IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. JERRY D. ANDERSON, Respondent.	Case No. SCO3-180

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

[Preliminary Statement: The record on appeal to the Second District Court of Appeal was not paginated due to it being an appeal from the denial of a summary rule 3.50 motion. For the convenience of this Court, the petitioner will attach copies of pertinent documentation as appendix exhibits to its initial brief. A copy of the decision of the Second District Court of Appeal in Anderson v. State, 865 So. 2d 640 (Fla. 2d DCA 2004) is attached to the Appendix as State Exhibit 3]

Jerry D. Anderson, hereinafter referred to as the Respondent, was charged by criminal information with the offense attempted murder in the second degree for an offense which took place on March 8, 1997 (Appendix State Exhibit 1: Order Denying Motion for Post-Conviction Relief with attachments-Exhibit D-Information]. He originally entered a no contest plea for a downward departure sentence of two (2) years community control followed by five (5) years probation (Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments-Exhibit B-affidavit for violation of probation; Exhibit D-information notation thereon of nolo contendere plea for downward departure). Using a 1994 guidelines scoresheet on which the attempted second degree murder was ranked as a level 9 offense, Respondent's total sentencing points came to 137 [91 points for the attempted second degree murder and 40 points for

severe victim injury; 6 points for release program violation] sentencing range was 81.75 months to 136.25 months (Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments-Exhibit C-1994 scoresheet). After a probation revocation hearing, trial court sentenced the Respondent to ninety (90) months imprisonment (Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments-Exhibit F).

Respondent filed a pro se Motion for Post-Conviction Relief alleging, in pertinent part, his scoresheet was improperly scored in that the offense of attempted second degree murder should have been scored as a level 7 offense rather than a level 9 offense. It is not listed on the offense severity chart and should, therefore, be scored as a level 7 offense. It would have amounted to 42 points, he argued his sentencing range would have been 45 months to 75 months. (Appendix State Exhibit 2-Defendant's pro se rule 3.850 motion at p.8-9).

The trial court summarily denied the motion and in pertinent part ruled:

> In considering that Defendant's offense was committed within the Heggs window period, a 1994 scoresheet was utilized after Defendant was adjudicated guilty and sentenced for violating his probation in 2001 to avoid Defendant later filing a motion to correct illegal sentence. *[Exhibit D: Information]*. However it appears that the State in preparing the scoresheet did err and use that version of § 774.04(4),

> Fla. Stat. (1995) which was declared unconstitutional in Heggs v. State, 759 So. 2d 620 (Fla. 2000). The aforementioned provision provided that inchoate crimes should be scored only one level below the completed crime ranked in § 921.0012.
>
> However, based on the reasoning in Williams v. State, 784 So. 2d 524 (Fla. 4th DCA 2001) and Reid v. State, 799 So. 2d 394 (Fla. 4th DCA 2001), the attempted second degree murder charge should have been scored as a level eight offense during the Heggs period, as attempted crimes were scored two levels below the completed crime as ranked in § 921.0012. See § 774.04(4)(a), Fla. Start. (1993- &1994 Supp). Per § 921.0012, Fla. Stat. (1993, 1994 Supp & 1995), second degree murder is ranked as a level ten. Therefore, attempted murder in the second degree should have been scored as a level eight offense, not as a level seven offense as Defendant contends nor as a level nine as the scoresheet indicates.

(Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments at p.2)

The trial court ruled, however, the Respondent was not adversely affected by the scoresheet error because if the attempted murder in the second degree had been properly scored as a level 8 offense, the Respondent's sentencing range would have been 69 months to 115 months (Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments at p.2 and Exhibit E-sentencing scoresheet prepared by court for illustrative purposes only). The trial court then denied the Motion for Post-Conviction, holding in pertinent part:

> ...As his ninety (90) month sentence is

> within this corrected range and Defendant was found guilty at the evidentiary hearing, Defendant is not entitled to relief. *[Exhibit F: Judgment & Sentence].* Heggs v. State, 759 So. 2d 620 (Fla. 2000). see also Hummel v. State, 782 So. 2d 450 (Fla. 1st DCA 2001).

(Appendix State Exhibit 1: Order Denying Motion For Post-Conviction Relief with attachments at p. 2-3)

On appeal to the Second District, the appellate court agreed with the trial court that the offense of attempted second degree murder should have been scored as a level 8 rather than a level 9 offense and that properly scored, his total sentence points would have been 120 and his sentencing range would have been 69 months to 115 months. Anderson v. State, 865 So. 2d 640, 642 (Fla. 2d DCA 2004) . The Second District disagreed, however, with the trial court's reliance on Heggs, *supra.,* and Hummel, *supra*, and with the trial court's summary conclusion that Respondent "was not adversely affected" by the scoresheet error because the ninety (90) month sentence imposed "is within the corrected range*."*

The Second District reasoned:

> In *Heggs*, which invalidated the statute adopting the 1995 sentencing guidelines, the supreme court held that, "if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that person will not be entitled to relief under our decision here." 759 So. 2d at 627. In *Hummel*, the First District stated that the supreme court has in *Heggs* "announced a new

> harmless error analysis to be applied in dealing with scoresheet inaccuracies." 782 So. 2d at 451. The First District concluded that the *Heggs* standard for determining whether a defendant is entitled to relief is generally applicable to claims based upon scoresheet errors and not limited to errors arising from the use of the invalid 1994 guidelines.
>
> This court, has, however, not understood *Heggs* as establishing such a generally applicable standard for determining whether scoresheet errors require resentencing. On the contrary, in *Voss v. State*, 808 So. 2d 282 (Fla. 2d DCA 2002); *Collins v. State*, 788 So. 2d 1109 (Fla. 2d DCA 2001), and *Bingham v. State*, 761 So. 2d 761 So. 2d 431 (Fla. 2d DCA 2000) - which were decided after *Heggs* - we have adhered to the view that a scoresheet error, like the error shown by Anderson, requires resentencing unless it can be shown conclusively that the same sentence would have been imposed if the corrected scoresheet had been used by the sentencing court. (citation omitted)
>
> In sum, we employ the would-have-been-imposed standard for determining whether scoresheet errors require resentencing while the First District under *Hummel* uses the could-have-been-imposed standard adopted from *Heggs*. Anderson would not have been entitled to relief under the could-have-been-imposed articulated in *Hummel.* But he is entitled to relief under the would-have-been imposed standard utilized in this district because there has been no conclusive showing that the trial court would have imposed the same sentence if it had utilized a correctly calculated scoresheet.
>
> Anderson, 865 So. 2d at 642-643.

The Second District certified direct conflict with First District in Hummel, *supra.* Anderson, *supra* at 643.

The state filed a timely notice to invoke discretionary jurisdiction based upon the certified conflict.

SUMMARY OF THE ARGUMENT

The Second District in Anderson v. State, 865 So. 2d 640 (Fla. 2d DCA 2004) erred in applying an incorrect harmless error test. Instead, this case is controlled by this Court's decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000). Since the sentence could have been imposed without a departure, Respondent is not entitled to relief. Even if this Court were to determine the Respondent's scoresheet err was not Heggs related, Petitioner submits this Court's standard of review for Heggs errors resulting in non-departure sentences under a corrected scoresheet - if the same sentence ***could have been imposed*** under the 1994 scoresheet without a departure the defendant is not entitled to relief - should apply to all scoresheet inaccuracy cases and not just Heggs related errors.

If this Court should determine (1) the respondent's scoresheet error is not controlled by Heggs, and (2) the Heggs standard of review does not apply to non-Heggs related scoresheet errors that result in nondeparture sentences under a corrected scoresheet, then this Court should consider an appropriate middle ground between the "would have been imposed" and "could have been imposed" standards of review, such as that advocated by Judge Altenbernd after his analysis of the problem in his concurring opinion in Anderson, *supra* at 644.

ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL, IN CONFLICT WITH HUMMEL v. STATE, 782 So. 2d 450 (Fla. 1st DCA 2001), ERRED IN NOT FOLLOWING THE HARMLESSNESS STANDARD ENUNCIATED BY THIS HONORABLE COURT IN HEGGS V. STATE, 759 So. 2d 620 (Fla. 2000).

The standard of review in this strictly legal sentencing matter is de novo review.

The Petitioner submits the Second District erred in applying a "would have been imposed" harmless error test instead of the "could have been imposed" test specifically mandated by this court with regards to scoresheet errors caused by the unconstitutionality of Chapter 94-185. Furthermore, the Petitioner would submit that this Court has, in effect, established a new harmlessness standard of review to be applied in all scoresheet inaccuracy cases and that is if the same sentence could have been imposed without a departure, the defendant is not entitled to resentencing.

The Second District Court of Appeal in Anderson v. State, 865 So. 2d 640 (Fla. 2004) erred when it failed to follow the dictates of this court in Heggs v. State, 759 So. 2d 620, 627-628 (Fla. 2000). In the case of Heggs v. State, *id*, the Florida Supreme court, in dealing with the unconstitutionality of Ch. 95.184, which effected guidelines calculations, the court

reasoned:

> We realize that our decision here will require, among other things, the resentencing of a number of persons who were sentenced under the 1995 guidelines, as amended by chapter 95.184. **However, only those persons adversely effected by the amendments made by chapter 95.184 may rely on our decision here to obtain relief. Stated in another way, in the sentencing guidelines context, we determine that if a person's sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines (without a departure), then that person shall not be entitled to relief under our decision here.** (citations omitted**).**
>
> (Bold emphasis added)

In this case, Anderson's scoresheet error was the result of scoring his attempted second degree murder conviction one level lower than that of the completed crime. This was a Heggs error because the state was relying upon § 777.004(4), Fla. Stat. (1995/1997), which stated criminal attempts were to be ranked for purposes of sentencing under the guidelines "one level below the ranking order under 921.012 or 921.0013". This was the result of Ch. 95-184, § 14, at 1703, Laws of Florida. Ch.95-184 was declared unconstitutional in Heggs, and § 777.004(4), Fla. Stat. (1993), the statute in effect at the time of the appellant's offense provided attempts were to be ranked "two levels below the offense attempted." Attempted murder in the second degree "782.04(2)" is a level 10 offense under 921.0012, "Unlawful killing of human; act is homicide; unpremeditated."

Therefore, a two level drop would make it a level 8 offense. As incorrectly scored as a level 9 offense, Respondent's recommended sentence was 109 months and his range was 81.75 months to 136.25 months (see Exhibit C as attached to Order Denying Motion); correctly scoring the offense as a level 8 offense, appellant's recommended sentence is 92 months and his sentencing range is 69 months to 115 months (see Exhibit E as attached to Order Denying Motion). Respondent's ninety (90) month sentence could have been imposed under the 1994 guideline scoresheet even if the Heggs error were corrected. Accordingly, under the Heggs reasoning - "If a person's sentence imposed under the 1995 guidelines [in this case under the unconstitutional Ch. 95-184, §14, at 1703, Laws of Florida] ***could have been imposed*** under the 1994 guidelines (without a departure), then that person shall not be entitled to relief under out decision here." Heggs, *supra* at 627).

The Second District's decision in Anderson, *supra*, is in direct and express conflict with this Court's decision in Heggs, supra. Regardless of whether this Court's decision in Heggs, *supra*, may or may not set forth a new standard of review regarding whether a defendant is entitled to resentencing as a result of a scoresheet error unconnected to any error that is the result of the unconstitutionality of Chapter 94-185.

Even if this Court were to determine the scoresheet error

in this case was not strictly a Heggs error, the Petitioner would submit this Court should affirm the reasoning of the First District in Hummel v. State, 782 So. 2d 450, 451 (Fla. 1st DCA 2001), wherein the appellate court stated:

> ...[i]n ***Heggs v. State***, 759 So. 2d 620 (Fla. 2000), the supreme court announced a new harmless error analysis to be applied in dealing with scoresheet inaccuracies. Using the Heggs rationale, we conclude that if a person's sentence imposed under an erroneous scoresheet could have been imposed under a corrected scoresheet (without a departure) then that person shall not be entitled to resentencing.

Prior to the decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000), the appellate courts of this State were in agreement that scoresheet errors that resulted in changes of the guidelines scoresheet "cells" (pre-1994) or "sentencing range" (post 1994, pre-Criminal Punishment Code) all required resentencing, whether raised in on direct appeal, in a rule 3.800(a) motion, or in a rule 3.850 motion, unless it could be shown from the record the trial court "***would have imposed*** the same sentence regardless of the scoresheet error" in which case the scoresheet error could be considered harmless. Deparvine v. State, 603 So. 2d 679, 670 (Fla. 1st DCA 1992); Green v. State, 569 So. 2d 888 (Fla. 1st DCA 1990); Terry v. State, 588 So. 2d 63 (Fla.5th DCA 1991); Bigham v. State, 761 So. 2d 431 (Fla. 2d DCA 2000).

Although the decision of this Court in Heggs v. State,

supra. 627-628, established a **could have been imposed** review standard in cases with non-departure errors caused by the unconstitutionality of Ch. 95-184, there is no reason not to apply this standard to all future scoresheet inaccuracy cases, even those not caused by the unconstitutionality of Ch. 94-185.

In the case of Lemon v. State, 825 So. 2d 927 (Fla. 2002), the appellant was sentenced to an upward departure sentence of 96 months (8 years) imprisonment when his guidelines scoresheet reflected a range of 47.7 months to 79. 5 months. The reasons given by the court for the upward departure were valid, statutory reasons even under the 1994 guidelines. Lemon's correct 1994 guidelines scoresheet would reflect a sentencing range of 31.5 months (2.6 yrs) to 52.5 months (4.3 yrs). The Fourth District Court of Appeals, in Lemon v. State, 769 So. 2d 417, 418 (Fla. 4th DCA 2000) reasoned:

> We reject the state's argument that because the departure sentence **could have been imposed** even if the 1994 guidelines had been used, appellant is not entitled to relief. Although this reasoning had been applied to habitual offender sentencing (citation omitted), those sentences do not arise from the guidelines, while departure sentences do. Nonetheless, relief may not be due where it can be shown that **the trial court would have imposed** the same 1995 guidelines departure sentence under the 1994 guidelines.

The Florida Supreme accepted conflict jurisdiction based upon decisions out of the Second District such as Ray v. State,

772 So. 2d 18 (Fla. 2d DCA 1000) which reasoned (bold emphasis added):

> In a motion filed in the trial court pursuant to Florida Rule of Criminal Procedure 3.800, Ray alleged that he should be resentenced pursuant to ***Heggs v. State***, 759 So. 2d 620 (Fla. 2000). The trial court denied Ray's motion because it found that Ray was given a departure sentence based on statutory aggravating factors that were equally valid under the 1994 and 1995 guidelines. **We affirm the departure sentence Ray was not "adversely effected by the amendments made by chapter 95-184. *Id.***

The Florida Supreme court in Lemon, *supra* at 930-931 (bold emphasis added), agreed with the Second District stating:

> We agree that our definition of "adversely effected" in Heggs may be applied to departure sentences as well as guidelines sentences.
>
> **By remanding this case for the trial court to rule on what it *would* have done, the Fourth District is effectively asking the trial court for a factual determination of how persuasive the scoresheet was in determining the upward departure. Our intention in *Heggs* was not to require trial court to apply a subjective hindsight analysis...**
>
> **In this case, we conclude that Lemon was not "adversely effected" by application of the 1995 guidelines because her sentence of 96 months was an upward departure sentence that *could* have been imposed under th either the 1994 or 1995 guidelines...Hence, because Lemon was not adversely effected by the amendments made in chapter 95.184, she is not entitled to *Heggs* relief.**

Petitioner submits the reasoning in Lemon, *supra* at 930-931

(where the Court stated its reasoning in Heggs was not to require the trial courts to apply a subjective hindsight analysis, asking the trial court for a factual determination of how persuasive the scoresheet was in determining the defendant's upward departure sentence) applies with equal force to all scoresheet errors. Regardless of whether the error was caused by the use of an incorrect scoresheet, due to the Heggs decision, or was the result of an incorrect scoresheet calculation, the error must result in a departure sentence without written reasons in order for the defendant to be entitled to relief. In effect, Petitioner submits the question to be asked in all scoresheet error cases as a result of Lemon is "**could** the same sentence have been imposed under a corrected guidelines scoresheet without a departure." If so, there is no sentencing error which requires resentencing.

Even the dissenting Justice Shaw, to which Justice Pariente concurred, recognized the logic, although his comments were framed in relation to a Heggs incorrect scoresheet case:

> **The rule of *Heggs*, i.e., that a 1995 guidelines sentence will be upheld if it "could have" been imposed under the 1994 guidelines, is sound when applied to a non-departure sentence**. If the sentencing court used the invalid 1995 guidelines in calculating the sentence, the sentence will not have been impermissibly effected by the error as long as the overall sentence falls within the permitted range for that crime. **Such a sentence "could have" been imposed under the 1994 guidelines and any allegation**

that the defendant was prejudiced by the error is speculative.

Petitioner submits the reasoning in Heggs as expounded upon in Lemon should apply to all non-departure scoresheet errors and not just scoresheet errors caused by the use of an erroneous scoresheet resulting from a Heggs error. Petitioner submits the only exception to this rule should be where a plea agreement that the appellant would receive a sentence at the bottom of the guidelines. As a result, the defendant does not receive the benefit of his plea bargain. In which case, the State would have the option of agreeing to the bottom of the guidelines sentence on the corrected scoresheet, or withdrawing from the plea and taking the defendant to trial on the original charges. Murphy v. State, 773 So. 2d 1174 (Fla. 2d DCA 2000); Buckingham v. State, 771 So. 2d 1206 (Fla. 2d DCA 2000).

In post-conviction actions, such as in the present case, the burden is on the defendant to prove harmfulness or prejudice. In the absence of a plea to the bottom of the guidelines, there is no way to establish harmfulness or prejudice when the sentence imposed would be a legal sentence, even under a corrected scoresheet, other than to merely "speculate" which Justice Shaw rejected in non-departure Heggs errors.

While the Petitioner's argument remains that the "could have been imposed" standard of review should apply in all scoresheet inaccuracy cases which result in non-departure sentences under

a corrected scoresheet, nevertheless, should this Court determine that the "could have been imposed" standard of review does not apply to non-Heggs non-departure cases, then this Court should consider an appropriate middle ground between the "would have been imposed" and "could have been imposed" standards of review. Such a middle ground was as that advocated by Judge Altenbernd, after his analysis of the problem in his concurring opinion in Anderson, *supra* at 644:

> If one must rely on *Heggs,* 759 So. 2d at 627, to determine the harmfulness of a scoresheet error, then under the 1994-1995 law the error must often be very large before it is harmful. Under the Criminal punishment Code, the sentence would have to exceed the statutory maximum before it deemed harmful[1],=. In essence, the scoresheet error is harmful only if it renders the sentence facially illegal. This standard seems too high. It compels prisoners to serve sentences that were entered in error and that would almost certainly have not been entered if the trial judge had relied upon a correct scoresheet.
>
> On the other hand, this court's decisions in *Voss,* 808 So. 2d at 282-82, *Collins*, 800 So. 2d at 661, and *Bigham*, 841 So. 2d at 645, arguably apply a *DiGuilio* standard in the context of a postconviction proceeding. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Those decisions prohibit the trial court from denying a postconviction motion unless the attachments show conclusively that the trial judge would not have imposed the same sentence despite the error. On direct appeal, the State is required to prove that the preserved

[1]The criminal punishment code scoresheet calling for a sentence beyond the normal statutory maximum set forth in § 775.082

sentencing error was harmless beyond a reasonable doubt. *See Johnson v. State*, 855 So. 2d 1157 (Fla. 4th DCA 2003). This is a reasonable standard on direct appeal. However in the context of a postconviction motion, the defendant should have a threshold burden to establish that the error was harmful.

The courts cannot impose a structure of cells upon the more recent sentencing systems. It seems to me, however, that we might establish a level of error at which the sentencing is presumptively harmful. In this case, for example, the midpoint of the range under the scoresheet used at sentencing was 109 months. The correct midpoint was ninety-two months. The correct midpoint was ninety-two months. The seventeen-point shift in the midpoint error is an error of about fifteen percent on the first scoresheet. That is enough to convince me that it was probable that the trial judge would have imposed a lesser sentence had he used a correct scoresheet. I would suggest that any scoresheet error that reduced the midpoint of the scoresheet by ten percent or more should be treated as presumptively harmful with the burden placed on the State to establish that the error was harmless beyond a reasonable doubt. On the other hand, any error less than ten percent should be deemed presumptively harmless with the burden placed upon the defendant to establish that the error was actually harmful in his case.

CONCLUSION

Petitioner respectfully requests this Honorable Court find:

(1) Respondent's scoresheet error is a Heggs related sentencing error. Since the same sentence could have been imposed under the corrected 1994 scoresheet, his is not entitled to relief.

(2) If Respondent's scoresheet error was not Heggs related, the conflict between the First District in Hummel, *supra.,* and the Second District in Anderson, *supra.,* should be resolved in favor the reasoning of the First District in Hummel. If a person's sentence imposed under an erroneous scoresheet could have been imposed under a corrected scoresheet (without a departure) then that person shall not be entitled to resentencing. The Court should reverse the decision of the Second District Court of Appeal in Anderson v. State, *supra.,* and remand the case with instructions to reinstate the sentence originally imposed by the trial court, to wit: ninety (90) months Florida State Prison.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard J. Sanders, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this 7th day of April 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SCO3-180

JERRY D. ANDERSON,

Respondent.
_____/

State Exhibit 1

Order Denying Motion for Post-Conviction Relief

Case Number CRC97-4513CFANO

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SCO3-180

JERRY D. ANDERSON,

Respondent.
_____/

State Exhibit 2

Motion for Post-Conviction Relief

Case Number CRC97-4513CFANO

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

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JERRY D. ANDERSON,

Respondent.
_____/

LIST OF EXHIBITS

Exhibit	Description
1	Order Denying Motion for Post-Conviction Relief Case Number CRC97-4513CFANO
2	Motion for Post-Conviction Relief Case Number CRC97-4513CFANO
3	Opinion Case No. 2D03-180

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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JERRY D. ANDERSON,

Respondent.
_____/

State Exhibit 3

Opinion

Case Number 2D03-180