IN THE SUPREME COURT OF FLORIDA

WILLIAM J. PLOTT,

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT,

Case No. SC12-
Lower Ct: 2D10-5719

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal in Plott v. State, 2D10-5719 (Fla. 2d DCA Mar.2, 2012) a copy of which is appended to Petitioner's Brief on Jurisdiction, outlines the relevant facts at this stage of the proceedings.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the decision of the Second District in Plott v. State, 2D10-5719 (Fla. 2d DCA, March 2, 2012), and the decision of the Florida Supreme Court in State v. Fleming, 61 So.3d 399 (Fla. 2001) or the decision of the First District in Hughes v. State 826 So.2d 1070 (Fla. 1st DCA 2002).

ARGUMENT

ISSUE I

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN PLOTT V. STATE, 2D10-5719, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN STATE V. FLEMING, 61 SO.3d 399 (FLA. 2001) AND HUGHES V. STATE 826 SO.2D 1070 (FLA. 1ST DCA 2002)? (RESTATED)

There is no "express and direct" conflict between the decision of the Second District in Plott v. State, 2D10-5719, and the decision of the Florida Supreme Court in State v. Fleming, 61 So.3d 399 (Fla. 2001) or Hughes v. State 826 So.2d 1070 (Fla. 1st DCA 2002).

There is no "express and direct" conflict with Fleming, *supra.*, because the Second District in Plott, *supra.*, reasoned that the holding in Fleming, *supra.*, did not apply in when sentencing claims are made based upon violation violations of 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) raised in a rule 3.800(a) motion as opposed to a direct appeal from a resentencing based upon Heggs v. State, 759 So.2d 620 (Fla. Fla. 2000):

> Mr. Plott is serving four life sentences for sexual batteries committed in July 1996. A jury convicted him of these offenses in November 1997. The trial court initially

sentenced Mr. Plott to life imprisonment for these offenses under the 1995 guidelines. We affirmed the direct appeal of his judgments and sentences in 1999. *See Plott v. State*, 731 So.2d 1285 (Fla. 2d DCA 1999) (table decision).FN1 In 2000, the supreme court held that the 1995 guidelines were unconstitutional. *See Heggs*, 759 So.2d 620. Thus, Mr. Plott was resentenced for these offenses in 2005.

By the time of the resentencing, the United States Supreme Court had issued its opinions in both *Apprendi* and *Blakely*. The trial judge and the lawyers at the resentencing discussed the effect of these decisions, and the trial court concluded that it could provide grounds for an upward departure sentence without empaneling a new jury. Without conducting a new hearing, the trial court determined from the testimony at the initial trial that the offenses were committed in a manner that was especially heinous, atrocious, or cruel. This ground would authorize an upward departure. See § 921.0016(3)(b), Fla. Stat. (1993). The trial court reimposed the four life sentences as upward departure sentences. Our record strongly suggests that an authorized finder of fact could have concluded that these offenses were especially cruel from this testimony.

Mr. Plott appealed the sentences imposed on resentencing. We affirmed the new sentences. *See Plott v. State*, 940 So.2d 432 (Fla. 2d DCA 2006) (table decision). In his appeal of the resentencing, he did not argue that the trial court erred by refusing to conduct a jury trial to determine the factual basis for the upward departure. It is noteworthy that the issue of whether a jury was required in this context was a hotly debated issue at that time. *See Fleming*, 61 So.3d at 404–05.

After this court affirmed his sentences, Mr. Plott did not file another

postconviction motion until September 2010, when he filed this motion claiming that his life sentences are illegal. The trial court denied this motion in November 2010, reasoning that the offenses permit sentences of this length and that a procedural error in the imposition of an upward departure sentence is not treated as a ground for relief under rule 3.800(a).

When Mr. Plott appealed the order denying his motion, this court stayed the appeal pending the outcome of a case that was then pending in the supreme court. *See Isaac v. State*, 911 So.2d 813 (Fla. 1st DCA 2005), *review granted*, 4 So.3d 677 (Fla.2009), *review dismissed*, 66 So.3d 912 (Fla.2011). In *Isaac*, the First District had reversed the summary denial of a postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850 that raised an *Apprendi* issue similar to the issue that is raised in this case. *See Isaac*, 911 So.2d at 814–15.

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.**

Without regard to whether the holding in *Fleming* may apply in the context of a mo-

> **tion 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); *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). *See Jackson v. State*, 29 So.3d 1152, 1154 (Fla. 2d DCA 2010) (holding that a claim that the trial court erroneously imposed an upward departure sentence without written reasons is not cognizable under rule 3.800(a)); *Judge v. State*, 596 So.2d 73, 77 (Fla. 2d DCA 1991) (en banc) ("Rule 3.800(a) .... is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process."), *approved by Bover v. State*, 797 So.2d 1246, 1251 (Fla.2001); *Ives v. State*, 993 So.2d 117, 120 (Fla. 4th DCA 2008) (holding that a mere deficiency in the procedure employed to impose an enhanced sentence does not in and of itself result in an illegal sentence). Here, the error was a procedural error in sentencing that could have been preserved and raised on direct appeal. Thus, it was not cognizable under rule 3.800(a).**

(Bold emphasis added)

The decision in Plott, *supra*, does not expressly and directly conflict with the decision of the First District in Hughes, *supra*, because the cases are factually distinguishable. In Hughes, *supra.*, the defendant's appeal of the denial of rule 3.800(a) claim alleging an Apprendi, *supra*, was his first op-

portunity for appellate review of the alleged Apprendi violation. In the instant case, as the Second District pointed out in its opinion Mr. Plott appealed the sentence imposed as a result of the Heggs resentencing but did not argue that the trial court erred in failing to impanel another jury to determine the factual basis for the upward departure sentence:

> Mr. Plott appealed the sentences imposed on resentencing. We affirmed the new sentences. *See Plott v. State*, 940 So.2d 432 (Fla. 2d DCA 2006) (table decision). In his appeal of the resentencing, he did not argue that the trial court erred by refusing to conduct a jury trial to determine the factual basis for the upward departure. It is noteworthy that the issue of whether a jury was required in this context was a hotly debated issue at that time. *See Fleming*, 61 So.3d at 404–05.
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proved by Bover v. State, 797 So.2d 1246, 1251 (Fla.2001); *Ives v. State*, 993 So.2d 117, 120 (Fla. 4th DCA 2008) (holding that a mere deficiency in the procedure employed to impose an enhanced sentence does not in and of itself result in an illegal sentence). Here, the error was a procedural error in sentencing that could have been preserved and raised on direct appeal. Thus, it was not cognizable under rule 3.800(a).

CONCLUSION

Based upon the foregoing authorities and arguments, the respondent requests that this court not exercise its discretionary jurisdiction where is no express and direct conflict between the decision of the Second District in Plott, *supra.*, and that of the Florida Supreme Court in Fleming, *supra.*, or the First District in Hughes v. State, 826 So.2d 1070.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to William J. Plott, DOC#894956, Graceville Correctional Facility, Gracesville, Florida 32440, on this 8th day of May, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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