IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1266

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

PETITIONER'S REPLY BRIEF ON MERITS

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ARGUMENT

I. Rather than focus on an elusive definition for an "illegal sentence," the focus in this case should be on the harmless error standard under Rule 3.800(a).

The State argues that the Petitioner is not entitled to relief because his sentence is not illegal. Respondent's Answer Brief at 10-11. The State concluded that Petitioner's sentence was not illegal because it was within the guidelines. Respondent's Answer Brief at 11. However, the State draws this conclusion from a superseded definition of illegal sentence.

The State provides the definition of "illegal sentence" from Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), as "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Respondent's Answer Brief at 10. This Court has implicitly and explicitly receded from the above statement to the extent that it is read to mandate that only those sentences that exceed the statutory maximum may be challenged as illegal. See Hopping v. State, 708 So.2d 263 (Fla. 1998)(implicitly receding from definition); State v. Mancino, 714 So.2d 429 (Fla. 1998)(explicitly receding from definition).

The State then cites Carter v. State, 786 So.2d 1173, 1180-1181 (Fla. 2001), as standing for the proposition that "an illegal sentence imposes the kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." Respondent's Answer

Brief at 10-11. The quote however was not the holding of the Carter decision. In fact, the Court mentioned the quote from Judge Farmer of the Fourth District Court of Appeal as "com[ing] close to a workable definition." Carter, 786 So.2d at 1181. This Court concluded that it would be "more helpful to provide a predictive description of the types of sentencing errors that may be corrected as illegal," than it would be to define the elusive term "illegal sentence." Ibid.

The issue before the Court is what should be the proper harmless error standard under Rule 3.800(a). The definition of "illegal sentence" is irrelevant to this inquiry. Looking to the language of Rule 3.800(a), it reads: "a court may at any time correct an illegal sentence imposed by it, *or* an incorrect calculation made by it in a sentencing scoresheet." (emphasis added). This case involves the second clause, rather than the first.

II. The State makes unsubstantiated inferences from Maddox and Rule 3.850.

The State cites this Court's decision in Maddox v. State, 760 So.2d 89, 103 (Fla. 2003), in support of the conclusion that a scoresheet error which results in a sentence which does not exceed the guidelines is harmless error. Respondent's Answer Brief at 11-12. This is a non sequitur. This Court's discussion in Maddox concerned fundamental error for the purposes of unpreserved issues raised on direct appeal and Rule 3.800(b). Maddox, 760 So.2d at 94. Maddox provides no logical or legal support for the State's conclusion.

The State proceeds to engage in a detailed discussion of Rule 3.850 and its time limitations. Respondent's Answer Brief at 13-15. Rule 3.850 and its time limitations do not apply to the instant case. This case has been properly brought under Rule 3.800(a), and is explicitly within the penumbra of its language. Petitioner's Initial Brief at 10.

III. The State improperly defines the "would-have-been-imposed test" which leads to confusion and incorrect conclusions.

Under the would-have-been-imposed test, a scoresheet error requires re-sentencing unless the record conclusively shows that the same sentence would have been imposed using a correct scoresheet. The language of Rule 3.800(a) makes clear that the error must be on the face of the record. Once a scoresheet calculation error is clear from the record, the burden is on the State to show from the record that the same sentence would have been imposed in spite of the error. The fact that the burden is on the State rather than the defendant explains why this Court equated the "would-have-been-imposed" test with "beyond a reasonable doubt." See State v. Anderson, 905 So.2d 111, 118 (Fla. 2005).

The State applied its own version of the "would-have-been-imposed test" to the facts. Respondent's Answer Brief at 16. "It is not apparent from the face of record whether the corrected scoresheet would have resulted in a different sentence..." Ibid. This version is not the would-have-been-imposed test at all. In

fact, it shifts the burden to the defendant. The "would-have" inquiry is not for the defendant to show a different sentence would have been imposed, it is for the State to show that the same sentence would have been imposed. The State draws incorrect conclusions from the misstated test. Respondent's Answer Brief at 16.

The proper test does not involve evidentiary hearings with inquiries into a judge's state of mind. Respondent's Answer Brief at 16. The proper test provides that the State must show conclusive proof solely from the record that the same sentence "would-have-been-imposed." Anderson, 905 So.2d at 116. Since the State is limited to the record, the State's concern that an unreasonable burden results from using the "would-have-been-imposed test" is unfounded. Similarly, concerns about the passage of time are obviated by the fact that a written record constrains the "would-have" inquiry.

In short, there is no reason articulated in the Respondent's Answer Brief to justify departure from the long-standing "would-have-been-imposed test" for harmless error under Rule 3.800(a). The test understood as the "beyond a reasonable doubt standard" is a fixed star in criminal law. The State has failed to present the substantial and pervasive reasons needed to justify departure from this bedrock principle of our jurisprudence.

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 7th day of November, 2006, to: Thomas D. Hall, Clerk of Supreme Court, and Laura Fisher Zibura, Office of the Attorney General, Criminal Appeals Division, 1515 N. Flagler Drive, West Palm Beach, FL 33401-3432.

By: _____
Isaac R. Ruiz-Carus
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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that Petitioner's Reply Brief on Merits complies with the font requirements of Fla. R.App.P. 9.210(a)(2).

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