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PRELIMINARY STATEMENT

Petitioner, Levi Rahming, 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 St. Lucie 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 Levi Rahming was convicted following a jury trial of attempted second degree murder with a firearm [as to Count I], aggravated battery with a firearm [as to Count II], and two counts of attempted robbery with a firearm and mask [as to Counts III and IV] (R 686, 776-777). He was so adjudicated (R 781-782).

On June 11, 1990, the judge sentenced Mr. Rahming as follows: as to Count I, thirty years imprisonment with a three-year mandatory minimum; as to Count II, to fifteen years imprisonment to run concurrently with Count I with a three-year mandatory minimum to run consecutively to the three-year mandatory minimum in Count I; as to Count III, fifteen years imprisonment with a three-year mandatory minimum, to run concurrently with Count II; as to Count IV, fifteen years with a three-year mandatory minimum, to run concurrently with Count III (R 754-755, 783-787). Pursuant to Section 39.111(e), Florida Statutes (1989), the judge entered an Order imposing adult sanctions (R 789-790).

In sentencing, the judge added points for legal constraint four times, once for each offense at conviction, over defense counsel's objection (R 718). This resulted in Petitioner receiving eighty-four (84) points instead of twenty-one (21) points (R 714, 718, 779-780). The multiple scorings for legal constraint placed Petitioner one cell higher than he would have been had he been properly scored for legal constraint. Petitioner maintained that his total points should have been two hundred thirty-five points instead of two hundred ninety-eight points which would have placed him in the recommended range of seventeen to twenty-two (17-22)

years incarceration instead of twenty-two to twenty-seven (22-27) years incarceration. However, the trial judge rejected Petitioner's objection.

On direct appeal, the Fourth District Court of Appeal upheld this multiplication of legal constraint points, citing Carter v. State, 571 So.2d 520, 522 (Fla. 4th DCA 1991) review granted, Case No. 77,434 June 5, 1991. Rahming v. State, Case No. 90-1704 (June 5, 1991) (Appendix 1).

This Court accepted jurisdiction of the instant cause on October 22, 1991. Prior to this Court's Order accepting jurisdiction it decided Flowers v. State, 16 F.L.W. S637 (Case No. 76,854 Opinion filed October 3, 1991). Flowers is dispositive of the instant cause and mandates a reversal of Petitioner's sentence.

## SUMMARY OF 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. Rahming committed while he was on probation. This was error, in the absence of any express language in the sentencing guidelines authorizing such multiplication.



## ARGUMENT

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

Initially it must be noted that this Court has decided the present issue in Flowers v. State, 16 F.L.W. S637 (Case No. 76,854 Opinion filed October 3, 1991). Pursuant to Flowers, Petitioner's sentence must be reversed. Petitioner files his brief on the merits in order to comply with this Court's October 22, 1991 order to file his brief on the merits.

In the present case, Mr. Rahming's guidelines sentence was arrived at by scoring eighty-four legal constraint points for each of the four offenses for which he was being sentenced and which were committed while he was on probation (R 714, 718, 779-780). Mr. Rahming'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 Rule 3.701(d)(6), Fla.R.Crim.P. 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 be indulged. E.g., Palmer v. State, 428 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. Fla.R.Crim.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>1</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

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<sup>1</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.

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 one-cell upward bump of Mr. Rahming's guidelines sentence.<sup>2</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

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<sup>2</sup> Had the legal constraint points been scored only once, Petitioner's guidelines sentence would place him in the range of seventeen (17) to twenty-two (22) years in prison (R 714, 718, 779-780).

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 conviction, but also for any "additional" offenses on the scoresheet 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 intent 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. Florid 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. Rahming'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 twenty-one points for being on legal constraint at the time he committed the new offenses for which he was being sentenced.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the Fourth District Court of Appeal and to remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Douglas J. Glaid, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 28<sup>th</sup> day of October, 1991.

  
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Counsel for Petitioner