IN THE SUPREME COURT OF THE STATE OF FLORIDA,

DERRICK GURLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-1376
4th DCA Case No. 4D04-2697

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant, and Respondent was Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the opinion sought to be reviewed, *Gurley v. State*, 906 So. 2d 1264 (Fla. 4th DCA 2005) A copy of the opinion is contained in the appendix to this brief.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretion to review this case. First, Petitioner's jurisdictional brief improperly addresses the merits of this case, contrary to Rule 9.120(d), Florida Rules of Appellate Procedure. More importantly, Petitioner has failed to show why this Court should exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal where *Blakely v. Washington*, 124 S. Ct. 2531 (2004) has not rendered § 775.082(9), *Florida Statutes* (2003), the prison releasee reoffender ("PRR") statute unconstitutional. Petitioner's petition for review should be denied.

ARGUMENT

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL.

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, §3(b)(3), *Fla. Const*. (1980) and *Fla. R. App. P.* 9.030(a)(2)(A)(i) to review a decision of the Fourth District Court of Appeal. Petitioner contends that § 775.082(9), is unconstitutional in light of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The State acknowledges that this Court has discretionary jurisdiction to review a decision of a district court "that expressly declares valid a state statute" under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i). However, the State submits that this Court should nonetheless decline to review the instant case.

As an initial matter, Rule 9.120(d), Florida Rules of Appellate Procedure, states that a jurisdictional brief is "limited solely to the issue of the supreme court's jurisdiction." In the 1977 Amendment to the Committee Notes, Rule 9.120 states, "The jurisdictional brief should be a short, concise statement of the grounds for invoking jurisdiction and the necessary facts. It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional

issue." *Id*. Respondent maintains that Petitioner's jurisdictional brief reads more like a merits brief. Pages six through eight of Petitioner's jurisdictional brief actually address the merits of the issue on review. Thus, Petitioner's jurisdictional brief should be stricken.

In an abundance of caution however, Respondent will briefly respond to the substance of Petitioner's argument that *Blakely* has rendered the PRR statute unconstitutional.

Respondent maintains that the PRR statute does not violate the Sixth Amendment in light of *Blakely*. *Blakely*, like *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not afford Petitioner any relief from his PRR sentence. To begin, in *McDowell v. State*, 789 So.2d 956, 957 (Fla. 2001), this Court recognized that the Prison Releasee Reoffender Act does not run afoul of the rule espoused in *Apprendi* because *Apprendi* by its express holding does not extend to the "fact of a prior conviction." *Id*. at 789 So.2d at 957 (*citing Apprendi*). Further, this Court reasoned that *Apprendi* did not overrule the high Court's previous decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *Id*. And, this Court's observation that *Apprendi* did not overrule *McMillan* was confirmed six years later in *Harris v. United States*, 536 U.S. 545 (2002).

Then, in deciding *Blakely*, the Court stated "this case requires us to apply the rule we expressed in (*Apprendi*) 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." 124 S. Ct. at 2536. So contrary to Appellant's position that *Blakely* is broader than *Apprendi, Blakely* is no more than an application of *Apprendi* to state sentencing guidelines. It involved facts that were elements of the offense, not facts relating to past convictions. *Blakely*, 124 S. Ct. at 2534 (sentence enhanced based on "deliberate cruelty" in commission of kidnapping); *see also Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004) (noting, in context of challenge to recidivist statute, that "Blakely merely applied Apprendi"; sentencing under recidivist statutes was independent to question of guilt in underlying substantive offense). Thus, like *Apprendi, Blakely* has no effect on the PRR statute and Petitioner's sentence. *See e.g Jones v. United States*, 526 U. S. 227, 119 S. Ct. 1215 (1999) (recognizing that recidivism is a sentencing factor, not an element of the offense; *Monge v. California* 524 U.S. 721, 118 S. Ct. 1219 (1998)(recidivism is a sentencing factor, rather than an element of the offense); and *Almendarez-Torres v. United States* 523 U.S. 224, 118 S. Ct. 1219 (1998) (upholding increased sentence based upon prior conviction that

had not been charged in the indictment or submitted to the jury as an issue, sentencing statute set forth enhanced penalties under certain circumstances, but did not create a separate offense, only sentencing factors.) Accordingly, the PRR sentencing provisions are an enhanced sentencing scheme based upon prior convictions.

It is interesting to note that the federal Eleventh Circuit continues, as does Florida, to hold that *Blakely* has not changed the *Apprendi* ruling that prior convictions do not need to be found by the jury. In the recent, unpublished opinion of *United States v. Hurtado*, 2005 U.S. App. LEXIS 10978 (11th Cir. June 10, 2005), the Court held that *Blakely* did not take the fact-finding of prior convictions out of the hands of the courts. *Id.* It also found that the decision in *Almendarez-Torres* was left undisturbed by *Apprendi* and *Blakely*. The Eleventh Circuit Court found that while recent decisions, such as *Shepard v. United States*, 125 S. Ct. 1254 (2005), may arguably cast doubt on the future prospects of *Almendarez-Torres*, the Supreme Court has not explicitly overruled *Almendarez-Torres* and, as a result, courts must follow *Almendarez-Torres*. *Id*. The Court also found that until the United States Supreme Court holds otherwise, *Almendarez-Torres* remains good law. *Id*. The United States Supreme Court's decisions in *Apprendi* and *Blakely* have not overruled its holding in *Almendarez-Torres*

that prior convictions may be considered in enhancing sentences. *Id*. Further, the Court held that a defendant's Sixth Amendment rights are not violated when his sentence is enhanced under the U.S. Sentencing Guidelines based on a prior conviction. *Id*. *See also United States v. Morgan*, 2005 U.S. App. LEXIS 13053 (11th Cir. June 28, 2005); *United States v. Rincon-Castrillon*, 2005 U.S. App. LEXIS 12557 (11th Cir. June 23, 2005); *United States v. Brown*, 2005 U.S. App. LEXIS 11589 (11th Cir. June 17, 2005); *United States v. Shelton*, 400 F.3d 1325, 1329 (11th Cir. 2005).

Based on the foregoing, § 775.082(9), has not been rendered unconstitutional by *Blakely* and this Court need not exercise jurisdiction in this case.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court deny jurisdiction in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: Anthony Calvello, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401, on September ___, 2005.

_____
MONIQUE E. L'ITALIEN

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with *Fla. R. App. P.* 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is not proportionately spaced.

_____
MONIQUE E. L'ITALIEN

APPENDIX A