IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2733

Questions of Great Public Importance
Certified by the First District Court of Appeal

GREGORY BANKS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AMENDED INITIAL BRIEF AND APPENDIX OF PETITIONER, GREGORY BANKS

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STATEMENT OF THE CASE AND FACTS

The issue in this case is the validity of a plea agreement based on sentencing guidelines that this Court subsequently invalidated in Heggs v. State, 759 So. 2d 620 (Fla. 2000). Resolution of the issue depends in part on whether or not the change in law announced in Heggs constitutes a newly discovered fact or should apply retroactively, an issue that will effect the time frame in which a challenge may be filed.

On October 7, 1996, Petitioner, Gregory Banks, entered a plea of nolo contendere to the charges against him. (See R. at 1.) The state provided Petitioner an *October 1, 1995 Rule 3.991(a) Sentencing Guidelines Scoresheet* ("1995 Guidelines") to use in considering whether to enter into a plea agreement. (See R. at 3, 8-9.) The 1995 Guidelines were enacted pursuant to chapter 95-184, Laws of Florida. Under the 1995 Guidelines, Petitioner was subject to a prison term ranging from 133.35 months to 222.25 months. (See R. at 3, 8-9.) In contrast, under the 1994 sentencing guidelines ("1994 Guidelines"), Petitioner's possible penalty ranged from only 80.1 months to a maximum of 133.5 months, which maximum was only four-and-a-half days longer than the minimum available under the 1995 Guidelines. (See R. at 3, 10-11.) Petitioner entered a plea of nolo contendere, accepting a sentence of 132 months. (See R. at 3.)

Three and a half years after Petitioner entered his plea agreement, this Court in Heggs invalidated the 1995 Guidelines. Petitioner obviously did not know at the time of entering his plea agreement, and could not have learned through the exercise of due diligence, that the 1995 Guidelines were unconstitutional. (See R. at 3.) The 132-month sentence to which Petitioner agreed was at the low end of penalties available under the 1995 Guidelines. Petitioner's sentence was only one-and-a-half months short of the maximum sentence and almost 60 months greater than the minimum sentence that could have been imposed under the 1994 Guidelines, which should have been used at the time of Petitioner's plea bargaining. (See R. at 10-11.) Had Petitioner known that three-and-a-half years later this Court, in Heggs, would hold that the 1995 Guidelines were illegal, he would have never entered into his plea agreement. (See R. at 4.)

Petitioner would not have knowingly and voluntarily foregone his right to trial in exchange for a prison sentence that is only one-and-a-half months greater that the maximum that he could have received at trial. Similarly, because Petitioner was seeking a sentence at the low end of what legal guidelines would allow, he did not knowingly and voluntarily accept a sentence that is over one-and-a-half times the minimum sentence that was available under the 1994 Guidelines.

Almost immediately upon this Court's decision in Heggs, Petitioner filed a pro se Motion to Correct an Illegal Sentence pursuant to Florida Rule of Criminal

Procedure 3.800. (See R. at 32, 2.) The trial court denied the motion. (See R. at 46, 2.) Petitioner then filed a pro se Motion for Post Conviction Relief pursuant to Rule 3.850 (the "3.850 Motion"), which motion is the subject of this petition. (See R. at 1-16.)

In his 3.850 Motion, Petitioner challenged the "voluntary and intelligent nature of [his] plea." (R. at 4.) Petitioner requested that the trial court either sentence him to the low end of the 1994 Guidelines, or allow him to withdraw his plea in favor of a new plea agreement or a trial. (See R. at 5.)

Apparently misunderstanding the basis of Petitioner's 3.850 Motion, the trial court denied the 3.850 Motion, ruling that most of the "issues and arguments set forth in [Petitioner's 3.850 Motion] are essentially identical to those previously considered and ruled on" pursuant to Petitioner's 3.800 Motion to Correct an Illegal Sentence. (See R. at 18.) Recognizing that the trial court apparently misinterpreted his 3.850 Motion, Petitioner filed a Motion for Rehearing and/or Clarification. (See R. at 43-54.) In that motion Petitioner noted that his 3.850 Motion sought to challenge the voluntary and intelligent nature of his plea and sought to withdraw the plea. (See R. at 51.) The trial court denied the motion without explanation. (See R. at 56.)

Petitioner then filed a timely pro se Notice of Appeal, challenging the trial court's order. (See R. at 58.) Neither party submitted any briefs to the First District. The First District affirmed the trial court's order. See Banks v. State, 801 So. 2d 153,

154 (Fla. 1st DCA 2001) [See A 1]. Notably, nowhere in its opinion does the First District mention that Petitioner was challenging the voluntary and intelligent nature of his plea. See id. The First District held that even if Petitioner's claims had merit, his motion was untimely. See id. Recognizing the import of the two issues involved in such a decision, the First District certified the following two questions to be of great public importance:

> WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED A "NEWLY DISCOVERED FACT" AS CONTEMPLATED BY RULE 3.850(B)(1), WHEREBY AN APPELLANT MAY RAISE A HEGGS-BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL?
>
> [and]
>
> WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED TO APPLY RETROACTIVELY, SUCH THAT AN APPELLANT MAY RAISE A HEGGS-BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL?

Id.

Petitioner then filed a timely Notice to Invoke Discretionary Jurisdiction, requesting that this Court review the First District's decision. Petitioner also filed with this Court a Motion for Appointment of Counsel, which this Court granted.

SUMMARY OF THE ARGUMENT

The Court should answer both certified questions in the affirmative. Further, the Court should remand to afford Petitioner an opportunity to enter a new plea under valid sentencing guidelines or to go to trial. Petitioner has validly raised a challenge to the voluntary and intelligent character of his plea because he based his plea decision upon sentencing guidelines that he believed to be valid, but which this Court subsequently invalidated.

This Court has held already that the legality of a possible sentence is a fact that an accused can consider when deciding to accept a plea. This case illustrates the importance of adhering to that holding. When Petitioner was contemplating his plea options, his main concern was the sentence that the State could impose if Petitioner lost at trial. Petitioner thought he agreed to the lowest legal sentence available, based upon the 1995 Guidelines. Petitioner did not and could not have known that this Court would hold those 1995 Guidelines to be unconstitutional. Thus, while Petitioner thought that he received one of the lowest possible sentences, he actually received a sentence that was a mere one-and-a-half months short of the maximum allowable. This fact would have been critical to Petitioner's plea deliberations. Further, four of the Districts agree that, at least in the context of a challenge to the voluntary and intelligent nature of the plea, the change in law created by Heggs is a fact for the purposes of Rule 3.850. This Court should hold likewise in the context of this case.

The change in law announced in Heggs also qualifies for retroactive application because it emanated from this Court, it was constitutional in nature, and it was of fundamental significance. The Heggs decision was so significant as to justify retroactive application. Retroactive application is necessary to ensure fundamental fairness to those sentenced under the unconstitutional 1995 Guidelines, and to provide a full remedy for the illegal enactment of those Guidelines. The fairness issue outweighs the interest in finality without wreaking large-scale havoc, because a relatively small group of people will have Heggs claims.

Finally, Petitioner is entitled to an evidentiary hearing on his motion, because he has raised a cognizable claim that his lack of knowledge of the change in law subsequently announced in Heggs means that his plea was not voluntary and intelligent. It is fundamental that one who enters a plea based upon a misunderstanding or misapprehension of the facts is entitled to withdraw his or her plea. A defendant who thought that the sentence range presented to him or her truly represented the legal sentences, when it did not, is entitled to withdraw his or her plea. This case is very analogous to those cases where a defendant who entered into a plea agreement based upon a miscalculated scoresheet was allowed to withdraw his plea on the grounds that he did not enter into it in a voluntary and intelligent manner. Thus, Petitioner has clearly filed a timely and facially valid motion for post-conviction relief that challenges the voluntary and intelligent character of his plea.

STANDARD OF REVIEW

The standard of review is de novo because the issues before this Court involve pure questions of law. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

ARGUMENT

The Court should reverse the ruling of the First District, which affirmed the trial court's denial of Petitioner's Motion for Post Conviction Relief, because the change in law announced in the Heggs decision constitutes a newly discovered fact for purposes of Rule 3.850(b)(1); the constitutional right declared in Heggs should apply retroactively; and Petitioner has raised a valid challenge to the voluntary and intelligent nature of his plea. Florida Rule of Criminal Procedure 3.850(a)(5) provides that a movant may assert involuntariness as grounds for relief from judgment entered on a plea agreement. Other than sentences that exceed the limits provided by the law, a motion to vacate or set aside a sentence must be brought within two years, unless:

> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Fla. R. Crim. P. 3.850(b)(1)-(2). In February, 2000, this Court held that the 1995 Guidelines, which were enacted pursuant to chapter 95-184, Laws of Florida, were unconstitutional. See Heggs v. State, 759 So. 2d 620, 630-31 (Fla. 2000). Those

persons who were sentenced between October 1, 1995, and May 24, 1997, are the people who were adversely effected by the unconstitutional 1995 Guidelines. See Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000).

Because this Court's decision in Heggs, declaring the 1995 Guidelines to be unconstitutional, is a fact that was unknown to Petitioner at the time he entered his plea, his Rule 3.850 challenge to the voluntary and intelligent nature of his plea is both timely and meritorious. Further, Petitioner's motion for post conviction relief is timely on alternative grounds because Heggs announced a fundamental constitutional right that should be applied retroactively.

I. THE CHANGE OF LAW CREATED BY THE HEGGS DECISION IS A "NEWLY DISCOVERED FACT" AS CONTEMPLATED BY RULE 3.850(B)(1), WHEREBY AN APPELLANT MAY RAISE A HEGGS-BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL.

The Court should consider the change in law announced in Heggs to be a newly discovered fact sufficient to form the basis of a challenge of the voluntary and knowing nature of a plea, thereby allowing a person to challenge his or her plea more than two years after his or her judgment and conviction became final.

A sentencing guideline is either legal or not. The legality vel non of a sentence is a question of fact notwithstanding that the fact of its validity is determined by legal analysis. Anyone considering a plea agreement must presume that the governing

guidelines are legal. If the law later changes, and the guidelines upon which the defendant relied are invalidated, then the change in the law produces a change in a crucial fact on which the defendant relied. The defendant could not knowingly and voluntarily agree to a sentence he could not have known to be invalid. Thus, the unconstitutionality of the 1995 Guidelines announced in Heggs is a newly discovered fact for the purposes of the knowing and voluntary nature of a plea agreement. Two District Courts of Appeal have agreed, explicitly holding that the Heggs decision is a fact for the purposes of Rule 3.850(b)(1), and two other Districts have suggested that the Heggs decision is a newly discovered fact upon which the knowing and voluntary nature of a plea may be challenged.

A. The Legality of the Possible Sentence is a Fact

The change in law created by the Heggs decision, which declared the 1995 Guidelines to be unconstitutional, is a "fact" that was unknown to Petitioner at the time that he entered his plea. This Court has held that a defendant's understanding of the legality of sentences available under a plea bargain is a fact pertinent to the voluntary and knowing nature of the plea. See Forbert v. State, 437 So. 2d 1079, 1081 (Fla. 1983). Forbert began by reiterating, "[i]t is a well-established principle of law that a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea." Id. The Court then held that the legality of the sentences that the

accused considered is such a fact by providing the example that "when a defendant pleads guilty with the understanding that the sentence he or she receives is legal, when in fact the sentence is not legal, the defendant should be given the opportunity to withdraw the plea." Id.

The defendant in Forbert agreed to a sentence that he believed was statutorily authorized. See id. This Court, in a separate decision, held that such a sentence was actually illegal. See id. Thus, the Court ultimately held that the defendant should be entitled to withdraw his plea because the legality of the sentence was a fact that the defendant misunderstood at the time of making his decision; therefore, his plea was not knowing and voluntary. See id.

B. Two Districts Have Explicitly Held that the Heggs Decision is a Newly Discovered Fact for the Purposes of Rule 3.850(b)(1).

Additionally, the conclusion that the change in law created by the Heggs decision is a fact for the purposes of Rule 3.850(b)(1), is buttressed by the rulings of two District Courts, one sitting en banc, that have already explicitly so held. The Second District en banc held as follows:

> As to the timeliness [of a Rule 3.850 Heggs-based challenge], we adopt the Fourth District's holding that an 'appellant should have two years from the issuance of the supreme court's opinion in Heggs' in which to file this claim because the facts on which the claim is based could not have been known earlier.

Murphy v. State, 773 So. 2d 1174, 1175 (Fla. 2d DCA 2000) (en banc) (quoting

Jenkins v. State, 771 So. 2d 37, 38 (Fla. 4th DCA 2000)). Similarly, the Fourth District has repeatedly held that "defendants should have two years from the issuance of the supreme court's opinion in Heggs in which to raise a rule 3.850 motion, as the facts on which the claim is predicated could not have been known earlier." Cox v. State, 805 So. 2d 1042, 1044 (Fla. 4th DCA 2002); accord Jenkins, 771 So. 2d at 38.

C. Other Districts Have Suggested that the Heggs Decision is a Newly Discovered Fact for the Purposes of Rule 3.850(b)(1).

The First and Fifth Districts have suggested that when challenging the voluntary and knowing nature of a plea, the change in law announced in the Heggs decision is a newly discovered fact that allows the motion to be brought more than two years after the judgment and conviction became final. The Fifth District in Banck v. State, 798 So. 2d 814 (Fla. 5th DCA 2001), suggested that if a defendant challenged the voluntary and intelligent nature of his or her plea, the Heggs decision could be an unknown fact that would allow the defendant to bring the motion more than two years after his judgment was final. See id. at 815. The defendant in Banck filed a Heggs-based challenge to his sentence, claiming that he was entitled to be resentenced to the low end of the 1994 Guidelines because he had agreed to a sentence at the low end of the 1995 Guidelines. See Banck, 798 So. 2d at 814. The Fifth District held that the defendant was not entitled to the relief that he was seeking, but suggested that the defendant may be entitled to "other relief based upon mutual mistake or [an]

involuntary plea," citing Murphy. Banck, 798 So. 2d at 815. Importantly, in response to a Heggs-based claim that did not mention the voluntary and knowing nature of the plea, the Fifth District had already held that the Heggs decision was not a "fact" that would allow a defendant to file a motion more than two years after his or her judgment and conviction were final. See Coppola v. State, 795 So. 2d 258, 259 (Fla. 5th DCA 2001). Thus, when the Fifth District suggested that the defendant in Banck may be able to challenge the voluntary nature of his plea, it was inherently suggesting that the Heggs decision is a fact for such a challenge, because otherwise such a challenge would have been untimely under that court's previous ruling in Coppola.

Even the First District has suggested that, in the context of a challenge to the voluntary nature of a plea, the Heggs decision is a newly discovered fact within the meaning of Rule 3.850(b)(1). See Hipps v. State, 790 So. 2d 583, 583 (Fla. 1st DCA 2001). Prior to the First District's ruling in Hipps, in an attempted Heggs-based challenge that was not based upon the voluntary nature of the plea, the First District held that Heggs was not a newly discovered fact for the purpose of Rule 3.850(b)(1). See Regan v. State, 787 So. 2d 265, 267 (Fla. 1st DCA 2001). Thus, much like the Fourth District did in Coppola, the First District in Hipps implicitly held that when the defendant raises a challenge to the voluntary and intelligent nature of his or her plea, the Heggs decision can constitute a newly discovered fact. Otherwise, Regan would have been controlling and the defendant in Hipps would not have been able to file a

timely Rule 3.850 motion. See Hipps, 790 So. 2d at 584.

In this matter, the Court should answer the first certified question in the affirmative because the legality of possible sentences is a fact that a defendant considers when contemplating a plea agreement. The Court has already held in Forbert that the legality of possible sentences is a fact that one would consider when contemplating a plea agreement. In the present matter, when Petitioner was considering his plea, he based his decision on the 1995 Guidelines, which he thought represented the legal and permissible sentences that he might receive if he did not accept the plea agreement. Petitioner thus entered into an agreement based upon the ultimately mistaken belief that he was accepting a sentence that was one of the lowest that was statutorily and constitutionally available. Of course, this Court's subsequent holding in Heggs revealed that the 1995 Guidelines were unconstitutional. This meant that Petitioner did not receive one of the lowest legal sentences, and thus that he did not receive a benefit commensurate with giving up his constitutional right to trial.

Thus, this situation is very similar to that in Forbert, where the defendant entered into a plea agreement, accepting a split-sentence under a scheme that this Court later declared to be illegal. As is the case here, the accused in Forbert based his decision regarding whether to enter into an agreement and forego his right to trial upon what he believed to be the legal sentences available to the State at the time. As here, the accused did not know that this Court would later hold some of the sentencing options

that were presented to him to be illegal. Thus, this Court should follow Forbert, approve the District Court cases cited above, and hold that the change in law created by its decision in Heggs is a newly discovered fact for the purposes of Rule 3.850(b)(1), giving rise to a valid challenge to Petitioner's plea agreement.

II. THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD APPLY RETROACTIVELY, SO THAT AN APPELLANT MAY RAISE A HEGGS-BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL.

The Court should hold that the change of law announced in the Heggs decision applies retroactively for the purposes of Rule 3.850(b)(2) because Heggs satisfies the three recognized tests for retroactive application. "For a new rule of law to warrant retroactive application it must satisfy three elements [known as the Witt test]: 'The new rule must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance.'" Ferguson v. State, 789 So. 2d 306, 309 (Fla. 2001) (citing State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995), and Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980)).

A. The New Rule of Law Created by Heggs Originated in the Florida Supreme Court

The new rule of law announced in Heggs, that the 1995 Guidelines were unconstitutional, originated in the Florida Supreme Court. See Heggs, 759 So. 2d at

630-31; see also Regan, 787 So. 2d at 268 (holding that the Heggs decision emanated from the Florida Supreme Court, and therefore met the first prong of the Witt analysis). Thus, there is no doubt that the new rule of law created by Heggs meets the first prong of the Witt analysis.

B. The New Rule of Law Created by the Heggs Decision is Constitutional in Nature

Next, the announcement by this Court in Heggs that the 1995 Guidelines were unconstitutional because their enactment violated the single subject rule of the Florida constitution, is constitutional in nature. See Heggs, 759 So. 2d at 627 (holding that the 1995 Sentencing Guidelines were not constitutionally enacted); see also Regan, 787 So. 2d at 268 (holding that the Heggs decision was constitutional in nature, and therefore met the second prong of the Witt analysis). Thus, the new rule of law created by the Heggs decision meets the second prong of the Witt analysis to qualify for retroactive application.

C. The New Rule of Law Created by the Heggs Decision is of Fundamental Significance

A case is of fundamental significance if the decision is one "'of sufficient magnitude to necessitate retroactive application' under the threefold test of Stovall v. Denno, 388 U.S. 293 . . . (1967)." State v. Callaway, 658 So. 2d 983, 986-87 (Fla. 1995), rev'd in part on other grounds, Dixon v. State, 730 So. 2d 265 (Fla. 1999); accord Ferguson, 789 So. 2d at 311. "The three factors considered under the test

announced in Stovall . . . are: '(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule.'" Ferguson, 789 So. 2d at 311. The Heggs decision is of fundamental significance under the three Stovall factors.

1. The Purpose Served by the New Rule Announced in Heggs

The purpose of the announcement in Heggs that the 1995 Guidelines were unconstitutional and void was to remedy the legislature's "evil" act of "logrolling" multiple unrelated laws into one package to get them all passed. See Heggs, 759 So. 2d at 627. Thus, the rule announced in Heggs serves the very important purpose of not allowing the legislature to employ invalid tactics to pass a law that affects citizens rights, which in the Heggs context were citizen's liberty interests. Each person's fundamental right to liberty is far too important to allow it to be jeopardized through the medium of invalid legislative tactics. If the Legislature is to pass sentencing guidelines that will necessarily have the effect of impinging on individuals' liberty interests, it must do so in a way that affords every protection that those interests deserve and not through invalid strategic maneuvering.

2. The Extent of Reliance Upon the Old Rule

The second element of the Stovall test is met if the amount of reliance upon the old rule was minimal. See State v. Stevens, 714 So. 2d 347, 350 (Fla. 1998) (Harding, J., concurring) (holding that when the courts only relied upon the old rule for six years,

such reliance was minimal and met the second prong of Stovall). This factor represents a pragmatic consideration of the volume of legal disarray that might be produced by reversing a rule upon which courts and litigants have relied. In this case the potential impact is slight, because the courts relied upon the unconstitutional 1995 Guidelines for a period of only one year and eight months, because that was the length of the window in which the 1995 Guidelines were unconstitutional. See Trapp, 760 So. 2d at 928. Certainly, if the six year period of reliance in Stevens was considered "minimal," for purposes of the Stovall test, then the period of reliance upon the unconstitutional 1995 Guidelines is even more clearly "minimal." Thus, the Heggs decision meets the second prong of the Stovall test because the courts only minimally relied upon the old rule of law.

3. The Effect on the Administration of Justice of a Retroactive Application of the New Rule Announced in Heggs

"The final consideration in the retroactivity equation requires a balancing of the justice system's goals of fairness and finality." Ferguson, 789 So. 2d at 312. In this instance, the scale tips in favor of fairness over finality. The retroactive application of the rule of law announced in Heggs would not take a great toll on the justice system. Initially, all prisoners who were sentenced under the 1995 Guidelines and whose sentences exceeded the maximum allowed under the 1994 Guidelines are already permitted to bring a Heggs-based challenge because there is no time limit to bring a

Rule 3.850 motion if the sentence exceeds the maximum allowed by law. See Fla. R. Crim. P. 3.850(b). Thus, the only additional people who would be allowed to bring a Heggs-based challenge if the rule of law in Heggs is applied retroactively are those people like Petitioner who entered into a plea agreement that was not voluntary and intelligent because they relied upon the 1995 Guidelines when bargaining for their pleas.

Hence, there is a very limited group of people who would be able to file a motion based upon the retroactive law of Heggs. The interest in the finality of the sentences of this limited group of people should be outweighed by the justice system's interest in fairness and ensuring that all pleas were entered into both knowingly and voluntarily. Therefore, this Court should hold that Heggs meets the third Stovall factor because the administration of justice favors the retroactive application of the rule of law announced in Heggs.

In summary, the Court should hold that the rule of law announced in Heggs applies retroactively because the decision originated in the Florida Supreme Court, the decision was constitutional in nature, and because the decision was of fundamental significance because it meets the three Stovall factors.

III. PETITIONER HAS RAISED A VALID RULE 3.850 CHALLENGE TO THE VOLUNTARY AND INTELLIGENT NATURE OF HIS PLEA DUE TO HIS LACK OF KNOWLEDGE OF THE RULE OF LAW CREATED BY THE HEGGS DECISION AT THE TIME OF ENTERING HIS PLEA.

The Court should reverse the First District by holding that Petitioner has raised a valid motion for post-conviction relief because his plea was not voluntary and intelligent. Petitioner's plea was not voluntary and intelligent because he based his plea decision upon a mistake of fact about what range of legal sentences was available to the State. Other courts have held in analogous circumstances that such a mistake may form the basis of a challenge to the voluntary and intelligent nature of a plea agreement.

A. Petitioner's Plea Was Not Voluntary and Intelligent Because Petitioner Misunderstood the Legality of the Possible Sentences Offered to Him.

As discussed earlier in this brief, Forbert held that one who enters into a plea agreement based upon a misunderstanding of the legality of the sentences available to the State did not enter into the agreement voluntarily and intelligently, and should be able to withdraw that plea. See 437 So. 2d at 1081. The Third District has employed similar reasoning to allow withdrawal of a plea:

> If a defendant claims that he would not have pled guilty or nolo if he had known what his correct scoresheet total had been . . . then that is an attack on the voluntary and intelligent character of the plea which is a claim that must be brought by a timely 3.850 motion to withdraw the plea in the trial court.

Skidmore v. State, 688 So. 2d 1014, 1015 (Fla. 3d DCA 1997); accord Smith v. State, 741 So. 2d 579, 580 (Fla. 3d DCA 1999) (holding that a defendant who entered a plea based upon a miscalculated guidesheet was entitled to withdraw his plea). The First District has agreed. See Gainer v. State, 590 So. 2d 1001, 1002 (Fla. 1st DCA

1991) ("If [the defendant] agreed to a 7 year sentence only because he believed that his guidelines score resulted in a recommended rage encompassing that sentence, that plea may be considered involuntary."); Hingson v. State, 553 So. 2d 768, 769 (Fla. 1st DCA 1989).

B. Several District Courts Have Either Explicitly Held or Suggested That One May Bring a Heggs-based Claim Challenging the Voluntary and Intelligent Character of His or Her Plea.

Most of the appellate courts in Florida have already held, or at a minimum implicitly suggested, that the change in law that Heggs effected may form the basis of a challenge to the voluntary and intelligent nature a plea. See Murphy, 773 So. 2d at 1175; Romero v. State, 805 So. 2d 92, 93 (Fla. 2d DCA 2002); Cox, 805 So. 2d at 1044; Soto v. State, 787 So. 2d 171, 171 (Fla. 2d DCA 2001); Videk v. State, 793 So. 2d 27, 29 n.2 (Fla. 2d DCA 2001); Jenkins, 771 So. 2d at 38; Hipps, 790 So. 2d at 584; Kleppinger v. State, 760 So. 2d 1045, 1046 (Fla. 2d DCA 2000); Sampson v. State, 794 So. 2d 762, 762 (Fla. 1st DCA 2001); see also Banck, 798 So. 2d at 815 (suggesting that defendant may be able to raise an involuntary plea challenge based upon Heggs).

This Court should hold that Petitioner has raised a valid challenge to the voluntary and intelligent nature of his plea because he alleged that he entered into the plea agreement thinking that the 1995 Guidelines represented the valid legal sentences available to the State, when in fact, they did not. As described in detail above, this

case is very much like Forbert. Thus the Court should hold that Petitioner has raised a valid claim to withdraw his plea, much like this Court previously held that the defendant in Forbert was entitled to withdraw his plea.

Further, this situation is analogous to those in Skidmore, Smith, Gainer, and Hingson. As here, the defendants in these cases all alleged that they would not have entered into the plea agreement if the sentencing guidelines presented to them actually showed the true legal sentence that the State could have imposed. It is of little import that the guidelines in Skidmore, Smith, Gainer, and Hingson were miscalculated, while the guidelines presented to Petitioner were the wrong guidelines. The reasoning is the same. The end result in this matter and those present in Skidmore, Smith, Gainer, and Hingson was that the defendant was presented with a piece of paper that purported to detail the range of legal sentences available to the State, but were wrong. Thus, this Court should hold, much like the courts in Skidmore, Smith, Gainer, and Hingson held, that Petitioner has, at least, raised a valid claim under Rule 3.850 that his plea was not voluntary and intelligent.

CONCLUSION

The change in law created by this Court in Heggs is a "newly discovered fact" upon which a motion pursuant to Rule 3.850 may be brought more than two years after a judgment and conviction are final. Additionally, the change in law created by Heggs should apply retroactively. Thus, this Court should answer both certified

questions in the affirmative. Finally, Petitioner has raised a valid challenge to the voluntary and intelligent nature of his plea because he has alleged that he entered the plea without knowledge of the Heggs decision, which dealt with the legal sentences available to the State. Therefore, the Court should reverse and remand to the trial court so that it may hold an evidentiary hearing on Petitioner's claim.

Respectfully submitted this ____ day of May, 2002.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States Mail to counsel for the Respondent, **Alan R. Dakan**, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050, this ____ day of May, 2002.

_____
Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point type, a font that is proportionately spaced.

_____
Attorney

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