IN THE SUPREME COURT OF FLORIDA

WILLIAM J. PLOTT
Petitioner,

V.

STATE OF FLORIDA
Respondent.

SC12-922
CASE NO.: 2D10-5719

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
STATE OF FLORIDA

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PETITIONER, ~~pro se~~

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STATEMENT OF CASE AND FACTS

The petitioner is serving four life sentences for offenses committed in July 1996, for which convictions were obtained at jury trial in November 1997. The initial sentence under 1995 guidelines was life imprisonment. Judgement and Sentence were affirmed in 1999. see Plott v State, 731 So2d 1285 (Fla 2d DCA 1999). In 2000 this Court held the 1995 Guidelines were unconstitutional. Heggs v State 759 So2d 620 (Fla 2000). The petitioner moved for and was granted resentencing which was held May 2005.

The instant case originates with the resentencing in May 2005, which took place well after the U.S. Supreme Court had issued its opinions in Apprendi v New Jersey, 530 U.S. 466 (2000) and Blakely v Washington, 542 U.S. 296 (2004). Though these cases were discussed the trial court without holding a new hearing or impaneling a jury found for upward departure and reimposed the four life sentences as upward departure sentences. The new sentences were affirmed on direct appeal, Plott v. State, 940 So2d 432 (Fla. 2d DCA 2006) (table decision).

Petitioner filed a 3.800(a) Motion to Correct Illegal Sentence. The trial court denied the motion reasoning that the sentences were within statutory maximums. The denial was appealed and the Second District Court of Appeal stayed the appeal pending this Court's disposing of Isaac v State, 911 So2d 813 (Fla 1st DCA 2005), review granted, 4 So3d 677 (Fla 2009), review dismissed, 66 So3d 912 (Fla. 2011). Isaac presented an issue similar but not identical to the issue resolved by this Court in State v Fleming, 61 So3d 399 (Fla 2011). In Fleming the relevant issue was if the defendant was entitled to relief when resentencing occurred after Apprendi and the issue was preserved and raised on direct appeal. This Court held that Apprendi did apply and remanded for harmless

error determination. Subsequently, this Court, affirmatively applying the decision in Fleming, dismissed the proceeding in Isaac, which raised the same issue in the context of a postconviction motion. Despite this outcome the Second District affirmed the trial court's denial of the petitioners postconviction motion concluding that the issue though arguably supported by this Court's decision was improperly raised under FL.R. Crim. P. Rule 3.800(a) Motion to Correct Illegal Sentence. Rehearing was denied on April 4, 2012 and petitioners notice to invoke the discretionary jurisdiction of this Court was timely filed on April , 2012.

SUMMARY OF THE ARGUEMENT

The district court's decision can not be reconciled with the decision of this Court in State v. Fleming 61 So3d 399 (Fla 2011) Wherein this Court held that the principles set forth by the U.S. Supreme Court in both Apprendi and Blakely apply to de novo resentencing. In this case, the district court of appeal held that this same issue raised by the petitioner was not a viable claim raised by post conviction motion. However, this court applied the ruling in Fleming to Isaac v State, 66 So3d 912 (Fla 2011) which raised the same issue in a rule 3.850 post conviction motion. Thus, the petitioner contends that the decision of the district court expressly and directly conflicts with a previous decision of this Court.

Moreover, the district court's decision is in conflict with the First District Court of Appeal decision in Hughes v. State, 826 So2d 1070 (Fla 1st DCA 2002), Wherein that court held that a 3.800(a) Motion to Correct Illegal Sentence is proper vehicle to raise Apprendi claim that can be determined from the face of the record. Thus, the petitioner contends that the decision of

the district court expressly and directly conflicts with a previous decision of another district court of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUEMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURTS DECISION IN STATE V. FLEMING, 61 SO3D 399 (Fla 2011), AND THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN HUGHES V. STATE 826 SO2D 1070 (FLA 1ST DCA 2002).

The district court of appeal ruled that Apprendi claims are not reviewable by 3.800(a) post conviction motions. As explained below this decision conflicts with a decision of this Court and a decision of the First District. The petitioner respectfully submits that this court should grant discretionary review and resolve the conflict by quashing the decision of the district court.

In Plott v. State, Case No. 2D10-5719 (Appendix A), the decision of the trial court was affirmed by the district court.

The opinion 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).

Thus, the district court expressly held that this Court's holding in Fleming which stated that the principles of Apprendi should be applied to resentencing hearings, is not a viable claim raised by post conviction motion. However, this Court applied its ruling in Fleming to Isaac v. State, 911 So2d 813 (Fla 1st DCA 2005), review granted, 4 So3d 677 (Fla 2009), review dismissed, 66 So3d 912 (Fla. 2011), which raised the same Apprendi issue in the context of a rule 3.850 post conviction motion.

The district court further explained that though this Court had applied the ruling in Fleming to Isaac it would not apply the same ruling in this case because:

> Despite the discussion in State v Fleming, 61 So3d 399 (Fla 2011) which arguably supports his position on this issue, we conclude that Mr. Plott is not entitled to raise this issue under Florida Rule of Criminal Procedure 3.800(a)

Thus the district court is expressly ruling that Fl. R. Crim. P. Rule 3.800(a) is improper motion to raise Apprendi claim, even where the error has resulted in an illegal sentence. Such a decision is in direct and expressed conflict with the decision of the First District Court of Appeal in Hughes v. State, 826 So2d 1070 (Fla 1st DCA 2002), wherein

that court expressly stated:

> We note initially that rule 3.800(a) is appropriate procedural vehical for raising Apprendi claim since such a violation would produce a sentence in excess of constitutional and statutory maximums and would be apparent on the face of the record. [1]

This this court and the First District Court of Appeal have separately held that the principles set forth in Apprendi apply to post-Apprendi resentencings and that the failure to apply them can be raised by postconviction motion, and specifically rule 3.800(a) motion. This court should now reaffirm that holding by accepting discretionary review and quashing the contrary decision of the district court.

CONCLUSION

This Court has discretionary jurisdiction to review the decision herein, and the Court should exercise that jurisdiction to consider the merits of the petitioners arguement.

William J Plott
WILLIAM J. PLOTT
Petitioner, prose.

1. also, Gorham v. State, 993 So2d 128 (Fla 4th DCA 2008), motion to correct illegal sentence is proper vehicle to raise certain Apprendi claims that can be determined from the face of the record.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner's Jurisdictional Brief has been provided by U.S. Mail to the Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Tampa FL 33607. On this 26th day of April, 2012.

Provided to Graceville Correctional Facility on
4-26-12 for mailing

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