IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-456

MARC JEAN PAUL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY 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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INITIAL BRIEF OF PETITIONER ON THE MERITS

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.

QUESTION PRESENTED

Whether the district court's decision holding "a defendant is not entitled to relief under *Heggs* on an involuntariness theory" must be reversed, where the State concedes that the Petitioner would be entitled to relief under *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), and *Banks v. State*, 887 So. 2d 1191 (Fla. 2004), if his sentence is an upward departure under the 1994 Guidelines.

SUMMARY OF ARGUMENT

The State concedes that the Petitioner is entitled to relief so long as his sentence would be an upward departure under the 1994 Guidelines. The district court, however, determined that the Petitioner was categorically ineligible for relief, holding "a defendant is not entitled to relief under *Heggs* on an involuntariness theory." (A. 2). In light of the State's concession, as well as the arguments set forth in the Initial Brief, the district court's decision must be reversed.

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 DISTRICT COURT'S DECISION HOLDING "A DEFENDANT IS NOT ENTITLED TO RELIEF UNDER *HEGGS* ON AN INVOLUNTARINESS THEORY" MUST BE REVERSED, WHERE THE STATE CONCEDES THAT THE PETITIONER WOULD BE ENTITLED TO RELIEF UNDER *HEGGS V. STATE*, 759 SO. 2D 620 (FLA. 2000), AND *BANKS V. STATE*, 887 SO. 2D 1191 (FLA. 2004), IF HIS SENTENCE IS AN UPWARD DEPARTURE UNDER THE 1994 GUIDELINES.

The State of Florida agrees that the facts alleged in the Petitioner's Rule 3.850 motion, if proven, would entitle him to relief:

> 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*.

Answer Brief of Respondent on the Merits, 6-7. Nevertheless, the Attorney General does not directly confess error. Instead, he argues that the record fails to establish the truth of the Petitioners allegations and that a remand for additional fact-finding is necessary. Answer brief at 6. If by this the State of Florida is suggesting that the district court's decision need not be reversed, it is mistaken. The State's concession ineluctably leads to the conclusion that this Court must reverse the district court's decision holding that relief is unavailable to the Petitioner as a matter of law must be reversed.

This is an appeal from the summary denial of Marc Jean Paul's Rule 3.850 motion. (A. 1, 14-15). Thus, the Petitioner's appeal to the district court was

governed by Florida Rule of Appellate Procedure 9.141(b)(2)(D), which states: "On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." Given the Attorney General's concession in this Court that the allegations in the Petitioner's motion would entitle him to relief, Answer Brief, 6-7, it is now clear that Rule 9.141(b)(2)(D) required the district court to reverse the summary denial.

The Third District Court of Appeal, however, affirmed. It determined that the Petitioner was categorically ineligible for relief, holding "a defendant is not entitled to relief under *Heggs* on an involuntariness theory." (A. 2). As demonstrated in the Initial Brief, this holding was incorrect. Moreover, by conceding that the Petitioner's allegations would entitle him to relief, the State of Florida necessarily agrees that the district court's opinion is wrongly decided. The district court's opinion must be reversed, and the cause must be remanded to the circuit court pursuant to Rule 9.141(b)(2)(D).

CONCLUSION

The State of Florida now agrees with the Petitioner that he is entitled to relief so long as his sentence amounts to an upward departure under the 1994

Guidelines. Based on this concession, as well as the arguments in the Initial Brief, the decision of the Third District Court of Appeal must be reversed.

Respectfully submitted,

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BY:_____
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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 April 4, 2005.

_____
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.

_____
ANDREW STANTON
Assistant Public Defender