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CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSE REINALDO AIRA,)
)
 Petitioner/Appellant,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

S.C.T. CASE NO. 78,486

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

CASES CITED:

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Aira v. State

583 So.2d 419 (Fla. 5th DCA 1991)

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Flowers v. State

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OTHER AUTHORITIES:

Rule 3.701(d)(6), Florida Rules of Criminal Procedure

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STATEMENT OF THE CASE AND FACTS

Petitioner, Jose Aira, was charged with resisting an officer with violence (R17). Petitioner entered a plea of no contest to the charge, and to possession of cocaine in another case (R23). Petitioner was sentenced for both crimes at a single sentencing procedure (R2-11).

At the sentencing hearing, defense counsel objected to scoring legal constraint points twice (R6). The additional thirty six points for a single legal constraint, raised the recommended sanction from the second to the third cell (R27). Petitioner was sentenced to two years community control, which is within the permitted range of the third cell (R39-41).

Petitioner appealed the double scoring of legal constraint points. The Fifth District Court of Appeal affirmed the use of the legal constraint multiplier, Aira v. State, 583 So.2d 419 (Fla. 5th.DCA 1991). The Fifth, in its opinion, recognized conflict with the Second D.C.A..

This Court accepted jurisdiction, and this appeal follows.

SUMMARY OF THE ARGUMENT

Petitioner argues that it was error for the lower court to score legal constraint points for each offense Petitioner was being sentenced on.

POINT

THE LOWER COURT ERRED BY
MULTIPLYING LEGAL CONSTRAINT POINTS
BY THE NUMBER OF OFFENSES FOR WHICH
PETITIONER WAS BEING SENTENCED.

The question presented by this case is whether legal constraint points are to be assessed for each offense committed while under legal constraint. This Court has recently answered this question in the negative, Flowers v. State, 16 FLW S637 (Fla. October 3, 1991).

The Florida Sentencing Guidelines Commission has also made it clear that it never intended to allow for multiple legal constraint points. Paragraphs eight through ten of the attached petition in this Court's case number 76,854 deal with the issue. The proposed Fla. R. Crim. P. 3.701(d)(6) included in the petition reads:

Legal constraint points are to be assessed where forms of legal constraint existed at the time of the commission of the 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 comment to this section reads:

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.

Petitioner asks this court to follow its own reasoning and the intent of the guidelines commission, vacate Petitioner's sentence and remand for resentencing.

CONCLUSION

BASED UPON the reasons expressed herein, Petitioner respectfully requests that this Honorable Court vacate Petitioner's sentence and remand for resentencing.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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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 25th day of November, 1991.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JOSE REINANDO AIRA,)
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 Appellant/Petitioner,)
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vs.) S.CT. CASE NO.
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STATE OF FLORIDA,)
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 Respondent.)
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A P P E N D I X

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