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**FILED**

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JUN 21 1991

CLERK, SUPREME COURT

By  Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,956

**TERRANCE RICKS,**  
Appellant/Petitioner,

vs.

**STATE OF FLORIDA,**  
Appellee/Respondent,

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MERITS BRIEF OF RESPONDENT

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**RULES**

Fla.R.Crim.P. 3.701(b) (4) . . . . .	3, 4, 6
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**PRELIMINARY STATEMENT**

Respondent was the prosecution in the trial court and appellee in the District Court of Appeal and Petitioner was the defendant in the trial court and appellant in the District Court of Appeal. In the brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by Respondent.

STATEMENT OF THE CASE AND FACTS

The State accepts the Statement of the Case and Facts as set forth in Petitioner's Initial Brief to the extent that it presents an accurate nonargumentative recitation of the proceedings below.

### SUMMARY OF ARGUMENT

Legal constraint points are properly assessed for each offense committed by a defendant while on probation. "The severity of a sanction should increase with the length and nature of the offender's criminal history." Fla.R.Crim.P. 3.701(b)(4). Although violations of probation are not substantive offenses, it is nonetheless proper to sanction more severely those who blatantly violate their restrictions by repeatedly committing crimes.

LEGAL CONSTRAINT POINTS ARE PROPERLY  
ASSESSED FOR EACH OFFENSE COMMITTED  
BY A DEFENDANT WHILE UNDER SUCH  
CONSTRAINT

Petitioner contends that the Court erred in assessing one hundred and ninety-two (192) points for legal constraint, once for each of the eight offenses for which Petitioner was being sentenced. He contends that points for legal constraint are to be applied only once, regardless of the number of offenses for which a defendant is being sentenced, as opposed to ascribing legal status points for each offense at the time of sentencing. Respondent disagrees.

"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 who commits only one crime." Adams v. State, 16 F.L.W. D642 (Fla. 5th DCA March 7, 1991). The Fifth District Court of Appeal observed in an earlier case that "[one] stated purpose of the 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 1986), citing Fla. R.Crim.P. 3.701 (b)(4). The Petitioner committed several additional offenses while on probation for earlier offenses. A defendant who commits a second or subsequent violation of probation can only be sentenced to the next higher cell under the sentencing guidelines without providing written reasons for departure. Fla.R.Crim.P. 3.701(d)(4). If the Petitioner's interpretation is accepted, a defendant, who committed

numerous criminal acts, despite the legal constraint, will receive no more of a sanction for blatantly and repeatedly violation his probation than does a defendant who violated it but once.

Petitioner points to the recently amended scoresheet to support its position. It is true that the new scoresheet provides for the multiplication of victim injury points. Equally as true, it was not until the amendment that the scoresheet contained a multiplier on its face. Cf. In Re: Florida Rules of Criminal Procedure 3.701 and 3.988 (Sentencing Guidelines), 15 F.L.W. S210 (Fla. April 12, 1990) and In Re: Florida Rules of Court, West Pub. (St. Paul, MN 1990). One of the problems in comparing legal constraint points with victim injury points is that the latter seems to have finally been resolved, while the instant issue is of recent origin. There have been no committee notes whatsoever regarding legal constraint points under rule 3.701(d)(6) since the guidelines were established. Subsection (d)(7), on the other hand, has been amended on a number of occasions for purposes of clarification. See, e.g., Pisano v. State, 539 So.2d 486, 487 (Fla. 2d DCA 1989), cause dismissed, 554 So.2d 1165 (Fla. 1990). Because this is the first plenary review of the instant issue by this Court, the mere omission of a multiplier on the face of the scoresheet is not significant. Indeed, the scoresheet now provides a space for the "total" of legal constraint points. See Fla.R.Crim.P. 3.988 (1990).

The comparison between the legal constraint provision and the express multipliers in categories 1, 3, 5, and 6 of the scoresheet

is tenuous because each of the latter is included under a defendant's prior record. Prior record, like legal constraint, is in and of itself a section under the rule. Fla.R.Crim.P. 3.701(d)(5). The express multipliers, on the other hand, are not. Further, points for prior convictions are not straight multipliers. For instance, one prior conviction for a second degree felony scores thirty (30) points on a category 9 scoresheet, while four priors score one hundred and thirty-eight (138) points. Of course, if the prior record was a straight multiplier the score would have been one hundred and twenty (120) points. Hence, a comparison between prior record and legal constraint is strained because it appears likely that different policy considerations apply.

Independent of crimes per se, the fact that a criminal continues to commit crimes despite placement on probation is material to consideration of "nature of the offender's criminal history." Fla.R.Crim.P. 3.701(b)(4). Although violation of probation is not a substantive offense, criminal defendants should not be free to repeatedly defy such restrictions with virtual impunity. In Gissinger, the court noted:

. . . it would not promote uniformity in sentencing if one defendant could avoid the points for legal constraint because he committed a less serious crime while on probation for an earlier, more severe crime, while another defendant who committed the identical crimes, only in reverse order, would receive the points for legal constraint. That would produce incongruous results in cases which should be treated alike.

481 So.2d at 1270.

In closing, one more point needs to be addressed. The defense

speaks of the proposed clarification to Fla.R.Crim.P. 3.701(d)(6). As his discussion indicates, the passage will not become part of the rule unless the legislature implements it. Florida Rules of Criminal Procedure, Re: Sentencing Guidelines (Rules 3.701 and 3.988), 16 F.L.W. S198, 199 (Fla. March 7, 1991). By sold holding, this court acknowledged that the legislature might have very well intended to score legal constraint differently than that suggested in the committee proposal.


Thus, the question certified by the Fourth District Court of Appeal should be answered affirmatively and the decision below approved.

**CONCLUSION**

Wherefore, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the decision of the District Court be approved.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by Courier to: TANJA OSTAPOFF, Counsel for Defendant, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 18 day of June, 1991.



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Of Counsel