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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC12-922

WILLIAM J. PLOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON DISCRETIONARY CONFLICT REVIEW FROM A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

William J. Plott sought discretionary conflict review of the Second District Court of Appeal decision affirming the denial of his Rule 3.800 motion, which had contended that his life sentences were imposed in violation of *Apprendi* and *Blakely*, and in violation of the Sixth Amendment. This Court granted review, based on the alleged conflict with *State v. Fleming*, 61 So. 3d 399 (Fla. 2011), *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005), and *Hughes v. State*, 901 So. 2d 837, 845 (Fla. 2005).

While the decision below may appear to be compelled by this Court's decision in *Hughes*, Plott submits that *Hughes* should be revisited, in view of the growing body of law recognizing the fundamental significance of *Apprendi* and *Blakely* to criminal sentencing. His life sentences, which were imposed on resentencing as upward departure sentences based on aggravating factors found by a judge, not a jury, are plainly in violation of *Apprendi*, and satisfy any reasonable definition of "illegal sentence." Depriving Plott of the Sixth Amendment rights to which every defendant is entitled is a manifest injustice, and this Court should reverse his sentence and remand for sentencing within the Guidelines.

Plott was originally sentenced to four life sentences for sexual batteries committed in July 1996. *See Plott v. State*, 86 So. 3d 516, 517 (Fla. 2d DCA 2012). The trial court issued the life sentences in 1997, under the 1995 sentencing

guidelines. *Id.* The Second District Court of Appeal affirmed his judgment and sentences. *Id.* (citation omitted). In 2000, however, this Court in *Heggs v. State,* 759 So. 2d 620 (Fla. 2000) held that the 1995 sentencing guidelines were unconstitutional because it violated the single subject rule, thereby requiring Plott's sentences to be vacated and remanded for resentencing. *See Plott,* 86 So. 3d at 517.

At his resentencing in 2005, the trial court "reimposed the four life sentences as upward departure sentences." *Id.* The trial court found, without empanelling a new jury or conducting a new hearing, that the crimes were committed in a "heinous, atrocious, or cruel" manner, and that this justified the upward departure to four life sentences, under Florida Statute Section 921.0016(3)(b) (1993). *Id.* The Second District summarily affirmed those sentences, without opinion. *Id.* (citing *Plott v. State,* 940 So. 2d 432 (Fla. 2d DCA 2006) (table decision)).

Between 1997 (the initial sentencing) and 2005 (the resentencing), the Supreme Court of the United States issued two opinions that affected the law of sentencing nationwide. *See Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). *Id.* The *Apprendi* Court ruled: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." 530 U.S. at 490. In *Blakely,* the Court applied the rule in *Apprendi* as it relates guidelines sentences and to the specific enhancing factor of "deliberate cruelty." 542 U.S. at 298-301. If the sentencing factor of "heinous atrocious and cruel" in Plott's case is not applied, the sentencing guidelines range is 13.23 years to 22.06 years. (R. 14-15).

In his direct appeal of the resentencing, Plott (who was represented by counsel), did not argue that the trial court's failure to conduct a jury trial to support the basis for the upward departures was error. *Plott,* 86 So. 3d at 518. The Second District noted that the issue was "hotly debated" at the time. *Id.* (citing *State v. Fleming,* 61 So. 3d 399, 404-05 (Fla. 2011)). The Second District also noted its opinion the "record strongly suggests than an authorized finder of fact could have concluded that these offenses were especially cruel from this testimony." *Plott,* 86 So. 3d at 518.

In September 2010, Plott filed for post-conviction relief in the form of a motion to correct illegal sentence under Rule 3.800(a) of the Florida Rules of Criminal Procedure. *Id.* (R. 41). Plott argued that his life sentences were illegal because they violated *Apprendi*. (R. 26, 41). The trial court found that Plott's claim that his sentences were illegal upward departures to be without merit because his sentences are within the statutory maximums. (R. 5). Furthermore, the trial court concluded that, the imposition of an upward departure sentence is not a

ground for relief under rule 3.800(a). *Plott,* 86 So. 3d at 518.

Before considering Plott's appeal of the denial of the rule 3.800(a) motion, the Second District stayed the appeal pending the outcome of *Isaac v. State,* 911 So. 2d 813 (Fla. 1st DCA 2005). *Id.* (R. 26). In *Isaac,* the First District considered the applicability of *Apprendi* to rule 3.850 (ineffective assistance of counsel). *Id. Isaac* presented a similar issue to a case then pending before this Court. *Fleming,* 61 So. 3d at 400. *Id.* "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." *Id.* In *Isaac,* the issue was whether the defendant was entitled to relief if the relief sought was in a post-conviction 3.850 procedural posture. *Id.* This Court held that *Apprendi* did apply to these resentencings and dismissed the pending appeal in *Isaac* as resolved by *Fleming*. *Id.*

The Second District decided that the procedural context of a rule 3.850 claim (*Isaac*) and a direct appeal after resentencing (*Fleming*), versus a motion under rule 3.800(a) is qualitatively different. The District Court was not convinced that *Fleming* requires treatment of Plott's 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." *Id.* (citing *Hughes v. State,* 901 So. 2d 837, 845 (Fla. 2005); *McGregor v. State,* 789 So. 2d

976, 977 (Fla. 2001)). The Second District deemed the error procedural and unreviewable under rule 3.800(a) because the claim could have been preserved and raised on direct appeal. *Plott,* 86 So. 3d at 518-19. The conflict among *Fleming, Isaac,* and *Hughes,* led this Court to accept jurisdiction in this case.

SUMMARY OF ARGUMENT

I.

William Plott would, no doubt, be entitled to a new sentencing hearing, where the State would have to prove beyond a reasonable doubt, to a jury that there are aggravating factors that justify an upward departure from the pre-1995 sentencing guidelines. *Apprendi/Blakely* error is the type of an illegal sentence that is subject to review under rule 3.800(a), and retroactive, in the years since *Apprendi, Blakely,* and *Fleming.*

Plott's sentence is an illegal sentence, not solely as a matter of retroactivity of *Apprendi* and its progeny. Under the evolving definition of the term "illegal sentence," Plott has the procedural vehicle through rule 3.800 to collaterally attack his unlawful sentence. Despite confusion over the interpretation of the meaning of "illegal sentence" as sentencing schemes have change, the Court can determine Plott's sentence as one that "patently fails to comport with statutory or constitutional limitations," from the record alone. *See State v. Mancino,* 714 So.2d 429, 433 (Fla.1998). No evidentiary hearing is required to determine that the

constitutional principles of *Apprendi* were ignored.

Even under the more recent interpretation, ". . . 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," requires more clarity. The only set of factual circumstances is one in which the fundamentals of *Apprendi* were applied by the sentencing court. Short of that meaning, there is no set of factual circumstances. "Illegal sentence" does not mean impossible under any sentencing scheme either. For example, a habitual offender sentence when the type of crime is not habitual offender qualified, would be illegal, but not impossible under any sentencing scheme. *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001).

The State's interest in the finality of convictions does not outweigh the principle of fairness in sentencing. A sentence that is not allowable by law is an illegal sentence. *Id.* at 1177. An illegal sentence is appropriately reviewed at any time under rule 3.800(a).

II.

Since the principle of *Apprendi* was announced, its importance has grown. Sentencing cases that have been issued since 2000, by the Supreme Court have extended as far as declaring the once binding sentencing guidelines with its upward departure sentencing factors, unconstitutional. *United States v. Booker*, 543 U.S. 220 (2005). It has further applied its principles to fines as part of sentencing

corporate criminal defendants. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012). In light of this evolution, this Court should review *Fleming* and *Hughes* and recognize *Apprendi* has retroactive application.

In *Hughes v. State*, 901 So. 2d 837 (Fla. 2005), there were two dissenting opinions that outline why the principles of *Apprendi* should be retroactive. Chief Justice Pariente dissected *Apprendi* into two newly announced rules: a procedural rule and a substantive one. *Id.* at 851. Chief Justice Pariente reasoned that since the burden of proof to find sentencing factors was raised to beyond a reasonable doubt, *Apprendi* requires retroactivity post-conviction. *Id.* Justice Anstead agreed, but additionally reasoned that since *Apprendi* announced a new rule requiring a jury to adjudicate those sentencing factors, retroactivity post-conviction was also required. *Id.* at 855.

Lastly, because *State v. Isaac*, was resolved by this Court's ruling in *Fleming*, there is conflict with *Hughes*. 911 So. 2d 813 (Fla. 1st DCA 2005). The Court in *Isaac* determined that Isaac's sentencing was manifestly unfair in light of *Apprendi* the collateral attack did not warrant much consideration of retroactivity. The State's interest in finality was not outweighed by fundamental fairness.

III.

Even if Plott's sentence is not an "illegal sentence" or this Court does not revisit the retroactivity of *Apprendi* and its progeny, the Court should remand for resentencing because the sentence is manifestly unjust. *State v. McBride*, 848 So. 2d 287 (Fla. 2003). In *Isaac*, the majority specifically acknowledged that " *Apprendi* is not retroactive" but did not find this relevant when remanding. 911 So.2d at 814. Without elaboration, the First District held that "the trial court was bound" by *Apprendi* because *Apprendi* was decided before Isaac's resentencing. *See State v. Fleming*, 61 So. 3d 399, 404 (Fla. 2011). *Isaac*, a case in which this Court granted review, but dismissed after it granted relief in *Fleming*, stated: "Under the particular facts of this case, we conclude that reliance on the law of the case doctrine would be manifestly unfair because the United States Supreme Court made clear that the State of Florida's post-*Apprendi* and pre-*Blakely* interpretation of the phrase 'statutory maximum' violated the appellant's sixth amendment right to a jury trial." 911 So. 2d at 815. (emphasis added). Plott's claim implicates two fundamental rights: adjudication by a jury; and proof beyond a reasonable doubt. The failure of the trial court to follow *Apprendi* resulted in the unjust impsition of life sentences without adherence to those principles.

ARGUMENT

STANDARD OF REVIEW

Whether a sentence is illegal under rule 3.800 is a question of law to be reviewed *de* novo. *State v. McBride*, 848 So. 2d 287, 289 (Fla. 2003).

I. UPWARD DEPARTURE SENTENCES ADJUDICATED BY FACTS FOUND BY THE SENTENCING JUDGE, IN VIOLATION OF *APPRENDI*, IS AN ILLEGAL SENTENCE REMEDIED BY RULE 3.800(A).

There is no question that if Plott's case were on direct appeal, under *Fleming*, the law would require reversal of his life sentences. *Fleming*, 61 So. 3d at 408; *See also Plott*, 86 So. 3d at 517; (R. 32 pg. 3). Furthermore, there is little doubt that his sentence would be reversed if his claim were being reviewed under Florida Rules of Criminal Procedure 3.850. *Isaac v. State,* 911 So. 2d 813 (Fla. 1st DCA 2005). *Apprendi/Blakely* error is the type of an illegal sentence that is subject to review under rule 3.800(a), and retroactive, in the years since *Apprendi*, *Blakely,* and *Fleming.* Plott's motion to vacate this obviously improper sentence, under rule 3.800(a) was appropriate. Under this rule, a defendant may allege "(1) that the sentence imposed is illegal; (2) that insufficient credit was awarded for time served; or (3) that the sentencing scoresheet was incorrectly calculated." *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008). The definition of "illegal sentence" has

evolved since 1968 when it first became a rule of procedure in this State.

Rule 3.800 always provided an opportunity for a defendant to correct an illegal sentence. *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001). The rule, however, does not define the term "illegal sentence." *Id.* In years subsequent, the interpretation of the rule has broadened and narrowed leading to confusion and conflict. This Court recognized that over decades sentencing has become more complex due to changing guidelines and departures. *Id.* Consequently, the opportunity for sentencing courts to run into "hidden traps" became more prevalent. *Id.*

The Court intended to balance the need for "finality of convictions" with the goal of ensuring that defendants do not serve unlawful sentences. *Id.* The Court has struggled with the shifting definitions of the term as guidelines have changed and legislative minimums have evolved, leading the Court to ask how unlawful does a sentence have to be, in order for it to be "illegal" and reviewable under rule 3.800. As Judge Altenbernd from the Second District noted, in the 1960s and 1970s "the notion that a sentence could be 'unlawful' or 'erroneous' or 'imposed in violation' of the law without also being 'illegal' would probably have seemed odd to most lawyers and judges." *Maddox v. State*, 760 So. 2d 89, 97 n. 6 (Fla. 2000) (citing *Brown v. State*, 633 So. 2d 112, 113 (Fla. 2d DCA 1994) *disapproved of by State v. Mancino*, 705 So. 2d 1379 (Fla. 1998)). Even pleas to the Rules

Committee to enumerate specific procedural rules have failed to provide definitive guidance. *See Carter,* 786 So. 2d at 1181. What courts are left with are case by case examples and an elusive and shifting definition of "illegal sentence."

For example, in *Davis v. State,* 661 So. 2d 1193 (Fla.1995), this Court determined that the sentencing court's failure to make written findings justifying departure is error but not illegal, as long as the sentence was within the maximum authorized by law. "With the exception of calculation errors in a sentencing guideline scoresheet, rule 3.800(a) may not be used to correct sentencing guideline errors." *Id.* This Court in reaching this conclusion defined an illegal sentence as "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." *Carter,* 786 So. 2d at 1777 (citing *Davis,* 661 So. 2d at 11). The Court also stated the definition of "illegal sentence" is one that "exceeds the maximum allowed by law." *Id.*

On the same day, this Court issued its opinion in *State v. Callaway,* 658 So. 2d 983 (Fla. 1995). In *Callaway,* the defendant claimed that his consecutive habitual offender sentence was an illegal sentence because the sentencing court could not give consecutive sentences for one criminal episode. *Carter,* 786 So. 2d at 1177. In denying Callaway's claim, the court reasoned that rule 3.800, because it is not time barred, must be resolvable as a matter of law without an evidentiary determination. *Id.* The Court "soon explained that our definition of 'illegal

sentence' in *Davis* should not be construed so narrowly as to preclude correction of a sentence that had been unconstitutionally lengthened in violation of the Double Jeopardy Clause." *Id.; Hopping v. State,* 708 So.2d 263, 265 (Fla.1998) ("This Court recognized and emphasized the same principle against improper consecutive sentences as a violation of the double jeopardy clause on resentencing").

Then this Court visited a sentencing issue that did not involve improper consecutive sentences with double jeopardy implications, but one where the trial court failed to credit a defendant with credit for jail time served. *State v. Mancino,* 714 So.2d 429, 433 (Fla.1998). In *Mancino,* the Court explained that an illegal sentence is not only one which exceeds the statutory maximum, but is also one which "patently fails to comport with statutory or constitutional limitations." *Id.* This explanation seems to broaden the term at the same time begging the question: what does "patently fail" mean in this context.

After *Davis* and *Mancino,* this Court continued to struggle with a concrete application of rule 3.800. *Carter,* 786 So. 2d at 1177-78. The Court adopted Judge Farmer's definition from *Blakely v. State,* 746 So. 2d 1182, 1186-87 (Fla. 4th DCA 1999):

> To 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. (emphasis added).

While this definition may seem to strike a happy middle between *Davis* and *Mancino*, in the context of this case, the phrase "under the entire body of sentencing statues could possibly inflict under any set of factual circumstances," remains unclear. Theoretically, any third degree felony could be raised to a life sentence if a court were to, for example, find that the defendant was a public official under color of office or the offense resulted in a substantial economic hardship to a victim and consisted of an illegal act or acts committed by means of concealment, guile or fraud . . .", or any other upward departure factors that do not consist of prior convictions. §§ 921.0016(g), (n), Fla. Stat. (1997) (sentencing statute enacted at the time of Plott's conviction). On the other hand, does "under any set of factual circumstances" assume facts that were adjudicated to be proven beyond a reasonable doubt by a jury. Even employing the *Blakely v. State* standard, the set of factual circumstances is subject to interpretation in this case. Can the court reach any set of factual circumstances to arrive a life sentence? Yes, but only if the Court violates the precepts of *Apprendi*, *Blakely,* and *Fleming.* This concept does not depend on any retroactivity of *Apprendi*. The test for illegal sentence is an independent ground from determining whether a sentence can be

attacked collaterally.

In *Carter,* the defendant claimed that he was improperly given a life sentence as a habitual offender. *Carter,* 786 So. 2d at 1179. In resolving the issue in *Carter* this Court broke down habitualization in to a two-step process: adjudicated an offender, "habitual"; and, then imposing a sentence. *Id.* By adjudicating a defendant the status of habitual offender, determines and alters the "maximum allowable sentence under any set of factual circumstances." *Apprendi* and *Blakely* also do not apply in a habitual offender status inquiry because a jury is not required for adjudication of prior criminal history. The issue becomes more confusing because the habitual sentence in *Carter* was "illegal" because the crime, failed to fall into the classification of habitual, not that Carter himself had the requisite habitual criminal history. *Id.* at 1180. At this point in Florida jurisprudence, life felonies were not subject to the habitual offender statute. *Id.* Presumably, Carter otherwise qualified as a habitual offender, but his offense (second degree murder with a weapon), did not. *Id.* To the extent that the life felony was not habitual qualified, Carter did not meet the first step of the habitualization process. But, in this instance, the meaning of the phrase "under any set of factual circumstances" is a shifting or changing term due to different circumstances. This line of cases leaves Plott's matter unresolved and subject to review.

Plott's case can be resolved without an evidentiary hearing. The error, that is the unlawful sentence, is plain on the record. The record demonstrates a sentence that is outside the maximum allowable sentence without making additional findings of fact. The guidelines call for less than a life sentence, and the sentencing court sentenced Plott to life. Creating a rule that allows review on the record alone, is a rule that is workable, concrete, and can be reached without an evidentiary hearing. A sentence can be deemed "illegal" and remedied under rule 3.800(a), if it is plain error, that is, it can be identified and remedied without an evidentiary hearing. The impact on the value of finality of sentences is minimal, yet supports the other goal in sentencing, fairness.

II. THE COURT SHOULD REVISIT THE RETROACTIVITY OF *APPRENDI* AND BLAKELY.

A. *APPRENDI* ANNOUNCED AND APPLIED TWO FOUNDATIONAL CONSTITUTIONAL RIGHTS

Two constitutional rights are in play in this case: 1) the right to a jury trial, under the Sixth Amendment; and, 2) the common law standard of proof beyond a reasonable doubt that justifies an upward departure from conventional sentencing guidelines. *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); *State v. Fleming* 61 So. 3d 399 (Fla. 2011). When those two constitutional rights interplay in a sentencing proceeding, the sentencing court's

discretion is limited to facts adjudicated beyond a reasonable doubt, by a jury. *Id.* Since those watershed decisions, the sentencing court cannot make judicial findings to support an upward departure (unless stipulated to by the parties). But that is what happened in this case.

The sentencing court did not rely on sentencing factors adjudicated beyond a reasonable doubt, by a jury, to support an upward departure of a pre-1995 guidelines sentence to life in prison. Plott's sentencing consisted of the sentencing court relying upon the trial transcript to make factual findings to support upward departure sentences that exceeded the top end of the pre-1995 sentencing guidelines. (R. 26-29).

Apprendi, changed sentencing procedure when the Court declared that the Sixth Amendment to the Constitution requires a jury to find, beyond a reasonable doubt, any fact used by the trial court to increase the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction. The Sixth Amendment right is applied to the States through the Due Process Clause of the Fourteenth Amendment. *Fleming,* 61 So. 3d at 402 (citation omitted). Four years later the Court reaffirmed *Apprendi* and extended its application to guideline sentencing schemes in *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). Subsequently, this Court announced in *State v. Fleming* that the rule in *Apprendi* and *Blakely* must be applied at resentencing, because a

resentencing is akin to an original sentencing. 61 So. 3d at 399.

In *Fleming*, the jury found the defendant guilty of aggravated battery with great bodily harm, permanent disability, or disfigurement, among other felonies. *Id.* at 400. "The trial court found four departure bases for the sentence: (1) the crime was committed in a heinous, atrocious, or cruel manner; (2) the victim suffered permanent physical injury; (3) the offense was committed to avoid arrest; and (4) the primary offense was scored at level seven or higher, and a prior conviction scored at level eight or higher." *Id.* Fleming's conviction and sentence became final when the case was affirmed on direct appeal. *Id.* *Apprendi*, however, was decided the following year. *Id.* Fleming filed a post-conviction attack on his sentence, alleging his sentence was illegal under *Heggs.* The First District agreed and remanded for a resentencing. *Id.* At resentencing, Fleming was sentenced under guidelines that relied upon severe victim injury points and the other grounds for departure stated above. *Id.* After *Blakely v. Washington* was decided a year later, the First District granted a belated appeal from his resentence. *Id.* at 401. During the appellate process, however, Fleming filed a motion under rule 3.800(b)(2), claiming his sentence violated *Apprendi* and *Blakely.* *Id.* His motion was ignored by the State and the trial court. *Id.* The First District, however, found that there was no error in regards to the finding of the victim injury points, but the other grounds for upward departure did violate *Apprendi* and *Blakely.* *Id.* Based

upon those grounds, Fleming's sentence was remanded again for application of *Apprendi* and *Blakely*. *Id.*

When deciding that a new rule "for the conduct of criminal prosecutions" applied to nonfinal sentences, including remanded sentences, this Court relied upon *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed.2d 649 (1987). *Fleming*, 61 So. 3d at 403. Additionally, when this Court announces a new rule of law or applies an established rule to "a new of different factual situation," the decision applies in every pending Florida case that is not yet final. *Id.* (citing *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992); *Wuornos v. State*, 644 So. 2d 1000, 1007 n. 4 (Fla.1994)). This Court concluded: "Regardless of whether a defendant's conviction and sentence were final before *Apprendi* and *Blakely* issued, we hold that where a defendant's resentencing was not final when *Apprendi* and *Blakely* issued, the rules established in these cases apply to that *de novo* proceeding." *Fleming*, 61 So. 3d at 408. Because Plott's resentencing was final after *Apprendi* and *Blakely* were controlling law, and he did not raise an objection on direct appeal, the question became whether an *Apprendi* violation warrants post-conviction relief.

When deciding whether a new rule applies retroactively to final cases in post-conviction proceedings, courts in Florida rely on *Witt v. State*, 387 So. 2d 922 (Fla. 1980). This Court in *Hughes v. State*, 901 So. 2d 837 (Fla. 2005), decided the

question of retroactivity of *Apprendi* under *Witt*. The majority of the Court ruled that *Apprendi* is not retroactive. *Id.* at 843.

The *Witt* framework analyzes whether the change emanates from this Court or the Supreme Court of the United States; is constitutional in nature; and "constitutes a development of fundamental significance." *Id.* There was no argument that *Apprendi* is a Supreme Court case that is constitutional in nature. The flashpoint of the controversy was whether it constituted a development of fundamental significance. *Hughes*, 901 So. 2d at 840.

There are two potential categories that are used in considering the fundamental significance: changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and those "which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." 387 So.2d at 929. *Apprendi* does not fall within the first category. *Hughes,* 901 So. 2d at 840. Therefore, the question is whether it is of "sufficient magnitude" as to require retroactive application. *Id.*

To decide that issue, the Court considered the three factors of the *Stovall/Linkletter*[1] test: (a) the purpose to be served by the new rule; (b) the extent

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1 Stovall v. Denno, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965) *disapproved of by Griffith v. Kentucky*, 479 U.S. 314 (1987).

of reliance on the old rule; and (c) the effect of retroactive application of the rule on the administration of justice. *Id.* (citing *Witt,* 387 So. 2d at 926). The majority found that the protection against the erosion of the Sixth Amendment right to have facts support upward departures in sentencing to be the purpose of the new rule. *Id.* 840-41. The Court emphasized that the jury, when deciding sentencing factors, is not determining guilt at that procedural point. *Id.* at 843. By comparing *Apprendi,* the right to a jury determine sentencing factors, to *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 491 (1968), the extension of the right to a jury trial for a determination of guilt, to the States, this Court concluded on balance *Apprendi* does not implicate the "core values to the degree of retroactive application." *Id.* at 843.

When the majority considered the second factor under the *Stoval/Linkletter* test, the extent of reliance on the old rule, the Court referred to trial courts exercising discretion over sentencing proceedings since 1994, including sentences over the statutory maximum. *Id.* at 845 (statutory citations omitted). "Therefore, when *Apprendi* was decided there had been a considerable period of reliance on this principle in sentencing under both the guidelines and the Code." *Id.* Consequently, the Court *Apprendi* does not meet the second factor.

The third factor under *Stoval/Linkletter,* tests the effect of retroactive application on the administration of justice. The Court found *Apprendi* did not

meet this factor of the test either. The Court accepted the remarks of District Courts fearing that the effect would be "colossal" or "monumental" on the administration of justice. *Id.* at 846. Because of this conclusion, the Court concluded that the new criminal procedure announced in *Apprendi* "does not warrant retroactive application." *Id.*

Thus, as it stands, this State does not recognize retroactive application of *Apprendi* and its progeny. Below, Plott requests that this Court reconsider *Hughes* and the retroactivity of *Apprendi*.

B. EVOLUTION OF SENTENCING LAW EMPHASIZES THE FUNDAMENTAL RIGHTS UNDER *APPRENDI* AND ITS PROGENY

Since *Apprendi* was decided in 2000, its importance has grown, not waned. *Apprendi's* rule is "rooted in longstanding common-law practice." *Cunningham v. California*, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). It preserves the "historic jury function" of "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice*, 555 U.S. 160, 163, 129 S. Ct. 711, 172 L.Ed.2d 517 (2009). The Supreme Court has repeatedly affirmed this rule by applying it to a variety of sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012); *Hughes v.*

State, 901 So. 2d 837, 855 (Fla. 2005) (Anstead, J., dissenting). It is now an established part of sentencing jurisprudence. Its application has even been extended to imposition of fines on corporate criminal defendants. *Id.* Furthermore an analysis of the Supreme Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005), emphasizes the importance the right to a jury trial on sentencing guidelines have, to the point where the federal guidelines were deemed unconstitutional, after governing sentencing proceedings for over twenty-five years. In light of the fundamental importance of *Apprendi* and its progeny, this Court should revisit its retroactivity in the limited cases that potentially remain.

The controlling case on the retroactivity of *Apprendi/Blakely* is *Hughes. Hughes* 901 So. 2d at 837. According to the majority in *Hughes, Apprendi* does not "implicate core values to the degree necessary to its retroactive application." *Id.* at 843. But in light of the development of the law from the Supreme Court of the United States, the *Hughes* dissents' arguments justify retroactive application more so today.

Chief Justice Pariente dissected *Apprendi* into a newly announced procedural rule (adjudication of sentencing factors by a jury), and a newly announced substantive rule (proof of those factors beyond a reasonable doubt). *Hughes v. State*, 901 So. 2d at 851. (Pariente, C.J., dissenting). The procedural rule created is not retroactive under *Witt. Id.* However, the determination in *Apprendi*

that "facts authorizing a particular sentence must be found beyond a reasonable doubt is a new rule of substantive law that warrants retroactive application under *Witt*." *Id.*

Justice Anstead determined both principles of *Apprendi*, adjudication by a jury and beyond a reasonable doubt is retroactive under *Witt*. *Id.* at 855 (Anstead, J., dissenting). In his dissent Justice Anstead wrote: "the majority has reduced to insignificance two of the most important United States Supreme Court decisions rendered in modern times impacting our criminal law and our death penalty jurisprudence. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002)). The majority, he reasoned, has forsaken the retroactivity standard enunciated in *Witt v. State*, 387 So.2d 922 (Fla.1980), and substituted it with the federal retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989). *Id.* at 857. The State standard in *Witt* balances fairness and finality. *Id.* "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to

avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* at 857 (citing *Witt,* 387 So. 2d at 925) (citations omitted).

In *Isaac v. State,* the First District concluded that "reliance on the law of the case doctrine" as it pertains to the missed chance to apply *Apprendi* at resentencing, would be "manifestly unfair." 911 So. 2d at 815. Furthermore, from the short opinion in *Isaac,* whether *Apprendi* was retroactive or the procedural vehicle that brought Isaac to the District Court was irrelevant. *See Fleming,* 61 So. 3d at 404. Whether Isaac argued the unfairness of his sentence through rule 3.800 or 3.850, was not part essential to the District Court's analysis. Whether *Apprendi/Blakely* was applied upon resentencing was foremost. *Id.*

This Court's review of *Isaac* was granted but later dismissed after the opinion in *Fleming.* In the effort to emphasize finality over fairness, Mr. Plott suffers the injustice of life sentences without the fundamental rights under the Sixth Amendment. After *Apprendi,* these fundamental rights were "jealously guarded" on a going forward basis and the defendants who were luckier as a matter of timing, whose cases fell within the window of nonfinality, received the benefit of the announced rule. *See id.* William Plott deserves the same rights as a matter of

fundamental fairness.

III. DENYING REVIEW OF PLOTT'S SENTENCE FOR *APPRENDI* AND *BLAKELY* ERRORS IS A MANIFEST INJUSTICE.

If this Court determines that Plott's claim: *Apprendi* and its progeny do not require retroactive review or relief under rule 3.800 because *Apprendi's* requirement of proof beyond a reasonable doubt adjudicated by a jury does not constitute a "development of fundamental significance," *Hughes,* 901 So. 2d at 840, then it remains an illegal sentence or it is manifestly unfair. The manifest unfairness was recognized in *Isaac,* and analyzed above. 911 So. 2d at 815.

The Sixth Amendment right to a trial by jury and burden of proof beyond a reasonable doubt is a bedrock of American jurisprudence. *Blair v. State,* 698 So. 2d 1210, 1212 (Fla. 1997) ("this right was of paramount importance to the Founding Fathers. Indeed, '[t]rial by jury, as instituted in England, was to the Founders an integral part of a judicial system aimed at achieving justice.'" (citing Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries,* 61 Geo. Wash. L.Rev. 723, 742 (1993)). *In re Winship,* 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure")).

If the Court does not require that Plott's sentence be vacated, under this narrow circumstance the Court should analyze whether the result would be a "manifest injustice." *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003). Because Plott's resentencing Court made factual findings to supporting an upward departure to four-life sentences without proof beyond a reasonable doubt or empanelling a jury to adjudicate those facts. Contrary to the Sixth Amendment, his sentence is a manifest injustice.

Lastly, an illegal sentence is a manifest injustice. The analysis above regarding the meaning of an illegal sentence would make the same sentence a manifest injustice. Both an illegal sentence and a manifestly unjust one are capable of review at any time. As it stands, the difference between 22.06 years and four life sentences is the difference between eventual freedom and death in prison. A resentencing within the guidelines should be ordered.

CONCLUSION

Apprendi and its progeny compel the conclusion that Plott's sentence was illegal or manifestly unjust. This Court should approve of *State v. Fleming* and *Isaac v. State*. The Court should disapprove of *Hughes v. State* and reverse with directions that Plott be resentenced within the applicable guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY certifies that this Brief complies with the type-volume limitations and font and format requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: ____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email delivery to Marilyn Muir Beccue, Assistant Attorney General CrimAppTPA@myfloridalegal.com; Marilyn.Beccue@myfloridalegal.com 31st

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