IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No. SC04-261
JERRY D. ANDERSON,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the State's statement of the case and facts.

SUMMARY OF THE ARGUMENT

The issue here is what harmless error test applies when a miscalculated scoresheet (to the defendant's detriment) is used and the sentence imposed could have been imposed, without a departure, under an accurate scoresheet. This will be called the "nondeparture mis-calculation" issue in this brief.

Under Heggs v. State, 759 So. 2d 620 (Fla. 2000), defendants are not entitled to resentencing if the sen-tence "could have been imposed under the 1994 guidelines (without a departure) ...." Id. at 627. This test con-flicts with the harmless error test used by the district courts in pre-Heggs nondeparture miscalculation cases, under which resentencing was required "unless the record conclusively shows" the trial court "would have imposed" the same sentence under a correct scoresheet. Fortner v. State, 830 So. 2d 174, 175 (Fla. 2d DCA 2002). This test was used in both direct appeal and post-conviction cases.

The certified conflict here is whether the could-have-imposed test is now the sole test for harmless error, even in non-Heggs cases. Since Heggs was a direct appel, and the present case concerns the summary denial of a post-conviction motion, a corollary issue here is what test applies in post-conviction proceedings.

The State first argues the error here "was a Heggs error." IB, p.8. The State is mistaken. The sentence was imposed under the correct 1994 scoresheet. The fact that the offense level would have been correct but for Heggs does not make this a Heggs case; but for Heggs, the use of the 1994 scoresheet would have been erroneous. Respondent's claim is no different from any other non-Heggs claim of scoresheet miscalculation.

The State next argues Heggs' could-have-imposed test applies to non-Heggs scoresheet errors. The following hypothetical exposes the problem with this argument. At the sentencing, the trial court asserts:

> I have a guidelines scoresheet showing a permitted sentencing range of 5-7 years imprisonment. Both counsel agree, and I concur, that the scoresheet is accurate.
>
> Having presided at Defendant's trial, and having sat in the criminal division of this court for over 20 years, I believe five years

imprisonment is unconscionably harsh. Unfortunately, I can find no ground for departure. I, most reluctantly, hereby sentence you to the guidelines minimum term of five years imprisonment.

On direct appeal, Defendant's counsel files an Anders brief. The district court affirms per curiam. Defendant's post-conviction motion, filed under rules 3.800(a) and 3.850, is summarily denied, as follows:

> In his first claim, Defendant argues trial counsel was ineffective for failing to object to a scoresheet error. The scoresheet does contain a serious error; the proper guidelines score is 3-5 years.
>
> There are two elements to an ineffective assistance claim, "deficient performance" and "prejudice." Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance was clearly deficient; the error was obvious and counsel should have spotted it (as should have this court and the prosecutor).
>
> However, Defendant has not shown prejudice. Under Heggs, scoresheet errors are harmless if the sentence could have been imposed under an accurate scoresheet. Heggs was a direct appeal; if Defendant's counsel had objected to the error at sentencing, and the objection had been overruled, the sentence would have been affirmed on direct appeal. "If the harmless error test [for direct appeal] has been satisfied, then it follows there can be no prejudice under Strickland." Johnson v. State, 855 So. 2d 1157, 1159 (Fla. 4th DCA 2003). Further, if the could-have-imposed test is appropriate for direct appeal, and the threshold for post-conviction relief is higher, then, at the least, Defendant must show the sentence could not have been imposed (absent counsel's error) in order

> to show prejudice. Defendant cannot make this showing. Claim one is denied.
>
> In his second claim, Defendant argues he is entitled to relief under rule 3.800(a), which allows trial courts to "at any time correct ... an incorrect calculation ... in a sentencing scoresheet ...." However, again, if Defendant must pass the could-have-imposed test to gain relief on direct appeal, his burden cannot be any lower in a rule 3.800(a) motion. It is his burden to show the sentence could not have been imposed under an accurate scoresheet. He failed to do this; this claim is also denied.

The unfairness of this hypothetical shows the would-have-imposed test is the proper harmless error test for nondeparture miscalculations, in both direct appeals and post-conviction proceedings.

The would-have-imposed test recognizes that harmless error analysis in this context must focus on the effect the scoresheet error had on the trial court's exercise of its discretion when imposing a sentence within the permitted guidelines range. The assumption here is that trial courts are influenced by the total sentencing points on the scoresheet (which in turn influences the permitted range) when they exercise their sentencing discretion. Scoresheet miscalculations which lead to an erroneous permitted range may improperly influence the court when it determines the proper within-guidelines

sentence; in simple terms, more points leads to harsher sentences. Scoresheet errors are harmless only if it is clear the error had no effect on that discretionary sentencing decision.

By focusing solely on whether the trial court could impose the sentence, the Heggs test overlooks this discretionary element to guidelines sentencings. The Heggs test also conflicts with the basic harmless error test applied to trial errors, which asks whether it is clear beyond reasonable doubt that "the result would have been the same absent the error." Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988)(emphasis added).

Although this Court has never (other than Heggs) expressly considered what harmless error test applies to nondeparture miscalculation issues, the Court rejected the could-have-imposed test and adopted the would-have-imposed test for a related issue which also has a significant element of judicial discretion: departure sentences based on both valid and invalid reasons. Albritton v. State, 476 So. 2d 158 (Fla. 1985). Although the point is not free from doubt, the Court may have implicitly approved the would-have-imposed test in an-

other related context: upward departure sentences supported by valid reasons but based on erroneous scoresheets. State v. Mackey, 719 So. 2d 284 (Fla. 1998). Maddox v. State, 760 So. 2d 89, 103 (Fla. 2000) also implicitly endorses the would-have-imposed test.

It is not clear why Heggs adopted the more stringent harmless error test. The Court may use the more stringent test when the sentencing challenge is based on a single subject violation, although it is not clear why the basis for the sentencing challenge should affect the harmless error analysis in this fashion. The Court may also have been simply trying to reduce the burden on the lower courts dealing with Heggs' wake; the would-have-imposed test would have required many more post-Heggs resentencings. This is a valid policy consideration. But, given that harmless error analysis is grounded on constitutional principles of fairness to defendants and judicial responsibility to protect them from harmful error, Goodwin v. State, 751 So. 2d 537, 541-46 (Fla. 1999), it is not clear why this policy consideration should override the basic harmless error test.

Regardless of the reason for Heggs' adoption of the

could-have-imposed test, that test should not be extended to non-Heggs nondeparture miscalculation issues. The would-have-imposed test must be used, in both direct appeals and post-conviction proceedings. Under that test, the trial court erred in summarily denying Respondent's post-conviction motion because the attachments to the court's order do not conclusively prove Respondent would have received the same sentence under an accurate scoresheet.

ARGUMENT

THE PROPER HARMLESS ERROR TEST FOR NONDEPARTURE MISCALCULATION ISSUES, ON BOTH DIRECT APPEAL AND IN POST-CONVICTION PROCEEDINGS, IS THE "WOULD-HAVE-IMPOSED" TEST, WHICH REQUIRES RESENTENCING UNLESS IT IS CLEAR FROM THE EXISTING RECORD THAT THE TRIAL COURT WOULD HAVE IMPOSED THE SAME SENTENCE UNDER AN ACCURATE SCORESHEET.

Rule 3.850 claims may be summarily denied if the claims are "either facially invalid or conclusively refuted by the record." Foster v. State, 810 So. 2d 910, 914 (Fla. 2002)(citations omitted). Respondent's motion was facially sufficient. Under the would-have-imposed test, the denial of the motion was erroneous because the attachments to the court's order do not show Respondent would have received the same sentence under an accurate scoresheet.

The discussion that follows focuses first on the proper harmless error standard for nondeparture miscalculation issues raised on direct appeal. The question of whether that same test applies to post-conviction proceedings will then be discussed.

I. HARMLESS ERROR IN GENERAL

With respect to convictions based on jury verdicts,

the harmless error test requires "close[] examination of [how the error] might have possibly influenced the jury verdict":

> The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.... If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is ... harmful.

State v. DiGuilio, 491 So. 2d 1129, 1138-39 (Fla. 1986)(emphasis added).

The appellate court must not "make its own determination of whether a guilty verdict could be sustained"; the focus must be on what role the error "may have played ... in the jury's deliberation and [the] verdict ...." Goodwin, 751 So. 2d at 542 (emphasis added)(citation omitted). The question the appellate court must answer is "whether the result would have been the same absent the error." Ciccarelli, 531 So. 2d at 131 (emphasis added). This test applies to both constitutional and nonconstitutional errors. Goodwin, 751 So. 2d at 538, 542-44.

II. HARMLESS ERROR AND SCORESHEET MISCALCULATIONS

Harmless error analysis in sentencing issues raises

different considerations. There is no jury; issues of fact are often determined more informally and by a lower standard of proof. Most important, with some sentencing issues, the analysis must focus on the effect the error had on the court's exercise of its sentencing discretion, rather than on the court's factfinding. The nondepar-ture miscalculation issue is such an issue.

A central tenet of the guidelines is that the decision of where, within the permitted range, to sentence the defendant is a discretionary matter. That discretion is unlimited, at least in the sense that it is unreviewable on appeal; if an accurate scoresheet is used, the length of a sentence within the permitted range cannot be challenged on appeal. However, that discretion is not unlimited according to the guidelines rules. Under those rules, the range of permitted sentences is divided into categories, and some guidance is provided regarding how the court is to exercise its discretion when fashioning a sentence within those categories. In simple terms, a sentence near the middle of the permitted range is presumed to be proper, and the extent of variance from that presumptive sentence should

be determined by the extent the court believes the circumstances of the case vary from those of the "average" such case.

The harmless error test for nondeparture miscalculations must consider this guided discretionary element of guidelines sentences. While appellate courts cannot second guess such discretionary sentencing decisions, they can (and must) insure that discretionary decision is made within the mandated framework, i.e., under an accurate scoresheet.

There are three types of scoresheet errors: legal, factual, and mathematical. Legal errors occur when points are scored in an manner not authorized by the applicable guidelines; the present case is an example. Factual errors occur when the factual predicate for the scoring is inadequate. Math errors are math errors.

On appeal, the issue of whether a scoresheet error occurred is a matter of law. With factual errors, the issue will be: Is there legally sufficient evidence in the record to support the trial court's finding of fact? Regardless of the type of error, the issue on appeal will always be: Were the challenged points lawfully

scored? If not, harmless error analysis need not focus on the effect the error had on the trial court's factual findings. We know that effect; the court found the defendant had a higher number of sentencing points than he should have had.

Harmless error analysis must address the effect the error had on the sentence. If the sentence was outside the correct guidelines range, that effect is obvious: The sentence was an invalid upward departure. If the sentence was within the correct range, the focus must be on the effect the error had on the court's exercise of its sentencing discretion. The error is the inclusion of the points on the scoresheet. To the extent the points total influences the court in exercising its discretion when imposing a within-guidelines sentence, the inclusion of those points is harmful.

III. THE PRE-HEGGS CASES: THE "WOULD HAVE IMPOSED" TEST

A. NONDEPARTURE MISCALCULATIONS IN THE DISTRICT COURTS

The would-have-imposed test developed under the pre-1994 guidelines, particularly after the 1988 amendments. Before 1988, a guidelines points total yielded a single-

number-of-years presumptive sentence and a one-cell recommended range of years. Fla. R. Crim. P. 3.701 (1984). The presumptive sentence was "assumed to be appropriate"; the recommended range "permit[ted] some discretion without the requirement of [reasons for departure]." Fla. R. Crim. P. 3.701(d) (8) (1984).

The 1988 amendments retained the concepts of the presumptive sentence (still "assumed to be appropriate") and the one-cell recommended range, but added a three-cell permitted range. Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 & 3.988), 522 So. 2d 374, 377 (Fla. 1988). "Nonetheless, it [was] contemplated that the use of the 'permitted' range would be the exception rather than the rule and that most sentences [would] remain in the recommended [range]." Id. at 375. The permitted range "allow[ed] the sentencing judge additional discretion when the particular circumstances ... make it appropriate ...." Fla. R. Crim. P. 3.701(d)(8) (1989).

Before 1988, the harmlessness of scoresheet errors was a simple issue. The error was harmless if it did not change the recommended range and the sentence was within

that range. E.g., Owens v. State, 626 So. 2d 240 (Fla. 2d DCA 1993). If the error changed the recommended range and the sentence was outside the correct range, the error was harmful because the sentence was a de facto departure. E.g., Whitfield v. State, 487 So. 2d 1045 (Fla. 1986).

The three-cell permitted range of the 1988 amendments complicated the issue. An error could alter the recommended range but the sentence could be within the correct permitted range. The would-have-imposed test developed in this context. Under that test,

> when the deletion of improper[] points ... results in a reduction of one or more cells, resentencing [is required]....
>
> This rationale is consistent with the theory of the guidelines, ... that a correct calculation of the scoresheet is essential to establish a valid base for the trial court's exercise of its discretion in determining an appropriate sentence .... "[A]n incorrectly calculated ... sentence range ... constitutes an erroneous base upon which the trial court exercises its discretion ...." Only in circumstances where the appellate court is clearly convinced that the defendant would have received the same sentence ... have the sentences been affirmed ....[1]

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[1] Sellers v. State, 578 So. 2d 339, 341 (Fla. 1st DCA 1991)(emphasis added)(citations omitted), approved on other grounds, State v. Sellers, 586 So. 2d 340 (Fla. 1991); accord, Lewis v. State, 574 So. 2d 245, 247 (Fla. 2d DCA 1991); Green v. State, 569 So. 2d 888, 889 (Fla. 1st DCA 1990); see also Thomas v. State, 659 So. 2d

The structure of the guidelines was significantly altered in 1994. The points total now yielded a single number of prison months (called the recommended sentence and, again, "assumed to be appropriate") which may, "at the discretion of the court," be increased or decreased by 25 percent to provide a permitted range of months. Secs. 921.0014(2) and .0016(1)(a)-(b), Fla. Stat. (2003). This restructuring complicated the harmless error problem. Before 1994, a range of sentencing points yielded the same recommended range; scoresheet errors which did not change that range could easily be found harmless. Under the 1994 guidelines any scoresheet error alters both the recommended sentence and the 25% discretionary range; a would-have-imposed test, strictly applied, may render all nondeparture miscalculations harmful. Although not addressing this basic question, the district courts continued to use the would-have-imposed test under the post-1994 guidelines. Some cases required resentencing even though the error was minor and the sentence was well within the correct range, because "a

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404, 405 (Fla. 4th DCA 1995); Lawrence v. State, 590 So. 2d 1068, 1069-70 (Fla. 5th DCA 1991).

trial judge should have a correct scoresheet before deciding whether to apply the permitted range and thus such errors in scoring are not harmless."[2]

These cases recognize that harmless error analysis in nondeparture miscalculation cases must focus on the effect the error had on the court's sentencing discretion. Although not citing DiGuilio, the cases appear to apply that test. To say resentencing is required unless it "appear[s] beyond reasonable doubt that different sentences would not have been imposed," Annunziato, 697 So. 2d at 999, seems the same as saying a conviction must be reversed if it "cannot [be said] beyond a reasonable doubt that the error did not affect the verdict ...." DiGuilio, 491 So. 2d at 1138-39. The only differ-

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[2] McGreevy v. State, 717 So. 2d 1111, 1112 (Fla. 5th DCA 1998); see also, Lopez v. State, 811 So. 2d 815 (Fla. 2d DCA 2002); Carter v. State, 705 So. 2d 582 (Fla. 2d DCA 1997); Annunziato v. State, 697 So. 2d 997 (Fla. 5th DCA 1997).

Scoresheet errors are harmless under the post-1994 guidelines if a habitual offender sentence was imposed or if the sentence resulted from a negotiated plea. E.g., Patterson v. State, 796 So. 2d 572 (Fla. 2d DCA 2001). Other than these two situations, it appears there is only two reported cases holding a scoresheet error was harmless. In the first case, the miscalculated range was 40.95-68.25 months, the correct range was 39.45-66.75 months, and a 48 month sentence was imposed. Eppert v. State, 712 So. 2d 461 (Fla. 2d DCA 1998). In the second case, an error of 1.2 points elevated the maximum sentence from 181.25 months to 182.7 months and a 15 year sentence was imposed. Perez v. State, 840 So. 2d 1179 (Fla. 5th DCA 2003).

ence here is that the first test focuses on the effect the error had on the court's sentencing discretion, while the second test focuses on the effect the error had on the jury's factfinding. In both situations, the crucial question is "whether the result would have been the same absent the error." Ciccarelli, 531 So. 2d at 131.

This Court did not address the nondeparture miscalculation issue before Heggs. The Court did address two analogous issues: valid upward departure sentences based on miscalculated score-sheets, and departure sentences based on both valid and invalid reasons. The reasoning of these cases supports the use of the would-have-imposed test for nondeparture miscalculations.

B. VALID UPWARD DEPARTURE SENTENCES BASED ON MISCALCULATED SCORESHEETS: Mackey

In Mackey, the trial court used the wrong year of scoresheet and imposed a statutory maximum 15 year departure sentence. The district court ordered resentencing because "[a] trial court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart ...." 719 So. 2d at 284 (quoting district court opinion). The district court "certified conflict with Hines [v. State, 587 So. 2d 620 (Fla. 2d DCA 1991)], which affirmed a departure sentence imposed on [a mis]calculated scoresheet, finding that the trial court would have imposed the same sentence ...." Id. (emphasis added). Although agreeing the wrong scoresheet was used, this Court in Mackey said resentencing was not required:

> [I]t is ... important for the trial court to have ... a properly calculated scoresheet .... However, it does not necessarily follow that all cases involving scoresheet errors must be automatically reversed for resentencing. This case demonstrates that a per se reversal rule is unnecessary.
>
> ... [In this case, the wrong scoresheet] provided for a lower recommended sentencing range ... than the [correct scoresheet].... [T]he trial court entered a departure sentence

> ... because it assumed that a guidelines sentence could be no greater than 9 years .... [The correct] scoresheet ... indicated a maximum guidelines sentence of 15.8 years [and] there would have been no need [to depart] ....
>
> Here the defendant may have actually benefitted from the use of the erroneous scoresheet.... [T]o the extent that Mackey stands for a per se rule of reversal in every instance where the trial court has utilized an erroneous scoresheet, we disapprove of Mackey and approve Hines....

Id. at 284-85 (citation omitted)(emphasis added).

It appears that, when Mackey "approved Hines," it did not intend to approve the would-have-imposed test. In a second case raising the same issue, the Court said Mackey "disapprov[ed] a rule of per se reversal .... To that extent, we disapproved Mackey and approved Hines." State v. Rubin, 721 So. 2d 716, 716 (Fla. 1998)(emphasis added).

As discussed below, Mackey was cited in both Heggs and the post-Heggs case of State v. Lemon, 825 So. 2d 927 (Fla. 2002), and its status as precedent for the nondeparture miscalculation issue is ambiguous. Mackey merits further discussion.

The first point here is that Mackey "benefitted from the use of the erroneous scoresheet ...." 719 So. 2d at

285. Would the result be different if the scoresheet error harmed Mackey? Or does a valid upward departure render all scoresheet errors harmless? If the trial court believed the miscalculated guidelines were inadequate, that belief would only be strengthened if the court realized the guidelines score was even lower. This is particularly true in cases like Mackey, where the error was the use of the wrong scoresheet. In most such cases, the same factors (the defendant's prior record, the extent of victim injury, etc.) will be scored under both scoresheets, albeit at a lower level under the correct scoresheet.

The second point about Mackey is that the issue of departure sentences based on miscalculated scoresheets (particularly when the error benefits the defendant) is distinguishable from the issue of nondeparture miscalculations. The latter issue contains an element of judicial discretion not present in Mackey. True, the decisions of whether to depart, and by how much, are also discretionary. But, in the Mackey situation, in most cases it would be clear beyond reasonable doubt that the error was harmless because it did not affect the court's

exercise of its discretion. Again, if the court exercised its discretion (both to depart and by how much) based on its belief that the guidelines score was higher than it should have been, there is little reason to believe the sentence would have been different under an accurate scoresheet. In short, the scoresheet error did not likely affect the discretionary elements of the sentencing decision.

In guidelines miscalculation cases, the scoresheet error may affect the court's discretionary sentencing decision. The erroneous inclusion of the points may influence the court regarding where, within the permitted range, to set the sentence.

Mackey is correct in rejecting a per se rule of reversal in this context, but this does not tell us which alternative test should be used. Although Mackey did not expressly disapprove the would-have-imposed test or approve the could-have-imposed test, Mackey can be read as supporting the use of the would-have-imposed test for nondeparture miscalculations.[3]

[3] Justice Anstead believes Mackey approved the would-have-imposed test. Lemon, 825 So. 2d at 933, n. 13 (Anstead, J., dissenting). He may be correct.

C. DEPARTURE SENTENCES BASED ON BOTH VALID AND INVALID

REASONS: ALBRITTON, ET AL.

This Court adopted the would-have-imposed test for a related issue which also has a significant element of

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Mackey quashed "[t]hat portion of the district court's decision that vacated the sentence" and remanded with "direct[ions to] affirm[]" the sentence. 719 So. 2d at 285. The Court did not remand with instructions to apply the would-have-imposed test. But this may be explained by the facts that: 1) Mackey "actually benefitted" from the use of the wrong scoresheet; 2) "there would have been no need for the trial court to have departed" under the correct scoresheet; and 3) a statutory maximum sentence was imposed. Id. (emphasis added). Arguably, Mackey used the would-have-imposed test when it decided to remand with directions to affirm the sentence: Since the statutory maximum sentence would-have-been within the correct guidelines, it is clear beyond reasonable doubt the trial court would-have-imposed the same sentence under the correct scoresheet.

This reading of Mackey is reinforced by Rubin, which quashed "that portion of the district court's decision that applied the per se rule of reversal" and remanded for "reconsideration ... in light of ... Mackey." 721 So. 2d at 716. Like Mackey, the district court in Rubin certified conflict with Hines. Rubin v. State, 697 So. 2d 161, 163 (Fla. 3d DCA 1997). Unlike Mackey, the scoresheet error in Rubin increased the guidelines score. Rubin v. State, 734 So. 2d 1089 (Fla. 3d DCA 1999). The opinions in Rubin do not say whether Rubin was sentenced to the statutory maximum, but it is clear that (unlike Mackey), Rubin's sentence was a departure from the properly calculated guidelines. Given these factual distinctions from Mackey, the fact that Rubin did not remand with instructions to affirm the sentence could also be read as an endorsement of the would-have-imposed test.

The post-Mackey district court cases on point use the would-have-imposed test to find any errors harmless. In all these cases, the scoresheet errors increased the score. The logic in the cases is that, since the reasons for departure were valid, it is clear the court would have imposed the same sentence even if it knew the correct scoresheet points total was lower. Mooney v. State, 864 So. 2d 60 (Fla. 4th DCA 2004); Braggs v. State, 815 So. 2d 657 (Fla. 3d DCA 2002), disapproved in part on other grounds sub nom, State v. Ruiz, 863 So. 2d 1205 (Fla. 2003); Cardali v. State, 794 So. 2d 719 (Fla. 3d DCA 2001); Isom v. State, 750 So. 2d 734 (Fla. 3d DCA 2000); Rubin, 734 So. 2d at 1090.

judicial discretion: departure sentences based on both valid and invalid reasons. The Court asserted:

> [T]here are three potential answers to the question: (1) reliance on an invalid reason, regardless of the presence of a valid reason, is per se reversible error; (2) reliance on a valid reason, regardless of the presence of invalid reasons, is per se affirmable; or (3) reliance on valid and invalid reasons should be reviewed applying a harmless error analysis....
>
> ... We ... hold that when a departure sentence is grounded on both valid and invalid reasons[,] the case [must be] remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence.

Albritton, 476 So. 2d at 159-60 (emphasis added).

"This ... is essentially the harmless error analysis [of] DiGuilio"; the appellate court "must be satisfied that there is no reasonable possibility that the elimination of the invalid reasons would have affected the departure sentence." Casteel v. State, 498 So. 2d 1249, 1251 (Fla. 1986)(emphasis added). Further, "a trial court's statement, made at the time of departure ..., that it would depart for any one of the reasons given, regardless of whether both valid and invalid reasons are found on review, [does not] satisfy the standard ... in Albritton":

> The obvious difficulty [with this] is the danger [that] some trial judges may be tempted to mechanically include a "boiler plate" statement without conscientiously weighing whether his or her decision would be affected by the elimination of one or more of several reasons for departure....
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> . . .
>
> ... The trial judge must conscientiously weigh relevant factors in imposing sentences; in most instances an improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence.
>
> . . .
>
> ... [T]he appellate court ... must reverse unless the state can show beyond a reasonable doubt that the sentence would have been the same without the invalid reasons. [S]uch a standard can[not] be met through the anticipatory language of the trial judge rather than the reweighing of only the appropriate departure factors....

Griffis v. State, 509 So. 2d 104, 1104-05 (Fla. 1987)(emphasis added)(citations omitted).

These cases show the Court feels the would-have-imposed test is the harmless error test required (by DiGuilio) for sentences which contain a discretionary element and which could be legally imposed, but which were possibly based (at least in part) on consideration of an improper factor. Albritton's "potential answer" #1 (per se reversible) is the test rejected in Mackey; "potential answer" #2 (per se affirmable) is the could-

have-imposed test. Albritton rejected both.

The issue of nondeparture miscalculations is factually distinguishable from the issue in Albritton. But this distinction should not require a different harmless error test. In both situations, the challenged sentence could be imposed; judicial discretion plays a big role in the sentencing decision; and the erroneously considered information is the type that often figures prominently in the exercise of that discretion. A court needs only one valid reason to depart; but the court may be influenced (both in its decision to depart and by how much) if it wrongly believes there are additional reasons to depart. Just as more perceived reasons to depart elevate the apparent egregiousness of the case (and possibly influence departure decisions), the addition of erroneous points moves the case toward the higher end of the permitted range (and possibly influences within-guidelines sentencing decisions). The logic of Albritton compels the conclusion that the would-have-imposed test applies to nondeparture miscalculations.[4]

[4] The problem addressed in Albritton was eliminated by statute. Ch. 87-110, Laws of Fla., currently codified at sec. 921.001(6), Fla. Stat. (2003). There has never been any analogous statute addressing

the problem of nondeparture miscalculations.

IV. THE HEGGS COULD-HAVE-IMPOSED TEST

"'[C]an' (present tense of 'could') [means] 'to be able to do, make, or accomplish'[;] 'would' [means] 'wished, desired'...." Lemon, 825 So. 2d at 930, n.3 (citations omitted). Thus, could-have-imposed means "the court was legally permitted to impose this sentence, without a departure"; would-have-imposed means "the court wished to impose this sentence, regardless of the proper guidelines score." "Legally permitted" is not the same as "wished."

The could-have-imposed test conflicts with the would-have-imposed test of DiGuilio and Albritton. The DiGuilio test asks "whether the result would have been the same absent the error," Ciccarelli, 531 So. 2d at 131, which requires courts to determine how a scoresheet error "might have possibly influenced the [sentence]" and to remand for resentencing if "there is a reasonable possibility that the error affected the [sentence]." DiGuilio, 491 So. 2d at 1139. Albritton requires resentencing unless it is "show[n] beyond a reasonable doubt that the [scoresheet error] would not have affected the ... sentence." 476 So. 2d at 160. As noted

above, the could-have-imposed test is analogous to the "per se affirmable" rule rejected in Albritton. Id. at 159. If we assume courts are influenced by guidelines points totals when exercising their discretion to impose within-guidelines sentences, the could-have-imposed test does not properly address the question of harmlessness of scoresheet errors.

Heggs did not say why it adopted the more stringent harmless error test. There are three possible explanations: 1) the scoring error was the use of the wrong scoresheet; 2) the sentencing challenge was based on a single subject violation; or 3) policy considerations (i.e., reducing the post-Heggs stress on the lower courts) required it. These explanations are unconvincing.

A. POSSIBLE EXPLANATION #1: SPECIAL HARMLESS ERROR RULE FOR WRONG SCORESHEET CASES

As to the possibility of a special harmless error test for wrong scoresheet issues, Heggs did not indicate it saw any distinction between such issues and other types of scoresheet errors. There is no reason for such a distinction. The relevant fact here is that the sen-

tence was based on an erroneous guidelines score; whether the error was the use of the wrong scoresheet or a miscalculation in the correct scoresheet, the net effect on the court's discretionary sentencing decision is the same.

B. POSSIBLE EXPLANATION #2: SPECIAL HARMLESS ERROR RULE FOR SENTENCING CHALLENGES BASED ON SINGLE SUBJECT VIOLATIONS

Heggs used the expression "adversely affected by the amendments made by chapter 95-184," 759 So. 2d at 627, rather than "harmed" or "prejudiced." This indicates Heggs distinguished "adversely affected by the amendments" from "harmed by the scoresheet error." But the adverse affect of the amendments was to add more points to the scoresheet. The distinction between "adversely affected" and "harmed" seems to be a matter of semantics and does not explain why a different harmless error rule applies to single subject cases.

Some support for this possible explanation may be found by noting the two cases Heggs cited after announcing the could-have-imposed test:

See, e.g., Freeman v. State, 616 So. 2d 155,

> 156 (Fla. 1st DCA 1993)(affirming denial of the defendant's motion to correct sentence, even in light of this Court's decision in State v. Johnson, 616 So. 2d 1 (Fla. 1993), because the defendant failed to allege that "he could not have been habitualized without the amendments effected by chapter 89-280"); cf. State v. Mackey [citation omitted] (affirming fifteen-year sentence that departed from [the wrong] guidelines ... because the ... sentence would have been within the [correct] guidelines range).

759 So. 2d at 627 (emphasis added).

A "see" signal means the cited authority "clearly supports the cited proposition"; a "cf." signal means the cited authority "supports a proposition different from the main proposition but sufficiently analogous to lend support." A Uniform System of Citation, pp. 22-23 (17th ed. 2000).

The see signal for Freeman indicates Heggs believed that case "clearly supports" the use of the could-have-imposed test. And it does. Freeman arose in the wake of Johnson, which held that chapter 89-280 violated the single subject rule. Among other things, chapter 89-280 enlarged the definition of habitual offender, making more defendants eligible for such sentences. Ch. 89-280, Laws of Fla., sec. 1. Freeman affirmed the summary de-

nial of a rule 3.800(a) motion because:

> [A]n habitual offender sentence will be reversed ... only if the defendant was "affected by the amendments ... contained in Chapter 89-280." [Quoting Johnson]. Freeman fails to allege that he could not have been habitualized without the amendments ....

616 So. 2d at 156 (second emphasis added).

Freeman's quote from Johnson is part of the following passage from Johnson:

> [T]his decision will require the resentencing of a number of individuals .... However, the resentencing requirement will apply only to those defendants affected by the amendments ... in chapter 89-280 .... This result is mandated by the legislature's failure to follow the single subject requirement of the constitution. Had the legislature passed the habitual offender amendments in a single act, this case would not be before us today.

616 So. 2d at 4 (emphasis partially added).

This passage, read in the light of similar language in Heggs as it adopted the could-have-imposed test,[5] indicates there is a special harmless error test for sentences challenged on single subject grounds. There is a distinction between such challenges and simple nondeparture miscalculation issues. With single subject

[5] Heggs said: "[O]ur decision here will require ... the resentencing of a number of persons .... However, only those persons adversely affected by the amendments made by chapter 95-184 may ... obtain relief." 759 So. 2d at 627.

challenges, the scoresheet would be correct if the legislature had followed proper procedure when amending the guidelines. With simple nondeparture miscalculations, the applicable guidelines do not authorize the challenged scoring, without regard to any legislative errors.

But this seems to be a distinction without a difference. Regardless of why the scoresheet error occurred, the possible effect on the sentence is the same. Why should defendants be penalized because the legislature made a mistake? Why is this legislative mistake different, for harmless error purposes, from the judicial mistake of a simple miscalculation?

Further, the Johnson-Freeman habitual offender issue differs from the guidelines issues created by Heggs. In Johnson-Freeman cases, the statutory amendments declared invalid raised a simple either/or proposition: Either the defendant qualified for habitualization without the 1989 amendment or he did not. If he did qualify, the amendment did not affect his sentence; if he did not, then the sentence is flatly illegal. Application of the standard harmless error test yields the same result as

the could-have-imposed test in Johnson-Freeman cases.

Nondeparture miscalculation issues are not an either/or proposition, concerned merely with whether the defendant legally qualifies for the sentence. There is also the element of the discretionary decision regarding where, within the permitted range, to set the sentence.

In essence, Heggs was a wrong-scoresheet case. True, the use of the 1995 scoresheet became wrong only after a single subject violation was found, while simple wrong-scoresheet cases are generally based on a mistaken view regarding which scoresheet must be used for offenses committed on the applicable date. Sentences imposed under a 1995 scoresheet before Heggs came out were based on the correct-at-the-time scoresheet, while in non-Heggs cases the scoresheet was wrong from the start. But if the single subject violation rendered the use of the 1995 scoresheet invalid, why should it matter that the violation was not definitively established until several years later? Is there some type of "good faith" element here, which takes account of the fact that, pre-Heggs, trial courts reasonably believed they were using the correct scoresheet? Why should this distinction mandate

the use of a different harmless error test? Again, the crucial fact is that the wrong scoresheet was used; the reason that occurred seems irrelevant to the fact that the sentence was imposed based on a mistaken (albeit good faith) belief about the guidelines score.[6]

Heggs' cf. cite to Mackey also supports an argument that a special harmless error test applies to single subject challenges. Heggs believes Mackey (also a wrong-scoresheet case) "supports a proposition different from the main proposition but sufficiently analogous to lend support," A Uniform System of Citation, p. 23, and then notes that Mackey's sentence was affirmed because it "would have been within the [correct] guidelines range." 759 So. 2d at 627 (emphasis added). This indicates Heggs does not read Mackey as adopting a could-have-imposed test; otherwise, presumably, Heggs would have used a see citation to Mackey. Mackey expressly went no further than to reject "a per se rule of reversal," 719 So. 2d

[6] See Gonzales v. State, 779 So. 2d 520, 520-21 (Fla. 2d DCA 2000)(Altenbernd, A.C.J., concurring). Suppose, for example, trial courts had imposed sentences based on an interpretation of the guidelines which had been approved by the district courts but was later rejected by this Court. Would such "good faith reliance" mandate the use of a different harmless error test?

at 285, which may be a proposition sufficiently analogous to lend support to the could-have-imposed test. But Heggs' parenthetical explanation for Mackey makes no mention of Mackey's rejection of a per se rule of reversal. As discussed above, language in Mackey (coupled with language in Rubin) could be read as implying the Court believed the would-have-imposed test should be used in the departure-based-on-erroneous-scoresheet context. The Heggs parenthetical seems to reinforce that reading by indicating that Mackey's sentence was upheld because the Court was convinced the same sentence would have been imposed under the correct scoresheet and thus the error was harmless.

But this is not a proposition sufficiently analogous to lend support to the could-have-imposed test of Heggs. This Court later noted the significant difference between "could" and "would" in this context. Lemon, 825 So. 2d at 930, n.3.

Heggs' parenthetical explanation for its cite to Mackey suggests another proposition sufficiently analogous to lend support to the could-have-imposed test. In Mackey, the scoresheet error was beneficial to Mackey

and the sentence "would have been within the [correct] guidelines range," 759 So. 2d at 627; thus, the sentence could have been imposed under the correct scoresheet without reason for departure. This proposition supports the could-have-imposed test in Heggs: Departure sentences based on miscalculated scoresheets will be affirmed if the sentence "could have been imposed under the [correct] guidelines (without a departure) ...." 759 So. 2d at 627.

Thus, Heggs does not read Mackey as adopting a could-have-imposed test for nondeparture miscalculations (a point reinforced by the fact that Mackey was not a nondeparture miscalculation case). Further, Heggs' cf. cite to Mackey indicates Heggs sees some distinction between nondeparture miscalculation issues based on single subject challenges and those based on simple errors: If Heggs reads Mackey as not embracing a flat could-have-imposed test for the issue of valid-departure-sentences-based-on-erroneous-scoresheets, then that test would not be proper for the more difficult issue of nondeparture miscalculations. It is not clear what the distinction might be between simple

nondeparture miscalculation issues and such issues based on single subject challenges; but if that is the distinction Heggs was based upon, then the could-have-imposed test does not apply to simple nondeparture miscalculation issues.

C. POSSIBLE EXPLANATION #3: POLICY CONSIDERATIONS

In announcing the could-have-imposed test, Heggs recognized that decision "will require ... the resentencing of a number of persons ...." 759 So. 2d at 627. This indicates that test was adopted as a partial dam to the perceived flood of Heggs-based claims. This is a valid policy consideration; but should this override the standard harmless error test? As Goodwin stated:

> [T]he harmless error rule is concerned with the due process right to a fair trial .... [A] defendant has a constitutional right to a fair trial free of harmful error.
>
> . . .
>
> ... [It is] the undeniable obligation of the judiciary to safeguard a defendant's right to a fair trial and ... to determine when an error is harmless ....… . .
>
> [The DiGuilio] standard[] furthers important policies by: ... (2) protecting a citizen's constitutional right to a fair trial by ensuring that no conviction will be affirmed unless, from a review of the record as a whole, there is no reasonable possibility that the

> error affected the verdict; ... and (4) providing an incentive on the part of the State, as beneficiary of the error, to refrain from causing error to occur ....

751 So. 2d at 541-46 (emphasis deleted)(citations and internal quotation marks omitted).

If this language applies to nondeparture miscalculation issues, Heggs' use of policy considerations to override the standard harmless error rule is questionable. If the defendant has a "due process[,] constitutional right to a fair [sentencing] ... free of harmful error," and appellate courts have "the undeniable obligation ... to safeguard [that] right [and] to determine when an error is harmless," id., the could-have-imposed test is hard to defend. That test produces unjust results in some cases. See Martin v. State, 779 So. 2d 593, 593-94 (Fla. 2d DCA 2001); Gonzalez, 779 So. 2d at 521 (Altenbernd, A.C.J., concurring); Barber v. State, 775 So. 2d 325, 326 (Fla. 2d DCA 2000). Indeed, under that test, a sentence must be affirmed even if it is clear from the record that the trial court would not have imposed the same sentence under the correct scoresheet. Compare Rosales v. State, 834 So. 2d 901 (Fla.

4th DCA 2003); Delapierre v. State, 808 So. 2d 277, 277-78 (Fla. 1st DCA 2002)(Kahn, J., concurring).

Further, with nondeparture miscalculations, not only is there the "important polic[y of] providing an incentive [to] the State" to prevent error, Goodwin, 751 So. 2d at 546, there is the equally important policy of providing that incentive to trial courts, who bear "[u]ltimate responsibility for assuring that scoresheets are accurately prepared ...." Fla. R. Crim. P. 3.701, commission notes. Unlike its role at trial, the sentencing court is more than a neutral arbiter presiding over a clash of advocates attempting the sway the ultimate decision-maker (the jury). The sentencing court is the ultimate decision-maker and bears the responsibility of insuring that decision is based on accurate information, regardless of whether counsel raises objections. The could-have-imposed test may encourage a "close enough is good enough" attitude among some members of the trial bench; no need to worry about scoresheet precision if a lax harmless error standard will bail you out.[7]

[7] Recall that, in Griffis, this Court held "a trial court's statement, made at the time of departure ..., that it would depart for any one of the reasons given [does not] satisfy the standard

Thus, the three possible explanations for Heggs' adoption of the could-have-imposed test are problematic.

D. THE COULD-HAVE-IMPOSED TEST AND DEPARTURE SENTENCES:

STATE V. LEMON

Lemon addressed the issue of Heggs claims when the sentence was an upward departure under the 1995 guidelines and the reasons for departure were valid under the 1994 guidelines. Citing Hines and Mackey, the Fourth District applied the would-have-imposed test and remanded for resentencing. 825 So. 2d at 930. This Court disagreed:

[adopted] in Albritton" because of "the danger [that] some trial judges may ... mechanically include a 'boiler plate' statement without conscientiously weighing whether his or her decision would be affected by the elimination of one or more of several reasons for departure." 509 So. 2d at 1104-05. Rather, since "[t]he trial judge must conscientiously weigh relevant factors in imposing sentences [and] an improper inclusion of an erroneous factor affects an objective determination of an appropriate sentence," Albritton requires resentencing so the trial court can "reweigh[] only the appropriate departure factors." Id.

Similar logic applied to nondeparture miscalculation issues compels the conclusion that "a trial court's statement, made at the [sentencing], that it would [impose the same sentence] regardless of whether [scoresheet errors] are found on review," id., should not inoculate the sentence from review. Yet the could-have-imposed test applied to nondeparture miscalculations not only implicitly approves such "boiler plate statements," it effectively reads such statements into all sentencings: There is no need to remand for resentencing; the "improper inclusion of [the] erroneous [points did not] affect[] an objective determination of [the] sentence," id., because, since the trial court could impose the sentence, it would have imposed the sentence.

> [The district court] interpreted our definition of "adversely affected" in Heggs when applied to a [departure] sentence ... as being based on whether the trial court would initially have sentenced a defendant to a departure sentence if it had seen a 1994 scoresheet, instead of a 1995 scoresheet....
>
> [O]ur definition of "adversely affected" in Heggs may be applied to departure sentences ....
>
> By remanding this case for the trial court to rule on what it would have done, the [district court] is effectively asking the trial court for a factual determination of how persuasive the scoresheet was in determining the defendant's upward departure. Our intention in Heggs was not to require trial courts to apply a subjective hindsight analysis.... [Applying the Heggs test to upward departure sentences] comport[s] with our reasoning in Heggs regarding which defendants were "adversely affected" by chapter 95-184. See ... Mackey [citation omitted]("[I]t is undoubtedly important for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision. However, it does not necessarily follow that all cases involving scoresheet errors must be automatically reversed for resentencing.").
>
> ... Lemon was not "adversely affected" because her sentence ... could have been imposed under [the 1994 guidelines].

Id. at 930 (emphasis partially added)(footnote omitted).

As in Heggs, Lemon used the phrase "adversely affected" (no less than seven times) rather than "harmed" or "prejudiced." Id. at 929-31. This, coupled with the tenor of the opinion, lends support to the argument that

the could-have-imposed test is a special test used in single subject cases. Lemon's apparent explanation for this is that the would-have-imposed test "effectively ask[s] the trial court for a factual determination of how persuasive the scoresheet was in determining the defendant's [sentence and o]ur intention in Heggs was not to require trial courts to apply a subjective hind-sight analysis." Id. at 930.

But the would-have-imposed test does no such thing:

> [Harmless error] analysis ... should be made solely from the record. Resort to 'mind reading' is not necessary and, in fact, the need to resort to such mind reading would evidence a reasonable doubt.

Casteel, 498 So. 2d at 1252 (emphasis added).

The would-have-imposed test is based the principle that "mind reading" is impossible in nondeparture miscalculation cases; and, not being able to read the trial court's mind, the appellate court must remand for resentencing so the trial court can decide what sentence it would impose under an accurate scoresheet. Remanding for resentencing is not "effectively asking the trial court for a factual determination of how persuasive the

scoresheet was in determining the [sentence]"; it is telling the trial court to resentence, because the appellate court is not sure whether the error affected the sentence.

Lemon said "[o]ur intention in Heggs was not to require trial courts to apply a subjective hindsight analysis." 825 So. 2d at 930 (emphasis added). This indicates the could-have-imposed test was adopted for use in post-conviction proceedings, where trial courts would determine whether resentencing was required (which in turn supports the argument the could-have-imposed test was adopted for policy reasons). Lemon was a post-conviction case; but Heggs was a direct appeal. Heggs did not indicate the could-have-imposed test was not to be used on direct appeal.

But, on direct appeal, harmless error analysis does not require trial courts to apply subjective hindsight analysis. It is a rule for appellate courts, to determine when a case must be remanded to redo something, precisely because appellate courts cannot apply subjective hindsight analysis and determine what the outcome would have been without the error.

The would-have-imposed test does not require subjective hindsight analysis or a determination of how persuasive the scoresheet was in determining the sentence. The only factual inquiry in the would-have-imposed test is whether it is clear from the record that the same sentence would have been imposed under a correct scoresheet. By approaching the problem from the other end -- by asking, not "what would the trial court have done," but rather "can we be sure the court would not have done something else" --, the would-have-imposed test does not require any mind-reading by the reviewing court (either at the trial or appellate level).

Lemon does not fully explain why the could-have-imposed test was adopted in Heggs (other than the policy considerations argument). Further, Lemon does not reject the would-have-imposed test for simple nondeparture miscalculation issues; that issue is not addressed, even inferentially, in Lemon.[8]

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[8] Lemon's "see" citation to Mackey -- for the proposition that "all cases involving scoresheet errors [need not] be automatically reversed for resentencing," 825 So. 2d at 930 -- does not clarify Mackey's status here. The two cases are basically factually identical: valid departure sentences were imposed based on the wrong scoresheet. The primary distinction between the two cases is the reason why the scoresheet was "wrong": a single subject violation in Lemon, simple oversight in Mackey. As with Heggs' cite to Mackey, the

E. MADDOX AND FUNDAMENTAL SENTENCING ERROR

Maddox addressed the concept of fundamental sentencing error in light of the Criminal Appeals Reform Act ("CARA"). Maddox defined fundamental sentencing errors as being those which are patent and serious, with the "serious" element requiring a "focus on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence." 760 So. 2d at 99. "In most cases, a fundamental sentencing error will be one that affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected." Id. at 100.

As to scoresheet errors, Maddox first noted Mackey's rejection of a per se rule of reversal, then said:

> [T]he appellate courts should consider the qualitative effect of the error on the sentenc-

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Lemon see citation, coupled with the explanatory parenthetical, indicates Lemon does not read Mackey as adopting the could-have-imposed test. Rather, Lemon reads Mackey as rejecting a per se rule of reversal.

The district court in Lemon used the would-have-imposed test, not a per se rule of reversal. 825 So. 2d at 930. In rejecting that test, Lemon gave no indication that that decision was based on anything other than Heggs' definition of "adversely affected," i.e., the district court's erroneous interpretation of the phrase. There is nothing in Lemon to support an argument that the Heggs test applies to non-Heggs nondeparture miscalculation issues.

> ing process and whether the error was likely to cause a quantitative effect on the defendant's sentence. If this cannot be determined readily on appeal, the scoresheet errors are more appropriately addressed in the trial court....
>
> .... Correction of these [fundamental] errors ... at their earliest opportunity comports with the interests of both the State and the defendant in not forcing an individual defendant to serve a sentence longer than authorized by law....

Id. at 103 (emphasis added)(citations omitted).

Maddox did not directly address the nondeparture miscalculation issue raised here.[9]

It is not clear what was meant by the phrase "more appropriately addressed in the trial court." Id. Does this mean that, if the appellate court cannot "readily determine" the "qualitative effect of the error on the sentencing [and the error's] likely ... quantitative effect on the sentence," id., the court should remand

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[9] The Maddox appendix listed five cases as being "scoresheet error" cases. 760 So. 2d at 111-12. Two of those cases were Heggs cases. Hope v. State, 736 So. 2d 1256 (Fla. 4th DCA 1999); Latiif v. State, 711 So. 2d 241 (Fla. 5th DCA 1998). In the third case, a habitual offender sentence was imposed. Kenon v. State, 724 So. 2d 716 (Fla. 5th DCA 1999). In the fourth case, the scoresheet error resulted in an unknowing upward departure. Seccia v. State, 720 So. 2d 580 (Fla. 1st DCA 1998). The facts in the fifth case are too sketchy to determine the effect of the alleged error. Jervis v. State, 727 So. 2d 981 (Fla. 5th DCA 1999).

The body of the Maddox opinion mentioned only two of these cases, Seccia and Latiif; Latiif is discussed below. Noting "the parties have not adequately briefed the merits of the actual alleged sentencing errors" in these cases, Maddox "remand[ed] for proceedings consistent with this opinion." 760 So. 2d at 103.

for resentencing under a correct scoresheet? Or affirm and leave the matter to post-conviction proceedings?

In either event, it seems clear Maddox did not endorse the could-have-imposed test. Maddox issued about three months after Heggs and Heggs is not mentioned in this portion of the Maddox opinion. If the could-have-imposed test was intended to be the general harmless error test (even for non-Heggs issues), Maddox could have dealt with the fundamental error issue by directing the appellate courts to apply that test. By directing the courts to consider "the qualitative effect of the error on the sentencing process" and whether the error "likely caused a quantitative effect" on the sentence, Maddox seems to approve the would-have-imposed test. This in turn further supports the notion that the could-have-imposed test applies only to single subject cases.

F. THE COULD-HAVE-IMPOSED TEST AND NEGOTIATED SENTENCES:

LATIIF

The discussion so far has been concerned with "imposed sentences" rather than "negotiated sentences." Imposed sentences are imposed following a trial, a revocation evidentiary hearing, or a true open plea. Negoti-

ated sentences are sentences based on pleas in which the State gives up something to induce the plea.

In Latiif v. State, 787 So. 2d 834 (Fla. 2001), this Court considered a Heggs challenge to a negotiated sentence which was within the 1995 guidelines but a departure under the 1994 guidelines. The Court held:

> [Latiif] would be entitled to Heggs relief because his sentence constitutes a departure under the 1994 guidelines. This relief is not automatic, however, because the State gave up something as part of the plea agreement....
>
> The sentence ... was part of a quid pro quo, in which Latiif bargained with the State for the reduction of one of the charges against him .... [U]pon remand, the State should be given the option of proceeding to trial on the original charges or having Latiif resentenced under the 1994 guidelines.

Id. at 837 (emphasis added)(citations omitted).

Latiif provides further support for the argument that the could-have-imposed test is limited to single subject cases. Latiif adopts a different rule from that usually used in this context. Latiif was a direct appeal, not a post-conviction proceeding, and the score-sheet issue was not raised in trial court. Normally (in non-Heggs situations), when a defendant receives a lawful negotiated sentence based on a miscalculated score-

sheet, relief must be sought through rule 3.850 (as an ineffective assistance or involuntary plea claim), not by raising the unpreserved scoresheet error on direct appeal. E.g., Skidmore v. State, 688 So. 2d 1014 (Fla. 3d DCA 1997)(collecting cases). Yet Latiif says Heggs entitles such defendants to relief, even though there has been no motion to withdraw the plea and no showing the plea would not have been entered if the defendant knew of the scoresheet error. True, that relief is not automatic resentencing, but such defendants can force the State to choose between agreeing to resentencing or withdrawing from the plea. This is the rule that applies to non-Heggs negotiated sentences which are facially illegal (because a defendant cannot agree to an illegal sentence). E.g., Clay v. State, 750 So. 2d 153 (Fla. 1st DCA 2000). But, until Heggs came out, this rule was not applied to legal negotiated sentences based on sentenc-ing misadvice. E.g., Jolley v. State, 392 So. 2d 54 (Fla. 5th DCA 1981).

In non-Heggs cases, if a defendant moves to withdraw his plea based on sentencing misadvice, the State always has the option of proposing a new sentence. But, if the

defendant establishes grounds for plea withdrawal, he does not have to accept the resentencing option; rather, he can withdraw his plea and take his chances.

Latiif turns the situation around: With negotiated sentences under Heggs, it is the State, not the defendant, that has the option of agreeing to resentencing or withdrawing from the plea.

The Latiif rule is quite different from the rule applied to the non-Heggs issue of legal-negotiated-sentences-based-on-sentencing-misadvice. Again, the reason for this differential treatment is not clear; but the only reason that seems to make sense is that different rules apply to sentencing challenges based on single subject violations.

G. CONCLUSION

The potential injustice of the could-have-imposed test has been discussed, as has the conflict between that test and the harmless error test this Court has consistently used in non-Heggs circumstances. The Heggs test would also render harmless all scoresheet errors under the Criminal Punishment Code, unless the sentence was above the statutory maximum. See Rosier v. State,

864 So. 2d 1285, 1286 (Fla. 1st DCA 2004); Romero v. State, 805 So. 2d 92, 93-94 (Fla. 2d DCA 2002)(Altenbernd, J., concurring). The Heggs test would also render moot all State appeals (or cross-appeals) from a trial court's refusal to assess disputed points, unless the sentence was a downward departure under an accurate scoresheet.

The question of where, within the applicable guidelines range, to set the sentence is within the trial court's discretion, and use of an accurate scoresheet is crucial to the proper exercise of that discretion. To the extent that points totals and permitted ranges influence the exercise of that discretion, the inclusion of improper points on a scoresheet will be harmful. Regardless of the reason for Heggs' use of the could-have-imposed test, that test should not be used for non-Heggs nondeparture miscalculations.

V. DIRECT APPEAL VERSUS POST-CONVICTION RELIEF

The final issue here is, assuming the would-have-imposed test applies on direct appeal, does it also apply to post-conviction proceedings? And, if so, what is the defendant's burden of pleading and proof when seeking relief in a post-conviction motion? The harmless error test for direct appeals does not necessarily apply to post-conviction proceedings. E.g., Hill v. State, 788 So. 2d 315 (Fla. 1st DCA 2000). However, in cases like the present case (scoresheet errors and deficient performance of defense counsel, prosecutor, and trial court plain on the face of the record; the injustice of defendants serving more prison time than they should; the general impossibility of defendants being able to show anything other than the possibility of prejudice; a simple remedy of resentencing), there is no valid reason for applying a higher standard in post-conviction proceedings -- and every reason not to.

Since the sentence in present case was imposed, the problem of negotiated sentences need be only briefly noted. By definition here, we are dealing with sentences which are not facially illegal. Plea withdrawal is the

only remedy for defendants seeking relief from a negotiated nondeparture miscalculation sentence. Whether phrased as an involuntary plea claim or an ineffective assistance claim, rule 3.850 is the only available vehicle. The defendant bears the burden of showing that, but for the misunderstanding about his guidelines score, he would not have entered the plea; and, if this is shown, the remedy is plea withdrawal, not resent-encing.

Imposed nondeparture miscalculation sentences present a different problem. There are two avenues for relief here: rule 3.800(a), which allows trial courts to correct "an incorrect calculation ... in a sentencing scoresheet," and rule 3.850. Rule 3.850 authorizes the correction of sentences "imposed in violation of the ... laws ... of Florida," and it can be used for scoresheet miscalculations which require factual determinations; rule 3.800(a) is limited to errors plain on the face of the record. E.g., Brownlee v. State, 842 So. 2d 903 (Fla. 2d DCA 2003). Rule 3.850 can also be used to raise an ineffective assistance claim, based on counsel's failure to object to the error.

Until Hummel v. State, 782 So. 2d 450 (Fla. 1st DCA

2001), the district courts consistently used the same would-have-imposed test used on direct appeal for nondeparture miscalculation issues raised under either post-conviction rule. E.g., Herrmann v. State, 768 So. 2d 511 (Fla. 2d DCA 2000); Bigham v. State, 761 So. 2d 431 (Fla. 2d DCA 2000). More recent cases have questioned this symmetry because "[u]nlike direct appeals in which the State must prove that an error was harmless beyond a reasonable doubt, in postconviction motions the burden is on the defendant to prove harmfulness ...." Romero v. State, 805 So. 2d 92, 93 (Fla. 2d DCA 2002)(Altenbernd, J., concurring).

However, it is not accurate to say the State must prove that the error was harmless in direct appeals. Although such statements appear with regularity in the Florida cases, this Court concluded otherwise in Goodwin, when it addressed the provision of CARA which imposed on appellants (including defendants) "the burden of demonstrating that prejudicial error occurred ...." Sec. 924.051 (7), Fla. Stat. (1996). Goodwin interpreted this provision as "a reaffirmation of the important principle that the defendant bears the burden of demon-

strating that an error occurred ..., which was preserved by proper objection." 751 So. 2d at 544. Noting "[t]he solemn obligation of the Court to perform an independent harmless error review ..., even when the State has not argued that the complained of error was harmless," Goodwin said:

> [A] burden of persuasion is ill-suited to the appellate process ....
>
> . . .
>
> Review of the record to ascertain whether the error is harmless is an essential and critical appellate function.... [T]o shift the burden to the defendant would not only be an abdication of judicial responsibility, but could lead to the unjust result of an affirmance of a conviction even though the appellate court was not convinced beyond a reasonable doubt that the error did not affect the defendant's conviction.

Id. at 545-46 (citations omitted).

As to the notion that the defendant must prove harmfulness in post-conviction proceedings, the basis for differentiating post-conviction motions from direct appeals is that, "once a conviction has been affirmed on direct appeal a presumption of finality and legality attaches to the conviction and sentence." Goodwin, 751 So. 2d at 546 (citation omitted). The general validity of this principle is unquestioned. But its application

to cases like the present one is problematic, for two reasons: 1) This Court amended rule 3.800(a) in 1986 for the express purpose of diverting unpreserved scoresheet errors from the appellate court to the trial court; and 2) all responsible parties -- defense counsel, the prosecutor, the trial judge -- failed to correct the error at sentencing. Given these reasons, such differential treatment is fundamentally unfair.

A. "INCORRECT CALCULATIONS" AND SENTENCES "IMPOSED IN VIOLATION OF THE LAWS OF FLORIDA": RULES 3.800(a) AND 3.850

In Whitfield v. State, 487 So. 2d 1045 (Fla. 1986), the Court amended rule 3.800(a) to allow trial courts to "at any time" correct scoresheet errors. The error in Whitfield was plain on the face of the record, unpreserved in the trial court, and caused a de facto departure. Whitfield held such errors were fundamental and correctable on direct appeal. Id. at 1047. The Court further asserted:

> [A]ll parties contributed by commission or omission to the error and ... this error was easily preventable and correctable at the trial court level ....
>
> ... [W]e place an equal responsibility for correction of such errors on the prosecutor as on the defense counsel. This is particularly

> true where, as here, the prosecutor, as an officer of the court, prepared and submitted the erroneous scoresheet which caused the error. Neither counsel served the trial court well. In order to facilitate the correction of such errors at the trial court level, we amend rule 3.800(a) to [add the "incorrect calculation" language].

Id.

Rule 3.800(a) cannot be used to correct alleged errors which raise factual issues. Dailey v. State, 488 So. 2d 532 (Fla. 1986). But this limitation "in no way lessens the ethical and legal duty of the State and the trial court to ensure that factual determinations made at sentencing are correct." Montague v. State, 682 So. 2d 1085, 1089 (Fla. 1996).[10]

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[10] Montague also asserted:

> All persons in prison under a sentence for the commission of a crime are there because the judicial system declared they did not follow and obey the law but, to the contrary, they did an illegal act. Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it. The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person. Further, as a practical matter, if relief from this obviously illegal sentence is not now given in this case, the defendant will, and should, be able to obtain it in other ways, [such as] by an ineffective assistance claim .... Courts should be both fair and

Whitfield did not discuss the issue of correcting nondeparture miscalculations under rule 3.800(a); such issues did not arise until the 1988 amendments to the guidelines. Whitfield provides no express guidance on the harmless error test to be applied to these issues. Nor did it consider the question of whether defendants must prove harmfulness when seeking relief under this rule; when Whitfield came out, the question of harmfulness was determined by whether the sentence was a de facto departure.

But the language from Whitfield just quoted, coupled with the fact that Whitfield came out about the same time as Albritton, clearly supports the argument that the would-have-imposed test applies to rule 3.800(a). The Whitfield amendment to rule 3.800(a) was designed to channel the issue of unpreserved (or even preserved) scoresheet errors back to the trial court, not only

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> practical and give relief as soon as it is recognized as due.

Id. (citation omitted); see also Maddox, 760 So. 2d at 98-99.

Maddox believed rule 3.800(b) "should eliminate the problem of unpreserved sentencing errors raised on direct appeal ...." Id. at 94. However, as the present case illustrates, rule 3.800(b) is not a panacea. See also A.F.E. v. State, 853 So. 2d 1091 (Fla. 1st DCA 2003); Cote v. State, 841 So. 2d 488 (Fla. 2d DCA 2003).

because such errors are easily correctable there, but because the prosecutor and the trial court, as well as defense counsel, bear equal responsibility for the error. The policy foundation of Whitfield would be undercut if defendants were disadvantaged by seeking relief under rule 3.800(a): Why shoulder the burden of proving harmfulness under rule 3.800(a) if you can get the more favorable would-have-imposed test in a direct appeal?

Further, if the defendant bears the burden of proving harmfulness under rule 3.800(a), what exactly does he have to show to get relief from a nondeparture miscalculation? Rule 3.800(a) is limited to issues which can be determined from the record; evidentiary hearings are not authorized. Must the defendant, in his motion, show the sentence would not have been imposed without the scoresheet error? In the absence of a record similar to that in the hypothetical at the beginning of this brief, how is this to be done? And, if we say the defendant meets his burden by showing the record does not conclusively prove the same sentence would have been imposed absent the scoresheet error, how is this different from the harmless error standard on direct appeal?

In either event, the matter is determined from the face of the existing record. As with Goodwin's rejection of burdens of proof on direct appeal (in which the issue of harmfulness is also determined from the face of the record), imposing burdens of proof in rule 3.800(a) motions makes little sense. There is no "proof" here, at least not in the evidentiary sense; the only proof in rule 3.800(a) motions is existing record.[11]

Anything but the would-have-imposed test would effectively render rule 3.800(a) useless for the correction of nondeparture miscalculation issues (as Judge

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[11] In his concurrence in the present case, Judge Altenbernd said "in the context of a postconviction motion, the defendant should have the threshold burden to establish that an error was harmful." Anderson v. State, 865 So. 2d 640, 643 (Fla. 2d DCA 2004)(Altenbernd, C.J., concurring)(emphasis added). It is not clear whether "threshold" adds anything significant to the mix here. Is this threshold established merely by showing a scoresheet error (which is the threshold Goodwin requires for direct appeals)? If not, what more is required? Since there is no evidentiary hearing, what else can the defendant do? And what happens when this threshold is met? Does the burden shift to the State to prove harmlessness? How is that to be done without testimony? The existing record is what it is; if we are limited to that record, neither side can prove anything else. Except in those rare cases in which the trial court states at sentencing what it would do if it knew the correct guidelines score -- rare cases indeed, for if the court knew the correct score, we wouldn't have this problem --, neither side can prove or disprove harmfulness, in any definitive way, in a rule 3.800(a) proceeding; that is, neither side can prove what the court would have done under a correct scoresheet. Putting the burden of proof on one side or the other is, in effect, outcome determinative here.

And, even if the court states at sentencing what it would do under the correct scoresheet, isn't this the type of "boilerplate statement" Griffis expressly disapproved in the departure context?

Altenbernd recognized, 865 So. 2d at 644, n.1 (Altenbernd, C.J., concurring)). Although Whitfield did not consider this problem, surely, if it had, it would not have approved such a rule. In amending rule 3.800(a), Whitfield did not limit the application of the rule to scoresheet errors which result in de facto departures. The same Court that decided Whitfield also adopted the would-have-imposed test for the issue of departure sentences based on both valid and invalid reasons. The responsibility for insuring scoresheet accuracy falls on all three lawyers in the trial court (defense, prosecutor, judge), and the only person who suffers from the mistake is the non-lawyer defendant (the only trial participant who cannot be expected to spot the mistake). Imposing on defendants the burden of proving they were not harmed by the mistakes of everyone else is neither rational nor fair.

The same logic should apply under rule 3.850, at least with errors such as that is the present case. There is no meaningful distinction between a sentence based on "an incorrect calculation in a sentencing scoresheet" and one "imposed in violation of the laws of

Florida"; the laws of Florida require accurate scoresheets. B. INEFFECTIVE ASSISTANCE CLAIMS UNDER RULE 3.850

Although there are numerous district court cases holding an ineffective assistance claim can be based on counsel's failure to object to scoresheet errors, all the cases Respondent could find reversed the summary denial of such claims; these cases do not address the "prejudice" element of such claims in any depth. The cases do say "[b]ecause the trial judge might have imposed a different sentence based upon a properly calculated scoresheet, the error is not subject to harmless error analysis," Sommers v. State, 796 So. 2d 608, 610 (Fla. 2d DCA 2001), and "[w]e cannot presume the trial court would have imposed the same sentence had the scoresheet errors been brought to its attention." Logan v. State, 619 So. 2d 350, 351 (Fla. 2d DCA 1993).

To show prejudice under Strickland:

> a defendant need not show that counsel's deficient conduct more likely than not altered the outcome .... The defendant must show that there is a reasonable probability that, but for counsel's ... errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.

466 U.S. at 693-94 (emphasis added).

Many cases assert "the test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance":

> [T]he test for prejudice on direct appeal is ... trial court error will result in reversal unless the prosecution can prove "beyond a reasonable doubt" that the error did not contribute to the verdict obtained. Conversely, ... prejudice may be found in a collateral proceeding in which ineffective assistance of counsel is claimed only upon a showing by the defendant that there is a "reasonable probability" that counsel's deficient performance affected the outcome of the proceeding.

Hill v. State, 788 So. 2d 315, 318-19 (Fla. 1st DCA 2001)(citations omitted), receded from on other grounds, Sanders v. State, 847 So. 2d 504 (Fla. 1st DCA 2003); accord, Goodwin, 751 So. 2d at 546.

However, as noted above, Goodwin rejected the use of burdens of proof or persuasion on direct appeal. 751 So. 2d at 545. As to ineffective assistance claims, certainly the defendant bears some burden here; he must initiate the proceeding through a proper motion and, assuming the claim is not conclusively rebutted by the

record, he bears the burden of producing proof to support his claim.

But this does not necessarily mean that, once deficient performance is proven, the prejudice inquiry is to be determined by a different rule than the standard harmless error test. With some issues (particularly some trial issues), there may be good reason for a different standard; the public interest in finality, the difficulties in retrying old cases, and the speculative nature of any possible prejudice combine to justify the different standard.[12] But in cases like the present one, the use of a different standard is not justified. Any public interest in finality is outweighed by the interest (shared by both the public and defendants) in insuring defendants are not imprisoned longer than they should be.[13] The remedy sought (resentencing under a correct scoresheet) is not unduly burdensome and does not create any problems of stale or lost evidence. And, again, it

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[12] E.g., such issues as failing to request jury instructions on lesser included offenses so the jury can exercise its pardon power, Sanders, 847 So. 2d at 507, or failing to object to the defendant's being shackled in front of the jury. Miller v. State, 852 So. 2d 904 (Fla. 4th DCA 2003).

[13] See Maddox, 760 So. 2d at 98-99; Montague, 682 So. 2d at 1089; Whitfield, 487 So. 2d at 1047.

will generally be impossible for defendants to prove anything other than the possibility of prejudice.[14] In this context, any semantic differences between a "reasonable probability that, but for counsel's ... errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694, and "a reasonable doubt [about] whether the result would have been the same absent the error," Ciccarelli, 531 So. 2d at 131, is negligible at best.

In Glover v. United States, 531 U.S. 198 (2001), the Court addressed the prejudice element of an ineffective assistance claim when counsel failed to raise proper objections to calculations under the federal sentencing guidelines. Rejecting the lower court's finding that a increase of 6 to 21 months in the sentencing range "was not significant enough to amount to prejudice," the Court asserted:

> Authority does not suggest that a minimal

[14] Alternatively, requiring defendants to prove, say, that the sentence would not have been imposed absent the scoresheet error would presumably require them to haul the original sentencing judge into court to testify on the matter. Aside from the potential for abuse and indignity here, and the real possibility busy trial judges may not even remember the case, simply ordering resentencing would be quicker and easier than trying to determine what the sentencing judge would have done under an accurate scoresheet.

> amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance....
>
> ... [T]here is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice. Indeed, it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total authorized sentence.... Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice.... This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, would have been correctable on appeal. We express no opinion on the ultimate merits of Glover's claim because the question of deficient performance is not before us, but it is clear that prejudice flowed from the asserted error in sentencing.

Id. at 202-04 (emphasis added)(citations omitted).

The post-Glover cases assert "the reasonable probability of any increase in [defendant's] sentence would establish prejudice." United States v. Mack, 347 F.3d 533, 540 (3d Cir. 2003); United States v. Ruzzano, 247 F.3d 688, 697 (7th Cir. 2001).

Glover recognizes that even relatively minor score-sheet errors may be prejudicial in a guidelines scheme in which sentencing judges have full discretion to impose sentences within a determinate range. A could-have imposed test is clearly inappropriate here, as is a test that requires the defendant to prove the sentence would have been different under an accurate scoresheet. A reasonable probability is all that need be shown.

C. CONCLUSION

In cases like the present case, the would-have-imposed test is the proper test for post-conviction proceedings, under either rule 3.800(a) or rule 3.850.

Respondent filed a rule 3.850 motion but he did not frame the sentencing issue as an ineffective assistance claim. Assuming there is some difference in the prejudice standard between rule 3.800(a) and rule 3.850, this Court should treat Respondent's motion as having been filed under the rule with the most favorable standard. "[Post-conviction] motions filed by prisoners pro se should not be scrutinized for technical niceties, since a prisoner is almost always unskilled in the law and cannot be held to a high standard of pleading.... [A]s a

matter of pleading, such motions should be treated with ... liberality ...." Ashley v. State, 158 So. 2d 530, 531 (Fla. 2d DCA 1964). This Court has also recognized that ineffective assistance claims may be raised on direct appeal, even if unpreserved, if "the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). The ineffectiveness is apparent here, and denying Respondent relief because of some technical pleading requirement would be grossly unfair, particularly since both the prosecutor and the sentencing court also failed to fulfill their duty to insure scoresheet accuracy. "In the interest of justice, the court may grant any relief to which any party is entitled." Fla. R. App. P. 9.140(h). "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought ...." Fla. R. App. P. 9.040(c); see also Art. V, sec. 2(a), Fla. Const. ("no cause shall be dismissed because an improper remedy has been sought.").

Respondent was sentenced to 90 months imprisonment

under a scoresheet showing a recommended sentence of 109 months and a permitted range of 81.75-136.25 months. All now admit the correct recommended sentence is 92 months and the permitted range is 69-115 months. Instead of the sentence near the bottom of the guidelines, Respondent has a sentence near the top. If we do this as a matter of percentages and assume the trial court would have sentenced Respondent at about the same level of the correct permitted range, he would have been sentenced to about 77 months. Of course, it is possible the court felt 90 months was appropriate regardless of the guidelines score. But there is nothing in the existing record to support such speculation. Simple justice requires more than such speculation.

The trial court erred in summarily denying Respondent's motion.

CONCLUSION

The decision under review should be approved.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this ___ day of April , 2004.

CERTIFICATION OF FONT SIZE

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