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**FILED**

SID J. WHITE

MAR 2 1998

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,179

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

**THE STATE OF FLORIDA**

Petitioner,

-vs-

**JOSEPH MACKEY,**

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW**

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**ANSWER BRIEF OF RESPONDENT ON THE MERITS**

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## INTRODUCTION

This is the answer brief on the merits of the respondent Joseph Mackey in this discretionary review on certified conflict from the Third District Court of Appeal.

## STATEMENT OF THE CASE AND FACTS

The respondent accepts the petitioner's statement of the case and facts in its initial brief on the merits of petitioner.

## SUMMARY OF ARGUMENT

The Third District Court of Appeal correctly ruled that the trial court must have the benefit of a correctly calculated scoresheet when imposing sentence and where, as here, the trial court used an incorrect scoresheet in imposing sentence, the sentence must be reversed and remanded to the trial court for resentencing pursuant to a correct scoresheet. The error is not harmless because the record does not conclusively show the trial court would have imposed the same departure sentence even if the correct scoresheet had been used.

## ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL CORRECTLY RULED THE TRIAL COURT MUST HAVE THE BENEFIT OF A CORRECTLY CALCULATED SCORESHEET AND WHERE, AS HERE, THE TRIAL COURT USED AN INCORRECT SCORESHEET, THE SENTENCE MUST BE REVERSED AND REMANDED FOR A RESENTENCING.

In the present case, it is undisputed the trial court used an incorrect scoresheet in calculating the recommended sentence pursuant to the sentencing guidelines and in imposing a departure sentence on the aggravated child abuse count. In its decision, the Third District stated the applicable law correctly: "A trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart from the recommended guidelines sentence." Rubin v. State, 697 So.2d 161 (Fla. 3d DCA 1997); Smith v. State, 678 So.2d 1374 (Fla. 4th DCA 1996). Here, the trial court did not have a properly calculated scoresheet when it imposed sentence and the correct remedy is a reversal for resentencing.

The state argues that any error in using the incorrect scoresheet should be deemed harmless because it is clear that the trial court would have imposed the same departure sentence anyway notwithstanding the scoresheet error.

The respondent submits that it is not clear from the record that the trial court would have imposed the same sentence notwithstanding the scoresheet error and that is the reason why this case must be reversed for a resentencing on that count.

CONCLUSION

Based upon the foregoing, the respondent requests that this Court affirm the Third District's decision in this case which reverses his sentence on the aggravated child abuse and remands the case to the lower court for a resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this 27<sup>th</sup> day of February, 1998.

By: Marti Rothenberg  
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