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IN THE SUPREME COURT OF FLORIDA

JOSE REINALDO AIRA,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 90-2553

S.Ct. Case No. 78,486

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner, JOSE REINALDO AIRA, was charged by information with resisting an officer with violence. (R17) Appellant entered a nolo contendere plea to the charge, and at the same time, entered a nolo contendere plea to a charge of attempted possession of cocaine in another case. (R23) Appellant was sentenced in both cases on the same day. (R2-11)

At sentencing, defense counsel objected to scoring legal constraint twice. (R6) If thirty-six points, the amount of one legal constraint, are removed from the scoresheet, the recommended sentence becomes community control or twelve to thirty months imprisonment, with a permitted range of any non-state prison sanction to three and one-half years imprisonment.

Petitioner timely appealed this decision to the Fifth District Court of Appeal and argued that it was error to score multiple legal constraint points. The Fifth District Court of Appeal in an opinion rendered August 1, 1991, rejected Appellant's argument. In so doing, the court noted that its rationale has been rejected by the Second District Court of Appeal in Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991).

Petitioner timely filed his notice to invoke discretionary jurisdiction with this Court on August 16, 1991. The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with the decision of the Second District Court of Appeal in Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), on the identical issue. Thus, this Court has discretionary

jurisdiction to accept the instant case to resolve this conflict.

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with a decision of the Second District Court of Appeal in Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991), on the identical issue.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHERE SUCH DECISION IS IN DIRECT CONFLICT WITH A DECISION FROM THE SECOND DISTRICT COURT OF APPEAL ON THE SAME ISSUE AND WHICH ISSUE IS CURRENTLY PENDING BEFORE THIS COURT.

This Court has discretionary jurisdiction to review a case which is in direct conflict with the decision of another district court of appeal on the same rule of law. See Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. On the face of the decision in the instant case, the Fifth District Court of Appeal has noted that the Second District Court of Appeal has specifically rejected the rationale of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990), on which the Second District Court relies in Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991). In Flowers the Fifth District Court of Appeal ruled that applying a multiplier to legal constraint points where the accused is being sentenced for more than one offense committed while on legal constraint, was proper. In so doing, the Fifth District Court of Appeal certified to this Court the question of applying a multiplier to the legal constraint points as a question of great public importance. In Lewis, the Second District Court of Appeal considered the same issue and specifically rejected the rationale of the Fifth District Court of Appeal in Flowers. Clear conflict exists.

Petitioner also draws this Court's attention to the fact that the Flowers, decision is currently pending resolution by

this Court in Case No. 76,854.

CONCLUSION

BASED ON the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review on the basis of express conflict between the decision of the Fifth District Court of Appeal sub judice and the decision of the Second District Court of Appeal in Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991).

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Jose Reinaldo Aira, Lincoln Arms Hotel, #221, 434 W. Church Street, Orlando, Florida 32801, on this 27th day of August, 1991.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JOSE REINALDO AIRA, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	S. CT. CASE NO.

A P P E N D I X

Aira v. State, 16 F.L.W. D2011 (Fla. 5th DCA August 1, 1991)

Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990)

Lewis v. State, 574 So.2d 245 (Fla. 2d DCA 1991)

order of July 23, 1990, the parties submitted the case upon the deposition of Heck to the court for a determination "as a question of law."

The court ordered that OBS "shall . . . submit a written memorandum of law" and that thereafter Heck "shall submit an opposing memorandum[.]" Heck claims that OBS failed to serve her with a copy of a memorandum.[2] Heck, waiting for the OBS memorandum, filed nothing. After an appropriate delay, the court entered its final judgment in favor of OBS on September 20, 1990.[3]

On September 26, Heck, by letter to the court, requested a rehearing because she was not permitted to be heard prior to final judgment. She contended that she was told not to file a memorandum until OBS did and that while she was waiting, the final judgment was entered.[4]

On October 23 the judge responded to Heck's follow-up letter by returning a copy of her letter with the following handwritten notation:

> The court finds in favor of the plaintiff—the final judgment stands as entered.
>
> Hale R. Stancil
> 10/23/90

On October 31, 1990 Heck appealed to the Marion County Circuit Court. OBS moved to dismiss the appeal because it "was filed more than 30 days from the date of the final judgment." The circuit court dismissed the appeal.

Since we construe her letter of September 26 to be a timely motion for rehearing not ruled on by the court until October 23, 1990, we find that the appeal filed on October 31 was timely and reverse its dismissal.

We remand to the circuit court for consideration of Heck's due process argument that she was denied the right to be heard. She expected, and asserts that she was assured by court and counsel, that her position expressed in a memorandum would be considered by the judge before ruling. She contends she was denied that right because OBS failed to serve her a copy of its memorandum. If so, she was denied the right to make an argument in support of her position.

Although not necessary for this opinion, we find the underlying issue interesting. The complaint does not specify the basis for alleging that its sales lease which designates Serenity Bloodstock Company, Inc. as its tenant was, in fact, a lease "entered into" by Heck. In OBS's memorandum supplied to the court after an order to supplement the record, it is apparent that OBS relied on 673.403(2), Florida Statutes (1989) although this statute applies only to negotiable instruments.[5]

But this issue awaits another day.

REVERSED with instructions to reinstate Heck's appeal in the circuit court. (GRIFFIN and DIAMANTIS, JJ., concur.)

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[1]Our task and that of respondent's counsel is made more difficult because petitioner is acting pro se. For example, her motion to dismiss, referred to in the file, (as well as a transcript of the hearing also referred to) is not included in the record. Because our decision is not based on the merits of the case, we find such omission not fatal.

[2]Actually it appears that OBS did file a memorandum with the clerk. However, as evident from the judge's letter of October 8, 1990, it apparently failed to make it to the court file—or to the judge. This lends credence to Heck's complaint that she did not receive a copy.

[3]The certificate of service shows that it left the judge's office on September 24.

[4]After the September 26th letter was acknowledged by the judge explaining that he waited until the time ran for memorandums before entering the final judgment, Heck again wrote the court complaining that she was not given an opportunity to be heard although the court and opposing attorney promised her that opportunity.

[5]§ 673.102(1)(3), Fla. Stat. (1989).

* * *

Dissolution of marriage—Settlement agreement—Modification—Error to grant wife's request for modification of settlement agreement providing for reasonable contact between husband and child and that neither party remove minor child from state for period longer than 30 days without written consent of other party based solely on wife's desire to marry out-of-state resident and move to that state with child

GRADY JUDE CONROY, Appellant, v. ARLENE THERESA CONROY, Appellee. 5th District. Case No. 90-2014. Opinion filed August 1, 1991. Appeal from the Circuit Court for Osceola County, Dorothy J. Russell, Judge. Gordon A. Shuey, Orlando, for Appellant. Jeff B. Clark, Orlando, for Appellee.

(PER CURIAM.) The former wife moved the trial court to modify the final judgment of divorce which adopted a dissolution settlement agreement providing in pertinent part:

> F. The Husband and the minor child shall have the right of liberal and reasonable contact with each other. Each party shall exercise good faith in promoting contact between the Husband and the child.
>
> G. Neither party shall remove the child from the State of Florida for a period longer than thirty (30) days without the written consent of the other party.

The sole basis for the requested modification is the custodial parent's desire to marry a New York resident and move with the parties' minor child to that state. The trial court's order granting the modification conflicts with *Cole v. Cole*, 530 So.2d 467 (Fla. 5th DCA 1988); *Jones v. Vrba*, 513 So.2d 1080 (Fla. 5th DCA 1987); and *Giachetti v. Giachetti*, 416 So.2d 27 (Fla. 5th DCA 1982). For that reason we reverse and remand.[1]

REVERSED and REMANDED. (GOSHORN, C.J. and COWART, J. and ORFINGER, M., Senior Judge, concur.)

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[1]*See* Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991).

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Legal constraint—No error to assess legal constraint points for each offense committed while under legal constraint—Conflict—No error in imposing public defender's fee without notice and opportunity to be heard where defendant stipulated to value of public defender's services—No error in imposing statutory costs without special notice

JOSE REINALDO AIRA, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-2553. Opinion filed August 1, 1991. Appeal from the Circuit Court for Orange County, Gary L. Formet, Sr., Judge. James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James N. Charles, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Jose Reinaldo Aira appeals the imposition of his sentence based upon a single scoresheet which shows that legal constraint points were calculated by multiplying 36 (the points to be awarded for commission of one offense while under legal restraint) times the two new offenses. We affirm on the authority of *Walker v. State*, 546 So. 2d 764 (Fla. 5th DCA 1989), and note conflict with *Lewis v. State*, 574 So. 2d 245 (Fla. 2d DCA 1991).

Aira also complains that a public defender's fee and statutory costs were imposed upon him as a condition of probation without a special notice being given to him in addition to the statutory notice. Ordinarily, he would be entitled to notice and opportunity to be heard before a public defender's fee is imposed pursuant to *Bull v. State*, 548 So. 2d 1103 (Fla. 1989), but in this case, the record reflects that Aira stipulated to the value of the public defender's services. As to the statutorily mandated and liquidated costs, no special notice was required before imposition. *Beasley v. State*, 580 So. 2d 139 (Fla. 1991).

AFFIRMED. (GOSHORN, C.J., and DAUKSCH, J., concur.)

* * *

agree that the fees were improperly assessed against Community. The right of an attorney to receive fees under the common fund doctrine is based on the theory that the successful efforts of the attorney benefits the class entitled to receive the fund and equity requires that each class member bear his or her pro rata share of the cost of recovering the fund. Thus, we conclude that Rishoi's fees should be paid by the receivership and not Community. *Kittel, supra; Fidelity, supra. See also Estate of Hampton v. Fairchild-Florida Construction Company,* 341 So.2d 759 (Fla.1976).

AFFIRMED in part; REVERSED in part; REMANDED.

COBB and PETERSON, JJ., concur.

Willie Otis FLOWERS, Appellant,

v.

STATE of Florida, Appellee.

No. 89-2304.

District Court of Appeal of Florida, Fifth District.

Oct. 11, 1990.

Defendant was convicted in the Circuit Court, Brevard County, John Antoon, II, J., of offenses committed while on probation, and he appealed his sentence. The District Court of Appeal, Goshorn, J., held that points for "legal constraint" could be awarded for each offense committed while on probation.

Affirmed; question certified.

Cowart, J., filed dissenting opinion.

In imposing sentence under guidelines, points for "legal constraint" could be awarded for each offense committed while on probation. West's F.S.A. RCrP Rule 3.701.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

GOSHORN, Judge.

Flowers appeals his sentence because points for "legal constraint" were awarded for each offense committed while on probation. We affirm. *Walker v. State,* 546 So.2d 764 (Fla. 5th DCA 1989).

Flowers urges that our decision in *Miles v. State,* 418 So.2d 1070 (Fla. 5th DCA 1982) dictates we reconsider our opinion in *Walker* and reverse. We reject this contention because *Miles* involved a single offense, while both Walker and Flowers committed multiple offenses for which they were being sentenced. In our view, *Walker*'s construction of Rule 3.701, Florida Rules of Criminal Procedure promotes the goal of fairness and uniformity envisioned by the enactment of the sentencing guidelines.

Because we are aware that numerous appeals involving this interpretation are pending, we certify to the supreme court 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?

AFFIRMED.

HARRIS, J., concur.

COWART, J., dissents with opinion.

such routine practice, in the absence of a proper factual predicate, is constitutionally impermissible. *Redfin v. State*, 453 So.2d 425 (Fla. 5th DCA 1984); *see generally, Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). Although the officer observed a bulge in the juvenile's jacket, he did not observe any bulges in appellant's clothing and the frisk of appellant's person was inappropriate. Furthermore, even when a basis for a protective frisk does exist the intrusion must be limited to an external pat-down of the individual. *See Sibron; cf., Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The officer's additional directive for appellant to empty his pockets, when there was no indication of a weapon contained therein, exceeded the scope of a protective pat-down and was also constitutionally impermissible. *See Blair v. State*, 563 So.2d 824 (Fla. 2d DCA 1990); *Sanchez v. State*, 516 So.2d 1062 (Fla. 3d DCA 1988); *see also, Piediscalzo v. State*, 549 So.2d 255 (Fla. 2d DCA 1989).

Since the search of appellant's person was unlawful, the physical evidence and statements derived therefrom should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The judgments of conviction are reversed and the sentences vacated, and the cause is remanded.

BOOTH and MINER, JJ., concur.

Ricky LEWIS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–00369.

District Court of Appeal of Florida, Second District.

Feb. 1, 1991.

Defendant was sentenced to seven years in prison by the Circuit Court, Manatee County, Thomas M. Gallen, J. Defendant appealed challenging computation of guidelines score sheet. The District Court of Appeal, Threadgill, J., held that: (1) multiplier could not be used with legal constraint to arrive at a recommended guideline sentence, and (2) trial court was without sufficient information to decide which sentence to impose due to incorrect scoring in computing presumptive guideline sentence.

Reversed and remanded.

1. Criminal Law ⇐1245(2)

Multiplier may not be used with legal constraint to arrive at recommended guideline sentence. West's F.S.A. RCrP Rules 3.701, 3.701, subd. d, par. 6, 3.988.

2. Criminal Law ⇐1232

Rule of lenity applies to sentencing guidelines rules. West's F.S.A. RCrP Rules 3.701, 3.988; West's F.S.A. §§ 775.021(1), 921.0015, 921.001.

3. Criminal Law ⇐1181.5(8)

Trial court was without sufficient information to decide which sentence to impose, and thus, remand for resentencing was required, even though sentence imposed was in permitted range, where trial court incorrectly scored second and third-degree felony offenses in calculating presumptive guideline sentence. West's F.S.A. RCrP Rules 3.701, subd. d, par. 8, 3.988(a-i).

4. Criminal Law ⇐1230

In creating two discretionary ranges for sentencing, i.e., recommended range and permitted range, instead of merely increasing presumptive range, Legislature intended trial courts to apply different criteria to each range, and thus, without knowing both presumptive and permitted ranges for particular offense, courts cannot implement intent of sentencing guidelines rules and statutes. West's F.S.A. RCrP Rules 3.701, subd. d, par. 8, 3.988(a-i).

way he was wearing it" to suggest that appellant had a weapon, the officer responded "no."

James Marion Moorman, Public Defender, and Megan Olson, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Brenda S. Taylor, Asst. Atty. Gen., Tampa, for appellee.

THREADGILL, Judge.

Ricky Lewis appeals a guidelines sentence of seven years in prison. He challenges the computation of his guidelines scoresheet on two grounds, and we reverse on both.

[1] The appellant first contends that Florida Rules of Criminal Procedure 3.701, and 3.988, do not authorize the use of a multiplier when calculating points for legal constraint. On the scoresheet used to compute the appellant's recommended sentence, the state multiplied the points for legal constraint by four, the number of new offenses the appellant committed while on probation. The trial court felt bound by the authority of *Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989), to use the multiplier. *See Chapman v. Pinellas County*, 423 So.2d 578, 580 (Fla. 2d DCA 1982) ("[A] trial court in this district is obliged to follow the precedents of other district courts of appeal absent a controlling precedent of this court or the supreme court."). Since *Walker*, the Fifth District has certified the use of the multiplier to the Florida Supreme Court, *Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA 1990), and the Fourth District has ruled in favor of a multiplier, *Carter v. State*, 571 So.2d 520 (Fla. 4th DCA 1990). We do not agree that the guidelines require the use of a multiplier with legal constraint.

[2] Florida Rules of Criminal Procedure 3.701,[1] and 3.988, do not require the use of a multiplier. Nor do they contain language susceptible of a different construction. Even assuming ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988) 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." We construe this statute as applying to the sentencing guidelines rules. *See Williams v. State*, 528 So.2d 453, 454 (Fla. 5th DCA 1988) (adopts the rule of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); §§ 921.0015 and 921.001, Fla.Stat. (Supp. 1988) (adopts rules 3.701 and 3.988, as substantive criminal penalties).

Strict construction requires that "'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included 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.'" *State v. Wershow*, 343 So.2d 605, 608 (Fla.1977), *quoting Ex parte Amos*, 93 Fla. 5, 112 So. 289 (1927). Therefore, applying the rule of lenity and strict construction to the sentencing guidelines rules and statutes, we conclude that a multiplier may not be used with legal constraint to arrive at a recommended guidelines sentence.

[3] The appellant also argues that the scoresheet incorrectly scores the second and third-degree felony offenses in the primary offense category. In addition, the scoresheet incorrectly scores three third-degree offenses, whereas the appellant was convicted of only two. The state concedes error, but argues it is harmless because the revised score would place the appellant in a "permitted" sentencing range of three and one-half to seven years in prison, whereas he is currently sentenced in the "recom-

1. Florida Rule of Criminal Procedure 3.701 d.6. (1989): 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 have failed to appear for a criminal judicial proceeding or who have violated conditions of a proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

Thomas M. SCOTT, Appellant,

v.

STATE of Florida, Appellee.

No. 90–00359.

District Court of Appeal of Florida, Second District.

Feb. 1, 1991.

Defendant convicted of offenses including robbery in the Circuit Court, Manatee County, Thomas M. Gallen, J., appealed his sentences. The District Court of Appeal, Altenbernd, J., held that use of legal status at time of offense as a multiplier for all offenses sentenced under scoresheet was improper.

Affirmed in part, reversed in part and remanded for resentencing.

Criminal Law ⇐1245(2)

Points a defendant received under guideline scoresheet for his legal status at the time of offense were improperly multiplied by all offenses sentenced under the scoresheet; use of multiplier resulted in 56% of the points assessed against defendant being based on his legal status, despite lack of explicit statutory authority for using multiplier for legal status. West's RCrP Rule 3.701; West's F.S.A. § 921.0015.

James Marion Moorman, Public Defender, and Megan Olson, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Elaine L. Thompson, Asst. Atty. Gen., Tampa, for appellee.

...ended" range of seven years. We dis-...gree.

[4] Rules 3.701 d.8.[2] and 3.988(a)–(i) ...ere amended to provide for a permitted ...nge within which the trial court might ...crease a recommended guidelines sen-...nce without written reasons for depar-...ure. As we have stated before, a trial ...urt is without sufficient information to ...ecide which sentence to impose without ...nowing the presumptive guideline sen-...nce. *See Berrio v. State*, 518 So.2d 979 (Fla. 2d DCA 1988); *Parker v. State*, 478 So.2d 823, 824 (Fla. 2d DCA 1985). The ...resumptive guideline sentence as recom-...ended would be four and one-half to five ...nd one-half years in prison.

We see no reason to modify our previous ...ecisions because of the addition of a high-...r discretionary range. By creating two ...scretionary ranges, instead of merely in-...reasing the presumptive range, we can ...nly conclude that the legislature intended ...e trial courts to apply different criteria to ...ch range. Without knowing both the ...resumptive and permitted ranges for a ...rticular offense, courts cannot implement ...e intent of the sentencing guidelines ...les and statutes. We therefore reverse ...e appellant's sentence and remand for ...rrection of the scoresheet and resentenc-...g.

Reversed and remanded.

SCHOONOVER, C.J., and RYDER, J., ...ncur.

[2] Florida Rule of Criminal Procedure 3.701 d.8. (1989): Guidelines Ranges: The recommended ...ntences provided in the guideline grids are ...sumed to be appropriate for the composite ...ore of the offender. A range is provided in ...der to permit some discretion. The permitted ...nges allow the sentencing judge additional discretion when the particular circumstances of a crime or defendant make it appropriate to increase or decrease the recommended sentence without the requirement of finding reasonable justification to do so and without the requirement of a written explanation.