

048

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,881

THE STATE OF FLORIDA,

Petitioner,

vs.

PEDRO CABRERA,

Respondent.

FILED

SID J. WHITE

JUN 17 1991

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

IVY R. GINSBERG
Assistant Attorney General
Florida Bar No. 0612316
Department of Legal Affairs
401 N.W. 2nd Avenue N-921
Miami, Florida 33128
305-377-5441

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-2
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	4-11

LEGAL CONSTRAINT POINTS MAY BE ASSESSED
MORE THAN ONCE ON A SINGLE SENTENCING
GUIDELINES SCORESHEET.

CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	12

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Adams v. State,</u> 490 So.2d 53 (Fla. 1986).....	10
<u>Adams v. State,</u> 16 F.L.W. 641 (Fla. 5th DCA Mar. 7, 1991).....	4
<u>Booker v. State,</u> 514 So.2d 1079 (Fla. 1987).....	10
<u>Cabrera v. State,</u> 16 F.L.W. 898 (Fla. 3d DCA Apr. 2, 1991).....	9,10
<u>Carter v. State,</u> 571 So.2d 520 (Fla. 4th DCA 1990).....	5
<u>Christy v. State,</u> 559 So.2d 683 (Fla. 2d DCA 1990).....	10
<u>Clark v. State,</u> 519 So.2d 1095 (Fla. 1st DCA 1988).....	7
<u>Clark v. State,</u> 16 F.L.W. 43 (Fla. Jan. 3, 1991).....	7-9
<u>Florida Rules of Criminal Procedure re: Sentencing Guidelines,</u> (Rule 3.701 and 3.988), 16 F.L.W. 198 (Fla. Mar. 7, 1991).....	5,6
<u>Flowers v. State,</u> 567 So.2d 1055 (Fla. 5th DCA 1990).....	5
<u>Gissinger v. State,</u> 481 So.2d 1269 (Fla. 5th DCA 1989).....	4,5
<u>Lambert v. State,</u> 545 So.2d 835 (Fla. 1989).....	10
<u>Scott v. State,</u> 16 F.L.W. 356 (Fla. 2d DCA Feb. 1, 1991).....	5,6

Teer v. State,
557 So.2d 910 (Fla. 1st DCA 1990)..... 10

Williams v. State,
559 So.2d 680 (Fla. 2d DCA 1990)..... 10

OTHER AUTHORITIES

Rule 3.150(a), Florida Rules of Criminal Procedure..... 8-9

Rule 3.701(b)(4), Florida Rules of Criminal Procedure.. 4

Rule 3.701(d), Florida Rules of Criminal Procedure..... 9

INTRODUCTION

The Petitioner, THE STATE OF FLORIDA, was the appellee below and the prosecution in the trial court. The respondent, PEDRO CABRERA, was the appellant below and the defendant in the trial court. The symbols "R." and "T." will be used to designate the record on appeal and the transcript of proceedings. An appendix is being filed contemporaneously with this brief with a copy of the decision below.

STATEMENT OF THE CASE AND FACTS

Pedro Cabrera was convicted and sentenced for committing an aggravated battery, robbery and possession of a vehicle with an altered identification number. (R. 77-83a). He appealed his convictions and sentences to the Third District. (R. 87-88). His convictions were affirmed but his sentences were reversed. (R. 93-97).

The sole question presented for review is whether legal constraint points may be assessed more than once on a single sentencing guidelines scoresheet. (R. 95). The facts concerning this issue are as follows. At the time of the offenses Cabrera was on probation. (R. 94). For disposition of the instant case, a category 3 sentencing guidelines scoresheet was prepared. (R. 95). Item IV of the scoresheet, "legal status at time of offense," specifies 17 points if defendant is under legal constraint. (R. 95).

In preparing the scoresheet the court assessed 17 points for each of the three counts, for a total of 51 points for legal constraint. (R. 95). The Third District adopted the second district's view on this issue which has interpreted the guidelines to call for assessment of legal constraint only once per scoresheet. See Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991); see also Scott v. State, 16 F.L.W. D356 (Fla. 2d DCA Feb. 1, 1991); Worley v. State, 16 F.L.W. D354 (Fla. 2d DCA Feb. 1, 1991). See generally Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. Mar. 7, 1991). (R. 95).

Because both the Fourth and Fifth District have upheld sentences where the legal constraint points were multiplied by each count, See Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990); Green v. State, 570 So.2d 1014 (FLA. 5th DCA 1990)(question certified); Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990); Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989) the Third District certified conflict with those decisions and also certified the following question as one of great public importance:

WHETHER LEGAL CONSTRAINT POINTS MAY BE
ASSESSED MORE THAN ONCE ON A SINGLE
SENTENCING GUIDELINES SCORESHEET?

(R. 95, 97).

SUMMARY OF THE ARGUMENT

As a matter of public policy and uniformity in sentencing, a person who commits more than one crime while on probation should be treated more harshly and in direct proportion to the number of crimes for which he is convicted of while on probation, than one who commits only one crime. Since "legal status at the time of the offense" refers not only to the primary offense, but any offenses at conviction, points for legal status should be assessed for each offense committed while on probation.

Assuming arguendo that legal status points should not be applied for each new offense because in some cases a disproportionate amount of points will be assessed for this factor, then legal status points should be assessed for each new separate criminal episode or separate information. This would balance the competing interests of the State and defendants.

Alternatively, the State submits that legal constraint points be assessed only once, but in cases where defendants commit multiple criminal episodes for which legal constraint points cannot be assessed, the courts should be able to consider this as a reason for departure where there are independent criminal episodes scored on the same scoresheet for which legal status points may not be assessed. The certified question should be answered affirmatively or alternatively in the negative with the above qualification.

ARGUMENT

LEGAL CONSTRAINT POINTS MAY BE ASSESSED
MORE THAN ONCE ON A SINGLE SENTENCING
GUIDELINES SCORESHEET.

The purpose of the sentencing guidelines is to increase the severity of the sanctions as the length and nature of the defendant's criminal history increases. Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1989); Fla.R.Crim.P. 3.701(b)(4). A person who commits more than one crime while on probation should be treated more harshly and in direct proportion to the number of crimes for which he is convicted, than one who commits only one crime. Adams v. State, 16 F.L.W. 641, 642 (Fla. 5th DCA Mar. 7, 1991). Even though a defendant is already being treated more harshly because points are scored for each additional offense, those scored points still do not take into consideration the repeated disregard for a defendant's probationary status. This case involves the propriety of applying a multiplier to the "legal status" factor in computing a guidelines sentence under Florida Rules of Criminal Procedure 3.701 d.6. This rule provides:

Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who may 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.

The plain meaning of "legal status at the time of the offense" indicates that "legal status" should be assessed for each offense for which the defendant is on probation or otherwise on legal constraint. Two District Courts have clearly interpreted the rule in this manner and have held under the sentencing guidelines, "legal status at the time of the offense" refers not only to the primary offense, but any offenses at conviction. Carter v. State, 571 So.2d 520, 522 (Fla. 4th DCA 1990); Gissinger, 481 So.2d at 1270. If the interpretation of Rule 3.701 d.6. by the Second District in Scott v. State, 16 F.L.W. 356 (Fla. 2d DCA Feb. 1, 1991) is accepted, a defendant who committed numerous acts while under legal constraint will receive no more of a sanction for blatantly and repeatedly violating his probation than does a defendant who violated it but once. This simply does not comport with the public policy reasons underlying the entire sentencing guidelines scheme which were intended to promote the goals of fairness and uniformity in sentencing. Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990)(question certified).

The Sentencing Guidelines Commission recently asked this Court to adopt changes or additions to the committee notes accompanying rules 3.701 d.6. indicating that it never intended to assess legal constraint points for each offense committed while under legal constraint. Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16

F.L.W. 198 (Fla. Mar. 7, 1991). While this Court noted that the rules previously proposed by the Commission with regard to legal status offenses "are admittedly and self-evidently vague", it refused to enact the proposed amendments to the committee notes concluding that "the final decision to adopt the rules in the first instance, must come from the Legislature." Id. at 199. The State submits that the rule itself and the policies underlying the sentencing guidelines are a better indication of the intent of the legislature rather than a reactionary statement from the commission rendered after the District Courts have interpreted the rule.

Assuming *arguendo* that legal status points should not be applied for each new offense, the State maintains that legal status points should be assessed for at least each new separate criminal episode. This would prevent a disproportionate amount of points being assessed for legal constraint, while at the same time punish the defendant in proportion to the number of criminal episodes which occurred while the defendant was on probation or community control. See *e.g.*, Scott v. State, 16 F.L.W. 356 (Fla. 2d DCA Feb. 1, 1991)(428 points assessed for legal status or 56% of the points assessed against defendant). This approach would balance the interests of the State and defendants and eliminate the problem exemplified in Scott and in other cases where a disproportionate amount of points may be assessed for legal constraint when multiplied for each offense.

The issue of multiplying legal constraint points in computing a guidelines sentence cannot be considered in isolation. In Clark v. State, 16 F.L.W. 43 (Fla. Jan. 3, 1991) the defendant was charged in two separate informations with four counts involving the sale and possession of cocaine. Clark was tried in front of one judge and found guilty on the second information. Two days later this judge sentenced Clark to a four year sentence. That same day, he was tried in front of another judge for the offenses in the first information. Id. He was found guilty on those charges as well and sentenced separately to a four year term to run consecutively to the four year sentence previously imposed. The First District affirmed the defendant's sentences but certified to the supreme court the question of whether it is the trial court's duty to assure that all of a defendant's cases "pending" in a particular county at the time of the defendant's first sentencing hearing are disposed of using one scoresheet. Clark v. State, 519 So.2d 1095 (Fla. 1st DCA 1988).

This Court held that one scoresheet must be used for every pending case before the trial court. Clark, 16 F.L.W. at 44. As a general rule, an offense should not be considered as "pending" before the trial court for sentencing unless a verdict of guilty or a plea of nolo contendere has been obtained. Id. The Court provided a broad exception to the rule which allows a defendant to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending

against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. Id.

The rule and procedures outlined in Clark interplay with the issue at bar. Although Clark instructs that a single scoresheet should be used when sentencing on "pending" offenses charged in separate informations, the situation will still arise where separate sentencings will occur and separate scoresheets will be used when "pending" offenses cannot be combined because of undue delay.

For example, when a defendant commits offenses a few days apart and the trials are held several months apart, the trial judge will not be able to wait to sentence the defendant on both cases simultaneously because of undue delay. Therefore, the defendant will be sentenced for these criminal episodes separately using separate scoresheets and may perhaps be sentenced by two different judges. In this circumstance, assuming the defendant was on probation at the time both offenses occurred, legal constraint points will be assessed on both scoresheets. Under Rule 3.150(a), Florida Rules of Criminal Procedure, the State usually will have some discretion to join the offenses and charge them in a single information, or alternatively, charge the offenses in separate informations. If the State charges the offenses in separate informations, legal constraint points will be assessed on each information and will

essentially result in a multiplier effect. The State submits that it should not lose this multiplier effect in exchange for the convenience factor of trying cases together.

Alternatively, the State submits an approach that would balance both the interests of the State in punishing those who commit numerous offenses or criminal episodes while on "legal status" vis-a-vis the interests of defendants would be to assess legal constraint points only once, but in cases where defendants commit multiple criminal episodes for which legal constraint points cannot be assessed, the courts would be able to consider this as a basis for departure. See, Cabrera v. State, 16 F.L.W. 898, 899 (Fla. 3d DCA Apr. 2, 1991).

This approach is both logical and fair because the guidelines scoresheet was originally designed on the assumption that it would ordinarily be used for sentencing after disposition of a *single indictment or information*. By definition, offenses joined in a single indictment or information "are based on the same act or transaction or on two or more connected acts or transactions." Fla.R.Crim.P. 3.150(a). Cabrera, 16 F.L.W. at 899. However, as noted above, if two or more indictments or informations are brought on for simultaneous sentencing, only a single scoresheet will be prepared. Clark v. State, 16 F.L.W. 43, 44 (Fla. Jan. 3, 1991); Fla.R.Crim.P. 3.701(d). If this Court finds that the scoresheet only allows legal constraint points to be assessed once, (even though they could be assessed for each separate

information or indictment if there were separate sentencings assuming a defendant was under legal constraint at the time of the events giving rise to each indictment or information) then the scoresheet has not taken into account the fact that a defendant has repeatedly committed new offenses while on probation. Under existing sentencing guidelines doctrine, where there is a pertinent factor not otherwise scored on the guidelines scoresheet, that unscored factor can serve as a basis for departure. See Booker v. State, 514 So.2d 1079, 1080 (Fla. 1987).

The State submits that permitting courts to depart from the recommended sentencing guidelines range based on multiple violations of probation is not precluded by this court's holding in Lambert v. State, 545 So.2d 835 (Fla. 1989). See Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990)(en banc)(question certified); Christy v. State, 559 So.2d 683 (Fla. 2d DCA 1990); but see, Teer v. State, 557 So.2d 910 (Fla. 1st DCA 1990). In Williams, the Second District relied on this Court's earlier decision in Adams v. State, 490 So.2d 53 (Fla. 1986) which held that repeated violations of probation is a valid reason for departure. Williams, 559 So.2d at 681. Accordingly, independent criminal episodes for which legal constraint points cannot be assessed, should be considered as a clear and convincing reason for departure. See, Cabrera, 16 F.L.W. 898, 899.


Turning to the instant case, Cabrera was sentenced upon convictions under a single information. If this Court finds points for legal constraint may be assessed more than once, then the district court's decision should be reversed. Alternatively, if this Court finds that points for legal constraint may only be assessed once and that unassessed points for independent criminal episodes while on legal constraint may be a basis for departure, the decision below is correct and should be affirmed since the defendant's multiple offenses were charged under a single information.

CONCLUSION

Based on the foregoing arguments and authorities, the question certified below should be answered affirmatively and the decision below reversed, or in the alternative, the question should be answered in the negative with approval of unassessed legal constraint points as a basis for departure.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



IVY R. GINSBERG
Assistant Attorney General
Florida Bar No. 0612316
Department of Legal Affairs
401 N.W. 2nd Avenue N-921
Miami, Florida 33128
305-377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to VALERIE JONAS, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 14th day of June, 1991.



IVY R. GINSBERG
Assistant Attorney General

mls/

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,881

THE STATE OF FLORIDA,

Petitioner,

vs.

PEDRO CABRERA,

Respondent.

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

IVY R. GINSBERG
Assistant Attorney General
Florida Bar No. 0612316
Department of Legal Affairs
401 N.W. 2nd Avenue N-921
Miami, Florida 33128
305-377-5441

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1991

PEDRO CABRERA, a/k/a
ARLIX FUENTES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

**

**

**

CASE NO. 90-1272

**

**

**

RECEIVED

APR 3 85

ATTORNEY GENERAL
MIAMI OFFICE

Opinion filed April 2, 1991.

An Appeal from the Circuit Court for Dade County,
Thomas M. Carney, Judge.

Bennett H. Brummer, Public Defender, and Valerie Jonas,
Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Ivy R. Ginsberg,
Assistant Attorney General, for appellee.

Before COPE, LEVY and GODERICH, JJ.

COPE, Judge.

Pedro Cabrera appeals his convictions and sentences of
aggravated battery, robbery and possession of a vehicle with an
altered vehicle identification number. We affirm the convictions
but reverse the sentences.

With regard to the first issue on appeal, assuming arguendo that the point was properly preserved, we conclude that the trial court did not abuse its discretion in admitting evidence of the defendant's use of other names. See United States v. Williams, 739 F.2d 297 (7th Cir. 1984); United States v. Kalish, 690 F.2d 1144, 1155 (5th Cir. 1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983); Wynn v. State, 571 So.2d 34 (Fla. 3d DCA 1990); Weston v. State, 452 So.2d 95 (Fla. 1st DCA), review denied, 456 So.2d 1182 (Fla. 1984).

With regard to the second issue, the State concedes that the defendant's objection during the prosecutor's closing argument should have been sustained insofar as it was susceptible of a suggestion that defendant may be engaged in other uncharged criminal conduct. See Randolph v. State, 556 So.2d 808, 809 (Fla. 5th DCA 1990); see generally Shorter v. State, 532 So.2d 1110, 1111 (Fla. 3d DCA 1988); State v. Bermudez, 515 So.2d 421, 422 (Fla. 3d DCA 1987). We conclude, however, that the comments complained of by defendant were harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).¹

Defendant's third point has merit. At the time of the offenses defendant was on probation. For disposition of the instant case, a category 3 sentencing guidelines scoresheet was prepared. Item IV of the scoresheet, "legal status at time of

¹ Defendant also contends that other comments in closing argument by the prosecutor, although not objected to, constituted fundamental error. We disagree. Assuming the comments were improper, and assuming the point was properly preserved, we think the comments were harmless. State v. DiGuilio.

offense," specifies 17 points if defendant is under legal constraint. Id.; see Fla. R. Crim. P. 3.701(d)(6).

In preparing the scoresheet the court assessed 17 points for each of the three counts, for a total of 51 points for legal constraint. That approach--multiplying legal constraint points times each count--has been adopted in the fourth and fifth districts. See Carter v. State, 571 So.2d 520 (Fla. 4th DCA 1990); Green v. State, 570 So.2d 1014 (Fla. 5th DCA 1990) (question certified); Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990); Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989).

The second district has interpreted the guidelines to call for assessment of legal constraint only once per scoresheet. See Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991); see also Scott v. State, 16 F.L.W. D356 (Fla. 2d DCA Feb. 1, 1991); Worley v. State, 16 F.L.W. D354 (Fla. 2d DCA Feb. 1, 1991). See generally Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198 (Fla. Mar. 7, 1991). We think the latter is the better view and align ourselves therewith. We certify conflict with the fourth and fifth district decisions cited above.

Assuming the second district approach is adopted, the State suggests the following analysis. The guidelines scoresheet was designed on the assumption that it would ordinarily be used for sentencing after disposition of a single indictment or information. By definition, offenses joined in a single indictment or information "are based on the same act or transaction or on two or more connected acts or transactions."

Fla. R. Crim. P. 3.150(a). The guidelines contemplate that legal constraint will be scored only once for the single indictment or information, regardless of the number of counts therein.

If two or more indictments or informations are brought on for simultaneous sentencing, only a single scoresheet will be prepared. Clark v. State, 16 F.L.W. S43, S44 (Fla. Jan. 3, 1991); Fla. R. Crim. P. 3.701(d). The scoresheet only allows legal constraint points to be assessed once, even though they could be assessed for each separate information or indictment if there were separate sentencings.² Under existing sentencing guidelines doctrine, where there is a pertinent factor not otherwise scored on the guidelines scoresheet, that unscored factor can serve as a basis for departure. See Booker v. State, 514 So.2d 1079, 1080 (Fla. 1987). Thus, where there are multiple indictments or informations brought on for simultaneous sentencing on a single scoresheet, legal constraint points would be assessed only once, but the unscored factor--independent criminal episodes for which legal constraint points cannot be assessed--would be a basis for departure.³

² For purposes of this example, it is assumed that the defendant was under legal constraint at the time of the events giving rise to each information or indictment.

³ The "indictment or information" analysis refers to the current charges being sentenced at disposition. Where there is a simultaneous revocation of probation, the penalty imposed for the offense for which the defendant was on probation is that provided by the one-cell increase of Florida Rule of Criminal Procedure 3.701(d)(14). See Ree v. State, 565 So.2d 1329, 1331 (Fla. 1990).

The present case involves sentencing upon conviction under a single information. Points for legal constraint should have been scored only once. Elimination of the excess points will reduce the guideline ranges. We therefore reverse the sentencing order and remand for resentencing under a corrected scoresheet.

Because the scoring issue presented here affects numerous sentencings on a daily basis, we certify that we have passed on a question of great public importance:

Whether legal constraint points may be assessed more than once on a single sentencing guidelines scoresheet?

Convictions affirmed; sentencing order reversed and remanded for resentencing; conflict certified; question certified.