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**FILED**

SID J. WHITE

JUL 24 1991

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOHNNY O. CLOUD, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Case No. 78,154

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

JOHNNY O. CLOUD,            )  
                                  )  
      Petitioner,            )  
                                  )  
vs.                            )  
                                  )  
STATE OF FLORIDA,         )  
                                  )  
      Respondent.            )  
\_\_\_\_\_                      )

Case No. 78,154

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner, while under legal constraint, committed several other criminal offenses. Petitioner pled to several of these offenses and when he appeared for sentencing, a guidelines scoresheet was prepared in which legal constraint points were assessed for each of the offenses for which Petitioner was being sentenced.

Petitioner appealed to the Fifth District Court of Appeal and argued that there was no authority for applying a multiplier to the legal constraint points. The Fifth District Court of Appeal affirmed on the authority of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) and certified the following question as being of great public importance:

DO FLORIDA'S UNIFORM SENTENCING GUIDELINES  
REQUIRE THAT LEGAL CONSTRAINT POINTS BE  
ASSESSED FOR EACH OFFENSE COMMITTED WHILE  
UNDER LEGAL CONSTRAINT?

The Flowers decision is currently pending resolution by

this Court in Case No. 76,854.

Petitioner filed a timely petition to invoke  
discretionary review.

SUMMARY OF THE ARGUMENT

The guidelines scoresheet provides that if a defendant is being sentenced for an offense which he committed while on probation, he is to be assessed points for being under legal constraint. There is no provision in the guidelines for applying multiple legal constraint points based on the number of offenses committed while under legal constraint. The Fifth District Court of Appeal has in essence created a multiplier for legal constraint points which they had no authority to do. The answer to the certified question herein must be a resounding no.

## ARGUMENT

FLORIDA'S UNIFORM SENTENCING GUIDELINES  
DO NOT PERMIT THAT LEGAL CONSTRAINT  
POINTS BE MULTIPLIED FOR EACH OFFENSE  
COMMITTED WHILE UNDER LEGAL CONSTRAINT.

Petitioner, while under legal constraint, committed several other criminal offenses. Petitioner pled to several of these offenses and when he appeared for sentencing, a guidelines scoresheet was prepared in which legal constraint points were assessed for each of the offenses for which the Petitioner was being sentenced. The effect of applying the multiplier to the legal constraint points was to increase the recommended guidelines sentence for Petitioner. On appeal, the Fifth District Court of Appeal affirmed the use of a multiplier for legal constraint points on the authority of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) wherein the Court certified to this Court the question of whether a multiplier is proper.

In Gissinger v. State, 481 So.2d 1269 (Fla. 5th DCA 1986), the defendant was serving probation for aggravated child abuse when he committed a new offense of resisting arrest with violence. In preparing the guidelines scoresheet, the aggravated child abuse offense was designated as the primary offense at conviction because it was the offense which when scored resulted in the most severe sanction. Rule 3.701(d)(3), Florida Rules of Criminal Procedure. On appeal, Gissinger argued that legal constraint points should not have been scored because the defendant was not on probation for the primary offense. The

Fifth District Court of Appeal rejected the claim recognizing that the legal constraint provision did not clearly state whether "legal status at the time of the offense" referred to only the primary offense or to any offense at conviction. Despite the lack of clarity in the rule, when read in pari materia with the stated purpose of the guidelines to achieve uniformity in the sentencing, the Fifth District Court of Appeal concluded that legal status at the time of the offense should be scored for any offense for which the defendant is being sentenced, which was committed while under legal constraint. In Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), the Court took this logic one step further and created a legal status multiplier in those cases in which the defendant committed several offenses while on a single probation. The Fifth District Court of Appeal reaffirmed its holding in Walker in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) but certified the question to this Court. Petitioner submits that the Fifth District Court of Appeal had no authority to create such multiplier.

The key issue to be decided by this Court is whether the legislature intended that a multiplier be applied when calculating legal constraint points. Petitioner asserts that the answer to this question is no. Initially, it must be noted that the guidelines scoresheet itself does not provide a mechanism for multiplying legal constraint points. To determine the legislative intent, one need only examine the legislature's treatment of similar scoresheet factors. For instance, the



amended rule of victim injury points permits victim injury points for each injured victim and for each count in which victim injury is an element of the offense. See Committee Note, Rule 3.701(d)(7) (1987 and 1988) amendments), Florida Rules of Criminal Procedure. Indeed, this Court has amended the sentencing guidelines scoresheet and forms including form 3.988(g), Category seven: Drugs. In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines), 15 FLW S210 (Fla. April 10, 1990), revised on motion for clarification, 15 FLW S458 (Fla. September 6, 1990). The newly-approved guidelines form for category seven provides clearly on the face of the scoresheet a mechanism by which victim injury is multiplied by the number of victims. No such corresponding provision for multiplying legal status points appears on the face of the guidelines scoresheet.

Additionally, on several of the scoresheet categories, the legislature has clearly provided for multipliers to enhance prior offenses. Specifically, on the category one scoresheet, a multiplier is to be used for prior DUI convictions. On a category three scoresheet, there is a provision for prior category three offenses. On the category five scoresheet there is a provision for prior category five offenses. And finally, on a category six scoresheet, there is a provision for prior convictions for category six offenses. Nowhere in the guidelines or the committee notes thereto is there such provision for a legal status multiplier. Petition submits that the maxim

"expressio unius est exclusio alterius" applies in the instant situation. Where the legislature has specifically provided for multipliers in other areas on the guidelines scoresheet, the absence of any multiplier in the legal status category must be assumed to be intentional.

As noted by Judge Cowart in his dissent in Flowers, supra, the focus of the legal constraint factor is the defendant's legal status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. Judge Cowart then gave other cases to illustrate by analogy what is intended in the legal constraint category.

In Miles v. State, 418 So.2d 1070 (Fla. 5th DCA 1982) the defendant was charged in two separate cases with aggravated assault, released, and ordered to appear before the trial court at one time and one place for a pre-trial conference. When the defendant failed to appear on that date he was charged with two counts of willfully failing to appear for the pre-trial conference. On appeal, the Fifth District Court of Appeal reversed on conviction, rejecting the state's argument that the emphasis should be on each of the original criminal cases for which Miles failed to appear. Rather, the Court recognized that the essence of the charge was Miles' failure to appear which occurred but one time even though it related to two different cases.

In Hoag v. State, 511 So.2d 401 (Fla. 5th DCA 1987), rev. denied 518 So.2d 1278 (Fla. 1987) the defendant left the

scene of an accident in which four persons were injured and one person was killed. Hoag was convicted of five counts of leaving the scene of an accident involving injuries or death. The Fifth District Court of Appeal reversed four of the convictions on the grounds that the focus of the criminal conduct was on leaving the scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene, one time by the defendant.

Finally, in Burke v. State, 475 So.2d 252 (Fla. 5th DCA 1985), rev. denied 484 So.2d 10 (Fla. 1986), the Fifth District Court of Appeal held that giving three altered dollar bills to one person at one time constituted but one criminal act of uttering a forged instrument.

Applying the logic of these cases to the instant case, the focus of factor four on the guidelines relates to a defendant's status as being under, or not being under, legal constraint, and not on the number of offenses that he committed while on or under legal constraint.

By permitting a multiplier for legal constraint points, the Court in essence permits "double dipping". The offenses for which the accused is being sentenced are already scored as either primary offenses or additional offenses at conviction. However, the same offenses then are used to calculate multiple legal constraint points. Surely, the legislature never intended for such "double dipping". To allow this to occur is in essence to eviscerate the sentencing guidelines.

This Court has the benefit of knowing what the position of the sentencing guidelines commission is with regard to this issue. Pursuant to Section 90.202(6), Florida Statutes (1989) this Court may take judicial notice of a petition currently pending before this Court. In Supreme Court Case No. 76,683, the Florida Sentencing Guidelines Commission is petitioning this Court for a revision to the sentencing guidelines. Paragraphs eight through ten of this petition discuss the issue of assessing multiple legal constraint points. The commission has proposed a committee note to clarify the commission's intent with regard to this issue. The new rule will state:

Legal status points are to be assessed where forms of legal constraint existed at the time of the commission of offenses scored as primary or additional offenses at conviction. Legal status points are to be assessed only once whether there are one or more offenses at conviction.

To comment to this new rule states:

The purpose of this revision is to clarify the original intent that legal constraint is a status consideration and is not to be considered a function of the number of offenses at conviction.

(A copy of the petition is attached as an appendix hereto).

Thus, it is clear, that the decision of the Fifth District Court of Appeal in the instant cases is at odds with the intention and spirit of the guideline themselves.

Petitioner also directs this Court's attention to its previous decision in Brown v. State, 569 So.2d 1223 (Fla. 1990). In Brown, the defendant was released on bail and committed three

other offenses. The trial court departed from the recommended sanction and gave as a reason the violations of the conditions of bail release. In disapproving the departure, this Court initially ruled that a violation of specific conditions for release on bail was the equivalent of legal constraint and as such could not be used as a reason to depart. This Court noted:

Had Brown been on probation when he committed {the offenses}, there would have been seventeen extra points factored into his guidelines scoresheet for legal constraint.

Id. at 1221. Thus, it is apparent that this Court has in effect already answered the certified question in the negative by ruling that Brown could not be scored but once for legal constraint despite committing three offenses.

Petitioner further notes that three other District Courts of Appeal have rejected the reasoning of the Fifth District. See, Sellers v. State, 16 FLW 2D921 (Fla. 1st DCA April 3, 1991); Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991) and Cabrera v. State, 576 So.2d 1358 (Fla. 3rd DCA 1991).

In summary, Petitioner argues that the guidelines do not permit points for legal constraint to be multiplied by the number of offenses for which the accused is being sentenced which were committed while he was on legal constraint. The concept of legal constraint points focuses solely on the defendant's status as being under or not being under legal constraint. The legislature never intended for a multiplier to be used in calculating legal constraint points. Therefore, this Court

should answer the certified question in the negative.

Consequently, Petitioner's sentence must be vacated and the cause remanded for sentencing under a corrected scoresheet.

CONCLUSION

BASED UPON the foregoing cases, authorities, Petitioner urges this Honorable Court to answer the certified question in the negative and rule that in calculating legal constraint points, a court may not employ a multiplier based on the number of offenses committed while on legal constraint. The decision of the District Court must be quashed and the cause remanded with instructions to vacate Petitioner's sentence and remand for resentencing under a properly calculated scoresheet.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

*for Barbara L. Condon*  
MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 267082  
112 Orange Ave., Ste. A  
Daytona Beach, FL 32114  
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Johnny O. Cloud, P.O. Box 333, Raiford, FL 32083, this 22nd day of July, 1991.

*for* Barbara L. Condon  
MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER



IN THE SUPREME COURT OF FLORIDA

JOHNNY O. CLOUD,            )  
                                  )  
      Petitioner,            )  
                                  )  
vs.                            )  
                                  )  
STATE OF FLORIDA,         )  
                                  )  
      Respondent.         )  
\_\_\_\_\_                  )

Case No. 78,154

A p p e n d i x

Cloud v. State, DCA Case No. 90-2532 (5th DCA May 30, 1990)

Florida Rules of Criminal Procedure re: Sentencing guidelines  
(Rules 3.701 and 3.988), Case No. 76,683 (Filed October 2, 1990)

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

JANUARY TERM 1991

91-95  
MB

JOHNNY O'DELL CLOUD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 90-2532

**RECEIVED**

**MAY 30 1991**

**PUBLIC DEFENDER'S OFFICE  
7th CIR. APP. DIV.**

Opinion filed May 30, 1991

Appeal from the Circuit Court  
for Brevard County,  
Lawrence V. Johnston, III, Judge.

James B. Gibson, Public Defender,  
and Michael S. Becker, Assistant  
Public Defender, Daytona Beach,  
for Appellant.

Robert A. Butterworth, Attorney  
General, Tallahassee, and Belle  
B. Turner, Assistant Attorney  
General, Daytona Beach, for Appellee.

PER CURIAM.

We affirm. However as in *Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA  
1990), we certify to the supreme court the following question:

DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE  
THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH  
OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT?

AFFIRMED.

DAUKSCH, GRIFFIN and DIAMANTIS, JJ., concur.

SUPREME COURT OF FLORIDA

FLORIDA RULES OF CRIMINAL PROCEDURE  
re SENTENCING GUIDELINES  
(Rules 3.701 and 3.988)

CASE NO. 76,683

PETITION

The SENTENCING GUIDELINES COMMISSION petitions this Court for revisions to the sentencing guidelines to conform the rule to recent statutory enactments and to revise certain portions of the rule to clarify the intent of the Commission and would allege:

1. The 1990 Florida Legislature created new crimes subject to the sentencing guidelines. One of the new crimes will require an amendment to Florida Rules of Criminal Procedure 3.701(c), and the form appearing at Rule 3.988(b), Florida Rules of Criminal Procedure, while another of the new crimes was placed in a chapter of the Florida Statutes currently scored in the offense category for which the Sentencing Guidelines Commission recommends incorporation. The other new crimes are recommended for inclusion in the all other felonies category. No formal change to either Rule 3.701(c) or the forms found at Rule 3.988 is necessary to incorporate three of the four new crimes in the categories indicated.
2. The 1990 legislation subject to the sentencing guidelines is as follows:

Ch. 90-70, §1, Laws of Fla. This bill creates new penalties for psychotherapists who engage in sexual misconduct with a client or former client, an enhanced penalty for second and subsequent offenses and penalties for therapeutic deceptions. The offense is a third degree felony. Second and subsequent offenses are second degree felonies. §491.0112, Fla. Stat. (Supp. 1990).

Rules 3.701(c)  
and 3.988(b),  
Fla.R.Crim.P.  
(category 2)

Ch. 90-111, §6, Laws of Fla. This bill creates new crimes for sale, purchase, manufacture, delivery, or

Rule 3.988(g),  
Fla.R.Crim.P.  
(category 7)

possession with intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, a public or private college, university or other post-secondary educational institution, or any public park. The penalties upon conviction are determined in accordance with the type of controlled substance involved. §893.13, Fla. Stat. (Supp. 1990).

Ch. 90-301, Laws of Fla. This bill creates the offenses of commercial bribery and receiving a commercial bribe. A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common law duty as listed in s. 838.15(1). Commercial bribery is committed where a person, knowing that another is subject to a duty described in s. 383.15(1) and with intent to influence the other person to violate that duty, confers, offers to confer, or agrees to confer a benefit on the other. Both offenses are third degree felonies. §838.15, Fla. Stat. (Supp. 1990).

Rule 3.988(i),  
Fla.R.Crim.P.  
(category 9)

Ch. 90-306, §63, Laws of Fla. This bill makes it unlawful for any person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor. The new offense is a third degree felony. §847.0133, Fla. Stat. (Supp. 1990).

Rule 3.988(i),  
Fla.R.Crim.P.  
(category 9)

3. Legislation that should be incorporated into the guidelines by the Sentencing Guidelines Commission is provided for the review and approval of the Court as required by section 921.001(4)(b), Florida Statutes (1989). The Florida Legislature has given the Court the ability to revise the statewide sentencing guidelines, without legislative approval, where the Court certifies that the revisions are necessary to conform the guidelines to previously adopted statutory revisions. The preceding amendments are purely procedural and are intended to incorporate legislative

changes regarding crimes subject to the sentencing guidelines.

4. In addition to the revisions concerning recent legislative enactments, the Sentencing Guidelines Commission recommends two revisions to clarify the intent of the Commission in scoring victim injury and legal status.
5. A 1987 revision to Rule 3.701(d)(7), Florida Rules of Criminal Procedure, was made to expand the definition of victim injury. In revising the rule and the committee note, language that had been added to the committee note the previous year was omitted. The omitted language stated the intent of the Commission to score victim injury points for each count at conviction regardless of the number of victims.
6. As a result of that omission, recent case law has held that where multiple offenses are committed against a single victim, a cumulative injury should be considered and a single score assigned. This type of scoring provides the potential for disparity in the scoring of victim injury by resulting in a lower assessment where multiple offenses are committed against a single victim than would be scored for those same crimes if committed against multiple victims.
7. The consideration of cumulative injury to determine the level of victim injury points to be assessed also provides a potential for confusion. The current structuring of levels of victim injury will not readily adapt to a consideration of cumulative injury. The Commission recommends that the committee note to Rule 3.701(d)(7), Florida Rules of Criminal Procedure, be amended to clarify the manner in which victim injury is to be scored. Proposed language for a revision is attached.
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 under legal constraint, regardless of the number of offenses at conviction. The scoring of multiple assessments of legal status 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.
9. The application of the weighing process utilized under the sentencing guidelines is enhanced by the fact that

all criteria scored in the calculation of a recommended sentence, with the notable exception of legal status, have structured levels. This structuring establishes the relative importance of a particular criteria, allows for the means to regulate the impact of a particular criteria on a recommended sentence and also reflects a recognition that varying levels of points could be assessed.

10. By scoring multiple assessments of legal status points an alteration of the probability of incarceration not intended by the Commission could result. Legal status is a situational criteria that is to be applied only once and was not intended to be a function of the number of offenses committed while under legal constraint. A proposed committee note to clarify the Commission's intent is attached.

WHEREFORE the SENTENCING GUIDELINES COMMISSION petitions the Court to make the revisions to the rule as requested.

---

LEONARD HOLTON, Esquire  
Director, SENTENCING  
GUIDELINES COMMISSION  
Supreme Court Building  
Tallahassee, FL 32399-1901  
(904) 922-5085  
Florida Bar # 199915

Certificate of Service

I certify that a copy of this Petition has been provided by regular United States mail to The Florida Bar, Tallahassee, FL 32301-8226, and to the Office of the Attorney General, The Capitol, Tallahassee, FL, 32301, this 2nd day of October, 1990.

---

LEONARD HOLTON, Esquire  
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Florida Bar # 199915

Committee Note to

Fla.R.Crim.P. 3.701(d)(6)

Old Rule

New Rule

Comments

Legal status points are to be assessed where forms of legal constraint existed at the time of the commission of offenses scored as primary or additional offenses at conviction.  
Legal status points are to be assessed only once whether there are one or more offenses at conviction.

The purpose of this revision is to clarify the original intent that legal constraint is a status consideration and is not to be considered a function of the number of offenses at conviction.

Committee Note to

Fla.R.Crim.P. 3.701(d)(7)

Old Rule

(d)(7) This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal episode or transaction. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim injury is the result of a crime for which the defendant has been acquitted, it shall not be scored.

New Rule

(d)(7) This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal episode or transaction and for each count whether there are one or more victims. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim injury is the result of a crime for which the defendant has been acquitted, it shall not be scored.

Comments

The purpose of this amendment is to provide consistency in the scoring of victim injury by scoring for each offense at conviction for which victim injury can appropriately be scored whether committed against a single victim or multiple victims.