IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.
	)	
GWENDA JEAN LEMON,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Petitioner was the prosecution and the appellee in the courts below. Respondent was the defendant and the appellant.

In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

R = Record on Appeal

T = Transcript

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts, with the exceptions and additions set forth as follows, and with the additional caveat that Respondent's counsel did not represent her below, was appointed by this Court after jurisdiction was accepted, and therefore has no records other than the copies of the filings in this Court provided by the clerk. Respondent assumes that the state's brief is based on these same filings since the brief includes neither record references nor an appendix.

Respondent makes no comment about the state's recitation of facts regarding trial court case No. 96-18032 CF since that case is not involved at this level and because of Respondent's counsel's lack of records from the cases below as stated in the preceding paragraph.

In the case involved here, trial court No. 96-18086 CF, Respondent's score under the 1995 guidelines was 47.7 months to 79.5 months. Two reasons for upward departure are checked on the form accompanying the scoresheet: "Offense created substantial risk of death or great bodily harm to many persons or to one or more small children"; "Victim was physically attacked by the defendant in the presence of one or more members of the victim's family."

The Court Status sheet indicating adjudication and signed by the judge states "Upward Departure." Neither the sheet nor the

scoresheet states anything about the departure or the reasons being agreed as part of the plea.

Appended to this brief is a 1994 scoresheet filled out with the same primary offense, additional offenses and prior record as shown on Respondent's 1995 scoresheet, but recalculated with the 1994 guidelines values. The only difference between 1994 and 1995 is the scores for additional offenses. With these changes, the 1994 scoresheet yields a range of 31.5 to 52.5 months.

After its decision, the District Court denied the motion of Petitioner, the state, for rehearing or certification of conflict. The order of denial stated that there was no conflict with Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000), or Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000). On December 8, 2000, the state filed its jurisdictional brief in this Court. On May 30, 2001, it filed a Motion to Compel or Preclude Filing of Answer Brief on Jurisdiction. On June 14, 2001, Respondent *pro se* filed a response to the motion stating that she had attempted to obtain assistance from the Public Defender, that her access to the prison law library was limited, and that she needed more time to file a brief. On June 15, 2001, this Court entered an order accepting jurisdiction. On August 22, 2001, this Court granted the state's motion to compel or preclude by the same order which appointed the Public Defender to represent Respondent in this Court and set a briefing schedule

for briefs on the merits. It appears that Respondent did not file a jurisdictional brief.

SUMMARY OF ARGUMENT

I.

This Court should discharge conflict review as improvidently granted. Respondent was unrepresented by counsel at the time of this Court's decision accepting jurisdiction and was unable to file a brief. There is no express and direct conflict of decisions. The District Court denied certification of conflict with the cases which the state then argued to this Court for conflict. The cases are distinguishable on crucial points and do not directly bear on the issue raised in the instant case.

II.

The District Court properly granted Respondent the resentencing required under Heggs v. State, which held the 1995 amendments to the guidelines unconstitutional. Respondent was a person "adversely affected" by the unconstitutional 1995 amendments. Even though her sentence was an upward departure under either the 1994 or the 1995 guidelines, she was entitled to be sentenced after correct calculation of her guidelines range. Only the trial judge can now determine whether he would have imposed the same sentence under the lower 1994 guidelines.

ARGUMENT

POINT I

THIS COURT MUST DISCHARGE CONFLICT REVIEW AS IMPROVIDENTLY GRANTED.

This Court may dismiss a petition for review which is improvidently granted where no conflict of decisions exists. See, Salser v. State, 613 So. 2d 471 (Fla. 1993).

In the instant case Respondent was unrepresented by counsel at all points in the appellate proceedings until this Court appointed the Public Defender on August 22, 2001, by which time this Court had already accepted jurisdiction. It appears that Respondent was never able to file a jurisdictional brief on her own behalf. This case is therefore an appropriate one for this Court to consider jurisdiction along with the merits, especially since lack of conflict is also part of Respondent's argument on the merits.

This Court does not have jurisdiction in this case, or should decline to exercise it, because the decision of the Fourth District does not conflict with any decision of any other District Court of Appeal or of this Court. Conflict sufficient to confer jurisdiction on this Court must be express and direct and appear on the face of the court's opinion. Art. V, § 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv); see also, Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

The District Court denied the motion of Petitioner for rehearing or certification of conflict. The order of denial stated

that there was no conflict with the same decisions the state then cited for conflict in its jurisdictional brief, Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000), and Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000).

The distinctions between the instant case and Kwil and Ray which negate conflict are discussed below in Point II on the merits.

The state also cited McCray v. State, 769 So. 2d 1126 (Fla. 4th DCA 2000), for conflict in its jurisdictional brief. Conflict with another decision from the same district is not jurisdictional conflict under the constitution. Like Kwil and Ray, McCray is discussed below in Point II on the merits, and shown not to be in conflict with the instant case.

ARGUMENT

POINT II

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY REVERSED THE TRIAL COURT'S DENIAL OF RESENTENCING UNDER HEGGS V. STATE.

The District Court properly granted Respondent a resentencing with the benefit of a corrected score under the 1994 sentencing guidelines. This resentencing is required under Heggs v. State, 759 So. 2d 620 (Fla. 2000), which held the 1995 amendments to the guidelines unconstitutional. The District Court correctly rejected the state's argument that Respondent was not entitled to relief because her sentence was a departure from either version of the guidelines. The state now makes this same argument to this Court.

Heggs plainly states that those persons "adversely affected" by the unconstitutional 1995 amendments to the guidelines are entitled to relief. 759 So. 2d at 627. Respondent was adversely affected. The 1995 guidelines gave her an illegal range of 47.7 months to 79.5 months, whereas her legal range under the 1994 guidelines was 31.5 to 52.5 months (Appendix). The fact that her sentence of 96 months was greater than either range does not mean that she was not adversely affected. Accurate calculation of the range is the required beginning point for a legal sentence. As stated by the District Court, even departure sentences "arise" from the guidelines.

The District Court simply remanded for the trial court to consider whether it would have imposed the same sentence as a departure from the lower 1994 range. Knowing the correct range on remand, perhaps the trial court will find that it would have imposed the same sentence, and perhaps not. The state, however, wishes to deprive the trial court of the opportunity to make this determination for itself.

Whether the trial court would have imposed the same sentence cannot be determined from the appellate record. Reversal for resentencing with a corrected scoresheet is required 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 scoresheet. Smith v. Singletary, 666 So. 2d 986 (Fla. 4th DCA 1996).

Here, the record shows, first, that the trial court based the sentence on a mistake of law, an incorrect guidelines score. Second, there is no statement by the trial judge, or any other indication in the record, that he would have imposed the same 96 month sentence as a departure from a range of 31.5 to 52.5 months (1994) as he did from the range of 47.7 months to 79.5 months (1995). Ninety-six months is a 21 percent increase over 79.5, but an 83 percent increase over 52.5. The extent of the departure is an important consideration for the sentencing judge, but the extent

can only be known to the judge if he has a correct scoresheet before him.

The state's attempted distinction between "would have" and "could have" is a false one. Under either standard, remand to the trial judge is required. If this Court adopts "would have," remand will be required because only the trial court can say what it would have done, as shown above. On the other hand, if this Court adopts "could have," then this alone would establish that Respondent was "adversely affected," and therefore entitled to remand: if this Court cuts off the trial court's ability to reconsider the sentence with the benefit of a correct guidelines score, Respondent's sentence will remain the result of the unconstitutional 1995 guidelines. Because she was illegally sentenced in the first place, she will have lost the right to a correct scoresheet and will be stuck with a sentence based on the unconstitutional 1995 scoresheet.

The distinction made by the District Court is the crucial one and the correct one. Rejecting the state's "could have" argument, the District Court distinguished habitual offender cases, which disallowed remand, by pointing out that those sentences do not arise from the guidelines, while departure sentences do. This distinction disposes of the supposed support the state finds in non-guidelines cases (pp. 9-11 of brief).

McCray v. State, 769 So. 2d 1126 (Fla. 4th DCA 2000), does not undermine the instant decision or support the state's position in the way it claims. McCray's contrast with the instant decision only makes the instant decision clearer: McCray's plea provided for a specific sentence, while the record here shows no such agreement. Without an agreement stating otherwise, Respondent was entitled to have her sentence determined on the basis of a correct scoresheet. Only the trial judge can decide the effect, if any, of the terms of Respondent's plea.

Kwil v. State, 768 So. 2d 502 (Fla. 2d DCA 2000), and Ray v. State, 772 So. 2d 18 (Fla. 2d DCA 2000), also do not support the state's position as claimed because the opinions simply do not provide enough facts. Neither opinion says any more than that the sentences were upward departures based on valid statutory factors. Neither opinion states what the scores were under the 1994 and 1995 guidelines, what the reasons were for departure, what the extent was, whether there was a plea, whether a specific sentence was provided (as in McCray), or whether the record included any remarks by the trial judge about his sentencing intentions. Any or all of these facts might have shown whether the trial court would have imposed the same sentence under either guidelines version. In Eady v. State, 789 So. 2d 440 (Fla. 1st DCA 2001), the First District distinguished Ray because Eady's sentence, a downward departure

from the 1995 guidelines, exceeded the maximum under the 1994 guidelines.

The state's final concern, the need for an evidentiary determination, is not a legitimate reason to deny the required relief, a remand to the trial judge. The trial judge will indeed have to make some minimal determinations, such as whether he would have imposed the same sentence. This is unavoidable and inherent it the very nature of a remand. Fla. R. Crim. P. 3.800(a) does not prohibit such determinations. The rule explicitly contemplates correction of sentencing guidelines errors. The sentencing error here does appear on the face of the record: scoring on an illegal 1995 scoresheet. State v. Callaway, 658 So. 2d 983, 987-988 (Fla. 1995), is no longer applicable on this question because its discussion of the procedure for "erroneous," "unlawful" and "illegal" sentences has been superseded by the later amendments to Rule 3.800 and the addition of Rule 3.800(b), by Maddox v. State, 760 So. 2d 89 (Fla. 2000), and by Heggs.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to discharge review or to affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Jeanine M. Germanowicz, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 23rd day of October, 2001.

ALLEN J. DeWEESE
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately this 23rd day of October, 2001.

_____
ALLEN J. DeWEESE
Counsel for Respondent