**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.

# REPLY BRIEF OF PETITIONER, GREGORY BANKS

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## REPLY ARGUMENT AND AUTHORITIES

### Jurisdiction

This Court has jurisdiction over this entire petition because the District Court passed upon two questions that it certified to this Court to be of great public importance. This Court has the discretion to accept jurisdiction over "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." Art. V, § 3(b)(4), Fla. Const. Once the Court accepts jurisdiction, it may review the entire case for error. See Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 912 (Fla. 1995); Lawrence v. Florida E. Coast Ry. Co., 346 So. 2d 1012, 1014 n.2 (Fla. 1977). Hence, this Court's review encompasses the entire "decision" of the district court, not just the certified questions. See Reed v. State, 470 So. 2d 1382, 1383 (Fla. 1985); Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 612 n.1 (Fla. 1976).

Respondent's arguments in opposition to this Court's jurisdiction are not based upon the governing standards for jurisdiction. Respondent notes that neither Booker v. State, 771 So. 2d 1187 (Fla. 1st DCA 2000), nor Regan v. State, 787 So. 2d 265 (Fla. 1st DCA 2001), furnish a basis for review under Jollie v. State, 405 So. 2d 418 (Fla. 1981). (See A. Br. at p.4.) Jollie is completely inapplicable to this case because

it deals with the Court's jurisdiction to review "citation PCA[s]." 405 So. 2d at 419. The District Court here did not render a PCA, but rather certified two questions of great public importance. See Banks v. State, 801 So. 2d 153, 154 (Fla. 1st DCA 2001). The Court has jurisdiction to review the entire decision of the District Court.

Next, Respondent argues that Petitioner "did not address the question of whether the questions are ones of great public importance." (A. Br. at 4.) That is not at issue. The District Court alone determines whether a case raises a question of great public importance. See Rupp v. Jackson, 238 So. 2d 86, 88 (Fla. 1970); Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832, 835 (Fla. 1959). The District Court's certification vests this Court with jurisdiction. See Art. V, § 3(b)(4), Fla. Const.

In any event, the two certified questions are of great public importance because they will affect individual liberty interests, and because there is a degree of uncertainty and possible discord among the District Courts. Many individuals in addition to Petitioner have asserted rights that will be determined by the Court's resolution of the issues framed in the certified questions. See e.g., Murphy v. State, 773 So. 2d 1174, 1175 (Fla. 2d DCA 2000) (en banc); Cox v. State, 805 So. 2d 1042, 1044 (Fla. 4th DCA 2002).

Finally, contrary to unambiguous decisions from this Court, Respondent is

attempting to argue that even if the Court has jurisdiction over the first two issues, it would not have jurisdiction to resolve the third issue regarding whether Petitioner is entitled to withdraw his plea as it was involuntary. (See A. Br. at 28-29, 35.) Respondent argues that the Court should not reach this issue on appeal, because the issue allegedly does "not involve great public importance," and it "has not been raised by a certified question, nor has it been raised by way of alleged conflict." (See id.) Even if all of Respondent's allegations were true, which they are not, these assertions would not have any effect on the Court's jurisdiction over this issue. As this Court held in Leisure Resorts and Lawrence, once the Court accepts jurisdiction based upon the certified questions, it may review the entire case for error, which would include the error alleged by Petitioner in the third issue.

Further, contrary to Respondent's allegations, which would not affect jurisdiction in any event, the Court's resolution of the third issue is of great public importance and would have significant precedential value.[1] Two of the District Courts of Appeal already have held that a movant may bring a claim that his or her plea was

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[1] The third issue involves whether 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.

involuntary based upon the Heggs decision. See Murphy, 773 So. 2d at 1175; Cox, 805 So. 2d at 1044. Two other District Courts have suggested the same. See Hipps v. State, 790 So. 2d 583, 583 (Fla. 1st DCA 2001); Banck v. State, 798 So. 2d 814, 815 (Fla. 5th DCA 2001). By deciding the third issue, the Court could remove any doubt as to the ability of a person to raise a claim that his or her plea was not voluntary or intelligent based upon Heggs.

## Merits

### 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.

This Court should hold that the change in law announced in the Heggs decision constitutes a "newly discovered fact" within the meaning of Florida Rule of Criminal Procedure 3.850(b)(1) upon which Petitioner may file a motion for postconviction relief challenging the voluntary and intelligent nature of his plea more than two years after his judgment and conviction became final. This Court should follow its previously established precedent, in which it held that the possible legality of a sentence constitutes a fact. See Forbert v. State, 437 So. 2d 1079, 1081 (Fla. 1983).

Respondent has not offered any case law or arguments to controvert this established precedent. Further, two District Courts have already agreed that the change in law announced in Heggs is a newly discovered fact within the meaning of Rule 3.850(b)(1). See Cox, 805 So. 2d at 1044; Murphy, 773 So. 2d at 1175. Two other District Courts have suggested that this is the case. See Hipps, 790 So. 2d at 583; Banck, 798 So. 2d at 815. Respondent's sole attack on these authorities is that they "are incorrectly decided." (See A. Br. at 16.) To the contrary, these decisions are fair and accurate, and the Court should follow them to allow Petitioner's Heggs claim.

Respondent's quibbling over how to define a "fact" for Rule 3.850 purposes misses the mark. (See A. Br. at 15.) The Regan definition of a "fact" is circular and not helpful: "'evidence, which is anything which tends to prove or disprove a material fact.'" (See id. (citing Regan, 787 So. 2d at 267).) Further, Respondent's citation of Regan begs the question, because Petitioner challenges the Regan reasoning.

Respondent further argues that the only "fact" that can justify a belated Rule 3.850 challenge "must be of such a nature that it would probably produce an acquittal on retrial." (See A. Br. at 15.) Respondent presupposes that the movant was previously tried and convicted, whereas the issue now before the Court is the validity of a plea agreement. In the context of a plea agreement, a more logical definition of

a "fact" would be any piece of information that is of such a nature that it would probably *change Petitioner's mind about whether to enter into the plea agreement before him*. Such a definition would be similar to the reasoning this Court used in Forbert, holding that the legality of the defendant's possible sentence constituted a fact. See Forbert, 437 So. 2d at 1081. In the present matter, the answer to that question would be "yes"—the fact that this Court held the 1995 Sentencing Guidelines to be unconstitutional would have changed Petitioner's mind about entering into the plea agreement.

Obviously, Petitioner could not have discovered the change in law created by the Heggs decision until after that decision was released; he could not speculate about the outcome of that or any other case and was required to assume that the law was valid until a court of competent jurisdiction declared it invalid. Respondent would inappropriately place upon criminal defendants the obligation to know every nuance of the law and to arrive at their own conclusions about their validity. Only the judicial branch can do that. See Cotton v. County Comm'rs of Leon County, 6 Fla. 610, 1856 WL 1527, at *3 (Fla. 1856). Additionally, "all laws are presumed constitutional." Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210, 1214 (Fla. 2000); accord Department of Ins. v. Keys Title and Abstract Co., 741 So. 2d 599, 601 (Fla. 1st DCA

1999) (holding that "there is ._. . a presumption in the law that a statute is constitutionally valid").

Finally, this Court should hold that the time period in which Petitioner was able to file a motion pursuant to Rule 3.850, based upon the newly discovered fact of the change in law announced in this Court's decision in Heggs, should not have begun to run any sooner than the release of that decision. Once again, Respondent misses the point by assuming that the newly discovered fact is that chapter 95-184 violated the single subject rule. (See A. Br. at 17.) That is not the newly discovered fact upon which Petitioner based his Rule 3.850 motion. The newly discovered fact in this matter was the change in law, declaring the 1995 Guidelines to be unconstitutional, as announced in this Court's decision in Heggs. The District Court recognized that this was the newly discovered fact, by framing the certified question as "WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED A 'NEWLY DISCOVERED FACT.'" Banks, 801 So. 2d at 154. Contrary to Respondent's assertions, an after-the-fact judicial determination that the legislature violated the single subject rule cannot retroactively trigger an obligation to have acted as soon as the legislature acted. Petitioner would not have been entitled to plead under the 1994 Sentencing Guidelines until a court held that the 1995 Guidelines

were unconstitutional, because the 1995 Guidelines were presumed constitutional until this Court subsequently invalidated them. The earlier decision of the District Court, which did not invalidate chapter 95-184, likewise did not create a deadline for Petitioner's motion, even if as Respondent argues it put Petitioner on constructive notice of "the issue" (A. Br. 17.)

Petitioner was entitled to no relief until this Court officially ruled in Heggs. Therefore, this Court should hold that Petitioner could not have, and did not, discover the fact upon which Petitioner's motion is based—that the 1995 Guidelines were unconstitutional—until this Court so held in Heggs; as such, the deadline for filing a motion thereon did not begin to run any sooner than that date.

## 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 rule of law announced in Heggs applies retroactively because the decision meets the three part test for retroactive application as set forth in Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980): it originated in the Florida Supreme Court, the decision was constitutional in nature, and the decision was of fundamental significance because it meets the three factors from Stovall v. Denno,

388 U.S. 293 (1967).[2] Cases using the Witt test and ultimately denying retroactive application of a law are irrelevant. (See A. Br. at 21). Respondent apparently intends to argue that after applying the Witt factors, some changes in law should not be retroactively applied. Perhaps so, but that is not the issue here. The cases Respondent cites do not undermine the conclusion that Heggs should apply retroactively because it meets the three part Witt test.

Further, without applying the three part test for determining whether the change in law is of fundamental significance, as announced in Stovall, Respondent asserts superficially that Heggs was not of fundamental significance because "it does nothing more than recognize that the underlying legislative act contained more than one subject," and that it was "a temporary measure to repair a *'glitch'* in the normal sentencing process." (See A. Br. at 24 (emphasis added).) The change of law announced in Heggs is far from being as simple and unimportant as Respondent attempts to cast it.

Respondent's attempt to shrug off a violation of the single subject rule as a

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"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 v. State, 789 So. 2d 306, 311 (Fla. 2001).

mere insignificant "glitch" is unavailing. The single subject rule is part of the state constitution. See Art. III, § 6, Fla. Const. It is there for a good reason, principally to prevent "logrolling." State v. Thompson, 750 So. 2d 643, 646-47 (Fla. 2000) (quoting State v. Lee, 356 So. 2d 276, 282 (Fla. 1978)); accord Heggs v. State, 759 So. 2d at 620, 627 (Fla. 2000). The Heggs Court itself described the act to be an "evil" of the legislature. 759 So. 2d at 627. Thus, the change in law announced in Heggs was neither simple nor insignificant as Respondent attempts to characterize it. On the contrary, the change in law announced in Heggs satisfies the first Stovall requirement.

Respondent's "floodgate" argument based on Regan is unfounded. (See A. Br. at 26.) A very limited group of people would be able to file a motion based upon the retroactive law of Heggs, and their rights are important enough to be pursued and protected.

The spectra of "unjustified" motions being filed in reliance upon Heggs (see A. Br. at 27) likewise cannot justify eliminating the rights of defendants with valid claims. The Court should reject this argument outright as a matter of simple due process.

## 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.

Standard of Review

Respondent correctly asserts that when no evidentiary hearing took place, the standard for review under Florida Rule of Appellate Procedure 9.141(b) is that "unless the record shows *conclusively* that the [Petitioner] is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." (A. Br. at 28 (emphasis added)). Accord Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1998); Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986). This standard favors Petitioner and mandates, at a minimum, reversal and remand for an evidentiary hearing.

Further, Petitioner's allegations of reliance upon the 1995 Guidelines in deciding to enter his plea agreement must be taken "as true, except to the extent that they are rebutted conclusively by the record." Valle, 705 So. 2d at 1333. Contrary to Respondent's unsupported argument that Petitioner did not rely upon the 1995 Guidelines, Petitioner expressly asserted in his motion that he considered his scoresheet total under the 1995 Guidelines. (See R. at 4.) Petitioner's written plea agreement clearly states that "I further understand my sentence will be imposed *under the Uniform Sentencing Guidelines*." (See R. at 21 (emphasis added).) Additionally, at the plea hearing, Petitioner's counsel explained to the court the sentence that was

available under the scoresheet. (See R. at 23-24.) The court responded by pointing out that "we'll need an amended guideline scoresheet in the case." (See R. at 24.) In addition to this express record evidence of reliance on the unconstitutional Guidelines, common sense dictates that anyone entering a plea agreement would consider the time to be served if sentenced under the Guidelines, in evaluating the offered plea. If Petitioner had known that the offered plea represented a sentence only a month and a half shorter than the maximum sentence he could have received if sentenced after trial, he might have evaluated the offer very differently. It makes no sense to assume that Petitioner would have traded six weeks for his constitutional right to a trial. The record supports, and certainly does not rebut, Petitioner's assertion of reliance on the Guidelines, which must therefore be taken as true, and thus at a minimum entitles him to an evidentiary hearing.

Finally, Respondent correctly asserts that Petitioner must allege some prejudice resulting from his reliance upon the unconstitutional 1995 Guidelines. (See A. Br. at 33.) Respondent fails, however, to recognize that the abandonment of the right to trial in exchange for a few weeks' reduction in sentence constitutes precisely such prejudice. Petitioner thought that he was accepting a sentence that was the minimum legal sentence. (See R. at 8-11.) Petitioner's liberty interests have been prejudiced as

a result of his reliance on unconstitutional Guidelines.

Merits

Respondent essentially concedes this point by asserting that "[a] defendant's misunderstanding as to the maximum penalty could also be the basis of withdrawal of a plea." (See A. Br. at 34.) That is what happened here. Petitioner has demonstrated entitlement to post-conviction relief based upon his mistake of fact about the valid legal sentences that he could have received. Other courts have held that mistake of fact about what range of legal sentences was available to the State may form the basis of a challenge to the voluntary and intelligent nature of a plea agreement, which is exactly the situation before the Court.

Respondent cites Booker v. State, 771 So. 2d 1187 (Fla. 1st DCA 2000) for the proposition that Petitioner may not challenge the sentence he accepted in his plea agreement. (See A. Br. at 31.) Booker is inapplicable because it did not explicitly involve a challenge to the voluntary and intelligent nature of the movant's plea. See Booker, 771 So. 2d at 1187. Booker is of questionable merit in any event because the same court in the later-decided case of Sampson v. State, 794 So. 2d 762, 762 (Fla. 1st DCA 2001), held that a movant may be able to raise a Heggs based challenge to the voluntary and intelligent nature of his plea.

Further, Respondent mischaracterizes the issue by asserting that "petitioner does not cite any cases in which the courts have recognized that an act which occurs after the plea can be a 'mistake' or cause a 'misunderstanding.'" (See A. Br. at 33.) Petitioner has cited cases demonstrating that a subsequent event may constitute a mistake or misunderstanding giving rise to entitlement to relief under Rule 3.850. (See Am. In. Br. 20 (citing Forbert v. State, 437 So. 2d 1079, 1081 (Fla. 1983) (subsequent judicial invalidation of plea constituted mistake of fact); Skidmore v. State, 688 So. 2d 1014, 1015 (Fla. 3d DCA 1997) (movant who entered into a plea agreement based upon a miscalculated scoresheet could withdraw the plea upon later discovering the mistake because it was based upon a mistake of fact))).

## CONCLUSION

The District Court's passing upon and certification of questions of great public importance vests this Court with jurisdiction to consider those questions and all other issues in the case. The Court should hold that Petitioner's motion was timely by answering both certified questions in the affirmative. The Court should also reverse the District Court's ruling on the merits, by holding that Petitioner did raise a valid challenge to the voluntary and intelligent nature to his plea. At the very least, the Court should hold that Petitioner is entitled to an evidentiary hearing on whether his plea was

valid.

Respectfully submitted this ____ day of July, 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 July, 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