IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2442
DCA CASE NO. 5D01-2630

SAMUEL A. COPPOLA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Coppola's Statement of the Case and Facts with the following additions and clarifications:

In his motion for post conviction relief, Coppola asserted it was timely filed because it was based on facts unknown to him and which could not have been known earlier (R 329). Among other things, Coppola claimed that counsel was ineffective for advising him that he would receive a sentence conditioned on the guidelines and failing to establish this condition during the plea hearing (R 331). The relief requested in the motion was a new sentence based upon a corrected scoresheet (R 329, 331). Coppola presented the same "unknown fact" argument in his motion for rehearing (R 10).

In summarily denying Coppola's motion, the trial court did not rely "solely" upon a letter from Coppola's trial counsel regarding plea disposition (IB 3). The trial court found that based on the language of the plea form and transcript, the record was "clear" that the plea was for a specific term of years (R 24). A review of the plea hearing shows that the sentencing guidelines were never mentioned (R 38-62). The prosecutor stated that defense counsel had made a proposal to him, and he conveyed the proposal to the victim's family, which requested a counter proposal (R 39-40). The proposal (which was the letter referred to by the trial court) was a request for a guilty plea to second degree murder and a 32 year

sentence, and states, "[w]e believe this sentence serves the interest of the people of the State of Florida and the victim's family and permits our client some limited hope of freedom late in his life" (R 207). The prosecutor countered with 35 years, which was agreed to by both parties.

Coppola appealed the order denying his motion for post conviction relief to the Fifth District Court of Appeal. No response was requested from respondent (appellee below) before the district court ruled.

SUMMARY OF THE ARGUMENT

Coppola is not entitled to relief from his plea. First and foremost, Coppola never alleged in his post conviction motion that he was entitled to relief based on a change in law that should be applied retroactively, and should not be permitted to now seek relief on this basis. In addition, there is no conflict among the district courts on this issue as only two have addressed it, and both are in agreement. Further, as both the trial court and Fifth District Court of Appeal found, Coppola was not sentenced pursuant to the guidelines, but rather, to a negotiated plea for a specific sentence.

In any event, based upon the reasoning of the First District Court of Appeal, in *Regan v. State*, 787 So. 2d 265 (Fla. 1st DCA 2001), and followed by the Fifth District in the instant case, this Court should conclude that *Heggs*[1] does not apply retroactively. The *Heggs* decision is not a "newly discovered fact" within the meaning of Rule 3.850, and thus does not constitute an exception to the two year time limitation. Further, when analyzed under the *Witt* criteria, the *Heggs* decision is not such a fundamental upheaval of established law as to warrant retroactive application.

[1] *Heggs v. State*, 759 So. 2d 620 (Fla. 2000)

ARGUMENT

TO THE EXTENT THAT COPPOLA ASSERTS A CHANGE IN THE LAW REQUIRING RETROACTIVE APPLICATION AS A BASIS FOR RELIEF, THE CLAIM WAS NOT PRESERVED FOR APPELLATE REVIEW NOR IS THERE CONFLICT AMONG THE DISTRICT COURTS; THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT COPPOLA IS NOT ENTITLED TO RELIEF.

Coppola was indicted for first degree murder and conspiracy to commit first degree murder for offenses that occurred in 1997. In 1998, he pled guilty to second degree murder and conspiracy to commit murder in exchange for a 35 year sentence. Coppola now contends that this Court's decision in *Heggs v. State,* 759 So. 2d 620 (Fla. 2000), constitutes a change in law that should be retroactively applied to his plea and sentence which were entered in 1998. He claims that because his plea is unconstitutional, he should be automatically resentenced under lawful guidelines. Respondent disagrees.

A. Coppola never alleged that he was entitled to relief based on a change in law that should be applied retroactively.

Pursuant to Florida Rule of Criminal Procedure 3.850, no motion shall be considered beyond the two year time limitation unless it (a) alleges that the facts on which the claim is predicated were unknown to the movant and could not have been ascertained by due diligence, or (b) the fundamental constitutional right

asserted was not established within the two year time limitation and has been held to apply retroactively. Coppola first claims that this Court's decision in *Heggs v. State,* 759 So. 2d 620 (Fla. 2000) must be applied retroactively pursuant to *Witt v. State,* 387 So. 2d 922 (Fla. 1980). A review of Coppola's 3.850 motion demonstrates that he never alleged a retroactive change in the law that should be applied to him, nor did the trial court ever rule on this issue. Coppola claimed that he was filing the motion based on facts unknown to him and which could not have been known earlier,[2] and the trial court ruled that the motion had been filed beyond the two year time limit. A claim not presented to the trial court in a Rule 3.850 motion cannot be raised for the first time on appeal from the denial of post conviction relief. *Doyle v. State,* 526 So. 2d 909, 911 (Fla. 1988). Respondent contends that Coppola should not be permitted to seek relief on a basis that was never alleged in his post conviction motion.

Respondent would also point out that there is no conflict among the district courts on this issue. Only the First and Fifth Districts have expressly addressed the issue of the retroactive application of *Heggs* under *Witt*, and both agree it is not entitled to retroactive application. *Regan v. State,* 787 So. 2d 265 (Fla. 1st DCA 2001); *Coppola v. State,* 795 So. 2d 258 (Fla. 5th DCA 2001). The Second and Fourth Districts have found that defendants should have two years from the

[2] Respondent will address this allegation in its retroactivity analysis.

issuance of *Heggs* to raise the claim in a 3.850 motion because the facts on which the claim is predicated could not have been known earlier (which is the exception set forth in 3.850(b)(1)). *Murphy v. State,* 773 So. 2d 1174 (Fla. 2d DCA 2000); *Jenkins v. State,* 771 So. 2d 37 (Fla. 4th DCA 2000). *See also, Foster v. State,* 794 So. 2d 731 (Fla. 3d DCA 2001), *rev. denied,* 900 So. 2d 553 (Fla. 2005) and *Herrera v. State,* 833 So. 2d 791 (Fla. 3d DCA 2002), *rev. denied,* 2005 Fla. LEXIS 1796 (Fla. August 25, 2005), which both certified conflict with *Murphy. But see, Paul v. State,* 2005 Fla. LEXIS 16892 (Fla. September 1, 2005).

B. Coppola was not sentenced pursuant to the guidelines.

Respondent next contends that *Heggs* is not even applicable to the facts of the instant case because, as both the trial court and district court found, Coppola did not receive a guidelines sentence. A review of the plea hearing shows that the sentencing guidelines were never mentioned (R 38-62). The prosecutor stated that defense counsel had made a proposal to him, and he conveyed the proposal to the victim's family, which requested a counter proposal (R 39-40). The proposal (which was the letter referred to by the trial court) was a request for a guilty plea to second degree murder and a 32 year sentence, and states, "[w]e believe this sentence serves the interest of the people of the State of Florida and the victim's family and permits our client some limited hope of freedom late in his life" (R 207). The prosecutor countered with 35 years, which was agreed to by both

parties. There was never any reference to the guidelines. In fact, Coppola asserted in his 3.850 motion that counsel was ineffective for not assuring at the plea hearing that this was a guidelines sentence, which further indicates it was not. Where a plea agreement is not conditioned on the guidelines, relief is not warranted. *See, Bonilla v. State,* 766 So. 2d 1192 (Fla. 5th DCA 2000).

C. Heggs does not apply retroactively.

Even if this Court finds that Coppola's claim is properly before it, he is not entitled to any relief because *Heggs* does not apply retroactively to sentences imposed pursuant to pleas where the convictions were final prior to the decision in *Heggs.* Coppola's convictions and sentences, which were imposed pursuant to a negotiated plea, became final in August, 1998, almost two years before this Court's decision in *Heggs v. State,* 759 So. 2d 620 (Fla. 2000) (rehearing denied July 10, 2000). The motion for post-conviction relief in the instant case was filed on April 10, 2001. That motion was untimely, as *Heggs* should not apply retroactively. Whether a decision of this Court must be applied retroactively is a pure question of law, subject to *de novo* review. *Bunkley v. State,* 833 So. 2d 739 (Fla. 2002), *vacated on other grounds, Bunkley v. Florida*, 538 U.S. 835 (2003).

First, *Heggs* should not apply retroactively when the sentence at issue is one which has been imposed pursuant to a negotiated plea. When the sentence has been imposed pursuant to a plea, any effort to challenge it must also challenge the

plea and the conviction. This flows from the general principle that when a defendant accepts the benefits of a plea, the defendant may not thereafter pick those parts of the plea which the defendant wishes to retain while attempting to set aside other onerous portions of the plea. A plea is a package deal, and it stands or falls as a package. *See, e.g., Williams v. State*, 650 So. 2d 1054 (Fla. 1st DCA 1995); *Jolly v. State*, 392 So. 2d 54, 55 (Fla. 5th DCA 1981) ("As the negotiations were based on a material mistake of law, the plea was invalid and no legal sentence could be imposed. The remedy, in those circumstances, is not to correct the sentence but to set aside the plea (and the consequent judgment and sentence). . .").

Interestingly, Coppola never mentions the possibility of withdrawing from his plea deal and proceeding to trial on a charge of first degree murder, where he will face a sentence of death or life without the possibility of parole. He asserts that his "negotiated plea deal is unconstitutional", and claims that he should be automatically resentenced under the 1994 guidelines. In essence, his claim is "I would not have entered a plea to a term of years if I had known that the guidelines would be found unconstitutional, so I am entitled to a guidelines sentence." To merit relief, he would have to allege at a minimum that the **State** agreed to a guidelines sentence as part of the deal. A claim that his attorney recommended he enter into the plea because the sentence was within the current guidelines is nothing more than a claim that counsel was ineffective for failing to anticipate a

change in the law. This Court has consistently rejected such claims. *Cummings-El v. State,* 863 So. 2d 246 (Fla. 2003).

1. The Heggs Decision is Not a "Fact" Under Rule 3.850

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, 267 (Fla. 1st DCA 2001). *See also, Coppola*, 795 So. 2d at 259 (agreeing with the conclusions of the First District). *Heggs* is not a new fact. It is no more than an 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* is not that this 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 ascertainable, even if debatable, by reviewing Chapter 95-184, Laws of Florida, at the time it was published. As the "fact" of the single subject violation was something which could be ascertained by reviewing the law when it was published, it would not qualify as a fact under Rule 3.850(b)(1), which requires that the qualifying facts could not have been ascertained by due diligence.

The *Regan* Court recognized that the existence of the change in law here merely affects sentencing, and does not have a tendency to prove or disprove guilt or innocence. It concluded that if this change in the law is considered to be a "fact" contemplated by Rule 3.850, it would follow that every change in law would

become a fact and entirely remove the need to perform a *Witt* analysis. *Regan*, 787 So. 2d at 267. Respondent submits that the effect of such an allegation is the same as an allegation that counsel was ineffective for failing to anticipate a change in the law, and that change, while not subject to *Witt* application, should be applied to a defendant after his conviction is final. As stated, this Court has consistently rejected such claims. *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003).

2. The Heggs decision is not a fundamental upheaval of established law warranting retroactive application.

The second exception to the two-year time limitation for Rule 3.850 motions is for claims that are based on a fundamental, constitutional right that was not established within the two-year time period and has been held to apply retroactively. The criteria for such retroactive application are set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Witt* requires that the change in law (a) emanate from this Court or the Supreme Court of the United States; and (b) be constitutional in nature; and (c) constitute a development of fundamental significance. *Witt* was designed to balance the goals of ensuring finality of decisions and ensuring fairness and uniformity in individual cases. *Witt*, 387 So. 2d at 925. As a result of the importance of the goal of finality, *Witt* requires that changes in decisional law be of substantial significance. This Court reiterated the importance of finality and the requirement for a major change in the law in

Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001), when it held that the change must be a "'sweeping change of law' of 'fundamental significance' constituting a 'jurisprudential upheaval.'" 786 So. 2d at 529 (quoting *Witt*). Reiterating the principles of *Witt,* this Court, in *State v. Glenn*, 558 So. 2d 4, 6 (Fla. 1990), emphasized that decisions which were merely evolutionary refinements of existing law did not apply retroactively. Based on the importance of finality, the Court stated that "this Court rarely finds a change in decisional law to require retroactive application." *Glenn,* 558 So. 2d at 7.

In *Regan,* the First District Court of Appeal carefully analyzed the issue of the retroactivity of *Heggs* under *Witt* and concluded that *Heggs* did not apply retroactively and did not constitute an exception to the two year limitations period under Rule 3.850(b). *Regan,* 787 So. 2d at 267-69. The district court first determined that the *Heggs* decision emanated from this Court. The Court also found it is constitutional in nature in the sense that the enacting legislation was found to violate the single subject rule. Respondent questions whether *Heggs* even meets this prong. *Witt* simply uses the language "constitutional in nature", but Rule 3.850(b)(2) requires that a "fundamental constitutional right" be asserted to avoid the two year time bar. The content of the guidelines has never violated the constitution. It was simply the manner in which they were originally enacted that did. As the *Regan* Court noted in its analysis, there is no constitutional right to be

sentenced under the guidelines. *Id.* at 269. Thus, it would appear that no "fundamental constitutional right" is implicated that would entitle defendants to avoid the two year time limitation of Rule 3.850.

In any event, the *Regan* Court concluded that the change in law created by *Heggs* did not constitute a development of fundamental significance. *Id.* at 268. The Court determined that *Heggs* did not remove from the State of Florida the power to regulate certain conduct or to impose certain penalties. Nor was it a landmark decision that divested the State of any powers. *Id.* at 267. The Court then analyzed the three part test set forth in *Stovall v. Denno,* 388 U.S. 293 (1967), and *Linkletter v. Walker,* 381 U.S. 618 (1965), which was emphasized in the *Witt* opinion: (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice. *Regan*, 787 So. 2d at 267.

The Court first found that the purpose of the rule in *Heggs* "was not to correct any fundamental sentencing unfairness or to even correct a problem with the guidelines." *Id.* at 268. Rather, "[t]he purpose of the *Heggs* decision was to uphold the single subject rule which prevents the legislature from passing multiple laws that have no logical connection to one another under one title." *Id*. Significantly, the amendments to the 1995 sentencing guidelines were, in fact, reenacted and did, in fact, apply to thousands of criminal cases between 1997 and

1998, so there was clearly nothing fundamentally unfair about the guidelines. As the *Regan* Court recognized, there was no inherent problem with the 1995 guidelines, but only a technical defect because Chapter 95-184 contained criminal and civil provisions that had no logical connection to one another. *Id.* at 269. The court thus concluded that the *Heggs* decision does not meet the first prong of the *Stovall/Linkletter* test. *Id.*

The second factor to consider in the retroactivity analysis is the reliance by the courts on the old rule. This factor was deemed inapplicable by the *Regan* Court, because "the *Heggs* decision did not replace an old rule with a new rule. It merely prevented use of the 1995 guidelines during a two-year window, and only for those defendants who were adversely affected." *Id.*

The final factor in the retroactivity analysis under *Witt* is the effect on the administration of justice and whether such an adverse effect would be "serious enough to outweigh the concern for fairness and uniformity in individual cases." *Id.* As noted in *Regan, Heggs* "does not provide for uniformity in individual cases, but rather it calls for a case-by-case analysis of whether the individual defendant could have been sentenced to his present sentence without a departure under the 1994 guidelines." *Id*. Furthermore, post-conviction proceedings "may not be used to correct individual miscarriages of justice in the 'absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of

the original trial proceeding'." *Id*. (quoting *Witt*, 387 So. 2d at 929). Clearly, as the Regan Court stated, application of the single subject principle is not a constitutional change in the law "which casts doubt on the veracity or integrity of the original trial proceeding." *Regan*, 787 So. 2d at 269. Indeed, there is no constitutional right to sentencing under the guidelines at all. *Id*. Thus, the veracity, integrity, and fairness of the original proceedings were not at issue.

The *Regan* Court went on to conclude that, "[r]etroactive application of the *Heggs* decision 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." *Id*. at 270. The number of cases affected by the retroactive application of *Heggs*, even limited to those who were adversely affected by *Heggs*, would likely be in the thousands. The district court held that "the change of law created by *Heggs*, while constitutional in nature, is not of such fundamental significance as to warrant retroactive application." *Id*. at 270. Based on the reasoning of *Regan*, the State asserts that *Heggs* should not apply retroactively. *See also, Coppola v. State,* 795 So. 2d 258 (Fla. 5th DCA 2001).

Many cases have rejected retroactive applications of decisions under circumstances which could reasonably be compared to the decision in *Heggs*. *Hughes v. State*, 901 So. 2d 837 (Fla. 2005) determined that the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the United States Supreme

Court ruled that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt does not apply retroactively. *McCuiston v. State*, 534 So. 2d 1144 (Fla. 1988), declined to retroactively apply *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986). *Whitehead* held that finding a defendant to be an habitual offender was not a legally sufficient reason for a departure from the sentencing guidelines. *Anthony v. State*, 762 So. 2d 528 (Fla. 2d DCA 2000) involved the issue of retroactive application of *State v. Hudson*, 698 So. 2d 831 (Fla. 1997). *Hudson* held that a trial court had the discretion to choose whether the defendant would be sentenced as an habitual felony offender and that the discretion extended to determine whether to impose a mandatory minimum term of incarceration.

In conclusion, respondent contends that Coppola is not entitled to any relief. However, if this Court determines that *Heggs* creates an exception to the two year time limitation of Rule 3.850, the remedy in this case is not an automatic resentencing under the 1994 guidelines. Further consideration would only be warranted if this Court determines that *Heggs* constitutes a newly discovered fact, since that is all Coppola alleged in his motion. This determination would only require a finding that the 3.850 motion was timely filed and could be considered by the trial court. Since the trial court based denial on an alternative basis, this Court must then determine whether the trial and district court's findings that Coppola did

not plead to a guidelines sentence should be affirmed. As set forth previously, respondent asserts that affirmance on this basis is appropriate. Finally, if this Court determines that the trial court's finding is not supported by the record, the case is simply remanded to the trial court for further consideration of the 3.850 motion.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, the State respectfully requests that the Court affirm the decision of the Fifth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to John R. Blue, Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731-2861, and Christine R. Dean, Carlton Fields, P.A., P.O. Drawer 190,, Tallahassee, FL 32302-0190, this 28th day of September, 2005.

_____
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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

_____
KELLIE A. NIELAN
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