

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 91,270**

**THE STATE OF FLORIDA,**

**Petitioner,**

**v.**

**STEVEN RUBIN,**

**Respondent.**

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**ON PETITION FOR DISCRETIONARY REVIEW**

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**BRIEF OF RESPONDENT ON THE MERITS**

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## INTRODUCTION

Petitioner, the State of Florida, was the Appellee below. Respondent, STEVEN RUBIN, was the Appellant. In this brief, the parties will be referred to as the State and the Defendant. The symbol "R" will designate the record on appeal. The symbol "T" will designate the transcript of proceedings. The symbol "A" will designate the appendix to the brief filed by the Petitioner.

## STATEMENT OF THE CASE AND FACTS

The Defendant believes that the Statement of the Case and Facts presented by the State in its brief is incomplete and, therefore, will substitute the following Statement of the Case and Facts:

The Defendant was charged jointly with his father Al Rubin in a 16 (count) superseding information filed on May 28, 1996 (R34-48). In Counts 12 through 15, Steven Rubin and Al Rubin were charged jointly with four grand thefts which allegedly took place in late March and early April of 1994. (R44-47). In Counts 6 through 10, Steven Rubin and Al Rubin were charged jointly with three counts of grand theft and two counts of petty theft, which allegedly occurred in May of 1995. (R39-42a). In addition to these counts, Steven Rubin also was charged with two counts of burglary of an occupied structure (Counts 1 & 4), one count of burglary of an unoccupied structure (Count 2), two counts of felony criminal mischief (Counts 3 & 11), one count of misdemeanor criminal mischief (Count 5) and one count of conspiracy to commit burglary of an occupied structure (Count 16). (R34-48). The Defendants were tried jointly and the jury returned verdicts finding both Defendants guilty, as charged (R225-231).

As first time offenders, the Court ordered Presentence Investigation (PSI) Reports prepared. (T447). Steven Rubin's PSI was filed on August 12, 1996 (R272-82), as was the PSI prepared for his father Al Rubin (R256-270). With respect to Steven Rubin, the total sentence points, as correctly computed by the Probation Officer, was 58.6 (R282-83). Thus, as correctly computed by the Probation Officer, the recommended sentence for the Defendant would have been 30.6 months in state prison with a minimum of 22.9 months

and a maximum of 38.2 months (R280). The Probation Officer recommended that the Defendant be sentenced to a term of no less than two and a half year state prison, followed by two years probation. (R280).

Al Rubin's total guideline points amounted to 31.8, which mandated a guideline sentence of any non-state prison sanction (R267-68). The Probation Officer recommended a combination of imprisonment in the Dade County Jail and restitution. (R265).

Prior to sentencing, the State moved to depart from the Sentencing Guidelines, citing four grounds for Steven Rubin (R247) and one ground for departure for Al Rubin (R246). The ground asserted for departure for Al Rubin was identical to the first ground asserted in the State's Motion with respect to Steven Rubin, and consisted of the assertion that:

the offenses resulted in substantial economic hardship to the victim and consisted of illegal acts committed by means of concealment, guile or fraud to obtain money, and the offenses involved a high degree of sophistication and/or planning and occurred over a lengthy period of time, and the defendant used a position of trust and confidence to facilitate the commission of the offenses.

(R246-247).

In addition, with respect to Steven Rubin, the State alleged that the offenses caused great emotional harm, that the Defendant induced a minor to participate in the offenses and that the Defendant occupied a leadership role in a criminal organization. (R247).

At sentencing, the Court imposed departure sentences on both Defendants. The Court sentenced Al Rubin to three (3) in state prison followed by five (5) years probation,

with a special condition that he pay restitution in the amount of \$22,588.16, that he perform five hundred (500) hours of community service and that he write a letter of apology to the Hillel Community Day School (R340-344, 391). In imposing a departure sentence, the court stated two grounds for the upward departure. The first ground for departure was the one suggested by the State with respect to both Defendants and involved the finding that the offenses resulted in a substantial economic hardship to the victim, together with the other factors stated in the State's Motion (R240-41). The second ground for departure related to the fact that racially offensive symbols and words had been painted on the walls of the religious school which was the victim in this case. (R342). The Court indicated in its sentence that if, on appeal, no valid ground for departure was found to exist, Al Rubin should receive a guideline sentence of three hundred sixty four (364) days in jail, followed by four (4) years probation (R344).

In imposing her sentence on Steven Rubin, the Court did not rely upon the Guideline Score Sheet which was correctly calculated by the Probation Officer, but relied upon the State's calculations, which erroneously calculated the Defendant's sentencing range from a minimum of 31.785 months to a maximum of 52.975 months, almost fifteen (15) months more than that correctly calculated by the Probation Officer. (R352-53, 426). After stating that these were the guidelines that applied, the Court entered a departure sentence, sentencing Steven Rubin to eight (8) years in State prison, which was two and one half (2-1/2) times the maximum recommended under the correctly calculated guidelines. (R345-50).

The Court stated four (4) grounds for its departure. One of these grounds was the same ground relied upon for its departure with respect to Al Rubin, namely that the offense resulted in substantial economic hardship to the school as well as emotional trauma for the students and staff. (R347). The other grounds relied upon by the Court in departing upward were that the Defendant occupied a leadership role in a criminal enterprise, that the Defendant induced two minors to participate in the offenses and that the Defendant testified at trial and gave false testimony (R345-348). In addition to the prison sentence, Steven Rubin was sentenced to be placed on five (5) years probation, with the special condition that he pay Seventy-Eight Thousand Seven Hundred Fifty-Eight and sixteen cents (\$78,758.16) Dollars restitution, that he perform five hundred (500) hours of community service and that he write letters of apology. (R349, 392).

Following imposition of sentence, defense counsel filed a Motion to Set Aside Sentence (R363-64), followed by a Notice of Further Objections to Departure Sentences Imposed (R379-80). In the initial Motion, defense counsel objected to the fact that the Court had prepared its Sentencing Orders prior to the sentencings themselves, arguing that a sentence decided before the hearing violates due process. (R363-64). In the second pleading, defense counsel averred that prior to trial, plea offers had been offered to both Defendants whereby Al Rubin would be sentenced to probation and restitution and Steven Rubin would be sentenced to a maximum of fifteen (15) months in jail, extended probation and restitution. Defense counsel argued that the sentences imposed by the Court, which substantially exceeded the guidelines, violated the Defendants' Fifth Amendment Rights by penalizing the Defendants for going to trial. (R379-80).



On September 3, 1996, the trial court conducted a hearing in which the Court made its finding concerning the amount of restitution to be paid by the Defendants and denied Defendants' Motion to set aside the sentences (R443-52). During the course of this hearing, the Court indicated that had an apology been offered to the victims by the Defendants the Court would have modified any potential sentences it was considering. (R449).

Both Defendants appealed their convictions and sentences to the District Court of Appeal of Florida, Third District. The District Court affirmed their convictions. With respect to the Defendant Al Rubin, the District Court reversed his departure sentence and remanded the case with instructions that he be resentenced within the guidelines. The Court found that the first ground for departure stated by the trial court, based upon its finding that the victim suffered substantial economic hardship, was invalid in the absence of a preponderance of proof that the victim indeed sustained a "substantial economic hardship" and accepted the State's confession of error with respect to the second cited reason for departure, the painting of the offensive anti-somatic symbols on the victim's property during the commission of the thefts. (R461; A.3). It should be noted that pursuant to this opinion, Al Rubin's case was severed from that of Steven Rubin and on remand, the District Court re-sentenced Al Rubin to time served, followed by a period of probation and restitution.<sup>1</sup>

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The remand occurred approximately one (1) year after Al Rubin had begun serving his sentence and, therefore, the trial court ordered him released to begin serving the probationary portion of his sentence in June of 1997.

Steven Rubin also challenged his departure sentence arguing, inter alia that his departure sentence must be vacated and that he must be re-sentenced because the trial court had relied upon an incorrectly calculated score sheet in determining what departure sentence to impose. Additionally, the Defendant challenged each of the grounds relied upon for departure by the trial court. It should be noted that if the four (4) grounds relied upon by the court in imposing departure sentence on Steven Rubin, one of the grounds, the finding of substantial economic hardship, was addressed by the District Court in connection with Al Rubin's appeal and found to be invalid in the absence of a preponderance of proof that the victim indeed sustained a "substantial economic hardship" (R461) and the State confessed error with respect to a second ground, the Court's finding that the Defendant testified at trial and gave false testimony, under well established Florida law which holds that this is not an appropriate ground for departure. E.g. Beaubais v. State, 475 So.2d 1342 (Fla. 3d DCA 1985); City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985). Steven Rubin also argued that the trial court had unconstitutionally penalized him for exercising his right to go to trial and for testifying on his own behalf and that this required that he be resentenced by a different judge.

The District Court agreed with Steven Rubin's argument that his departure sentence must be vacated and that he must be re-sentenced due to the fact that the trial court had relied upon an incorrectly calculated score sheet, holding that "a trial court must have the benefit of a properly prepared score sheet before it can make a fully informed decision on whether to depart from the recommended guideline sentence", citing to Smith v. State, 678 So.2d 1374, 1376 (Fla. 4<sup>th</sup> DCA 1996) (quoting Dawson v. State, 532 So.2d 89 (Fla. 4<sup>th</sup>

DCA 1988)); *Moore v. State*, 519 So.2d 22, 23 (Fla. 3d DCA 1987); and *Davis v. State*, 493 So.2d 82, 83 (Fla. 1<sup>st</sup> DCA 1986). (R460;A-2). The Court declined to address Rubin's other sentencing arguments, including his contention that the trial court had penalized him for exercising his right of trial and for testifying, as well as his challenges to the court's reasons for departure. (R460-61; A2-3). Upon rehearing, the District Court certified that its holding expressly and directly conflicts with *Hines v. State*, 587 So.2d 620 (Fla. 2d DCA 1991). (R463-64; A5-6). The District Court then stayed its mandate with respect to Steven Rubin only and the State filed its Petition for Review.

**QUESTION PRESENTED**

**WHETHER THE TRIAL COURT'S RELIANCE UPON AN INCORRECT SENTENCING GUIDELINE SCORE SHEET, WHICH ERRONEOUSLY AND SUBSTANTIALLY INCREASED THE GUIDELINE CALCULATIONS, CAN BE CONSIDERED HARMLESS ERROR, WHERE IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT THE RECORD ESTABLISHES THAT THE TRIAL JUDGE WOULD HAVE IMPOSED THE SAME DEPARTURE SENTENCE NOTWITHSTANDING THE SCORE SHEET ERROR?**

## SUMMARY OF THE ARGUMENT

The prevailing rule of law in this State is that a trial court must have the benefit of a properly prepared Score Sheet before it can make a fully informed decision on whether to depart from the recommended guideline sentence, and where an improperly calculated Score Sheet is utilized, an upward departure sentence must be vacated unless there is evidence disclosing, beyond a reasonable doubt, that the trial court would have departed to the extent it did, notwithstanding the fact that the presumptive sentence was less than that indicated by the Score Sheet. E.g. *Smith v. Singletary*, 666 So.2d 986 (Fla. 4<sup>th</sup> DCA 1996); *Smith v. State*, 678 So.2d 1374 (Fla. 4<sup>th</sup> DCA 1996); *Moore v. State*, 519 So.2d 22 (Fla. 3d DCA 1987); *Sellers v. State*, 578 So.2d 339 (Fla. 1<sup>st</sup> DCA 1991); *Scott v. State*, 469 So.2d 865 (Fla. 1<sup>st</sup> DCA 1985); *Brown v. State*, 508 So.2d 522 (Fla. 2d DCA 1987). The State itself concedes in its brief that proper application of the Harmless Error Doctrine permits the reviewing court to uphold the departure sentence, notwithstanding the use of an incorrect Score Sheet, **only** if the Appellate Court finds "that beyond a reasonable doubt the record establishes that the trial judge would have imposed **the same departure sentence** notwithstanding the Score Sheet error." (State's Brief at 7-emphasis supplied). In this case, it cannot be said, beyond a reasonable doubt, that the record establishes that the trial judge would have imposed the same departure sentence had she had the benefit of a correctly calculated Score Sheet. Therefore, the District Court's rejection of the State's harmless error argument comports with the prevailing rule in Florida and does not conflict with any other Florida Court decision.

## ARGUMENT

**THE TRIAL COURT'S RELIANCE UPON AN INCORRECT SENTENCING GUIDELINE SCORE SHEET, WHICH ERRONEOUSLY AND SUBSTANTIALLY INCREASED THE GUIDELINE CALCULATIONS, CANNOT BE CONSIDERED HARMLESS ERROR, WHERE IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT THE RECORD ESTABLISHES THAT THE TRIAL JUDGE WOULD HAVE IMPOSED THE SAME DEPARTURE SENTENCE NOTWITHSTANDING THE SCORE SHEET ERROR.**

The Defendant is not sure why this case is before this Court, inasmuch as the decision of the District Court of Appeal does not depart from the prevailing rule of law in Florida with respect to the effect of score sheet errors and does not directly and expressly conflict with any other Florida Appellate Court decision, least of all the decision in *Hines v. State*, 587 So.2d 620 (Fla. 2d DCA 1991). Simply stated, the rule followed in this State is that a trial court must have the benefit of a properly prepared score sheet before it can make a fully informed decision on whether to depart from the recommended guideline sentence, and where an improperly calculated score sheet is utilized, an upward departure sentence must be vacated unless there is evidence disclosing, beyond a reasonable doubt, that the trial court would have departed to the extent it did, notwithstanding the fact that the presumptive sentence was less than that indicated by the score sheet. *E.g. Smith v. Singletary*, 666 So.2d 986 (Fla. 4<sup>th</sup> DCA 1996); *Smith v. State*, 678 So.2d 1374 (Fla. 4<sup>th</sup> DCA 1996); *Moore v. State*, 519 So.2d 22 (Fla. 3d DCA 1987); *Sellers v. State*, 578 So.2d 339 (Fla. 1<sup>st</sup> DCA 1991); *Scott v. State*, 469 So.2d 865 (Fla. 1<sup>st</sup> DCA 1985); *Brown v. State*, 508 So.2d 522 (Fla. 2d DCA 1987). As the State itself concedes in its brief, proper

application of the harmless error doctrine permits the reviewing court to uphold a departure sentence, notwithstanding the use of an incorrect score sheet, **only** if the appellate court finds "that beyond a reasonable doubt the record establishes that the trial judge would have imposed **the same departure sentence** notwithstanding the score sheet error." (State's Brief at 7-emphasis supplied). In this case, it cannot be said, beyond a reasonable doubt, that the record establishes that the trial judge would have imposed the **same** departure sentence had she had the benefit of a correctly calculated score sheet. Accordingly, the district court's rejection of the State's harmless error argument comports with the prevailing rule in Florida and does not conflict with any other Florida appellate court decision, including *Hines v. State*, 587 So.2d 620 (Fla. 2d DCA 1991).

This conclusion is evident from the very authority cited by the State in its brief. *Smith v. State*, 678 So.2d 1378 (Fla. 4<sup>th</sup> DCA 1996), cited by the State at Page 6 of its Brief, also was cited by the district court in its decision. (R460; A2). In *Smith*, the court reversed the trial court's imposition of an upward departure sentence and remanded for resentencing because of an improperly calculated score sheet. There, as here, the State argued that because the trial court imposed an upward departure, the score sheet error did not effect the defendant's sentence and was, therefore, harmless. The district court rejected this contention:

However, because the trial court might have imposed a different sentence if it had a correctly computed score sheet, appellant's sentence must be vacated. See *Zeigler v. State*, 647 So.2d 672 (Fla. 4<sup>th</sup> DCA 1994). In accord with *Dawson v. State*, 532 So.2d 89 (Fla. 4<sup>th</sup> DCA 1988) we hold that the "trial court must have the benefit of a properly prepared score sheet before it can make a fully informed decision on whether to

depart from the recommended guideline sentence." See also *Davis v. State*, 493 So.2d 82 (Fla. 1<sup>st</sup> DCA 1986).

Id. at 1376.

The other cases cited by the District Court of Appeal in its decision in this case stand for the same proposition. Thus, in *Dawson v. State*, 532 So.2d 89 (Fla. 4<sup>th</sup> DCA 1988), the district court reversed the defendant's sentence based upon the trial court's use of an incorrectly calculated score sheet, noting that "since the trial judge might have imposed a different sentence had he had the benefit of a corrected score sheet, defendant's sentence must be vacated." Id. at 90. In *Moore v. State*, 519 So.2d 22 (Fla. 3d DCA 1987), a different panel of the Third District Court of Appeal reversed an upward departure sentence which was based upon an incorrectly calculated score sheet, noting that "[t]he trial court may well not wish to depart, or to depart so extensively, from a guideline sentence which is presumably substantially lower than the one which it previously considered when it imposed the original ten (10) year term." Id. at 23.

The other cases cited by the State in its brief also support this proposition. In *Scott v. State*, 469 So.2d 865 (Fla. 1<sup>st</sup> DCA 1985), the State argued that because of the amount of the upward departure, the trial court's error in utilizing an improper score sheet was harmless. This argument was rejected by the court of appeals:

However, the combination of errors herein made it appear that the maximum guideline sentence available was twelve (12) years, not the actual maximum of seven (7) years. We cannot say that the court would have imposed twenty-five (25) year concurrent sentences had the correct information been before it.

Id. 469 So.2d at 867.



In *Smith v. Singletary*, the district court reversed the defendant's upward departure sentence, holding as follows:

An upward departure sentence based upon an erroneously calculated guideline score sheet can be upheld only if the trial court demonstrated that the departure sentence would have been imposed notwithstanding the score sheet error. We are compelled to reverse in the absence of evidence disclosing beyond a reasonable doubt that the trial court would have departed , **to the extent it did**, notwithstanding the fact that the presumptive sentence was less than that indicated by the score sheet. (Citations omitted).

Id. 666 So.2d at 987 (emphasis supplied).

A review of the cases reveals few instances in which appellate courts of this State have affirmed sentences under the Harmless Error Doctrine, notwithstanding the trial court's utilization of an incorrectly calculated score sheet. Indeed, the State apparently has not read the cases cited at Page 6 through 7 of its Brief very carefully, since in all but two of those cases the district courts reversed sentences based upon score sheet errors after applying the Harmless Error Doctrine and finding that the error was not harmless. Thus, in *Sellers v. State*, 578 So.2d 339 (Fla. 1<sup>st</sup> DCA 1991), cited by the State at Page 6 of its Brief, the Court held that "applying the parameters of harmless error discerned from this cases, we conclude that the erroneous score sheet calculation in this case cannot be treated as harmless." Id. at 341. In *Burrows v. State*, 649 So.2d 902 (Fla. 1<sup>st</sup> DCA 1995), the Court reversed the Defendant's sentence noting that "the record is not clear that the Court would have imposed the same sentence in the absence of the score sheet error." Id. at 904.

Only in two cases cited by the State in its Brief did a Court of appeals find the score sheet error to be harmless. In *Orsi v. State*, 515 So.2d 268 (Fla. 2d DCA 1987), the record reflected that *Orsi* originally was charged with sexual battery, a capital felony. Rather than face the possibility of receiving a mandatory life sentence, *Orsi* was permitted to plead to the reduced charge of attempted sexual battery, in exchange for which he stipulated to a twenty (20) year sentence. Since the Court of Appeals was convinced, beyond a reasonable doubt that *Orsi* would have received the same twenty (20) year sentence, which was the result of a valid plea bargain, notwithstanding the score sheet error, the court found the score sheet error to be harmless.

The only other reported Florida decision cited by the State in which the Court of Appeals found the score sheet to have been harmless is *Hines v. State*, 587 So.2d 620 (Fla. 2d DCA 1991). In *Hines*, where the victim apparently was raped six (6) times, the trial judge departed from the recommended guideline sentence on the basis of "extreme brutality on the part of defendant resulting in severe permanent physical and mental injury to victim." *Id.* at 621. Although the score sheet improperly assessed the victim's injury for six (6) separate convictions for sexual battery, the District Court found "beyond a reasonable doubt that the trial judge would have imposed the same departure sentence notwithstanding the score sheet error." *Id.*

The same conclusion cannot be reached here. For while the portion of the trial judge's sentencing colloquy which is quoted in the State's Brief certainly supports the proposition that the trial judge would have imposed some upward departure sentence had

a correct score sheet been utilized, it does not establish, beyond a reasonable doubt, that the **same departure sentence** would have been imposed.

For one thing, it is very clear from the sentencing transcript, that the trial judge considered the erroneous score sheet as the starting point for determining the extent to which she should depart from the recommended sentence. At the very outset of her sentencing colloquy, she states the following:

I think you have to look at also what they scored and the nature of the convictions. Al Rubin scores non-State prison. He could receive a sentence anywhere from probation up to a year in the Dade County Jail.

Under the guidelines Steve Rubin according to the State's calculations scores 31.785 points to 52.975 months, which is roughly two and a half (2-1/2) years, to just under four and a half (4-1/2) years.

(R426).

Only after stating this, does the Court go on to opine that the recommended guidelines do not reflect the nature of the offenses and to state her reasons for imposing upward departure sentences on both Defendants.

It is clear that at the time that the trial judge imposed sentence, she believed that Steven Rubin was facing a guideline sentencing range of approximately thirty-two (32) to fifty-three (53) months in prison, or a maximum sentence of "just under four and a half (4-1/2) years." (R426). The upward departure sentence she imposed on Steven Rubin was

eight (8) years in the State prison, which equals ninety-six (96) months, an increase by forty-three (43) months, or approximately three and one half (3-1/2) years over what she believed to be the maximum permitted under the guidelines.

Had the trial judge reviewed and utilized the Sentencing Score Sheet which had properly been calculated by the Probation Department, she would have known that the recommended guideline range for Steven Rubin ranged from 22.9 months to a maximum of 38.2 months in prison, a period of just over three (3) years and approximately fifteen (15) months less than that erroneously calculated by the State. (R280). Had the trial judge utilized the thirty-eight (38) months figure as her departure point and still departed to the same extent that she had in the sentence actually imposed, the resulting sentence would have been eighty-one (81) months in prison, instead of the ninety-six (96) months sentence that actually was imposed. In short, if we assume that had the trial judge had the benefit of the correctly calculated score sheet and had she departed to the same extent that she did utilizing the incorrectly calculated score sheet, then the error cannot be considered harmless because the fifteen (15) month difference between the correct and incorrect score sheets resulted in Steven Rubin receiving a sentence which was fifteen (15) months greater than that which he otherwise would have received. In short, there is nothing in this record which conclusively demonstrates, beyond a reasonable doubt, that Steven Rubin would have received the same ninety-six month sentence of imprisonment had the trial court utilized the correct score sheet.

Moreover, there are other factors present here which casts substantial doubt over whether the trial judge would sentence Steven Rubin to the same eight (8) year term of

imprisonment if he were to be resentenced utilizing a corrected score sheet. For one thing, a review of the sentencing transcript shows that the trial judge was concerned about the relative culpability of Steven Rubin, vis-a-vis his father Al Rubin and imposed departure sentences on both Defendants. Al Rubin's departure sentence, however, was reversed by the District Court of Appeal based upon the trial court's consideration of improper grounds for departure and his case was remanded to the trial court with directions for him to be resentenced to a guideline sentence of 364 days in jail followed by probation. (R461; A-3). We also know that at least two of the four grounds stated by the trial court to support her departure sentence for Steven Rubin, substantial economic hardship to the victim and the trial court's finding that Steven Rubin had testified falsely, were invalid, based upon the District Court's finding that there was an absence of a preponderance of proof that the victim indeed sustained a substantial economic hardship (R461; A-3) and based upon the State's confession of error before the District Court that a trial court's belief that a defendant testified falsely cannot form a basis for departure, under the authorities of *Beaubais v. State*, 475 So.2d 1342 (Fla. 3d DCA 1985) and *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985).

Bearing in mind that the proper standard for harmless error analysis is not whether the State can demonstrate, beyond a reasonable doubt, that the trial court would have departed at all, but rather, whether the State can demonstrate, beyond a reasonable doubt, that the trial court would have departed **to the extent that it did**, it cannot be said, based upon this record, that the score sheet error was harmless. Defendant respectfully submits that based upon this record, the decision by the District Court of Appeal finding that the

score sheet error was not harmless is consistent with the prevailing case law in this State, which holds that a score sheet error can be harmless only if the Court of Appeals can find, beyond a reasonable doubt, not only that the trial court would have imposed an upward departure sentence, but that the trial court would have imposed exactly the same upward departure sentence had a correct score sheet been utilized. This Court either should approve of the decision of the Court of Appeals below or should find an absence of actual and direct conflict between decisions and decline to accept conflict jurisdiction.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, Respondent respectfully requests that this Court find that the trial court's reliance upon an incorrect Sentencing Guideline Score Sheet, which erroneously and substantially increased the guideline calculations, constituted error and that this error was not harmless under the facts of this case, since it cannot be said, beyond a reasonable doubt, that the trial court would have departed to the extent it did had a correct score sheet been utilized. Respondent respectfully urges this Court to approve the decision of the District Court below or, in the alternative, to conclude that the decision of the District Court does not expressly and directly conflict with any other Florida authority and to dismiss the State's Petition.

Respectfully submitted,


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 12<sup>th</sup> day of January, 1998, to: Michael Neimand, Assistant Attorney General, Florida Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128.

  
\_\_\_\_\_  
IRA N. LOEWY, ESQ.