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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

REPLY BRIEF

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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).

The procedure that was employed by the trial court in sentencing was error, and a jury should have considered beyond a reasonable doubt whether the facts supporting Plott's upward departure to life sentences could be sustained. *See State v. Fleming,* 61 So. 3d 399 (Fla. 2011). The question that remains is whether the improper sentence is able to be remedied post-final judgment, under Florida Rule of Criminal Procedure 3.800(a).

Since the filing of the initial brief, the Supreme Court of the United States addressed another *Apprendi*[1]*/Blakely*[2] issue. The Court continues to uphold the importance of the standard of proof of beyond a reasonable doubt and adjudication by jury when sentencing factors increase punishment. The Supreme Court since *Apprendi* has been on a journey to harmonize the application of *Apprendi.*

In *Allyene v. United States,* the Supreme Court reaffirmed its commitment to *Apprendi* by overruling its opinion in *Harris v. United States*, 536 U.S 545 (2002). 133 S. Ct. 2151 (2013). The *Harris* Court held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. *Allyene,* 133 S. Ct. at 2155. In June of this year however, the

[1] *Apprendi v. New Jersey,* 530 U.S. 466 (2000).
[2] *Blakely v. Washington,* 542 U.S. 296 (2004).

Court concluded the distinction between facts that increase the statutory maximum and facts that increase only the minimum mandatory are inconsistent with *Apprendi* and the Sixth Amendment. *Id.* "… Any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury. Accordingly, *Harris* is overruled." *Id.* With this adjustment in the sentencing law, *Apprendi* has become "even more firmly rooted in the Court's Sixth Amendment jurisprudence. . . ." *Id.* at 2165. (Sotomayor, J, concurring). The fundamental importance of *Apprendi* increases with each opinion that applies it. What is essential to sentencing jurisprudence is consistency in *Apprendi's* progeny even if a judge disagrees with *Apprendi*. *Id.* at 2167. (Breyer, J., concurring).

This Supreme Court should embark on the same journey as the Supreme Court of the United States in harmonizing the meaning of "illegal sentence." Confusion arises when issues relating to the meaning of the term "illegal sentence." *Wright v. State*, 911 So. 2d 81, 83 (Fla. 2005); *Carter v. State,* 786 So. 2d 1173, 1176 (Fla. 2001). As it stands, minor discrepancies can be correctable any time under Rule 3.800, but Sixth Amendment violations might not.

At one point in the Court's journey it ruled: a discrepancy between an oral and written sentence is cognizable under Rule 3.800(a) as an illegal sentence. *Williams v. State,* 957 So. 2d 600, 605 (Fla. 2007). Yet the State would have this Court conclude, a sentence that applies the wrong burden of proof and by the

wrong finder of fact is not correctable under Rule 3.800(a). If the reasoning alone is that evidentiary hearings years later cannot be expected to correct an illegal sentence, then this reasoning would not deny Plott relief under Rule 3.800. The disposition order alone, would allow this Court to determine that the error occurred. As the value of Sixth Amendment right to adjudication by jury beyond a reasonable doubt grows or is recognized post-*Apprendi*, the line of illegal sentence is crossed and Plott is entitled to a resentencing.

The State further contends that if reviewable through Rule 3.800, the error would be harmless even though Plott is under several life sentences. Rape and kidnapping itself are violent crimes. But a jury, like juries in death cases, are asked to consider aggravating factors, may consider the State did not prove its case beyond a reasonable doubt, as to the aggravator, even though it has met its burden as to the substantive charge. Plott is entitled to this review in front of the proper fact-finder instructed on the proper burden of proof.

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

Since the filing of the initial brief in this matter this Court did issue the opinion in *State v. Johnson,* 2013 WL 3214599 (Fla. Je. 27, 2013). In *Johnson,* this Court held that *Blakely* is not retroactive. *Id.* at *3. In all candor, the Court has ruled on this issue presented.

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

This Court in effect rejected *Isaac v. State,* 911 So. 2d 813 (Fla. 1st DCA 2005), in *Johnson,* 2013 WL at 3214599. Regardless of the rejection of *Isaac,* the Sixth Amendment right to a trial by jury and burden of proof beyond a reasonable doubt is a bedrock of American jurisprudence. *See, e.g., Blair v. State*, 698 So. 2d 1210, 1212 (Fla. 1997). The consideration of whether a manifest injustice exception, still is reviewable by this Court. The "manifest injustice" exception is addressed in *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003). Because Plott's resentencing court made factual findings 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 and falls under this exception.

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/_ *Robert C. Buschel* ___
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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 29th day of August, 2013.

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