

IN THE SUPREME COURT OF FLORIDA

BRIAN MCLEAN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 95,949

SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent State of Florida was the appellee in the district court and will be referred to as the state. Petitioner BRIAN MCLEAN was the appellant in the district court and will be referred to as petitioner or by his proper name.

The state accepts petitioner's method of citing to the record.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF TYPE AND FONT

This brief was prepared using New Courier type 12 font.

STATEMENT OF THE CASE AND FACTS

The state accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The applicability of Heggs to crimes committed after 1 October 1996 is before the Court in numerous pending cases. Because of the current flux in the law, it is difficult to present arguments on these issues but the state adopts its earlier arguments that the window of unconstitutionality on chapter 95-184 ended with the enactment of chapter 96-388 effective 1 October 1996. However, the state also notes that this Court recently held that the window of unconstitutionality on chapter 95-182, the Violent Career Criminal Act, ended 24 May 1997, not 1 October 1996, as

argued by the state. Salters v. State. That decision is not yet final but it is relevant without necessarily being controlling. The state invites the attention of the Court to a critical distinction. The violent career criminal sentencing procedure addressed in Salter was created by chapter 95-182 whereas, here, chapter 96-388 both reenacted and amended the existing sentencing guidelines statute, whatever statute that may be, i.e., 1994 or 1995. Thus, even if this Court holds that the window of unconstitutionality created by Heggs does not end until 24 May 1997, the sentencing guidelines in effect at the time of the offenses here, after 1 October 1996, are those as amended by chapter 96-388.

ARGUMENT

ISSUE

DOES THE WINDOW OF UNCONSTITUTIONALITY
CREATED BY THIS COURT IN HEGGS EXTEND TO
CRIMES COMMITTED AFTER 1 OCTOBER 1996?
(Restated)

On the jurisdictional issue which brought this case here, the imposition of restitution, the Court should affirm the district court on the authority of Maddox v. State, case no. SC92805, SC93000, SC93207 and SC93966 (Fla. 11 May 2000).

The state adopts its arguments in prior pending cases that the window of unconstitutionality created by Heggs v. State, case no. SC93851 (Fla. 4 May 2000), as clarified, ended on 1 October 1996 when chapter 96-388 became effective in relevant part. Bortel v. State, 743 So.2d 595 (Fla. 4th DCA 1999).

The state notes, however, that this Court recently held in Salters v. State, case no SC95663 (Fla. 11 May 2000) that the enactment of chapter 96-388 did not cure the single subject violation involved in chapter 95-182. This decision is relevant, perhaps persuasive, on the question of whether chapter 96-388 cures the single subject violation involved in the enactment of chapter 95-184 but it is not directly controlling. Moreover, the state points out that the violent career act did not exist before the enactment of chapter 95-182 whereas the sentencing guidelines did exist prior to the enactment of chapter 95-184. Thus, even if chapter 96-388 is not a reenactment of chapter 95-184, it is an amendment to the sentencing guidelines as they existed in 1994 or 1995. Accordingly, criminals resentenced pursuant to Heggs v. State, case no SC93851, as clarified and reissued on 4 May 2000, must be sentenced pursuant to the law as it existed after 1 October 1996 when chapter 96-388 became effective in relevant part. The state will not hazard a guess on what that will specifically mean to the petitioner here and will only suggest to the Court that when the case law stabilizes, this case be remanded with instructions to the trial court to attempt to sort it all out and determine what law was in effect when these offenses occurred on 16 April 1997. The state does recognize that the changes in chapter 95-184 directly affected the guidelines

scoresheet and petitioner appears to have shown that his sentence under the 1995 sentencing guidelines was above the recommended range of the 1994 guidelines. Thus, if recomputation of the guidelines scoresheet at the trial court level confirms petitioner's claims, he will have shown prejudice and the right to resentencing as discussed in the clarified version of Heggs. [The state recognizes that opposing counsel did not have the benefit of the clarified Heggs decision of 4 May 2000 when he prepared and served his supplemental brief on 27 March 2000.]

CONCLUSION

The district court should be affirmed on the jurisdictional issue which brought this case here, restitution, pursuant to Maddox v. State, case no. SC92805, SC93000, SC93207 and SC93966 (Fla. 11 May 2000).

On the sentencing guidelines issue addressed in this supplemental brief, the state urges the Court to affirm on the basis that chapter 96-388 reenacted and amended the 1995 sentencing guidelines. Alternatively, if this is contrary to case law as it exists when this case is resolved, the state simply urges the Court to resolve the issue on the basis of that case law as it then exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Fred Parker Bingham, II, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 22nd day of May 2000.

James W. Rogers
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