IN THE SUPREME COURT OF FLORIDA

SAMUEL A. COPPOLA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Case No.: SC01-2442

DCA Case No.: 5D01-2360
L.T. Case No.: 97-274CF

PETITIONER SAMUEL A. COPPOLA'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner, Samuel A. Coppola ("Mr. Coppola"), was indicted for first degree murder and conspiracy to commit murder for criminal offenses that occurred on March 19, 1997. R. 184. On July 27, 1998, Mr. Coppola pleaded guilty to second degree murder and conspiracy to commit murder. R. 28. He was sentenced for a term of thirty-five years for the second degree murder charge and thirty years for the conspiracy charge, both sentences to run concurrently. R. 31, 34, 37. Mr. Coppola did not appeal his judgment and sentence. R. 23.

On June 27, 2000, within two years of the imposition of his judgment and sentence, Mr. Coppola filed a pro se Motion to Correct Illegal Sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). R. 92. Mr. Coppola argued that his negotiated plea was for a sentence within the 1995 sentencing guidelines that were declared unconstitutional in Heggs v. State, 759 So. 2d 620 (Fla. 2000) (Appx. A). R. 94-98. He requested that he be resentenced under the correct guidelines. R. 98. The trial court denied Mr. Coppola's motion, and the Fifth District affirmed in a citation PCA opinion. R. 101, 104.

On April 10, 2001, within two years of the release of Heggs, but more than two years after his judgment and sentence became final, Mr. Coppola filed a pro se Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850. R. 327. Mr. Coppola argued that his plea was not entered voluntarily

because he entered the plea based on statements by his counsel that he would be sentenced "somewhere in the middle" of the 1995 sentencing guidelines. R. 330. Mr. Coppola contended that his counsel showed him the actual sentencing guidelines scoresheet and showed him where his points fell in relation to the sentence he would receive. Id. Mr. Coppola explained that he felt he had no choice but to enter the plea because his sentence fell within the guidelines, but had he known that the guidelines were invalid, he would not have entered the plea. R. 45, 330-31. Based on these allegations, Mr. Coppola requested that the trial court vacate and set aside his judgment and sentence, so that he could be resentenced using correct guidelines. R. 331.

The trial court denied Mr. Coppola's 3.850 motion, ruling that the motion was not timely filed. R. 22. The court stated that Mr. Coppola had notice of the Heggs decision as of May 4, 2000, and that Mr. Coppola's applicable time period to raise a Heggs challenge expired just three months later, on August 28, 2000. Id.

The trial court further ruled that rule 3.850 is not available as a means to review errors which were cognizable on direct appeal. Because Mr. Coppola did not appeal his judgment and sentence, Mr. Coppola's claims were also procedurally barred under the court's ruling because "it has long been the law in Florida that post-conviction motions are not to be used as second appeals and claims which were, or could have been, raised on direct appeal are not to be used

as second appeals and claims which were, or could have been, raised on direct appeal are not cognizable in a motion filed pursuant to Fla. Crim. P. 3.850." R. 23-24.

The trial court did not explain how Mr. Coppola could have raised this issue had he appealed his judgment and sentence as Heggs had not yet been decided.

Despite these procedural bars, the trial court noted on the merits that the record demonstrates that Mr. Coppola's plea was voluntarily entered. The court so ruled despite the existence of the 1995 guidelines being attached to the Department of Corrections' package. Instead, the trial court relied solely on a letter from Mr. Coppola's trial counsel regarding the plea disposition, which did not reflect any reference to guidelines. The court thus concluded that Mr. Coppola's plea was not conditional or applicable to the guidelines. R. 26.

Mr. Coppola thereafter timely filed a pro se motion for rehearing, arguing that he should have two years from the date of the Heggs decision to raise a Heggs challenge. R. 10. He argued that, since his rule 3.850 motion was filed within two years of this decision, his motion was timely. Id. The trial court denied Mr. Coppola's motion for rehearing. R. 3.

Mr. Coppola appealed the trial court's order to the Fifth District. The Fifth District framed the issue before it as follows: "A determination of the timeliness of Coppola's motion is dependent upon our determination as to whether the decision

in Heggs is to be applied retroactively." Coppola v. State, 795 So. 2d 258, 259 (Fla. 5th DCA 2001) (Appx. B). In other words, the Fifth District would have concluded that Mr. Coppola's 3.850 motion was timely if Heggs is retroactive. The court then recognized that a conflict exists among the district courts with respect to whether Heggs should be applied retroactively.

In Regan v. State, 787 So. 2d 265 (Fla. 1st DCA 2001), the First District held that Heggs should not be applied retroactively. This is in stark contrast to Murphy v. State, 773 So. 2d 1174 (Fla. 2d DCA 2000) (en banc), and Jenkins v. State, 771 So. 2d 37 (Fla. 4th DCA 2000), in which the Second and Fourth Districts held that Heggs should apply retroactively.

The Fifth District adopted the reasoning of the First District in Regan and held that Heggs does not apply retroactively because it does not constitute newly discovered evidence and because it does not meet the retroactivity test of Witt v. State, 387 So. 2d 922 (Fla. 1980). Coppola, 795 So. 2d at 260.

In footnote to its decision, the Fifth District noted that, even if Mr. Coppola's claim were timely filed, he would not be entitled to Heggs relief because, as the trial court found, he was not sentenced pursuant to a guidelines sentence, but rather pursuant to a negotiated plea. Id. Like the trial court, the Fifth District did not explain its basis for this statement.

Mr. Coppola timely filed a notice to invoke the discretionary jurisdiction of this Court based on conflict between the decision below and Jenkins and Murphy. This Court entered an order staying consideration of this case pending disposition of Banks v. State, SC01-2733, which was then pending in this Court.

After deciding Banks, this Court directed the parties to file written responses addressing whether Mr. Coppola's sentence could have been imposed under the 1994 guidelines without a departure, and if so, why this Court should therefore not decline to exercise jurisdiction in this case in light of its decision in Banks. Coppola v. State, SC01-2442 (Fla. order filed Dec. 27, 2004).

In response to the Court's order, both parties filed written responses demonstrating that Mr. Coppola's sentence legally could not fall within the 1994 guidelines without a departure. Appx. C This Court thereafter accepted jurisdiction of this case, ordered a briefing schedule, and appointed undersigned counsel to represent Mr. Coppola before this Court on a pro bono basis.

This brief is filed pursuant to the Court's order.

SUMMARY OF THE ARGUMENT

On February 17, 2000, this Court released its decision in Heggs, which invalidated chapter 95-184, Laws of Florida (the 1995 sentencing guidelines) because it violated the single subject rule. The statute was thus void in its entirety. This decision applies retroactively, thereby permitting inmates sentenced under the unlawful 1995 guidelines to challenge their unlawful sentences under Heggs within two years of the date of this decision.

First, this Court has held that Heggs relief is available for those who committed their offenses between October 1, 1995, and May 24, 1997. Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000) (Appx. D). To deny retroactive application of Heggs would render Trapp a nullity. If Heggs is not retroactive, then inmates have two years from the date of their conviction and sentence to raise a Heggs challenge. Under the window period, many inmates would not be entitled to relief from their unlawful sentences because this time expired before Heggs was even decided. This patently absurd result belies common sense.

Second, Heggs constitutes a jurisprudential upheaval and squarely satisfies each prong of the Witt retroactivity test. Heggs was a change in the law that emanated from this Court, was constitutional in nature, and was of fundamental significance.

In addition, the Second District (sitting en banc) and the Fourth District correctly held that Heggs constitutes a newly discovered fact under rule 3.850(b)(1). That their sentences were lawful was a fact relied upon by inmates in entering their pleas, and it could not have been known prior to Heggs.

Finally, the Fifth District erred in holding that Mr. Coppola was not entitled to relief under Heggs because he entered a negotiated plea. This position has been rejected by this Court in a recent decision. The record in this case also shows that it was error for the trial court and the Fifth District to conclude that Mr. Coppola was not sentenced using the 1995 guidelines. As the trial court's order itself demonstrates, the record does not conclusively prove that Mr. Coppola was not sentenced using the 1995 guidelines.

This Court should quash the instant decision, approve Jenkins and Murphy, and hold that Heggs applies retroactively. Because Mr. Coppola timely filed his rule 3.850 motion and because his plea is unconstitutional, he should be automatically resentenced under lawful guidelines.

STANDARD OF REVIEW

The determination of whether a decision of this Court must be applied retroactively is a pure question of law, subject to de novo review. State v. Klayman, 835 So. 2d 248, 251 (Fla. 2002); Bunkley v. State, 833 So. 2d 739, 741 (Fla. 2002).

ARGUMENT

The conflict issue before this Court is whether Heggs v. State, 759 So. 2d 620 (Fla. 2000), should be applied retroactively. The Second and Fourth Districts correctly held that it should.

In Murphy v. State, 773 So. 2d 1174, 1175 (Fla. 2d DCA 2000), the Second District, sitting en banc, held that Heggs was retroactive and that a prisoner should have two years from the Heggs decision to file this claim because the facts upon which the claim is based could not have been known earlier. In so holding, the Second District adopted the reasoning of the Fourth District in Jenkins v. State, 771 So. 2d 37 (Fla. 4th DCA 2000). Murphy, 773 So. 2d at 1175; see also Cox v. State, 805 So. 2d 1042 (Fla. 4th DCA 2002); Honeycutt v. State, 805 So. 2d 987 (Fla. 4th DCA 2001).

As indicated above in the statement of case and facts, the First and Fifth Districts have held otherwise. In Regan and Murphy, the First and Fifth Districts held that Heggs does not apply retroactively.[1]

[1] Undersigned counsel recognizes that the Second and Fourth Districts in Murphy and Jenkins hold that Heggs is retroactive under rule 3.850(b)(2), and that the First and Fifth Districts in Regan and Coppola held that Heggs was not retroactive under either rule 3.850(b)(1) or (2). The conflict before this Court is the timeliness of a Heggs challenge, regardless of which subdivision of the rule it falls under. This Court should therefore consider whether Heggs is retroactive under either subdivision of the rule.

For the reasons set forth below, this Court should hold that Heggs is retroactive, quash the decision under review, and approve the Second and Fourth Districts' decisions in Murphy and Jenkins.

I. THIS COURT'S DECISION IN HEGGS IS RETROACTIVE.

In Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000), this Court defined the window period for those eligible for Heggs relief. According to Trapp, this Court provided that Heggs relief is available to those who committed their offense between October 1, 1995, and May 24, 1997. Id. Mr. Coppola fits into this window. If Heggs is not retroactive, then inmates, like Mr. Coppola, have two years from the date of their conviction and sentence to raise a Heggs challenge, even though Heggs was decided on February 17, 2000, more than four years after the window period opened. Fla. R. Crim. P. 3.850(b); Regan v. State, 787 So. 2d 265 (Fla. 1st DCA 2001).

If this Court were to hold that Heggs is not retroactive, such a holding would render Trapp a nullity. By way of example, if a prisoner committed his or her offense on October 1, 1995, and the judgment and sentence became final one year after that, on October 1, 1996, that prisoner would have to raise a Heggs challenge by October 1, 1998. Obviously, Heggs was not decided then. This patently absurd result belies common sense.

In addition to the common sense suggestion that Heggs must be applied retroactively, this Court's established retroactivity analysis demonstrates that Heggs should be applied retroactively to Mr. Coppola. This Court's law on whether a decision from this Court or the United States Supreme Court should apply retroactively is well established. The hallmark decision on the application of later decisional law is Witt v. State, 387 So. 2d 922 (Fla. 1980). See Bunkley v. State, 882 So. 2d 890, 906 (Fla. 2004) (Wells, J., concurring).

Under Witt, the initial question in a retroactivity analysis is whether the decision constitutes an "evolutionary refinement" or a "jurisprudential upheaval." Only jurisprudential upheavals potentially qualify for retroactive application. Witt, 387 So. 2d at 929-30.

If the decision constitutes a jurisprudential upheaval, then courts must analyze whether the decision should be applied retroactively under the test established in Witt. Under this test, a new rule of law applies retroactively when the following three requirements are satisfied: (1) it must originate either from the United States Supreme Court or the Florida Supreme Court, (2) it must be constitutional in nature, and (3) it must be of fundamental significance. Witt, 387 So. 2d at 931; see also Ferguson v. State, 789 So. 2d 306, 309 (Fla. 2001).

As demonstrated below: (1) Heggs constitutes a jurisprudential upheaval, not an evolutionary refinement, and (2) Heggs meets all three of the Witt requirements and should be applied retroactively.

A. Heggs Constitutes a Major Constitutional Change in the Law That Qualifies as a Jurisprudential Upheaval Under Witt.

Changes in the law by a decision of this Court or the United States Supreme Court fall into two categories: a jurisprudential upheaval or an evolutionary refinement. A "jurisprudential upheaval" is a major constitutional change of law that addresses a basic unfairness in the system. Bunkley, 833 So. 2d at 744; Witt, 387 So. 2d at 929. In contrast, evolutionary refinements afford new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review in capital cases, and for other like matters. Id. Jurisprudential upheavals are applied retroactively, but evolutionary refinements are not. Id.

This Court recently framed this issue another way, applying the United States Supreme Court's decision in Fiore v. White, 531 U.S. 225 (2001). In State v. Klayman, 835 So. 2d 248, 252 (Fla. 2002), this Court held:

> Although Florida courts have not previously recognized the Fiore distinction between a "clarification" and a "change," we conclude that this distinction is beneficial to our analysis of Florida law. Previously, this Court analyzed such cases strictly under Witt, and used the term "change" broadly to include what in fact were both clarifications and true changes. [evolutionary

> refinements and jurisprudential upheavals]. As explained in Fiore, however, a simple clarification of the law does not present an issue of retroactivity and thus does not lend itself to a Witt analysis. Whereas Witt remains applicable to "changes" in the law, Fiore is applicable to "clarifications" in the law.

Id. at 252-53 (citation omitted). This Court went on to define a clarification as follows: "A clarification is a decision of this Court that says what the law has been since the time of enactment." Id. at 253 (emphasis added).[2]

As this Court is well aware, Heggs did not simply clarify the law or afford a procedural change to existing law. It invalidated sentencing guidelines because the sentencing statute was unconstitutional. A decision invalidating a law most certainly is a change in the law; it cannot be construed as a clarification or refinement of a law previously enacted. Thus, Heggs constitutes a change in the law sufficient to qualify as a jurisprudential upheaval subject to the Witt retroactivity test.

[2] Undersigned counsel recognizes that the jurisprudential upheaval/evolutionary refinement distinction has sometimes been applied in the analysis of the third prong of the Witt test. See, e.g., Hughes v. State, 901 So. 2d 837, 840 (Fla. 2005); Callaway v. State, 642 So. 2d 636, 640 (Fla. 2d DCA 1994). In the interest of coherency, counsel discusses this issue here because, if Heggs constituted an evolutionary refinement (which it does not), then there would be no need to apply the three-part Witt retroactivity test. This order of analysis appearing in this brief also appears to be required by Witt and Klayman.

B. Heggs Satisfies the Three-Prong Witt Test.

1. Heggs Originated from the Florida Supreme Court.

In Heggs, this Court invalidated chapter 95-184, Laws of Florida, as unconstitutional because it violated the single subject rule, and therefore it was void in its entirety. 759 So. 2d at 640. Among other things, chapter 95-184 contained the revised 1995 sentencing guidelines. Heggs plainly originated from the Florida Supreme Court. It thus meets the first prong of the Witt test.

2. Heggs Was Constitutional in Nature.

In Heggs, this Court held that chapter 95-184, Laws of Florida, violated article III, section 6, of the Florida Constitution. Heggs thus meets the second prong of the Witt test because it was constitutional in nature. See also Regan, 787 So. 2d at 268 (holding that Heggs was constitutional in nature because it violated the single subject rule).

3. Heggs Is a Decision of Fundamental Significance.

The third prong of the Witt test – that the decision must be of fundamental significance – itself may be satisfied in two separate ways. A decision that is a development of fundamental significance may be categorized as either involving: (1) changes which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties; or (2) changes which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-part

sub-test of Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 318 U.S. 618 (1965). Johnson v. State, No. SC03-1042, 2005 WL 977027, at *6 (Fla. Apr. 28, 2005).

Heggs falls into the second category. Thus, it is necessary to consider whether Heggs is of sufficient magnitude to necessitate retroactive application under the three-part sub-test set forth in Stovall. Witt, 387 So. 2d at 929. The three sub-parts considered in this test are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297.

a. The Purpose Served by the Rule Announced in Heggs.

The purpose of this Court's decision in Heggs was to strike down a law that violated a provision of the Florida Constitution – a decision of manifest importance. Florida's constitution expressly prohibits the Legislature from enacting a law that contains more than one subject, particularly where, as here, the defect in the law affects a person's liberty interests. Art. III, § 6, Fla. Const. This Court recently acknowledged the important purpose served by invalidating laws that violate the single subject provision when it held a similar decision involving criminal sentences retroactive. This Court stated:

> We realize that our decision here [that chapter 95-182, Laws of Florida violated the single subject rule] will

> require a number of persons who were sentenced as violent career criminals under section 775.084, Florida Statutes, as amended by chapter 95.182. We realize that a number of persons affected by other amendments contained in chapter 95-182 may rely on our decision here in obtaining relief, such as persons who committed their offenses during the applicable window period and were sentenced as habitual violent felony offenders based on the qualifying offense of aggravated stalking, as well as those persons who were convicted of possession of a firearm by violent career criminal for an offense which occurred during the applicable window period. However, as this Court stated in *Johnson*, "This result is mandated by the Legislature's failure to follow the single subject requirement of the constitution. Had the Legislature not violated the single subject rule, we would not be here today."

State v. Thompson, 750 So. 2d 643, 649 (Fla. 1999) (emphasis added) (quoting State v. Johnson, 616 So. 2d 1, 4 (Fla. 1993) (alteration omitted)).

The purpose of the rule announced in Heggs is also as significant as, if not more so than, prior decisions of Florida courts finding this Court's decisions retroactive. For example, in State v. Calloway, 658 So. 2d 983 (Fla. 1995), receded from on other grounds, Dixon v. State, 730 So. 2d 265 (Fla. 1999), this Court retroactively applied its decision in Hale v. State, 630 So. 2d 521 (Fla. 1993). In Hale, this Court invalidated a law that purported to impose statutory penalties on citizens where such citizens had no legal notice of the penalty at the time of the offense. 630 So. 2d at 524. This Court in Callaway recognized that the purpose of that decision was to vindicate the constitutional due process and equal

protection interests of the accused. 642 So. 2d at 640-41. Those same constitutional interests were vindicated in Heggs.

Similarly, in Gantorious v. State, 693 So. 2d 1040, 1043 (Fla. 3d DCA 1997), the Third District recognized that the purpose of this Court's prior decision in State v. Iacovone, 660 So. 2d 1371, 1374 (Fla. 1995), was to ensure that the sentence imposed on the defendant was not greater than that permitted by law. The Third District held that this purpose was sufficiently significant to warrant retroactive application. Id. Mr. Coppola, here, is suffering under a sentence greater than that permitted by the correct guidelines.

Prisoners sentenced within the window period applicable to the Heggs decision likewise were entitled to notice as to whether the sentences imposed on them were constitutional. The purpose of this Court's decision in Heggs, striking down an unconstitutional law, is unquestionably significant. Otherwise, without retroactive application, prisoners like Mr. Coppola will serve more time than that permitted under the guidelines that really were in effect at that time.

b. The Extent of Reliance on the Old Rule.

This prong of the Stovall test is met when the amount of reliance on the old rule was minimal. State v. Stevens, 714 So. 2d 347, 350 (Fla. 1998) (Harding, J., concurring). This prong is met here because of the minimal reliance the Florida judiciary placed on chapter 95-184, Laws of Florida.

In Trapp, this Court established the window period within which persons may seek to invalidate a sentence that was imposed using the guidelines invalidated in Heggs. This Court held that "the window period for challenging the sentencing guidelines provisions amended in chapter 95-184, Laws of Florida, opened on October 1, 1995, when such amended guidelines provisions became effective, and closed on May 24, 1997, when chapter 97-97, Laws of Florida reenacted the amendments contained in chapter 95-184 as part of the biennial adoption process." 760 So. 2d at 928. Stated another way, persons challenging a sentence imposed under the unconstitutional guidelines have standing to do so if their offense occurred during the window period. Mr. Coppola's offense fits within the window period. Id.

Quite evidently, the extent of reliance on the old rule in this area is limited to the brief amount of time courts applied the 1995 guidelines. See Gantorious, 693 So. 2d at 1042. At most, courts relied on the old rule for a little over a year and a half. Notably, in other cases in which Florida courts have held a decision retroactive, the extent of reliance was greater. See Mitchell v. Moore, 786 So. 2d 521, 530 (Fla. 2001) ("several years"); Gantorious, 693 So. 2d at 1042 (six years and eight months); Callaway, 658 So. 2d at 987 (six years). Thus, Heggs meets the second prong of the Stovall test.

c. The Effect on the Administration of Justice.

The final Stovall prong focuses on the effect retroactive application of the new rule would have on the administration of justice. This Court has explained:

> This final consideration in the retroactivity equation requires a balancing of the justice system's goals of fairness and finality. "Deciding whether a change in decisional law is a major constitutional change or merely an evolutionary refinement is reflective of the balancing process of these two important goals [fairness and finality] of the criminal justice system."

Ferguson, 789 So. 2d at 312 (quoting State v. Glenn, 558 So. 2d 4, 6-7 (Fla. 1990)).

The principle of decisional finality in the criminal justice system is rooted in Florida's jurisprudence. This Court has recognized that litigation must come to an end at some point and that the absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. Glenn, 558 So. 2d at 7 (discussing Witt, 387 So. 2d at 925).

Despite that position, this Court has recognized that fairness prevails over finality. See Ferguson, 789 So. 2d at 311-312; Mitchell, 786 So. 2d at 530; Callaway, 658 So. 2d at 986-87. Fairness must prevail in Mr. Coppola's case. The interests of fairness and uniformity raised by Heggs are compelling. The considerations which normally tip the scales in favor of decisional finality do not control here, as the relief Heggs affords will have a minimal impact on the

administration of justice. See Ferguson, 789 So. 2d at 312; Mitchell v. Moore, 786 So. 2d 521, 530 (Fla. 2001).

As recognized above, the window period for those who could raise Heggs challenges is one year and eight months. Therefore, the number of inmates that could raise such a challenge is limited. Applying Heggs retroactively will not give rise to the usual concerns associated with this analysis: the retroactive application of Heggs would in no way "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." Ferguson, 789 So. 2d at 312 (quoting Witt, 387 So. 2d at 929-30). Although the State has the option of withdrawing the original plea, in most cases, a successful Heggs challenge will result in nothing more than automatic resentencing under the lawful guidelines. See Latiif v. State, 787 So. 2d 834, 836 (Fla. 2001); Trapp, 76- So. 2d at 928.

Retroactive application of Heggs would not require courts to overturn convictions or to delve extensively into stale records to apply the rule. See Callaway, 658 So. 2d at 987. As this Court has explicitly recognized:

> The administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of [the statute and this Court's decision invalidating the statute] are required to serve sentences [longer than] similarly situated defendants who happened to be sentenced after [this Court's decision].

Id.

Indeed, Heggs is exactly the type of case in which Florida's courts have upheld the doctrine of retroactivity. See Mitchell, 786 So. 2d at 530 (reasoning that, although there will be some disruption to the administration of justice, the importance of the right being advanced must outweigh these concerns); Gantorious, 693 So. 2d at 1042-43 (reasoning that the retroactive application of this Court's decision will not affect convictions and that there will therefore be no need to address the issues of guilt or innocence, track down witnesses or engage in lengthy and costly preparation of old cases at trial; the most that will be required is to resentence the affected defendants); Nilio v. State, 601 So. 2d 646, 646 (Fla. 4th DCA 1992) (reasoning that, if the prior decision was not applied retroactively, prisoners would receive higher sentences than permitted by law and that the change in the law was thus simply too substantial to not allow aggrieved prisoners to claim its provisions); Brown v. State, 535 So. 2d 332, 333 (Fla. 1st DCA 1998) (reasoning that a violation of the old rule is readily apparent from the face of the record and the remedy is equally straightforward). Thus, Heggs meets the third Stovall prong.

As the foregoing demonstrates, Heggs is precisely the type of case that Florida's courts have applied retroactively in the interests of justice and fairness. Heggs squarely satisfies each prong of the Witt analysis.

Notably, two justices of this Court have already concluded that Heggs applies retroactively based upon the express language in that decision. In Banks v. State, 887 So. 2d 1191 (Fla. 2004), this Court was confronted with the issue of whether Heggs is retroactive, but decided that case on other grounds and left until today the retroactivity of Heggs. However, Justice Anstead authored a separate decision, in which Justice Pariente concurred, recognizing that the Heggs decision itself states that it is to be applied retroactively. Justice Anstead explained:

> [W]e expressly recognized in Heggs that the decision should be applied retroactively by our explicit recognition that those individuals adversely impacted by reliance on the validity of the 1995 guidelines may be entitled to some relief, even those individuals whose judgments and sentences were final. As we specifically stated in Heggs, "We realize that our decision here will require, among other things, the resentencing of a number of persons who were sentenced under the 1995 guidelines, as amended by chapter 95-184." Heggs, 759 So. 2d at 627. In Trapp v. State, 760 So. 2d 924 (Fla. 2000), this Court discussed who would have standing to bring a challenge based on Heggs, and defined the window period for those individuals who were entitled to request relief predicated on Heggs. See Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000) . . . .

Id. at 1199 (Anstead, J., dissenting). That analysis applies here.

This Court should hold that Heggs is retroactive.

II. THIS COURT'S DECISION IN HEGGS CONSTITUTES NEWLY DISCOVERED FACT.

Even if this Court disagrees that Heggs is retroactive under the Witt test, Heggs constitutes a newly discovered fact within the meaning of rule 3.850(b)(1). This permits an inmate to raise a Heggs challenge within two years of the discovery of the new fact, even if more than two years have elapsed since the judgment and sentence become final. As Mr. Coppola asserted in his rule 3.850 motion, he agreed to his negotiated plea because he understood that his sentence would be "somewhere in the middle" of the 1995 guidelines. R. 330. As recognized by an en banc Second District and the Fourth District, there was no way for Mr. Coppola to know at the time he entered his plea that his sentence was unconstitutional. See Cox v. State, 805 So. 2d 1042, 1044 (Fla. 4th DCA 2002); Murphy, 773 So. 2d at 1175; Jenkins, 771 So. 2d at 38-39.

The First District's concern in Regan with respect to this issue is simply unfounded. In Regan, that Court stated that if it held that Heggs was a newly discovered fact as contemplated by rule 3.850(b)(1), then it follows that every change in the law will also necessarily become a fact as per this rule and remove entirely the need to perform a Witt analysis. 787 So. 2d at 267.

That an inmate sentenced under the 1995 guidelines could not have known that his or her plea imposed an unconstitutional sentence in no way renders every change in the law a newly discovered fact. In Heggs, this Court invalidated a

sentencing statute as unconstitutional. Thus, the sentences imposed pursuant to these guidelines were higher than the maximum sentence that could be imposed under the lawful guidelines. Obviously, an inmate could not have known this when relying on the guidelines in entering his or her plea. A holding limited to this issue would not apply to all changes in the law rendered by this Court. The en banc Second District and the Fourth District are correct.

III. THE FIFTH DISTRICT ERRED IN HOLDING THAT MR. COPPOLA WAS NOT ENTITLED TO RELIEF BECAUSE HE ENTERED A NEGOTIATED PLEA.

In footnote to its decision, the Fifth District noted that, even if Mr. Coppola's claim were timely filed, he was not sentenced pursuant to a guidelines sentence, but rather pursuant to a negotiated plea. Coppola, 795 So. 2d at 260 n.2. This statement in incorrect.

In Latiif v. State, 787 So. 2d 834 (Fla. 2001) (Appx. E), this Court recognized that a guidelines sentence can be imposed pursuant to a negotiated plea. This Court then held that, an inmate serving an unlawful sentence under Heggs imposed pursuant to a negotiated plea has two remedies. The inmate can either be automatically resentenced under lawful guidelines, or the state can withdraw the plea and reinstate the charges. Id. at 837. Accordingly, because Mr. Coppola entered into a negotiated plea using the 1995 sentencing guidelines, he should be automatically resentenced under lawful guidelines, unless the state decides to

withdraw the plea and reinstate the charges. See also Jolly v. State, 392 So. 2d 54, 56 (Fla. 5th DCA 1981) (holding that when plea negotiations are based on material mistake of law, plea was invalid).

Moreover, it was error for the trial court and the Fifth District to conclude that Mr. Coppola's 3.850 motion was conclusively disproved by the record. See Ford v. State, 825 So. 2d 358 (Fla. 2002). As recognized by the trial court, there is evidence that suggests Mr. Coppola was sentenced using the 1995 guidelines – they were attached to the package sent to the DOC. Mr. Coppola's attorney's letter that did not reference the guidelines does not conclusively prove that Mr. Coppola was not sentenced using the 1995 guidelines. It just means that the letter did not directly address the issue. Because the record cannot conclusively disprove this issue, Mr. Coppola is entitled to an evidentiary hearing on this issue.

CONCLUSION

Based on the foregoing, this Court should quash the decision in the instant case, approve Jenkins and Murphy, and hold that Heggs applies retroactively. Because Mr. Coppola's negotiated plea is unconstitutional, he should be automatically resentenced under the 1994 guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. Mail to Kellie A. Nielan, Department of Legal Affairs, State of Florida, 444 Seabreeze Boulevard, Floor 5, Daytona Beach, FL 32118-3958, on August 4, 2005.

Christine R. Dean

CERTIFICATE OF FONT COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Christine R. Dean