IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-456

MARC JEAN PAUL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

This cause is before the Court on a petition for discretionary review on the grounds of certified conflict of decisions. References to the Appendix accompanying this initial brief are indicated parenthetically by the letter "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Marc Jean Paul, filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (A. 3-13). In it, he challenged his convictions and sentences in four cases. (A. 4). The Petitioner's motion specifically alleged that his plea was involuntary. (A. 9).

The district court succinctly summarized the facts of the case as follows:

> Defendant-appellant Paul entered into a plea bargain whereby he was sentenced to eighteen years incarceration with a nine-year minimum mandatory term, to resolve four pending cases. At the time of the plea negotiation, his scoresheet was prepared under the 1995 guidelines. The defendant's guidelines range was from twenty-six years to forty-three years, eight months. Thus, the plea bargain was for a below guidelines sentence.
>
> Subsequently the Florida Supreme Court announced *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), which found the 1995 sentencing guidelines unconstitutional for crimes committed on or after October 1, 1995 and before May 24, 1997. *Trapp v. State*, 760 So. 2d 924 (Fla. 2000). The defendant's crimes are within the window period.
>
> The defendant states that his plea was involuntary, because he relied on the unconstitutional 1995 guidelines in his negotiation. The defendant alleges that under the 1994 sentencing guidelines, his sentence would have been a maximum of 16.3 years. He contends that he based his plea on misinformation and that the plea is involuntary.

(A. 1-2). *Paul v. State*, 838 So. 2d 687, 688 (Fla. 3d DCA 2003).

Thus, the Petitioner's motion alleged that he bargained for a downward departure sentence under the sentence guidelines. (A. 9-10). Instead, he received an upward departure sentence. The motion alleged that had the Petitioner known this, he would not have accepted the plea, but would instead have proceeded to trial. (A. 9-10).

The trial court denied the Petitioner's motion without an evidentiary hearing. (A. 16-17). The Petitioner appealed to the Third District Court of Appeal, and the district court affirmed, explaining:

> 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).

(A. 2). *Paul*, 838 So. 2d 688. The Petitioner invoked this Court's discretionary jurisdiction based on the certified conflict of decisions.

QUESTION PRESENTED

Whether a defendant may seek relief for an involuntary plea pursuant to *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), where his sentence satisfies the test for relief under *Heggs* and *Banks v. State*, 887 So. 2d 1191 (Fla. 2004).

SUMMARY OF ARGUMENT

The Petitioner has established a prima facie case that his plea was involuntary. Florida law recognizes that a plea entered on the basis of an incorrect understanding of the defendant's sentencing range may be involuntary. The Petitioner agreed to an 18-year sentence on the basis of a 1995 sentencing guidelines range of 26 to 43 years. The 1995 guidelines are invalid under *Heggs v. State*, 759 So. 2d 620 (Fla. 2000). The valid 1994 guidelines would yield a range of 10.9 to 16.3 years. Though he bargained for a downward departure, the Petitioner received an upward departure.

The Petitioner's claim also satisfies the test for relief established by *Heggs* and extended to involuntary plea claims in *Banks v. State*, 887 So. 2d 1191 (Fla. 2004). The 18-year sentence could not have been imposed absent an upward departure. And unlike the trial courts in *Lemon v. State*, 825 So. 2d 927 (Fla. 2002), *Ray v. State*, 772 So. 2d 18 (Fla. 2d DCA 2000) and *Kwil v. State*, 768 So. 2d 502 (Fla. 2d DCA 2000), the trial court here could not have departed for the same reasons under both versions of the guidelines. There is no aggravating circumstance that would justify an upward departure, and the Petitioner would not have entered an agreement for an upward departure sentence.

The district court has advanced no reason for a categorical ban on *Heggs*-

based voluntariness claims. The decision of the district court is contrary to the law of Florida. This Court should reverse it, with directions to remand for an evidentiary hearing on the Petitioner's motion.

STANDARD OF REVIEW

This case presents a pure question of law. Such questions are subject to review *de novo*. *See, e.g., State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

ARGUMENT

THE PETITIONER, WHOSE SENTENCE SATISFIES THE TEST FOR RELIEF UNDER *HEGGS* AND *BANKS*, IS ENTITLED TO CHALLENGE HIS INVOLUNTARY SENTENCE PURSUANT TO *HEGGS*.

The district court affirmed the summary denial of the Petitioner's postconviction motion based on its holding that: "[A] defendant is not entitled to relief under *Heggs* on an involuntariness theory." (A. 2). *Paul v. State*, 838 So. 2d 687, 688 (Fla. 3d DCA 2003). This holding is contrary to Florida law. Under established Florida law, a defendant who enters a plea based on a mistake concerning his possible sentence may challenge his or her plea as involuntary. While the Petitioner's claim arises from the use of the unconstitutional 1995 sentencing guidelines, his sentence satisfies the additional test created by this Court in *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) and applied to voluntariness claims *Banks v. State*, 887 So. 2d 1191 (Fla. 2004). The judgment of the district court must be reversed.

A. The Petitioner's Sentence Is Involuntary Under Established Florida Law.

The due process of law guaranteed by our constitutions requires that a guilty plea be "a voluntary and intelligent choice among the alternative courses of action

open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see Boykin v. Alabama*, 395 U.S. 238 (1969); U.S. Const., amends. 5, 14; art. I, § 9, Fla. Const. In *Forbert v. State*, 437 So. 2d 1079, 1081 (Fla. 1983), the Court stated:

> It 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.

The misunderstanding of fact at issue in *Forbert* was the legality of the defendant's sentence.

A plea agreement entered based on a mistaken understanding of the appropriate guidelines range is subject to attack as involuntary. *See, e.g., Hingson v. State*, 553 So. 2d 768 (Fla. 1st DCA 1989); *Smith v. State*, 741 So. 2d 579 (Fla. 3d DCA 1999). In *Hingson*, the defendant entered a plea agreement for a 20-year sentence. He made this decision on the basis of a sentencing guidelines scoresheet that indicated a range of 17 to 22 years. This sentencing range, however, was arrived at by an the use of guidelines amendments which could not constitutionally apply to pre-1986 offenses. 553 So. 2d at 769; *Mincey v. State*, 525 So. 2d 465 (Fla. 1st DCA 1988) (finding ex post facto violation). Hingson filed a Rule 3.850 motion alleging that applying the guidelines rules which properly governed his case

would yield a recommended range of 12-17 years. The district court reversed the summary denial of Hingson's motion, concluding:

> If appellant based his plea, agreeing to the state attorney's recommendation of 20 years' imprisonment, upon a belief that his guidelines score resulted in a recommended range of 17 to 22 years instead of 12 to 17 years, then his plea may be considered involuntary.

553 So. 2d at 769. *See also Skidmore v. State*, 688 So. 2d 1014 (Fla. 3d DCA 1997); *Gainer v. State*, 590 So. 2d 1001 (Fla. 1st DCA 1991).

The Petitioner's Rule 3.850 motion states a claim for relief under general principles of Florida law. Mr. Paul gave up his right to trial and accepted a sentence of 18 years based on a 1995 guidelines scoresheet that indicated a sentencing range of 26 to 43 years. Like the defendant in *Hingson*, the Petitioner's sentencing range was based on guidelines amendments that could not validly by applied to him. *See Heggs v. State*, 759 So. 2d 620 (Fla. 2000); *Trapp v. State*, 760 So. 2d 924 (Fla. 2000). Mr. Paul has alleged that he received an upward departure sentence under the valid 1994 guidelines, and that he would not have entered the plea agreement had he known the correct sentencing range. This establishes a prima facie case that the plea was involuntary.

B. The Petitioner Was Adversely Affected By The 1995 Sentencing Guidelines As Required By *Heggs* and *Banks*.

The Petitioner's sentence also meets the additional test for relief imposed by *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) and *Banks v. State*, 887 So. 2d 1191 (Fla. 2004). In holding the 1995 sentencing guidelines unconstitutional, the Court announced that not everyone sentenced pursuant to those guidelines would be entitled to relief:

> [O]ur decision here will require, among other things, the resentencing of a number of persons who were sentenced under the 1995 guidelines, as amended by chapter 95-184. However, only those persons adversely affected by the amendments made by chapter 95-184 may rely on our decision here to obtain relief. Stated another way, in the sentencing guidelines context, we determine that if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that person shall not be entitled to relief under our decision here.

Heggs, 759 So. 2d at 627. Some courts concluded that this language applied only to claims for resentencing, and not to attacks on the voluntary character of a plea. *See, e.g., York v. State*, 788 So. 2d 296 (Fla. 2d DCA 2001); *Carvello v. State*, 824 So. 2d 202 (Fla. 4th DCA 2002). Other courts strictly applied the letter of *Heggs* to involuntary-plea claims. *See Booker v. State*, 771 So. 2d 1187, 1188 (Fla. 1st DCA 2000).

The Court recently addressed this question in *Banks v. State*, 887 So. 2d 1191 (Fla. 2004), and extended the *Heggs* requirement to involuntary plea claims:

> 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.

887 So. 2d at 1194. The Court concluded that:

> Banks has not been adversely affected by reliance on the 1995 guidelines because the sentence he ultimately received was a valid sentence under the 1994 guidelines.

Id.

The Petitioner's claim passes the *Heggs-Banks* test. Mr. Paul accepted a sentence of 18 years. The 1994 sentencing guidelines range is 10.9 to 16.3 years. Patently, the 18-year sentence is an upward departure from the 1994 guidelines and could not "have been imposed under the 1994 guidelines without a departure." The Petitioner was "adversely affected by reliance on the 1995 guidelines" because that reliance caused him to agree to a sentence that could not be imposed under the 1994 guidelines.

The Petitioner's claim is not precluded by *Lemon v. State*, 825 So. 2d 927 (Fla. 2002). In *Lemon*, the Court approved the reasoning of *Ray v. State*, 772 So.

2d 18 (Fla. 2d DCA 2000) and *Kwil v. State*, 768 So. 2d 502 (Fla. 2d DCA 2000). Both *Ray* and *Kwil* involved *Heggs* resentencing claims where the court had imposed an upward departure sentence based on reasons valid under both the 1994 and 1995 guidelines. The Second District Court of Appeal reasoned that neither Ray nor Kwil was "adversely affected" by the unconstitutional 1995 guidelines. In *Lemon*, this Court agreed, applying the *Heggs* test to conclude that no relief was available where the trial court "could have" imposed same upward departure sentence based on the same aggravating circumstances:

> In this case, we conclude Lemon was not "adversely affected" by application of the 1995 guidelines because her sentence of 96 months was an upward departure sentence that could have been imposed under either the 1994 or the 1995 guidelines. The statutory aggravating circumstances cited by the trial court in this case were valid under both the 1994 and the 1995 sentencing guidelines scoresheet. *See* § 921.0016(3)(i), (m), Fla. Stat. (1995); § 921.0016(3)(i), (m), Fla. Stat. (1993).

825 So. 2d at 931.

The Petitioner was "adversely affected" by *Heggs* within the meaning of *Lemon*. Unlike Ray, Kwil, or Lemon, Mr. Paul is not arguing he would have received a smaller upward departure sentence based on the same reasons had the court considered a 1994 guidelines scoresheet. The very heart of the Petitioner's claim is that the trial court could *not* have imposed the upward departure sentence

at all. On the present record, the only circumstance that might conceivably justify an upward departure sentence would be a "legitimate, uncoerced plea bargain." § 921.0016(3)(a), Fla. Stat. (1993). It is, of course, this very plea bargain which is involuntary as a result of the use of an invalid guidelines range. Had the Petitioner been aware of the correct 10.9 to 16.3 year sentencing range, he would not have entered the plea agreement, and 921.0016(3)(a) would have been unavailable. *See Eady v. State*, 789 So. 2d 440 (Fla. 1st DCA 2001) (distinguishing *Ray* where sentence that had been a downward departure under 1995 guidelines became an upward departure when the valid 1994 guidelines were applied).

C. The District Court's Opinion Provides No Support For Its Blanket Ban On *Heggs*-Based Voluntariness Claims.

The district court held that the Petitioner's challenge to the voluntary and intelligent nature of his plea is categorically barred under *Heggs*:

> 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).

(A. 2). *Paul*, 838 So. 2d 688. As demonstrated above, this holding is contrary to

pre-*Heggs* law and is not supported by the test for relief this Court announced in *Heggs* and applied to voluntariness claims in *Banks*. The decision, moreover, fails to offer any other support for its holding.

The only authority cited in support of the district court's holding is *Foster*. *Foster*, in turn, cites *Mullins v. State*, 773 So. 2d 1240 (Fla. 3d DCA 2000), and expresses agreement with *Booker v. State*, 771 So. 2d 1187 (Fla. 1st DCA 2000). None of these decisions supports the district court's holding in the present case. All three cases involved plea agreements to a sentence that fell within the 1994 guidelines. All three cases found that the language of *Heggs* barred relief. Indeed, *Booker* acknowledged that the defendant might have a claim for relief but for the special requirement imposed by *Heggs.* The First District Court of Appeal has subsequently recognized that relief from an involuntary plea is available pursuant *Heggs* to defendants whose sentence does *not* fall within the 1994 guidelines. *See Hipps v. State*, 790 So. 2d 583 (Fla. 1st DCA 2001).

CONCLUSION

The Petitioner entered a negotiated plea for a downward-departure sentence in reliance on the unconstitutional 1995 sentencing guidelines. Under the valid 1994 guidelines, he received and *upward* departure. The has properly alleged that his

plea was involuntary under Florida law, and he has satisfied the test for relief under *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) and *Banks v. State*, 887 So. 2d 1191 (Fla. 2004). There is no basis for the district court's decision barring his claim. The decision of the Third District Court of Appeal should be reversed, and the cause should be remanded for an evidentiary hearing on the Petitioner's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Richard Polin, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on February 3, 2004.

_____

ANDREW STANTON
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ANDREW STANTON
Assistant Public Defender