

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.

**SUPPLEMENTAL BRIEF OF PETITIONER,
GREGORY BANKS**

PHELPS DUNBAR LLP

Kevin M. O'Brien

100 South Ashley Drive

Suite 1900

Tampa, FL 33602

(813) 472-7550

(813) 472-7570 (fax)

Counsel for Petitioner, Gregory Banks

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SUPPLEMENTAL ARGUMENT AND AUTHORITIES

This Court should hold that its decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000), was not a “clarification” in the law, as defined by State v. Klayman, 27 Fla. L. Weekly S951, 2002 WL 31519926 (Fla. Nov. 14, 2002), because Heggs declared the 1995 Guidelines to be unconstitutional; therefore, Heggs was a complete “change” in the law rather than a mere clarification of the plain meaning of the law. Thus, this Court’s decision in Klayman does not control the outcome of this case. The decision in Heggs was a change in law that: 1) should constitute 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; and 2) should apply 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).

I. THE DECISION IN HEGGS WAS A “CHANGE” IN THE LAW BECAUSE IT DECLARED THE 1995 GUIDELINES TO BE UNCONSTITUTIONAL.

This Court should hold that its decision in Heggs constituted a “change” in the law because the court in Heggs actually declared the 1995 Guidelines to be unconstitutional; a court’s declaration that a statute or law is unconstitutional is

always a change in the law. In Klayman, this Court noted, “[t]he United States Supreme Court in Fiore v. White, 531 U.S. 225 . . . (2001), held that whereas a change in the law may be analyzed in terms of retroactivity, a clarification in the law does not implicate the issue of retroactivity.” 2002 WL 31519926, at *2. This Court then held:

Although Florida courts have not previously recognized the Fiore distinction between a “clarification” and “change,” we conclude that this distinction is beneficial to our analysis of Florida law. . . . As explained in Fiore, however a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a Witt analysis. Whereas Witt remains applicable to “changes” in the law, Fiore is applicable to “clarifications” in the law.

Klayman, 2002 WL 31519926, at *3 (footnotes omitted).

The decision of the Supreme Court of Pennsylvania in Fiore v. White, 757 A.2d 842 (Pa. 2000) (hereinafter the “Pennsylvania Fiore Decision”), upon which the United States Supreme Court relied in Fiore, is helpful to this analysis. In the Pennsylvania Fiore Decision, the court answered a certified question from the Supreme Court, which asked “whether the interpretation of [the subject statute] set forth in Commonwealth v. Scarpone, . . . 634 A.2d 1109, 1112 (1993), states the correct interpretation of the law of Pennsylvania at the date William Fiore’s conviction became final.” Fiore, 757 A.2d at 843. The Supreme Court of

Pennsylvania began by noting “[a] decision does not articulate a new rule of law when it ‘merely relie[s] upon a statutory interpretation which was not wholly without precedent.’” Id. at 847 (emphasis added). The court then described situations which constitute a change in law rather than a clarification of the law by reasoning:

Our role is to interpret statutes as enacted by the Assembly. We affect legislation when we affirm, alter, or overrule our prior decisions concerning a statute or when we declare it null and void, as unconstitutional. Therefore, when we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of an existing law.

Id. at 848 (emphasis added).

The court ultimately answered the certified question holding, “Scarpone did not announce a new rule of law” but “merely clarified the plain language of the statute.” Fiore, 757 A.2d at 848-49 (emphasis added); accord Fiore, 531 U.S. at 228 (quoting the Supreme Court of Pennsylvania’s answer to the certified question in the Pennsylvania Fiore Decision). Therefore, pursuant to the Supreme Court of Pennsylvania’s reasoning, a court that declares a statute to be unconstitutional is actually affecting or changing the law, rather than merely clarifying the plain meaning of the law.

Furthermore, a court’s ruling that a statute or law is unconstitutional is a “change” in the law because citizens must treat all laws as constitutional until a court declares the law to be unconstitutional. In Florida, “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”). Therefore, a declaration that a statute is unconstitutional must be a “change” in the law because, as a result of such a ruling, the subject statute transforms from being in full force and effect to being null and void.

This Court should hold that the Heggs decision was a “change” in the law. Pursuant to the reasoning employed by the Supreme Court of Pennsylvania in determining whether a decision was a “change” in law or “merely” a “clarification” of the law, this Court’s decision in Heggs was a “change” in the law because it affected chapter 95-184, Laws of Florida by declaring it null and void, as unconstitutional. The Heggs decision did not interpret the meaning of the language of chapter 95-184, Laws of Florida, or of a term used in the 1995 Guidelines Worksheet; rather, the decision declared the law, in its entirety, to be unconstitutional for violating Florida’s “single subject rule.” 759 So. 2d at 627.

Thus, the Heggs decision was quite different from a decision in which a state's highest court offers its initial interpretation of the plain meaning of the language of a particular statute, such as the Scarpone decision. Rather, in Heggs, this Court for the first time declared all of the language of Chapter 95-184 to be null and void. Therefore, the 1995 Guidelines changed from a law that, pursuant to Chicago Title Insurance Company and Keys Title and Abstract Company, all citizens had to treat as constitutional and in full force and effect into a nullity.

Therefore, because Heggs declared the 1995 Guidelines to be unconstitutional (and thus null and void) rather than merely interpreting the plain meaning of the 1995 Guidelines, this Court should hold that the decision in Heggs was a "change" in the law. If completely taking a law "off the books" does not constitute a "change" in the law, it is hard imagine what would.

II. THIS COURT'S DECISION IN KLAYMAN DOES NOT CONTROL THE OUTCOME OF THIS CASE BECAUSE THE COURT SHOULD ANSWER THE FIRST CERTIFIED QUESTION IN THE AFFIRMATIVE IN ANY EVENT, AND BECAUSE THE DECISION IN HEGGS WAS A "CHANGE" IN THE LAW.

This Court should further hold that Klayman does not control the outcome of this case because: 1) regardless of whether the decision in Heggs was a "change" or a "clarification," it constitutes 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; and 2) the decision in Heggs was actually a “change” in the law, and not simply a mere “clarification” of the law. Therefore, this 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. Furthermore, this Court should hold that although Klayman does not apply, the change in the law announced in Heggs applies retroactively because Heggs meets the three-prong test of Witt, which still applies to changes in the law.

First, this Court should hold that Klayman has no effect on the outcome of this case, because regardless of whether the First District Court of Appeal should have phrased the certified question in terms of a “change” in the law or a “clarification” of the law, this Court should still answer the first certified question in the affirmative. 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). Based upon reasoning similar to that used by this Court in Forbert, this Court should hold that in the context of a plea agreement, the 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. 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.

Even if this Court were to hold that the decision in Heggs was merely a “clarification” of the law, which it is not, such a ruling would not alter the conclusion that Heggs constitutes a newly discovered fact. Petitioner could not speculate about the outcome of Heggs or any other case and was required to assume that the 1995 Guidelines were valid until a court of competent jurisdiction declared them invalid. See Chicago Title Ins. Co., 770 So. 2d at 1214; Keys Title and Abstract Co., 741 So. 2d at 601. Thus, at the time of entering into his plea agreement Petitioner was justifiably mistaken as to the constitutionally-valid sentences that were available to the State. Therefore, this Court should hold that the decision of law announced in Heggs is a “newly discovered fact” within the meaning of Rule 3.850(b)(1) upon which Petitioner may file a motion for postconviction relief challenging the voluntary and intelligent nature of his plea.

Second, this Court should also hold that Klayman does not effect the outcome of this case because the decision in Heggs was a “change” in the law. In

Klayman, this Court held that although the Fiore reasoning now applies to “clarifications” of the law in Florida, Witt remains applicable to “changes” in the law of Florida. 2002 WL 31519926, at *3. Therefore, because the decision in Heggs, declaring the 1995 Guidelines to be unconstitutional, was a “change” in the law, this case is subject to the Witt analysis for determining whether a change in law should be applied retroactively.

Therefore, the Klayman decision does not alter Petitioner’s previous arguments that this Court should answer the second certified question in the affirmative. The Court should hold that the change in law announced in Heggs applies retroactively because the decision meets the three part test for retroactive application as set forth in Witt: 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).¹

¹“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).

CONCLUSION

This Court should hold that the decision in Heggs was a “change” in the law because Heggs declared the 1995 Guidelines to be null and void, as unconstitutional. Heggs was not a decision simply interpreting the plain meaning of a statute, which would amount to a mere “clarification” of the law. Hence, the Court’s recent ruling in Klayman does not control the outcome of this case. Therefore, 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 January, 2003.

KEVIN M. O'BRIEN
Florida Bar No. 0496111
PHELPS DUNBAR LLP
100 South Ashley Drive
Suite 1900
Tampa, Florida 33602-5311
813-472-7570
813-472-7570 (fax)
Counsel for Petitioner

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, and co-counsel for Petitioner, Susan L. Kelsey, Holland & Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32302, this ____ day of January, 2003.

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