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IN THE SUPREME COURT OF FLORIDA

WILLIAM PLOTT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC12-922

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

In November 1997 a jury convicted Petitioner of four counts of sexual battery. He was initially sentenced under the 1995 guidelines to four life sentences. The Second District Court of Appeal affirmed Petitioner's convictions and sentences on direct appeal in 1999. Plott v. State, 731 So. 2d 1285 (Fla. 2d DCA 1999). Subsequently, this Court in Heggs v. State, 759 So. 2d 620 (Fla. 2000), declared the 1995 guidelines unconstitutional. The Heggs decision resulted in Petitioner being resentenced in 2005 using the valid 1994 guidelines.

By the time Petitioner was resentenced, the United States Supreme Court released its opinions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). Utilizing § 921.0016(3)(b) (1993), Fla. Stat. Ann.[1], and relying on the victim's trial testimony, the resentencing court imposed an upward departure sentence of four life sentences finding that the rapes were committed in a manner that was especially heinous, atrocious, or cruel.

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[1] Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justifiable include, but are not limited to:

(b) The offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel.

At resentencing, the court made the following observations about the victim's trial testimony, the truth of which Petitioner did not challenge at the resentencing hearing:[2]

> . . . after picking up the victim, [Plott] showed her a gun and threatened her. At the first location he punched her in the face with his fist so hard that it knocked her out of the jeep to the ground. He continued to hit her. I find that in trial testimony pages 38, 39, 90. (May 2005/T602).
>
> In addition, he pressed his forearm to the throat where she could not breathe and was seeing stars; that is found at trial testimony pages 40. (May 2005/T602-603).
>
> He committed extremely rough anal sex on her the first time; that's found at trial testimony page 44. He then drove her to another area and committed, had her commit oral sex upon him, in a rough and threatening manner; at trial testimony 45 to 49. (May 2005/T603).
>
> At the second location he again anally and vaginally raped her. He hit her in the head again, even though she had asked him please not hurt her. That's in trial testimony pages 50 to 53. (May 2005/T603).
>
> After committing those sexual batteries, again he straddled her in the vehicle,

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[2] A transcript of the resentencing hearing is attached to the circuit court's order summarily denying Petitioner's Rule 3.800(a) motion. The page numbers cited herein refer to the page number assigned by the clerk in compiling the original record on direct appeal and are located on the lower right hand side of the transcript.

> yanked her head back, placed the gun in her mouth to the point where she was gagging; that's found at trial testimony and page 55 and 59. He in addition threatened her with a knife, at trial testimony page 88 and 89. (May 2005/T603).

The Second District Court of Appeal noted that the "record strongly suggests that an authorized finder of fact could have concluded that these offenses were especially cruel."

Petitioner appealed the sentences imposed on resentencing, but did not raise the issue of whether the court erred in not having a jury determine whether the offense was committed in a heinous, atrocious, or cruel manner. The Second District Court of Appeal affirmed. Plott v. State, 940 So. 2d 432 (Fla. 2d DCA 2006)(table decision).

After the 2006 decision affirming his sentences, Petitioner did not file a post conviction motion until 2010 when he filed a 3.800(a) motion claiming his life sentences were illegal because the resentencing court failed to follow the procedures set forth in Apprendi and Blakely. The circuit court denied the motion and Petitioner appealed to the Second District Court of Appeal.

The Second District Court of Appeal stayed Petitioner's appeal pending this Court's decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), review dismissed, 66 So. 2d 912 (Fla. 2011). This Court dismissed review of Issac after resolving a similar issue in State v. Fleming, 61 So. 3d 399

(Fla. 2011). The Second District Court of Appeal observed, though, that:

> Isaac presented an issue that was similar but not identical to the issue resolved by the supreme court in Fleming, 61 So.3d at 400. In Fleming, the issue was whether the defendant was entitled to relief if the Heggs resentencing occurred after Apprendi and the issue was preserved and raised on direct appeal. The supreme court held that Apprendi applied to such a resentencing and remanded the case to the First District to determine if the error had been harmless. Id. at 408–09. Thereafter, the Florida Supreme Court dismissed the proceeding in Isaac, concluding that it had resolved the issue in conflict by its decision in Fleming. However, in terms of procedural context and the various rights attendant to litigants, Isaac, an appeal of a rule 3.850 motion, is significantly different from Fleming, which addressed direct appeals after resentencing.

Plott, 86 So. 3d at 518.

The Second District Court of Appeal held that "without regard to whether the holding in Fleming may apply in the context of a motion under rule 3.850, an issue that we do not reach today, we are unconvinced that Fleming requires this court to treat these life sentences as illegal sentences subject to correction under Rule 3.800(a). The Florida Supreme Court has held that Apprendi errors are not fundamental and must be preserved for appellate review. See Hughes v. State, 901 So. 2d 837, 845 (Fla. 2005) (Fla. 2005; McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001). It has long been the law that procedural errors in sentencing

that could have been preserved and raised in direct appeal are not grounds for relief under rule 3.800(a). (citations omitted)." Plott, 86 So. 3d at 519.

The Second District Court of Appeal affirmed the denial of Petitioner's Rule 3.800(a) motion. This Court accepted jurisdiction to resolve the alleged conflict between the Second District Court of Appeal's decision in this matter and this Court's opinions in Fleming and Hughes.[3]

[3] Because of the different procedural postures between Fleming (direct appeal of preserved Apprendi error in resentencing), Hughes (alleging Apprendi error in 3.800(a) motion after conviction and sentence were final and arguing for retroactive application of Apprendi), and the instant case (seeking Rule 3.800(a) post conviction relief after failing to preserve and raise on direct appeal Apprendi/Blakely error at resentencing, which occurred after those opinions were issued), the State maintains that there is no direct and express conflict on the face of the opinions.

SUMMARY OF THE ARGUMENT

ISSUE I: Petitioner was resentenced in 2005 using the valid guidelines that were in effect at the time he committed his offenses. Under those guidelines and associated statutes, Petitioner was subject to an upward departure sentences pursuant to § 921.0016(3)(b), Fla. Stat. (1993), which allowed for an upward departure from the recommended top of the guidelines where there was a finding that the crimes was committed in a manner that was especially heinous, atrocious, or cruel. Numerous sentences have been imposed using these statutes prior to Apprendi/Blakely. Petitioner does not claim, and cannot claim, that the court *could not have imposed* the multiple life sentences should the proper fact finder determine, like the judge did, that the rapes were committed in a manner that was especially heinous, atrocious, and cruel. Petitioner's sentences *are* authorized by law and therefore are not illegal for purposes of a Rule 3.800(a) motion.

ISSUE II: This Court, and many others, has held that Apprendi/Blakely do not apply retroactively to cases that were final before the United States Supreme Court issued those opinions. It is unnecessary in this case to revisit those thoughtful and detailed opinions for at least two reasons. First, the opinions have not proven to be unworkable or incorrect. This Court has repeatedly that it is committed to

the doctrine of stare decisis. Additionally, a retroactivity analysis is irrelevant to Petitioner's case because both Apprendi and Blakely were issued prior to Petitioner's resentencing proceeding. What Petitioner frames as a retroactivity issue is merely an attempt to extract himself from the consequences of his failure to raise the issue on direct appeal and to avoid the inapplicability of Rule 3.800(a) to his sentences.

ISSUE III: The sentence imposed was appropriate under the facts of the case and permissible under the laws of the State of Florida. Procedural deficiencies in imposing the sentence do not result in manifest injustice.

ARGUMENT

ISSUE I: PETITIONER'S SENTENCES WERE NOT RENDERED ILLEGAL DUE TO THE FAILURE OF THE RESENTENCING COURT TO COMPLY WITH THE PROCEDURE OF *APPRENDI* AND *BLAKELY*; THEREFORE, THE ISSUE IS NOT COGNIZABLE UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(a).

Criminal defendants have a number of options available to them to challenge erroneously imposed sentences. First, preserved errors can be raised on direct appeal. Second, certain unpreserved sentencing errors can be raised pursuant to Florida Rule of Criminal Procedure 3.800(b). Rule 3.800(b) serves two purposes: it allows the circuit court to correct the error during the pendency of an appeal and it gives the defendant an opportunity to preserve errors that were not immediately apparent during the sentencing proceeding for appellate review should the error remain uncorrected. See Jackson v. State, 983 So. 2d 562, 571 (Fla. 2008). Additionally, Florida Rule of Criminal Procedure 3.850(a)(2) allows the defendant to challenge sentences that "exceed the maximum authorized by law," but requires that the motion be filed within two years of the sentence imposition. Finally, Florida Rule of Criminal Procedure 3.800(a) permits the court to correct an "illegal sentence" at any time.

Specifically, Florida Rule of Criminal Procedure 3.800(a) states that "a court may correct at any time an illegal sentence imposed by it, or an incorrect calculation made by it in a

sentencing shore sheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their case an entitlement to that relief . . ." Unlike Florida Rule of Criminal Procedure 3.800(b), which speaks to "sentencing errors" as well as illegal sentences, Rule 3.800(a) applies, in relevant part, only to an "illegal sentence."

Not all "sentencing errors" equate to an "illegal sentence" that is correctable pursuant to Rule 3.800(a). "Rule 3.800(a) is reserved for the narrow category of cases in which the sentence can be described as truly 'illegal' as a matter of law." Judge v. State, 596 So. 2d 73, 78 (Fla. 2d DCA 1991)).

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process. Unlike a motion pursuant to rule 3.850, the motion can be filed without an oath because it is designed to test issues that should not involve significant questions of fact or require a lengthy evidentiary hearing.

Judge, 596 So. 2d at 77.

Similarly, in Blakely v. State, 746 So.2d 1182, 1186-1187 (Fla. 4th DCA 1999), approved, Carter v. State, 786 So. 2d 1173,

1181 (Fla. 2001), the Fourth District Court of Appeal stated that "[t]o be illegal within the meaning of rule 3.800(a) the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. On the other hand, if it is possible under all the sentencing statutes-given a specific set of facts-to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it."

The United States Supreme Court decisions in Apprendi[4] and Blakely[5] do not change the definition of an illegal sentence. Nor do those cases render sentenced imposed without following the procedure set forth in therein "illegal." Apprendi and Blakely determined the procedure by which facts that would increase a defendant's sentence, other than the fact of prior criminal conviction, must be determined.

In Apprendi, the question before the United States Supreme Court was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a

[4] 530 U.S. 466 (2000)
[5] 542 U.S. 296 (2004)

reasonable doubt." Apprendi committed an offense for which the maximum sentence, under ordinary circumstances, would have been 10 years, but that sentence could be increased to between 10 and 20 years if certain factual findings delineated in New Jersey's "hate crime" statute were found. Because the sentencing judge found, after an evidentiary hearing, that Apprendi's crime was racially motivated the judge imposed a 12 year sentence.

Apprendi filed direct appeals in the state court, ultimately landing in the New Jersey Supreme Court, arguing due process required that the finding of bias upon which the hate crime sentence was based be proved to a jury beyond a reasonable doubt. The state supreme court disagreed and affirmed Apprendi's sentence. The New Jersey Supreme Court held that the finding of racial bias was not an element of the offense but was merely a sentencing factor, which did not need to be proven to a jury beyond a reasonable doubt.

In Apprendi, the United States Supreme Court made clear that the question before it was the adequacy of the procedure used by New Jersey in imposing a sentence under its hate crime statute. The Court noted that the Constitution, and specifically the Due Process Clause, requires certain procedural safeguards before sentencing a criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the verdict alone. 530 U.S. 446, 483. The Court

reversed and remanded the case for further proceedings holding that the *New Jersey procedure* used to determine facts that would enhance a criminal defendant's sentence was unconstitutional. Apprendi, 530 U.S. at 488.

Likewise, in Blakely, the Court determined that any fact that increases the maximum allowed by law, including departures from sentencing guidelines, must be determined by a jury. Blakely objected to the imposition of a sentence in excess of the recommended range based on the sentencing court's finding that he acted with "deliberate cruelty." Relying on Apprendi, the Court held that the maximum sentence is that which the court can impose *without* any additional fact finding. The Court held that because the state's "*sentencing procedure* did not comply with the Sixth Amendment, petitioner's sentence is *invalid*." 542 U.S. at 305 (emphasis added). The Court emphasized that it was not invalidating the sentencing scheme; rather, it was addressing the state's implementation of the sentencing scheme and remanded the case for further proceedings. Blakely, 542 U.S. at 308.

Additionally, the Court in Blakely acknowledged that state can imposed enhanced sentences where the defendant either stipulates to the necessary facts or consents to judicial fact finding. "If appropriate waivers are procured, States may continue to offer judicial fact finding as a matter of course to

all defendants who plead guilty." Blakely, 542 U.S. at 310. ". . . [N]othing prevents a defendant from waiving his Apprendi rights." Id. As noted by this Court in Hughes v. State, 901 So. 2d. 837, 848 (Fla. 2005), courts have "unanimously consider Apprendi to be a rule of procedure that simply changes who decides certain sentencing issues."

In addition to being able to waive the procedural safeguards of Apprendi/Blakely, criminal defendants must object to any alleged defect in the Apprendi/Blakely procedure during sentencing. The Florida Supreme Court, as well as other state and federal courts, has held that Apprendi/Blakely errors are not fundamental and must be preserved for appellate review and subjected to a harmless error analysis. Hughes, 901 So. 2d, 845; Galindez v. State, 955 So. 2d 517 (Fla. 2007), (any alleged Apprendi/Blakely error on resentencing was harmless beyond a reasonable doubt.)

As the foregoing examinations reveal, the failure of a sentencing court to provide Apprendi and Blakely procedural protections does not render a sentence truly "illegal." While possibly erroneous, sentences imposed using a procedure contrary to that espoused in both Apprendi and Blakely are not sentences that "no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." Carter, 786 So. 2d at 1181. Therefore, Petitioner's sentence

does not fall into the narrow category of sentences that are correctable under Florida Rule of Criminal Procedure 3.800(a).

Petitioner's statements that "there is no question that if Plott's case were on direct appeal, under Fleming, the law would require reversal of his life sentences" is inaccurate. Rather, because Petitioner did not object during sentencing, and because Apprendi/Blakely errors are not fundamental errors, Petitioner would not necessarily be entitled to reversal of his life sentences even if he raised this issue on the direct appeal of his resentence. Moreover, even if he had preserved the issue for direct appeal, and raised the issue in the district court, the district court would have been compelled to conduct a harmless error analysis. Considering the Second District Court of Appeal's opinion in this case states, "our record strongly suggests that an authorized finder of fact could have concluded that these offenses were especially cruel from (the victim's) testimony," it is likely that any preserved Apprendi/Blakely error would have been deemed harmless beyond a reasonable doubt.

Nor is it clear, contrary to Petitioner's assertion, that Petitioner would have been entitled to relief under Florida Rule of Criminal Procedure 3.850 because the rule "does not authorize relief based on ground that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." Fla. R. Crim. P. 3.850(c)6).

Admittedly, as the Second District Court of Appeal noted, the issue of who was to make the factual findings for purposes of imposing an upward departure on resentencing was "hotly debated" at the time of Petitioner's resentencing. Plott, 86 So. 2d at 518.

Regardless, Petitioner did not seek review of the procedure used to impose his life sentences on resentencing either on direct appeal or pursuant to Florida Rule of Criminal Procedure 3.850. Rather, he waited five years and filed a motion under Florida Rule of Criminal Procedure 3.800(a) alleging his life sentences were illegal. Florida Rule of Criminal Procedure 3.800(a) is not a "catchall" provision that permits sentencing errors to go uncorrected and unchallenged for years only to be later challenged as "illegal." Rather, Rule 3.800(a) is intended to address those narrow class of sentences that are truly illegal and correctable at any time. Other avenues are available for criminal defendants to challenges erroneously imposed sentences. Failure to do so does not transform an erroneously imposed sentence into illegal sentence. The district court correctly affirmed the denial of Petitioner's Motion to Correct an Illegal Sentence. This Court should likewise affirm the Second District Court of Appeal.

Moreover, the fact that a sentence is illegal and correctable under Rule 3.800(a) must be apparent from the face of the court

records. In other words, Rule 3.800(a) does not permit an evidentiary hearing to be conducted months, years, even decades after the sentence was imposed. Petitioner claims that his "unlawful sentence" is plain on the record and subject to Rule 3.800(a). Assuming Petitioner is using "unlawful" and "illegal" interchangeably, this assertion is incorrect. Petitioner was resentenced after this Court determined in Heggs v. State, 759 So. 2d 620 (Fla. 2000) that the 1995 sentencing guidelines were unconstitutional and invalidated the statute.

Petitioner was resentenced in 2005 using the valid guidelines that were in effect at the time he committed his offenses. Under those guidelines and associated statutes, Petitioner was subject to an upward departure sentences pursuant to § 921.0016(3)(b) (1993), Fla. Stat. Ann., which allowed for an upward departure from the recommended top of the guidelines where there was a finding that the crimes was committed in a manner that was especially heinous, atrocious, or cruel. Numerous sentences have been imposed using these statutes prior to Apprendi/Blakely. Petitioner does not claim, and cannot claim, that the court *could not have imposed* the multiple life sentences should the proper fact finder determine, like the judge did, that the rapes were committed in a manner that was especially heinous, atrocious, and cruel. Petitioner's

sentences *are* authorized by law and therefore are not illegal for purposes of a Rule 3.800(a) motion.

Consequently, what is apparent from the face of the record is that Petitioner's sentences are legal as a matter of law. No relief is warranted and this Court should affirm the Second District Court of Appeal's opinion that Petitioner is procedurally barred from raising an Apprendi/Blakely issue in a Rule 3.800(a) motion. Alternatively, should this Court find that a Rule 3.800(a) motion was the correct vehicle for raising an Apprendi/Blakely procedural error, this Court should remand this case to the Second District Court of Appeal to conduct a harmless error analysis.

ISSUE II: IT IS NOT NECESSARY FOR THIS COURT TO REVISIT THE RETROACTIVITY OF *APPRENDI* AND *BLAKELY*.

This Court, and many others, has held that Apprendi/Blakely do not apply retroactively to cases that were final before the United States Supreme Court issued those opinions. See Hughes, 901 So. 2d 837; State v. Johnson, --- So. 3d ---, 38 Fla. L. Weekly Supp 449 (Fla. June 27, 2013); See also Johnson v. State, 904 So. 2d 400 (Fla. 2005)(holding that the United State Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), which applied the Apprendi reasoning to death penalty cases does not apply retroactively to death sentences that were final when the decision was rendered). It is unnecessary in this case to

revisit those thoughtful and detailed opinions for at least two reasons.

First, the opinions have not proven to be unworkable or incorrect. This Court has repeatedly that it is committed to the doctrine of stare decisis. Strand v. Escambia County, 992 So. 2d 150, 159-160 (Fla. 2008), citing, N. Florida Women's Health & Counseling Services, Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003). The "doctrine of stare decisis, or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." Id. ; See also Valdes v. State, 3 So. 3d 1067, 1076 -1077 (Fla. 2009)(stating, "stare decisis counsels us to follow our precedents unless there has been a significant change in circumstances after the adoption of the legal rule, or ... an error in legal analysis.")

In order to recede from precedent, this Court must satisfy itself that an inclusive, three-prong test has been met. Strand, 992 So. 2d at 159. In doing so, this Court remembers that the presumption in favor of adhering to precedent is strong. Id. The questions to be asked are as follows: (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"; (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the

stability of the law; and, (3) Have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification.

The burden is on the party seeking a break with precedent to present evidence that the prior decision has proved unworkable due to reliance on an impractical legal fiction. See Strand, 992 So. 2d at 159 (declining to recede from precedent and finding that the Court had "not been presented with evidence showing that the [prior] decision has proven unworkable due to reliance on a legal fiction"). Petitioner in this case has presented no such evidence.

Additionally, a retroactivity analysis is irrelevant to Petitioner's case because both Apprendi and Blakely were issued prior to Petitioner's resentencing proceeding. See Fleming, 61 So. 3d at 407 (noting that resentencing is de novo, therefore, decisional law that is in effect at the time of resentencing or before any direct appeal from the proceeding is final applies.) What Petitioner frames as a retroactivity issue is merely an attempt to extract himself from the consequences of his failure to raise the issue on direct appeal and to avoid the inapplicability of Rule 3.800(a) to his sentences.

If this Court agreed with Petitioner's analysis it would open the floodgates allowing challenges to sentences imposed even decades ago that did not comply with the Apprendi/Blakely

procedure. Retroactive application of Apprendi and Blakely and/or or deeming sentences imposed absent Apprendi/Blakely procedural protections illegal would deny the state and society their acquired interest in finality of convictions.

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

To the extent a retroactivity analysis applies to Petitioner's case, an issue the state does not concede, this Court has previously correctly decided that the Apprendi and Blakely decisions are not retroactive. In Witt, this Court provided a framework for determining whether a change in decisional law should be applied retroactively. This Court held that such changes should not be applied retroactively unless the change 1) emanates from this Court or the United States Supreme Court; 2) is constitutional in nature, and 3) constitutes a development of fundamental significance. Id. at 931. In

Hughes, this Court held that Apprendi met the first two elements. The relevant question became, then, whether constituted a development of fundamental significance.

To make that determination, the Court looked to the test provided in Stovall v. Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965). The Stovall/Linkletter analysis requires a consideration of the following three factors: first, a consideration of the purpose to be served by the rule; second, the extent of the reliance on the old rule; and, third, the effect retroactive application of the rule on the administration of justice. Witt, 387 So. 2d at 926.

In Hughes, this Court conducted an extensive analysis of each of the Stovall/Linkletter factors, which need not be repeated here except to say that this Court determined that although Apprendi "reflects due process concerns, it does not address a miscarriage of justice or effect a judicial upheaval to the degree necessary to require its retroactive application." Hughes, 901 So. 2d at 842. Further, neither the accuracy of the conviction nor of the sentence imposed and final before Apprendi is seriously impugned; rather, Apprendi changes only the procedure by which sentences can be enhanced. 901 So. 2d 843-44.

Moreover, the reliance on the old rule was considerable. Courts throughout Florida long exercised their discretion in imposing enhanced sentences based on judicial, rather than jury, fact finding both under the Criminal Punishment Code and earlier sentencing guidelines. Hughes, 901 So. 2d at 845.

Finally, retroactive application of Apprendi would have a "far-reaching adverse impact on the administration of justice." This Court cited with approval the Fifth District Court of Appeal's statement in McCloud v. State, 803 So. 2d 821, 827 (Fla. 5th DCA 2001) that:

> . . . virtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score. Justice O'Connor's observation that the effect of Apprendi to guidelines sentencing would be "colossal" barely describes the cataclysm in Florida if such sentences are invalidated because the jury did not make the "victim injury" finding.

This Court recently conducted a similar analysis, coming to the same conclusion, regarding the retroactivity of Blakely. State v. Johnson, --- So. 2d --- (Fla. June 27, 2013)(Blakely does not apply retroactively to sentences which became final after Apprendi was decided but before Blakely was decided), rejecting Isaac, 911 So. 2d 813. Petitioner presents no compelling reason to change course now.

ISSUE III: PETITIONER'S SENTENCE IS NOT MANIFESTLY UNJUST.

Petitioner's manifest injustice argument relies, in great part, on the First District Court of Appeal's decision Isaac, which was rejected by this Court in Johnson. (This Court's Johnson decision was issued about one month after Petitioner filed the Initial Brief in this matter). Moreover, Petitioner reiterates his argument that his sentence is illegal and, therefore, manifestly unjust. As argued in Issue I, Petitioner's sentence is not illegal. Rather, he has been sentenced based on the guidelines and associated statutes in effect at the time of his offense. The sentence imposed was appropriate under the facts of the case and permissible under the laws of the State of Florida. Procedural deficiencies in imposing the sentence do not result in manifest injustice.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the Second District Court of Appeal's decision; or, in the alternative, should this Court determined that Florida Rule of Criminal Procedure is the proper vehicle by which to raise Apprendi/Blakely errors, remand this case back to the Second District Court of Appeal for a harmless error analysis.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on August 9, 2013: Robert C. Buschel Buschel@BGLaw-pa.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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