction in the present case.

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 26th day of March, 1991.

Respectfully submitted,



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