

IN THE SUPREME COURT OF FLORIDA

GREGORY
BANKS,

Petitioner,

v.

STATE OF
FLORIDA,

Respondent.

CASE NO. SC01-2733

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Gregory Banks, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as the petitioner.

The record on appeal consists of one volume, which will be designated by the symbol "R."

"IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The state does not accept petitioner's statement of the case and facts because it is argumentative and presents irrelevant material which obscures the relevant facts. It also fails to recognize that the appeal in the district court was pursuant to Florida Rule of Appellate Procedure 9.141(b)(2) from the summary denial of a motion filed pursuant to Florida Rule of Criminal Procedure 3.850. The record on appeal in a rule 9.141(b)(2) proceeding is severely abbreviated and the applicable appellate standard of review is very narrow. The standard of review merely enables the district court to determine whether the abbreviated record shows conclusively that no relief is appropriate and that the trial court did not err in summarily denying relief; if not, the sole remedy is to remand for reconsideration by attachment of additional material or by evidentiary hearing. The state presents the following comprehensive statements of the case and facts.

Statement of the Case

This is a Petition from a decision by the First District Court of Appeal seeking to invoke this Courts discretionary jurisdiction to answer two questions certified by the district court to be of great public importance (Appendix I).

On May 22, 2001 the petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court (R. 1-6). The motion was summarily denied on June 15, 2001, without an evidentiary hearing. The trial court attached exhibits which the trial court believed refuted the petitioner's claims (R. 18 – 54). The petitioner filed a motion for rehearing which was denied July 18, 2001.

The petitioner appealed the order to the First District Court of Appeal (R. 58). Pursuant to Florida Rule of Appellate Procedure 9.141(b)(2) neither party filed briefs. The district court determined that the abbreviated record showed conclusively that no relief was appropriate and affirmed the trial court order. Specifically, the district court acknowledged that appellant/petitioner had standing to raise a Heggs v. State, 759 So.2d 620 (Fla. 2000)(Heggs) claim pursuant to Trapp v. State, 760 So.2d 924 (Fla. 2000), but held he was not entitled to relief by resentencing because “his sentence was imposed pursuant to a negotiated term of years, and not pursuant to the guidelines”, Hipps v. State 790 So.2d 583 (Fla. 1st DCA 2001); and, further, because “the appellant’s sentence could have been imposed under the 1994 guidelines, his claim that he was entitled to withdraw his plea also fails” under the terms of Heggs.

The district court then added that the petitioner was not entitled to withdraw his plea under Booker v. State, 771 So.2d 1187 (Fla. 1st DCA 2000), review granted, 791 So.2d 1095 (Fla. June 15, 2001) and the rule 3.850 motion was also untimely under Regan v. State, 787 So.2d 265 (Fla. 1st DCA 2001). However, on

the question of timeliness, anticipating that this Court would conduct review of both Booker and Regan, the district court again certified the questions certified in Regan as being of great public importance:

WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED A "NEWLY DISCOVERED FACT" AS CONTEMPLATED BY RULE 3.850(B)(1), WHEREBY AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL?

WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED TO APPLY RETROACTIVELY, SUCH THAT AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECOME FINAL?

The state points out that, contrary to the First District expectations, discretionary review was never sought in Regan and that Booker first sought discretionary review but then was voluntarily dismissed. *See, Booker v. State*, 804 So.2d 328 (Fla. 2001) dismissing review. Thus, neither Booker nor Regan furnish a constitutional basis for discretionary review pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981).

On December 10, 2001, the petitioner timely filed his notice to invoke discretionary jurisdiction with the district court. On April 11, 2002, this Court postponed its decision on the merits and directed a briefing schedule.

On April 22, 2002, prior to briefing, the State served a motion to dismiss this petition for lack of discretionary jurisdiction alleging that neither of the certified questions control the outcome of this case in that petitioner has not shown prejudice under Heggs because the sentence imposed could have been imposed within the 1994 sentencing guidelines. The motion further asserts,

There is an unfortunate predilection in the district court to ignore this Court's constitutional jurisdiction by certifying questions which are either (1) not presented by the district court decision or (2) not actually of great public importance. This is clearly an example of the first and, probably, an example of the second also.

The petitioner responded, arguing that this Court has "properly exercised its discretionary jurisdiction to review the decision of the First District." The petitioner further argued that this Court should reach the merits and determine if the petitioner has the right to withdraw his plea. The response does not address the question of whether the questions are ones of great public importance.

This Court withheld ruling on the motion to dismiss for lack of discretionary jurisdiction with the comment that it would consider it at the time it determines whether oral argument is needed. This declination to address discretionary jurisdiction at the threshold necessitated briefing by both parties on the certified questions.

State's Statement of the Facts

The Petition for Postconviction Relief

The petitioner alleged in his postconviction motion that under the 1995 sentencing guidelines the sentencing range was a minimum of 133.35 months to 222.25 months (R. 3). The petitioner entered into a plea of eleven years (132 months), which was slightly below the 1995 guideline minimum range (R. 3). He asserted that under the 1994 guidelines the guidelines sentencing range was 80.1 to 133.5 months. The petitioner apparently argued that because his plea was made without the knowledge that this Court would ultimately find the 1995 guidelines unconstitutional, his plea was not voluntarily and intelligently made (R. 4). The petitioner then prayed that he be sentenced to the minimum sentence under the 1994 guidelines or that he be permitted to withdraw his plea (R. 5).

The Trial Court Order

The trial court summarily denied the motion. The court found that the appellant was not entitled to relief because his plea was to a term of years and not the minimum range of the guidelines sentence (R. 18). This is consistent with the plea agreement form which states that the sentence will be eleven years (R. 20). It should be noted that the plea form contains the following language (R. 21),

I further understand my sentence will be imposed under the Uniform Sentencing Guidelines. The presumptive sentence will be determined based upon certain factors. The Court can exceed this presumptive sentence and impose up to the maximum sentence permitted by law by stating clear and convincing reasons for such departure. **If the guideline range is exceeded I will have the right to appeal my sentence.** (Emphasis supplied)

The trial court's finding was also based on the plea negotiation which is reflected in the plea colloquy. In announcing the plea the public defender stated that the agreement was for adjudication on the charges and eleven years in the Department of Corrections (R. 23). Subsequently the trial court pronounced a sentence of eleven years in the Department of Corrections.

Appellate Court's Ruling

The district court decision affirming the trial court's summary denial of relief can be found at Banks v. State, 801 So.2d 153 (Fla. 1st DCA 2001). (Appendix I).

For reader convenience, it is quoted in full.

PER CURIAM

The appellant challenges the trial court's summary denial of his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. After receiving a prison sentence pursuant to a plea agreement, the appellant claimed in his motion that he had been sentenced to the low end of the 1995 guidelines. Because the 1995 guidelines were declared unconstitutional in Heggs v. State, 759 So.2d 620 (Fla.2000), the appellant sought to be sentenced to the low end of the 1994 guidelines

or to withdraw his plea. We affirm the trial court's summary denial of the claim, but we again certify the questions we certified in Regan v. State, 787 So.2d 265 (Fla. 1st DCA 2001).

Although the appellant has standing to raise this Heggs claim, *see* Trapp v. State, 760 So.2d 924 (Fla.2000), he is not entitled to be resentenced because his sentence was imposed pursuant to a negotiated term of years, and not pursuant to the guidelines. *See* Hipps v. State, 790 So.2d 583 (Fla. 1st DCA 2001). His claim for re-sentencing also fails because the sentence he received could have been imposed under the 1994 guidelines. *See* Heggs v. State, 759 So.2d at 627. Because the appellant's sentence could have been imposed under the 1994 guidelines, his claim that he is entitled to withdraw his plea also fails. *See* Booker v. State, 771 So.2d 1187 (Fla. 1st DCA 2000), *rev. granted*, 791 So.2d 1095 (Fla. June 15, 2001).

Even if the appellant's claims had merit, his motion was untimely under our decision in Regan.¹ Because the supreme court's review in Booker might lead to a decision recognizing the viability of a claim to withdraw a plea in the circumstances presented in Booker and in the present case, and recognizing the likelihood that the appellant will seek supreme court review challenging our decisions in Booker and Regan, we certify to the supreme court the same questions certified in Regan as questions of great public importance:

WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED A "NEWLY DISCOVERED FACT" AS CONTEMPLATED BY RULE 3.850(B)(1), WHEREBY AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL?

WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED TO APPLY RETROACTIVELY, SUCH THAT AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECOME FINAL?

The order under review is affirmed.

¹Regan v. State, 787 So.2d 265 (Fla 1st DCA 2001).

SUMMARY OF ARGUMENT

The state argues at the threshold that there is no constitutional basis for discretionary jurisdiction because, as held by the district court below, petitioner cannot show prejudice under Heggs even if the certified questions are answered in his favor. It does not matter whether the rule 3.850 motion is timely or untimely; he loses under both conditions. The abbreviated record on appeal under rule 9.141(b) shows conclusively that no relief is appropriate. This Court should grant the state's motion to dismiss for lack of discretionary jurisdiction.

ISSUE I - IS Heggs A “NEWLY DISCOVERED FACT” UNDER RULE 3.850?

Even if this Court denies the state's motion to dismiss and accepts jurisdiction, the certified question should be answered in the negative. An opinion by an appellate court is not a “fact.” “Facts,” as the term is used in postconviction proceedings, are matters of evidence, which is anything that tends to prove or disprove a material fact.

Regardless, the decision by this Court in Heggs would not be the operative fact. The “fact”, if there is a fact, for purposes of this issue was the passage of chapter 95-184, which set out the 1995 guidelines. The fact that law contained more than one subject is a matter that could have been discovered by due diligence, as was done in Heggs v. State, 718 So.2d 263 (Fla. 2d DCA 1998). Florida Rule of Criminal Procedure 3.850 only deals with newly discovered facts that could not have been discovered by due diligence.

Even if a Heggs decision is a “fact” under 3.850, and even if it is the operative “fact,” the time should run from the district court of appeal's decision in

September of 1998. It was at that point that all persons subject to Florida law were put on notice that the 1995 guidelines presented a single-subject problem.

ISSUE II – SHOULD Heggs BE RETROACTIVELY APPLIED UNDER 3.850?

Witt v. State, 387 So.2d 922 (Fla. 1980), sets out three criteria for determining if a new rule of law should apply retroactively. They are the change (a) emanates from the Florida or United States Supreme Court, (b) is constitutional in nature and (c) constitutes a development of fundamental significance. In this case the first two criteria are met. Thus the question here is whether Heggs constitutes a development of fundamental significance.

As Witt notes, there is a strong presumption in favor of finality of judgments and sentences. The doctrine of finality should not be abridged unless a more compelling objective appears. In order for a new rule to be retroactively applied the change must be a sweeping change of law of fundamental significance constituting a jurisprudential upheaval. If a change is merely evolutionary, then it will not be retroactively applied.

Heggs does not meet the “fundamental significance” test. Heggs is nothing more than the application of an established principle to find a statute invalid as violating the single-subject rule. It did not change any fundamental precedent dealing with sentencing. It is an evolutionary refinement of the sentencing law; a temporary measure to repair a “glitch” in the normal sentencing process.

Retroactive application of Heggs would adversely impact the administration of justice and decisional finality, because it would require Florida courts to readdress criminal cases that have already become final. There would be no finality

as to every case which falls under the Heggs umbrella and within the Trapp window for which relief has not already been sought.

ISSUE III – DOES Heggs MAKE THE APPELLANT’S PLEA INVOLUNTARY?

There is no basis for arguing that Heggs renders the voluntary plea for a term of years involuntary. The trial court determined that the petitioner entered a plea to a specific term of years. The district court of appeal affirmed the trial court’s decision, thus conclusively finding that the record conclusively established this point. There is in fact nothing in the record even remotely suggesting that the parties relied on the sentencing guidelines in agreeing to a term of eleven years, which was not within the 1995 guidelines.

Even if Heggs is relevant, petitioner is not entitled to relief because he cannot show prejudice. The sentence of eleven years is within the 1994 sentencing guidelines. Assuming (incorrectly) that the Heggs decision gives rise to a “mistake” or “misunderstanding”, as those terms are used in plea bargains, a defendant at least must demonstrate some prejudice resulting from the change of law to make the “mistake” or “misunderstanding” relevant.

ARGUMENT

ISSUE I

CERTIFIED QUESTION: WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED A "NEWLY DISCOVERED FACT" AS CONTEMPLATED BY RULE 3.850(B)(1), WHEREBY AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECAME FINAL?

Jurisdiction

The state argues at the threshold that there is no constitutional basis for discretionary jurisdiction because, as held by the district court below, petitioner cannot show prejudice under Heggs even if the certified questions are answered in his favor. It does not matter whether the rule 3.850 motion is timely or untimely; he loses under both conditions. The abbreviated record on appeal under rule 9.141(b) shows conclusively that no relief is appropriate. This Court should grant the state's motion to dismiss for lack of discretionary jurisdiction.

In support of this jurisdictional argument, the state also points out that review below was conducted pursuant to rule 9.141(b)(2) with a very narrow, case-exclusive, standard of appellate review, namely, whether the abbreviated record on appeal shows conclusively that no relief was appropriate to the particular petitioner/appellant. The state suggests that it would be extremely rare for a case addressing a narrow issue for one party to meet the constitutional definition of a case of great public importance. It may be hypothetically possible for such a case to be of great public importance but nothing about this case suggests it will be applicable to significant numbers of parties. If this Court, and the district courts

themselves, treat district courts as intermediate courts from which routine questions are certified to the state's highest court then the constitutional revisions of 1980 which corrected an earlier manifestation of this faulty constitutional practice will be for naught. See, the discussion of this problem in this Court's Jenkins v. State, 385 So.2d 1356 (Fla. 1980) and Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958).

Standard of Review

The certified questions present pure questions of law. The State agrees with the petitioner that the standard of review is *de novo*. See Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000)(cited by the petitioner). "Appellate courts are not required to defer to trial judges and administrative law judges on pure issues of law. The standard of review of legal issues involve no more than a determination whether the issue was correctly decided." Section 9.4 Philip J. Padovano, FLORIDA APPELLATE PRACTICE (2d ed. 1997).

Merits

Rendering of Heggs Is Not a "Fact" Within Meaning of Rule 3.850

The term "fact" as used in rule 3.850, cannot be considered to encompass decisions handed down by the various appellate courts. Otherwise, every decision by an appellate court would be a "fact" which would warrant withdrawal of a plea in every case remotely raising the result whether inside the two year time limitation under 3.850 or not.

As used in rule 3.850 the term “fact” only “contemplates a fact in the sense of evidence, which is anything which tends to prove or disprove a material fact.” Regan v. State, 787 So.2d 265 (Fla 1st DCA 2001) *See also* Coppola v. State, 795 So.2d 258 (Fla. 5th DCA 2001). The law is clear that the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See* Jones v. State, 591 So.2d 911, 915 (Fla. 1991). A holding rendered by an appellate court dealing with sentencing does not affect the outcome of the trial.

Decision in Heggs Is Not the Operative Fact Within the Meaning of Rule 3.850

At the outset it must be noted that Heggs is not a “change” in established law. It is no more that the application of an established rule of law: laws passed by the legislature that have more than one subject are unconstitutional. The “fact” involved in Heggs it is not that the Supreme Court decided the case. Rather, it is the “fact” that chapter 95-184, which set out the 1995 guidelines, had more than one subject. This “fact” was easily ascertainable by perusal of chapter 95-184 when it was published.

Rule 3.850(b)(1) provides that the two-year limitations is not applicable where the facts were unknown to the movement and, more important here, **could not have been ascertained by due diligence.** *See* Torres-Arboleda v. Dugger, 636 So.2d 1321, 1324-1325 (Fla. 1994)(“First, the asserted facts ‘must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.’”).

In the case of chapter 95-184, “due diligence” meant appropriate research into the laws of Florida, from which the fault could have been easily discovered. Since the operative “fact” was the defect in the statute, then necessarily the two year limit provided in 3.850 began to run from the passage of chapter 95-184.

Based on the foregoing, those cases which have determined that the “clock” began to run from the date Heggs was finally decided are incorrectly decided. *See, e.g. Cox v. State*, 805 So.2d 1042 (Fla. 4th DCA 2002) and cases cited therein; Murphy v. State, 773 So.2d 1174 (Fla. 2d DCA 2000).

If Heggs is a “Fact,” Time Runs From Court of Appeals Opinion

Assuming that the rendering of a decision constitutes a “fact” contemplated by rule 3.850 (which it does not), then it is the opinion by the Second District Court of Appeal in that begins the time limit. Decisions of a single district court of appeal are the law in Florida. As was said in Pardo v. State, 596 So.2d 665, 666-667 (Fla. 1992).

Initially, we note that the district court erred in commenting that decisions of other district courts of appeal were not binding on the trial court. This Court has stated that “[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.” Stanfill v. State, 384 So.2d 141, 143 (Fla.1980). Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. Weiman v. McHaffie, 470 So.2d 682, 684 (Fla.1985).

In this case, Heggs v. State, 718 So.2d 263 (Fla. 2d DCA 1998), decided September 4, 1998, was the sole case dealing with the issue of whether 95-184 involved a violation of the single subject rule. Although the district court did not make a specific ruling, deferring to the Supreme Court instead, it at least put defendant’s on notice of the existence of the issue. The State would submit that

under those circumstances any challenges to the 1995 guidelines should have been made based on the issues as raised in Heggs at the district court level. At that point the single subject issue most certainly was ascertainable by “due diligence.” Thus any petitions filed under Rule 3.850 more than two years from September 4, 1998, are untimely.

Under these circumstances, if this petitioner had a claim (and he does not) it is time-barred. It was not filed until May 21, 2001, or roughly eight months beyond the two-year limit.

Based on the forgoing, should this Court elect to exercise its discretionary discretion, it should affirm the district court of appeal on this issue.

ISSUE II

CERTIFIED QUESTION: WHETHER THE CHANGE OF LAW CREATED BY THE HEGGS DECISION SHOULD BE DEEMED TO APPLY RETROACTIVELY, SUCH THAT AN APPELLANT MAY RAISE A HEGGS BASED CLAIM FOR POSTCONVICTION RELIEF MORE THAN TWO YEARS AFTER THE APPELLANT'S JUDGMENT AND CONVICTION BECOME FINAL?

Jurisdiction

The state reiterates its arguments that these certified questions do not control the district court decision and thus are not grounds for discretionary jurisdiction.

Applicable Appellate Standard of Review

The state agrees that the standard of review is **de novo**.

Merits

Rule Requiring Retroactive Application Only Applicable to Major Upheavals in Constitutional Law

Heggs should not be retroactively applied, because it is not such a fundamental upheaval of established law as warrants retroactive application.

The appellant correctly observes that questions of retroactivity of changes in the law are governed by the criteria set out in Witt v. State, 387 So.2d 922 (Fla. 1980). These criteria are that the change (a) emanates from the Florida or United States Supreme Court, (b) is constitutional in nature and (c) constitutes a development of fundamental significance.

In analyzing these criteria one must view them in the context of the entire Witt decision. Witt does not deal with application of simple rules to a given individual fact pattern. Rather, Witt deals with the issue of the rare exceptions to the concept of finality of judgments.

In Witt the court started with the proposition that there is a conflict between two important goals of criminal justice: (a) ensuring finality of decisions and (b) ensuring fairness and uniformity in individual cases. 387 So.2d at 925. The court emphasized the significance of finality, saying, “The importance of finality in any justice system, including the criminal justice system, cannot be understated.” The court further noted that “. . . an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.” 387 So.2d at 925. The court concluded that the doctrine of finality should not be abridged unless a more compelling objective appears.

There can be no doubt that under Witt, the polestar is finality. There is a very strong presumption that a judgment and sentence is final. It can be attacked only under the rare circumstance where the law represents a major change in direction. Under Witt case law will be retroactively applied only when the change in the law is of substantial significance.

The importance of finality and the rarity with which the courts will apply retroactivity was underscored the Mitchell v. Moore, 786 So.2d 521 (Fla. 2001). There the court pointed out that for decisions to be applied in postconviction relief the change must be a “‘sweeping change of law’ of ‘fundamental significance’ constituting a ‘jurisprudential upheaval’” 786 So.2d at 529, citing and quoting Witt. Thus it would appear that in order to satisfy the Witt criteria the change in law must reach to the very foundations of justice.

This Court followed this rule in State v. Glenn, 558 So.2d 4 (Fla. 1990), pointing out that in Witt it had held that “. . . only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for postconviction relief.” *id.* at 6. A decision is not retroactive if it is merely an evolutionary refinement of existing law. *id.* at 6. Indeed the court pointed out that “[i]n practice, because of the strong concern for decisional finality, this Court rarely finds a change in decisional law to require retroactive application.” *id.* at 7.

In Glenn the issue was whether the court’s decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), should be retroactively applied. Carawan held that multiple convictions for a single criminal act violated the prohibitions against double jeopardy. The Supreme Court utilized the Witt criteria and found that Carawan should not be applied retroactively.

Decisions Utilizing Witt Criteria to Deny Retroactive Application

There are any number of cases in which the courts have held that decisions changes rules of law will not be applied retroactively. Glenn cites to several cases in which the court declined retroactive application. These included McCuiston v.

State, 534 So.2d 1144 (Fla. 1988) which declined to retroactively apply Whitehead v. State, 498 So.2d 863 (Fla. 1986). Whitehead holds that finding a defendant to be an habitual offender is not a legally sufficient reason for departure from sentencing guidelines.

In Wilson v. State, 812 So.2d 452 (Fla. 5th DCA 2002), the court questioned whether the decision in Servis v. State, 802 So.2d 359 (Fla. 5th DCA 2001) should be retroactively applied. Servis had been charged with DUI-manslaughter. The case involved a question of whether the Florida Administrative Code adequately provided for preservation of blood samples taken for blood-alcohol analysis. The court had ruled that it did not; thus the jury instructions on impairment presumptions were not available to the State.

Wilson, who also was convicted of DUI-manslaughter, argued that he was entitled to the same relief given in Servis. The district court of appeal disagreed. It found that the admissibility of blood-alcohol tests is an evolutionary refinement of the law rather than a jurisprudential upheaval that requires retroactive treatment under Witt. See also Curtis v. State, 805 So.2d 995 (Fla 1st DCA 2001), relied on by the Wilson court.

In Anthony v. State, 762 So.2d 528 (Fla. 2d DCA 2000) the issue was whether State v. Hudson, 698 So.2d 831 (Fla. 1997) should be applied retroactively. In Anthony the defendant claimed he was erroneously advised by his attorney and the trial court that the 15-year minimum mandatory sentence under section 775.084(b), *Fla. Stat.*(1990) was mandatory rather than permissive. He further claimed that his sentence was illegal because the trial court sentenced him under the impression that the statute was mandatory instead of permissive. As here, the defendant filed his postconviction motion more than two years after his conviction became final. However, he argued that he could not raise these

arguments until the Supreme Court decided State v. Hudson, 698 So.2d 831 (Fla. 1997). Hudson held that the trial court has discretion to choose whether defendant will be sentenced as habitual felony offender, and this discretion extends to determining whether to impose mandatory minimum term.

The Anthony court affirmed the trial court's order denying the defendant's motion for postconviction relief. The court stated that "[u]nder the analysis set forth in Witt, we conclude that Hudson made a 'evolutionary refinement' in the law and not a change of constitutional dimension." 762 So.2d at 529.

In State v. Oehling, 750 So.2d 109 (Fla. 5th DCA 1999), the defendant was convicted in 1992 of three counts of resisting three separate law enforcement officers with violence. In 1999, the defendant moved for postconviction relief arguing that under the then recent ruling in Wallace v. State, 724 So.2d 1176 (Fla. 1998) he could not be convicted of the three counts of resisting. Wallace holds that a defendant can only be convicted of one count of resisting an officer with violence based on one continuing episode. The trial court agreed with the defendant that Wallace should be applied retroactively, and granted the defendant's motion. On appeal the district court of appeal reversed. Applying the tests set out in Witt v. State 387 So.2d 922, 929 (Fla. 1980), *supra.*, p. 17, the court found that the changes wrought by Wallace were not of fundamental significance, but amounted to evolutionary refinement of judicial statutory interpretation.

In each of these decisions the defendant's case would more likely than not have resulted in different sentencing or reversal of the judgment and sentence with the application of the new opinion. Yet in each case the courts found, using the Witt criteria, that the opinion affecting the defendant's case would not be retroactively applied, because it did not constitute a fundamental upheaval of established law.

Heggs is not a Change of Fundamental Significance – Should not Be Retroactively applied.

Heggs did not result in a ‘sweeping change of law.’ It does not amount to a ‘jurisprudential upheaval’ of established precedent. At its foundation, it does nothing more than recognize that the underlying legislative act contained more than one subject. The result was simply a reversion to the 1994 sentencing guidelines. The decision does not amount to a new rule of law. It did not change any fundamental precedent dealing with sentencing. This is an evolutionary refinement of the sentencing law; a temporary measure to repair a “glitch” in the normal sentencing process.

The refinement was minimal. The reversion does not apply to individuals whose sentence could have been imposed under the 1994 guidelines, as is the case here. It does not apply to individuals who plead to a specific term of years, rather than to a sentence tied to the guidelines, as is the case here.

This Court should adopt the reasoning in Regan v. State, 787 So.2d 265 (Fla 1st DCA 2001). In Regan the defendant negotiated a plea bargain in which he would be sentenced to the low end of the 1995 sentencing guidelines. After Heggs was decided the defendant filed his motion for postconviction relief arguing the same issues that are argued in this appeal. The trial court summarily denied the defendant’s motion and the First District Court of Appeal affirmed.

In affirming the trial court the court reiterated the “critical” Witt rule that the change must amount to a jurisprudential upheaval. The court specifically noted that “[b]asically, the question boils down to whether the doctrine of finality should be abridged in order to ensure fairness and uniformity in individual adjudications.” 787

So.2d at 268 The court recognized that the reversion to the 1994 guidelines met two of the three Witt criteria. Thus the court was faced with determining if Heggs met the third criteria – the case constitutes a development of fundamental significance. 787 So.2d at 268.

The court then applied the three part test set out in Stovall v. Denno 87 S.Ct. 1967 (1967) and Linkletter v. Walker, 85 S.Ct. 1731 (1965). These criteria are (A) the purpose to be served by the new rule; (B) the extent of reliance on the old rule; and (C) the effect that retroactive application of the rule will have on the administration of justice.

As to the first prong, the court pointed out that the purpose of Heggs “. . . was not to correct any fundamental sentencing unfairness or to even correct a problem with the guidelines. Its underlying purpose was to uphold the single subject rule.” The court was at great pains to underscore this point

In short, the only reason that the 1995 sentencing guidelines were declared unconstitutional was because the guidelines happen to have been part of Chapter 95-184, which contained both civil and criminal laws that had no logical connection to one another (citation omitted). **Absent this technical defect, there was no inherent problem with the 1995 guidelines.** (emphasis supplied)

As to the second part of the Stovall/Linkletter test, the court found that it was not applicable. The court observed that Heggs did not replace an old rule with a new rule. 787 So.2d at 269. Heggs only prevented use of the 1995 guidelines during the two-year window and then only for those defendants who were adversely affected.

As to the third part of the test the appellate court found that Heggs does not provide for uniformity in individual cases. Instead, there must be a case-by-case analysis of whether the individual defendant could have been sentenced to his current sentence without departure under the 1994 guidelines. The court pointed

out that being sentenced pursuant to a guideline is not a constitutional right, citing Hall v. State, 767 So.2d 560 (Fla. 4th DCA 2000), *review granted* 790 So.2d 1104 (Fla.2001). Finally the court concluded that retroactive application “. . . would adversely impact the administration of justice and decisional finality because it would require Florida courts to readdress a significant number of criminal cases that have already become final.”

Based on this analysis the court concluded that Heggs was not of such fundamental significance that would warrant retroactive application. And rightly so. A small **class** of individuals is affected by the prohibition of use of the 1995 guidelines for a limited period. But the number of **individuals** in the class is very high. If Heggs were to be held to be retroactive, judicial review of those cases that fall within the Heggs window could literally number in the thousands. Each case would need to be reviewed to determine if the defendant could have been sentenced under the 1994 guidelines without a departure. Each case involving a plea would need to be reviewed to determine if the plea was tied to a guideline or was to a specific term of years. This process could involve hundreds of judicial hours throughout the State to resolve.

In addition to the processing of claims, it must be pointed out that the finality of every case that falls within the Heggs window would be nullified. Obviously this is not a desirable effect.

Other Decisions Concerning Retroactive Nature of Heggs.

The Fifth District Court of Appeal has followed Regan in Coppola v. State, 795 So.2d 258 (Fla. 5th DCA 2001). However, the Fourth District Court of Appeal has reached a different result, relying mostly on the “newly discovered fact”

approach rather than dealing with application of Witt. See, e.g. Cox v. State, 805 So.2d 1042 (Fla. 4th DCA 2002), and cases cited therein. Similarly the Second District Court of Appeal has determined that a claim may be filed within two years from the decision in Heggs. See Daniels v. State, 771 So.2d 57, 57-58 (Fla. 2d DCA 2000). However, that decision does not contain an analysis as to why the time limit is measured from Heggs.

The State has been unable to find any cases from the Third District Court of Appeal that deal with the question of retroactive application of Heggs. *But see* James v. State, 763 So.2d 535, 536 (Fla. 3d DCA 2000)(holding that where sentence under 1995 guidelines was within 1994 guidelines motion for postconviction relief lacked merit).

In any case, the State respectfully submits that Regan sets out the correct analysis as to why Heggs should not be applied retroactively. Based on Regan and the foregoing discussion this certified question should be answered in the negative.

ISSUE III

DID THE TRIAL COURT ERR BY DENYING THE APPELLANT'S PRAYER TO WITHDRAW HIS PLEA ON THE THEORY THE PLEAS WAS NOT VOLUNTARY? (Restated)

Applicable Appellate Standard of Review

This is an appeal from a trial court order summarily denying a motion filed pursuant to Florida Rule of Criminal Procedure 3.850. It is not a plenary appeal. The narrow standard of review and remedy is set forth in rule 9.141(b): "unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." The non-plenary nature of the appeal is well settled. Thames v. State, 454

So.2d 1061, 1065 (Fla. 1st DCA 1984)(Rule 9.141(b) review is not plenary; it is as much procedural as substantive; the only issue is whether the record conclusively shows that no relief is appropriate; and the only remedy if the record does not conclusively show no relief is appropriate is to remand for reconsideration); Griffin v. State, 573 So.2d 979 (Fla. 5th DCA 1991)(Review of summary denial of rule 3.850 motion is limited to whether the record shows conclusively that no relief is appropriate; parties may not supplement record on appeal; and remedy is to remand for reconsideration).

The state points out that pursuant to rule 9.141(b) if this Court determines that the trial court order with attachments does not conclusively show that no relief is appropriate, the remedy is limited to remand for either attachments of additional documents showing no relief is appropriate or for an evidentiary hearing to determine if the plea should be withdrawn. In the latter event, the state would have the opinion of restoring all original charges and proceeding to trial. In short, all this appellate labor would not involve great public importance. Thus, this Court is not only being asked to conduct error review, it is being asked to conduct rule 9.141(b) error review of a case specifically applicable only to the two parties before the court on this specific case. Reversal and remand for reconsideration will not have significant precedential value.

Merits

Heggs Not Fact or Mistake or Misunderstanding under 3.850

This issue is essentially a rehash of Issue One to the extent it relies on Heggs to produce a “fact” cognizable under Rule 3.850. The State adopts its argument in Issue One concerning what is a “fact.” The State submits that a change in the law which occurs after a defendant enters his or her plea is not the basis for a change of

plea unless the holding is considered retroactive. Since Heggs is not a “fact,” and since it should not be made retroactive, then it should not be the basis for a mistake or misunderstanding contemplated by Rule 3.850.

No Reliance on Guidelines

It is true that one should be allowed to withdraw one’s plea when it is based on a misunderstanding or misapprehension of the facts considered by the defendant in making the plea. *See Forbert v. State* 437 So.2d 1079 (Fla. 1983). However, this rule certainly does not apply when there is no mistake or reliance on a particular lack of fact.

In this case the petitioner alleged his plea was involuntary because of the change wrought by Heggs v. State, 759 So.2d 620 (2000), *supra*. The trial court found that the record conclusively refuted the appellant’s claim. The district court of appeal affirmed this finding. Thus the real question under this point is whether the court of appeal correctly affirmed the trial court’s holding. The answer is clearly yes.

The courts are not bound to the petitioner’s bald assertions. Those allegations can be refuted by the record. *See Montgomery v. State*, 615 So.2d 226 (Fla. 5th DCA 1993), which holds that an allegation that a plea was involuntary or based on a misunderstanding or mistake can be refuted by a written plea agreement or plea transcript, citing Knowles v. State, 582 So.2d 167 (Fla. 1st DCA 1991); Rackley v. State, 571 So.2d 533 (Fla. 1st DCA 1990).

In the present appeal, the trial court found that the petitioner negotiated his sentence for a term of years, not for a sentence related to the guidelines (R. 18). This finding is confirmed by the plea agreement form which states that the sentence will be eleven years (R. 20). The general language found in the plea form does not

apply in this situation where the form is plainly marked eleven years, and there are no initials or other indicia that the parties relied on the boilerplate language.

The fact that the petitioner did not rely on guidelines is further confirmed in the plea colloquy. In announcing the plea the public defender stated that the agreement was for adjudication on the charges and eleven years in the Department of Corrections (R. 23). Subsequently the trial court pronounced a sentence of eleven years in the Department of Corrections. Nowhere in this colloquy or in the sentence pronouncement is there any mention of the sentencing guidelines. Thus the record conclusively demonstrates that the petitioner did **not** rely on the guidelines in negotiating his plea. And, since he did not rely on the guidelines, he cannot be heard to seek an advantage under Heggs.

No Relief Where Sentence Within 1994 Guidelines

Even if the plea had referenced the guidelines the petitioner would still not be entitled to relief. In that regard the State would rely on Booker v. State, 771 So.2d 1187 (Fla 1st DCA 2000) *rev. dism.* 804 So.2d 328 (Fla. 2001). There the defendant timely filed a motion for postconviction relief alleging that he had negotiated for a sentence to be capped at the bottom of the 1995 guidelines of 234.9 months. The trial court sentenced the defendant to 200 months in accordance with this agreement. Of course Heggs was decided. The defendant argued that his plea was a result of a misunderstanding because the cap under the 1994 guidelines would have only been 141 months. The trial court denied the motion, and the district court of appeal affirmed.

The appellate court observed that ordinarily allegations of mistake and misinformation is sufficient to state a *prima facie* case for postconviction relief. However, the court went on to point out that Heggs imposed a specific “prejudice” requirement: Heggs is not available if the sentence imposed under the 1995 guidelines could have been imposed under the 1994 guidelines without departure. The Court then held

In the present case, the appellant’s claim to relief clearly rests upon the decision in Heggs. But since the sentence actually imposed, 200 months in prison, could have been imposed under the 1994 sentencing guidelines without a departure, we must conclude that the appellant’s allegations are legally insufficient under Heggs to entitle him to relief.

In short, there can be no mistake if there is no relief under Heggs.

It should be noted that the Second District Court of Appeal has held that Heggs can be the basis for Rule 3.850 relief in Murphy v. State, 773 So.2d 1174, 1175 (Fla. 2d DCA 2000). The Murphy court certified conflict with Booker. However, that alleged conflict is not before this Court in this appeal.

The holding in Booker is sound and the result reasonable. The State submits that a defendant must show some prejudice before a plea may be withdrawn based on a later change in the law. Otherwise, every single person whose case falls within the Heggs window would be entitled to withdraw their plea and return to the trial court for re-sentencing or trial.

Mistakes Should Be Ones Involving Facts Existing At Time of Sentencing

The State submits that a “mistake” or “misunderstanding” in the plea context must relate to some point that existed at the time of the plea bargain. If there is to be any cohesiveness in judgments, relief from them cannot be based on some new point that surfaces after the plea bargain is consummated.

If the “mistake” or “misunderstanding” is to relate to some future change in the law, then the defendant will have a remedy if the change is so fundamental that it must be retroactively applied. However, if the courts deny retroactivity, then a defendant should not be able to argue that he or she misunderstood the nature of their bargain because of something that occurs in the future.

The petitioner does not cite any cases in which the courts have recognized that an act which occurs after the plea can be a “mistake” or cause a “misunderstanding.” The State has found no Florida cases that so hold either. However, the cases that deal with mistakes or misunderstandings deal with matters that existed at the time of the plea.

The cases cited by the petitioner relating to miscalculated guideline score sheets provide a typical example of this. *See* petitioner’s brief, pages 20, 21. A defendant’s misunderstanding as to the maximum penalty could also be the basis of withdrawal of a plea. *See, e.g. Rodriguez v. State*, 645 So.2d 1124(Fla. 3d DCA 1994). All of these cases deal with some circumstance that existed at the time of the plea bargain.

Petitioner’s Cases Misperceive Nature of Mistake or Misunderstanding for Rule 3.850 Purposes

The petitioner points to cases which he asserts have stated or suggested that the Heggs change might form the basis of a challenge to the voluntary and intelligent nature of a plea. The State respectfully submits that these decisions have missed the point as to what a fact is for purposes of a “mistake” under Rule 3850. They do not recognize that a “mistake” or “misunderstanding” must relate to a condition present at the time of the plea, and not to some future event.

To that end the State submits that Booker v. State, 771 So.2d 1187 (Fla 1st DCA 2000), *rev. Dism* 804 So.2d 328 (Fla. 2001), comes to the right conclusion in those cases where the defendant is entitled to no relief under Heggs – He or She is not entitled to raise a claim or mistake or misunderstanding.

And, based on Booker, the cases cited by the petitioner should not be relied upon to reach a different result.² One simply cannot relate an event from the future back to a plea date to establish a mistake or misunderstanding for purposes of withdrawing a plea. This is particularly true where, as is suggested by the State in this appeal, the future event – in this case a new Supreme Court decision – is not retroactively applied to permit proper petitions for postconviction relief.

But as has been noted before, this Court should not reach this issue in this appeal. The issue has not be raised by certified question, nor has it been raised by way of alleged conflict. Therefore the court need only decide if the district court of appeal's decision was correctly decided **in this case**. As the petitioner is not entitled to relief under Heggs, the decision was correctly decided and the District court should be affirmed on this point.

²It should be noted that in Murphy v. State, 773 So.2d 1174, 1175 (Fla. 2d DCA 2000), the Second District Court of Appeal has certified conflict with Booker.

CONCLUSION

Based on the foregoing, the State respectfully submits that the Court should dismiss the petition finding that there is not constitutional basis for the exercise of discretionary jurisdiction. Alternatively, if this Court finds a basis for discretionary jurisdiction, the certified questions should be answered in the negative and the decision of the District Court of Appeal approved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kevin M. O'Brien, FBN 049611, Holland and Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32302 on 11 June 2002.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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