

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-456

MARC JEAN PAUL,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In case no. 97-17643, Eleventh Judicial Circuit, Marc Jean Paul was charged with one count of armed robbery and one count of false imprisonment. In case no. 97-17639, he was charged with two counts of robbery using a deadly weapon or firearm. In case no. 97-15873, he was charged with one count of burglary with an assault or battery, one count of kidnapping with a weapon, and one count of armed robbery. In case no. 97-17225, he was charged with one count of armed robbery. (R. 77-97).

The defendant accepted a plea offer from the State of 18 years state prison, with a nine year mandatory minimum sentence, to resolve all four of his pending cases. (R. 56-75). At the time of the plea, the defendant's guidelines scoresheet resulted in a sentence range of 26 years to 43 years and eight months. (R. 3).

In July 2002, the defendant filed a motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. (R. 16, et seq.). In that motion, he claimed that he was entitled to relief pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000). He further alleged "that under the 1994 guidelines, the sentencing range would have been from 131.2 (10.9) years to 202 (16.3) years in prison." (R. 22; Motion, p. 7).

The record which was before the Third District Court of Appeal below does not contain any proffered scoresheet under the 1994 guidelines. The defendant's post-conviction motion did not include any calculations reflecting how the defendant determined that the sentence under the 1994 guidelines would have a range of 10.9 - 16.3 years.

The trial court denied the motion for post-conviction relief, stating: "The Courts interpreting the decision in Heggs have consistently ruled that if a Defendant was given a departure sentence, either above or below the guidelines, that the Defendant is not entitled to be resentenced under Heggs, as they were not adversely affected by the amendments." (R. 3). The trial court's order noted that the 18 year sentence which had been imposed through a plea agreement "was below guidelines." (R. 3).

On appeal to the Third District Court of Appeal, the defendant argued that his plea was involuntary, "because he relied on the unconstitutional 1995 guidelines in his negotiation." (R. 100). The Third District affirmed the order denying post-conviction relief: "This court has held that a defendant is not entitled to relief under Heggs on an involuntariness theory. Foster v. State, 794 So. 2d 731 (Fla. 3d DCA 2001). As we did in Foster, we certify direct conflict

with Murphy v. State, 773 So. 2d 1174 (Fla. 2d DCA 2000), and Mortimer v. State, 770 So. 2d 743 (Fla. 4th DCA 2000)." (R. 100).

SUMMARY OF ARGUMENT

The record before both this Court and the Third District contains only an allegation that the sentence of 18 years that was imposed pursuant to a plea would not have been within the recommended range of the 1994 guidelines. The record before both this Court and the Third District is therefore insufficient for the purpose of determining whether the defendant is entitled to any relief based on Heggs v. State, 759 So. 2d 620 (Fla. 2000), as construed by this Court in Banks v. State, 887 So. 2d 1191 (Fla. 2004). The case should therefore be remanded to the District Court of Appeal with directions to further remand the case to the trial court, to make the appropriate determination as to what the defendant's sentence would be under the 1994 guidelines and to then evaluate the case in light of Banks.

ARGUMENT

I. THE RECORD DOES NOT DEMONSTRATE THAT
THE PETITIONER IS ENTITLED TO RELIEF
UNDER HEGGS.

In Heggs v. State, 759 So. 2d 620 (Fla. 2000), this Court invalidated the 1995 sentencing guidelines based on a single subject violation of the Florida Constitution. This Court recognized, at that time, that only those who had been adversely affected by reliance on the validity of the 1995 guidelines might be entitled to relief.

More recently, this Court, in Banks v. State, 887 So. 2d 1191, 1194 (Fla. 2004), clarified the effect of Heggs:

. . . Hence, under Heggs, if a sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that defendant is not entitled to relief. Heggs imposes a bright-line test that precludes individuals from challenging their plea agreements when the sentences imposed pursuant to those agreements could have been imposed under the 1994 guidelines without a departure.

In the instant case, the defendant, pursuant to a plea, received a sentence of 18 years incarceration, where the 1995 guidelines had resulted in a range of 26 years - 43 years. The defendant, in his 3.800 motion to correct illegal sentence, alleged "that under the 1994 guidelines, the sentencing range would have been from 131.2 (10.9) years to 202 (16.3) years in prison." (R. 22; Motion, p. 7).

While the defendant effectively alleges that his 18-year sentence would require an upward departure under the 1994 guidelines, and that he would therefore be entitled to relief under Banks and Heggs, the record before this Court and the Third District Court of Appeal is insufficient to establish an entitlement to any such relief.

Neither the record in this Court nor in the Third District Court of Appeal contains any 1994 guidelines scoresheet. Furthermore, neither the trial court nor the Third District Court of Appeal has approved any calculations under the 1994 guidelines scoresheet. The defendant's allegation, in the 3.800 motion, that the 1994 guidelines would result in a maximum recommended range of 16.3 years is simply an allegation, which has not been approved by any lower court on the basis of a review of the scoresheet.

Accordingly, while it is possible that the defendant may be entitled to relief under Banks and Heggs, the record before this Court and the Third District Court of Appeal is insufficient to enable this Court to make that determination. Therefore, this Court should remand this case to the Third District Court of Appeal, with directions to that Court to further remand the case to the trial court, for the purpose of having a judicial determination by the trial court as to the appropriate scoring of the 1994 guidelines scoresheet. If the trial court then

finds that the sentence imposed under the 1994 guidelines could not have been imposed absent an upward departure, then the defendant should be granted relief under Heggs.

CONCLUSION

Based on the foregoing, this case should be remanded to the lower courts with directions to determine whether the sentence imposed herein could have been imposed under the 1994 guidelines without an upward departure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee was mailed this ___ day of March, 2005 to ANDREW STANTON, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

I hereby certify that the foregoing Brief has been typed in Courier New, 12-point type, in compliance with the Florida Rules of Appellate Procedure.

RICHARD L. POLIN