IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1266

JAMES L. BROOKS,	)	Appeal from the District Court
	)	of Appeals for the Fourth Circuit
Petitioner,	)	of Florida, Lower Tribunal No.:
	)	4D05-4876
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

INITIAL BRIEF ON THE MERITS FOR PETITIONER

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PREFACE

The parties will be referred to as the Defendant and the State. The following symbols will be used: (r)-record on appeal. Citations to volume and page.

ISSUE PRESENTED

What is the harmless error standard for rule 3.800(a) motions?

STATEMENT OF THE CASE AND OF THE FACTS

In 1999, Brooks was charged with two counts: carjacking and false imprisonment. (Exhibit A, Defendant's 3.800(a) Motion). Carjacking is a level 7 offense. The offense was correctly scored on the scoresheet. (Exhibit A, Defendant's 3.800(a) motion). Brooks later picked up a new charge of attempted robbery, thus violating his probation on the previous charges. The second scoresheet was incorrectly prepared. The second scoresheet erroneously scored the primary offense as armed carjacking instead of carjacking. (Exhibit B, Defendant's 3.800(a) motion). This error resulted in the scoring of the primary offense as a level nine instead of a level seven, adding 36 points to the scoresheet. Under the scoresheet the lowest permissible sentence was 66.3 months, with a proper score,

the lowest permissible sentence would have been 39.3 months. For the violation of probation, Brooks received a ten-year prison sentence, concurrent with other sentences.

After two successful appeals challenging other issues on separate charges, Brooks filed a 3.800(a) motion to correct an illegal sentence. See 837 So.2d 1125; 873 So.2d 1284. The court summarily dismissed the 3.800(a) motion relying on the reasons set forth in the State's Response. Brooks filed a timely appeal to the Fourth District Court of Appeal. Hearing the case en banc, the Fourth DCA receded from its earlier precedent that applied the would-have-been-imposed test to rule 3.800(a) motions, and applied a new could-have-been-imposed test to Brooks's motion. The result was an affirmance of the trial court's denial of Brooks's motion, rather than the resentencing Brooks would have received under the Fourth DCA's prior caselaw.

SUMMARY OF ARGUMENT

The harmless error standard for rule 3.800(a) motions should be the would-have-been-imposed test. The test is pervasive in Florida criminal law. It is the same as the beyond a reasonable doubt test. Substantial rights of defendants hinge on scoresheet calculations. This is precisely why the Florida Supreme Court has

highlighted the importance of a correct scoresheet for a trial judge. There is no reason to depart from the longstanding, widely-used beyond a reasonable doubt standard in this case.

The Fourth District Court of Appeal relied on dicta from State v. Anderson, 905 So.2d 111, 118 (Fla.2005), to recede from its prior use of the would-have-been imposed test. In fact, the case cited in the dicta supports the use of the would-have-been-imposed test. The case does not mention a state's interest in finality, and to the extent it might be read as limiting the class of errors reviewable under rule 3.800(a), the error in this case fits within the reviewable class.

Lastly, a departure from the widely-used would-have-been-imposed test would violate two cornerstone objectives of our criminal process. It would impermissibly shift the burden from the State, and it would erode the appearance of fairness of our criminal process.

For these reasons, this Court ought to find that the appropriate harmless error standard for rule 3.800(a) motions is would-have-been-imposed, and should remand for reconsideration in light of the standard.

ARGUMENT

I. JURISDICTION

This Court ought to invoke discretionary jurisdiction pursuant to Article V,

Section 3(b)(4) of the Florida Constitution as the court below, the Fourth DCA, certified conflict with the Second DCA, Wilson v. State, 913 So.2d 1277 (Fla.2d DCA 2005). Both the Fourth DCA and the Second DCA have requested that this Court provide the harmless error standard for rule 3.800(a) motions. This Court recognized that it has not yet settled the appropriate harmless error standard in rule 3.800(a) motions. State v. Anderson, 905 So.2d 111, 118 (Fla.2005).

II. STANDARD OF REVIEW

The issue of what harmless error standard applies to rule 3.800(a) motions is a pure question of law and is governed by the de novo standard of review. Hale v. State, 630 So.2d 521 (Fla. 1994).

III. ARGUMENT ON THE MERITS

A. The would-have-been-imposed test ought to apply to rule 3.800(a) motions.

The Florida Supreme Court has recognized that it is "undoubtedly important for the trial court to have the benefit of a properly calculated scoresheet when making a sentencing decision." State v. Mackey, 719 So.2d 284 (Fla.1998). The importance of a correct scoresheet is underscored by the fact that three rules of criminal procedure provide for review: 1. The scoresheet error may be addressed

on direct appeal. 2. The error may be raised before or during the pendency of an appeal. Fla.R.Cr.P. 3.800(b) 3. The error may be raised within two years. Fla.R.Cr.P. 3.850. 4. The error may be raised at any time. Fla.R.Cr.P. 3.800(a).

This case presents the question of which of two competing harmless error standards ought to apply to incorrect scoresheet calculation errors raised in a rule 3.800(a) motion. The two competing standards are: the would-have-been-imposed test and the could-have-been-imposed test. Under the would-have-been-imposed test, a scoresheet error requires resentencing unless the record conclusively shows that the same sentence would have been imposed using a correct scoresheet. Under the could-have-been-imposed test, the scoresheet error does not require resentencing if the sentence could have been imposed with a correct scoresheet.

The would-have-been-imposed test is pervasive in Florida criminal jurisprudence. It applies to direct appeals. See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). The test applies to rule 3.850 motions. See State v. Anderson, 905 So.2d 111 (Fla. 2005). The test applies to rule 3.800(b) motions. See Jones v. State, 901 So.2d 255 (Fla. 4th DCA 2005). Most District Courts of Appeal apply the would-have-been-imposed test the facts of the instant case. See Wilson v. State, 913 So.2d 1277, 1279 (Fla. 2d DCA 2005); Griffin v. State, 729 So.2d 423 (Fla. 1st DCA 1999). In fact, the court below, the Fourth DCA, had applied the would-have-

been-imposed test, but receded en banc in the instant case as a result of its reading of this Court's dicta in State v. Anderson, 905 So.2d 111 (Fla. 2005).

By far the prevailing standard is the would-have-been-imposed test. The prevalence of the test follows logically from its origin. As this Court noted in Anderson, the "would-have-been-imposed test is no different from the one announced in DiGuilio–whether beyond a reasonable doubt the error did not contribute to the verdict." Anderson, at 118.

Beyond a reasonable doubt is a fixed star in American criminal jurisprudence. It is the burden of proof placed on the State at trial. The harmless error test as applied to error on direct appeal utilizes beyond a reasonable doubt. As this Court pointed out, "the test focuses on the effect of the error on the verdict or sentence." Anderson, at 115. The would-have-been-imposed test is the selfsame beyond a reasonable doubt standard. State v. Burns, 491 So.2d 1139, 1140 (Fla. 1986). The would-have-been-imposed test requires "an examination of the record for conclusive proof that the scoresheet error did not affect or contribute to the sentencing decision." Anderson, at 116.

The application of the concept of harmless error in the review of criminal cases was an innovation of English jurisprudence. In Crease v. Barrett, 149 Eng. Rep. 1353 (Ex. 1835), the Court of Exchequer enunciated a rule which presumed

prejudice if an error occurred in the admission of evidence at trial. This English rule was adopted by American jurisdictions and expanded to errors beyond those of evidentiary admission. *The Harmless Error Rule Reviewed*, 47 Colum.L.Rev. 450 (1947). With regard to sentencing errors, all American jurisdictions look at the likely impact of the error on the outcome.

Harmless error analysis exists to alleviate concerns of the taint of an error in the reliability and justice of an outcome. The defendant has substantial rights tied into the outcome of a criminal proceeding. These substantial rights are not watered down on direct appeal, nor are they diluted in post-conviction motions. It is precisely this concern over the possible effect of an error on the substantial rights of the defendant that motivated the Supreme Court's iteration of the harmless error rule: "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Kotteakos v. U.S., 328 U.S. 750, 765 (1946). In particular, it is this concern for the substantial rights of the defendant that explains the pervasiveness of the beyond a reasonable doubt standard for error in our jurisprudence.

The would-have-been-imposed test (the beyond a reasonable doubt test)

ought to be the standard applied in rule 3.800(a) motions. The reasonable doubt standard is already in wide-use.[1] Moreover, any lesser standard would be inconsistent with the constitutional requirement that guilt be determined under a reasonable doubt standard.

The would-have-been-imposed test is internally consistent with the plain language of rule 3.800(a). The would-have-been-imposed test relies on the record and only the record to conclusively show that the same sentence would have been imposed using a correct scoresheet. An appellate court possessing the record can adequately review the case, so too can a judge who might hear the motion years later. Rule 3.800(a) provides that the court may review an illegal sentence provided that the "records demonstrate on their face an entitlement to that relief." The would-have-been-imposed test relies only on the record, and is therefore wholly consistent with the plain language of the rule.

The burden of proof at every stage of the criminal process is beyond a reasonable doubt. This is the state of affairs with the would-have-been-imposed test. A switch to the could-have-been-imposed test is an impermissible burden shift. It relieves the State of its burden. This shift in the limited area of 3.800(a) motions would be unwarranted and extraordinary. Beyond a reasonable doubt is a

[1] As explained above, it permeates every level of our criminal jurisprudence.

fixture of American jurisprudence, and there is no clear reason to support departure from this bedrock principle.

II. Correction of scoresheet errors falls squarely within the language of rule 3.800(a) and is not outweighed by the "State's interest in finality."

The court below relied on dicta in Anderson to recede from its own precedent. (Opinion of Fourth DCA, pp. 2). In particular, the court relied on the statement that "after the time for filing 3.850 motions has passed, the State's interests in finality are more compelling." Anderson, at 118. The dicta from Anderson is supposedly exemplified by Maddox v. State, 760 So.2d 89, 100 n.8 (Fla.2000). In Maddox, this Court found that "not all sentencing errors considered fundamental on direct appeal...would necessarily constitute an illegal sentence subject to correction at any time pursuant to rule 3.800(a)." Maddox, at 100. In the footnote explaining this text, this Court wrote that the class of errors that can be raised in a post-conviction motion decades later is narrower than those errors that can be raised on direct appeal. Id. at n.8.

There are several reasons why this train of thinking does not support the conclusion that this Court should apply the could-have-been-imposed test for scoresheet errors in 3.800(a) motions. First, Maddox is distinguishable. Maddox

does not deal with a scoresheet calculation error. The language of Maddox cited above does not support receding from the would-have-been-imposed test, but rather buttresses its use. In fact, an incorrect scoresheet calculation is within the "narrower class of errors" that can be raised. The very language of rule 3.800(a) directly supports this reading of Maddox: "A court may at any time correct an incorrect calculation made by it in a sentencing scoresheet..." The rule directly contemplates the precise error being raised in the instant case. The rule does not mention finality or some arbitrary timeframe. In fact, the plain language of the rule specifically provides that the exact error raised in this case can be raised "at any time." Any other reading renders the plain language of the rule moot. The substantial rights protected by rule 3.800(a) cannot be obviated by the bare mention of the State's interest in finality.[2]

Even if this Court finds that the State has an interest in finality with regards to the error complained of in this case, that interest is in conflict with the State's obligation to correct scoresheet errors. This Court has placed an "equal responsibility" for the correction of scoresheet errors such as the one in this case on both the State and defense counsel. State v. Whitfield, 487 So.2d 1045, 1047

[2] In fact, Maddox does not mention the State's interest in finality. Justice Cantero's dicta in Anderson extends the application of Maddox well beyond the four corners of that decision.

(Fla.1986). In fact, this obligation may hinge on a pre-existing professional duty. Id., at 1047.

In the instant case, the Exhibits attached to the State's Response to Defendant's Motion to Correct Illegal Sentence support the Defendant's position that an error was committed. The State supplies exhibits in support of its argument that the Defendant's sentence was not illegal because he committed the crime of armed carjacking, but the State's Exhibit I reads "carjacking without a firearm," Exhibit II reads "delete firearm," and Exhibit III provides the crime as "carjacking" not "armed carjacking." The State's own Exhibits on their face do not support the State's argument, and yet this does not prevent the State from raising the argument. The trial court summarily denied the Defendant's motion and specifically relied on the State's Response. (Order Denying Defendant's Motion to Correct Illegal Sentence). The State failed in its obligation and responsibility to correct a scoresheet error that is obvious from the face of the record. If the State and defense counsel really do share an equal responsibility in correcting scoresheet errors, it does not seem appropriate to allow the State to rely on finality when it fails to fulfill its obligation.

III. Receding from the would-have-been-imposed test erodes cornerstone objectives of the criminal process.

Certain objectives are so fundamental to American jurisprudence that they characterize it. Two such cornerstone objectives are: the burden on the State and maintaining the appearance of fairness.

Unlike other foreign jurisdictions and American civil law, American criminal law is characterized by the burden it places on the State. This burden is defined as beyond a reasonable doubt. This standard completely permeates Florida criminal jurisprudence and is the test adopted at trial, on direct appeal, in rule 3.850 motions, in rule 3.800(b) motions, and with the exception of Brooks in rule 3.800(a) incorrect scoresheet calculation motions. The instant case does not present the substantial and pervasive reasons needed to justify departure from this bedrock principle of our jurisprudence.

Another cornerstone objective of the criminal process is maintaining the appearance of fairness. The criminal justice process seeks not only to provide fair procedures, but also to maintain the appearance of fairness in the application of those procedures. The appearance of fairness is deemed essential to the effectiveness of the process. It is vital to maintain public confidence in the justice system. In the instant case, there is the plain language of the rule that applies. There is a scoresheet calculation error properly raised in a rule 3.800(a) motion.

Changing the existing harmless error standard so that the rule is in effect rendered impotent does not appear fair. It is changing the rules *in medias res*–and it is fundamentally unfair. If the standard is indeed changed, the criminal process itself is tainted and public confidence will be decreased. This Court ought not change the pre-existing and wide-spread would-be-imposed harmless error standard in this case.

CONCLUSION

For these reasons, this Court ought to find that the harmless error standard under rule 3.800(a) is the would-have-been-imposed test and remand this case for reconsideration in light of the test.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, this 5th day of September, 2006, to: Thomas D. Hall, Clerk of Supreme Court,

and Laura Fisher Zibura, State of Florida AG's Office.

By: _____

Isaac R. Ruiz-Carus
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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that Appellant's Initial Brief complies with the font requirement of

Fla.R.App.P. 9.210(a)(2).

By: _____

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