IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC07-436

v.

JULIUS MCGRIFF,

Respondent.

PETITIONER'S REPLY BRIEF

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ISSUE I

WHETHER APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000), AND BLAKELY v. WASHINGTON, 542 U.S. 296 (2004), APPLY TO RESPONDENTS SENTENCE?

In its order accepting jurisdiction in this matters, this Court directed the parties to address the question of "[w]hether Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), apply to resentencing proceedings held after Apprendi issued where the resentencing was final after Blakely issued, in cases in which the convictions were final before Apprendi issued. The State maintains that both Blakely and Apprendi should be inapplicable to such resentencings.

Argument

A. McGriff's Florida Rule of Criminal 3.800(a) motion failed to Affirmatively Allege that the Trial Court Records Affirmatively Entitle Him to Relief as Required by the Rule. (Restated)

McGriff filed his answer brief indicating that the State had failed to comply with this Court's order regarding the motion to strike. The State complied with this Court's order based upon the motion made by counsel and did not include the objected to argument in its brief. It, however, because of the short time permitted by this Court in which to file its brief coupled with additional pending cases and their deadlines, in an

attempt to meet the deadline inadvertently failed to change the section's header. The State has restated the header to comport with the argument made in the Amended Brief above. The State notes that opposing counsel did not make contact with the State such that this matter could have been cured. The error was obvious and the text in the argument section is substantially different.

To be clear, in its original brief filed with this Court, the State argued in Section A of its brief that if error occurred it was harmless because the trial court departed based upon recidivist based matters. The State based its argument upon documents contained in the record this Court originally permitted to be supplemented. McGriff objected to the use of the supplemental record, which left the State unable to make a harmless error argument. The State's argument in the Amended Brief is not that the error was harmless, but rather that the motion fails on its face to meet the requirements of Florida Rule of Criminal Procedure 3.800(a). This is not the same argument.

McGriff's objection to this Court leading to the order striking the State's complained of use of the supplemental record and argued that any argument of harmlessness of any type was a violation of this Court's second briefing order. This

Court ordered that portion of the brief stricken.

As a result, the State made no argument that any error was harmless. The State has argued that McGriff's motion on its face is insufficient to entitle him to relief. Florida Rule of Criminal Procedure 3.800(a) expressly requires that the defendant "affirmatively allege[]" in his motion "that the court records demonstrate on their face an entitlement to relief." In the current case, McGriff's amended motion to correct illegal sentence affirmatively alleges on its face that the trial court departed for the following reasons:

> "1) The defendant's unscored juvenile record. The defendant had two juvenile adjudications- breaking and entering in 1975, and battery in 1978. See, Cumming v. State, 489 So. 2d 121 (Fla. 1DCA 1986).
>
> 2) The defendant is totally unamenable to rehabilitation. A review of his prior record demonstrated that he has been placed on probation in different forms, from the time of his first juvenile offense to the present. None of these rehabilitative efforts has been successful, including his term in prison. See, Kiser v. State, 455 So. 2d 1070 (Fla. 2DCA 1984), and Allen v. State, 522 So. 2d 850 (Fla. 4DCA 1987).
>
> 3) The evidence at trial clearly demonstrated that the defendant engaged in a scheme to cover-up the crime and attempted to conceal or destroy evidence and the body of his victim. See, State v. McCall, ___ So. 2d ___, (13 Fla. L. Weekly (S)311 (Fla. 1986), and Everage v. State, 504 So. 2d 1255 (Fla. 1DCA 1986)."

(R 17-18).

The result is that appellant's own motion alleges that the

trial court departed for two reasons related to McGriff's prior convictions that are unequivocally legal and not subject to the application of Apprendi or Blakely because the essential holding in Apprendi, 530 U.S. at 490, was that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.". The third basis is the only basis potentially subject to the application of Apprendi or Blakely. Pursuant to section 921.001(6), Florida Statutes (2008), a "departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure." See also Perry v. State, 714 So. 2d 563 (Fla. 1st DCA 1998). As a result, even if Apprendi and Blakely were applicable to McGriff's sentence, the courts were obliged to deny him relief because the departure was supported, as McGriff's motion affirmatively contended, by reasons exempt from the application of the United States Supreme Court decisions in Apprendi and Blakely. Therefore, the decision of the First District should be reversed because McGriff's motion fails to show on its face that he is entitled to any relief.

B. McGriff's Claims Are Not Properly Raised by the Filing of a Florida Rule of Criminal Procedure 3.800(a) Motion. (Restated)

McGriff filed his answer brief indicating that the State had failed to comply with this Court's order regarding the motion to strike. The State complied with this Court's order based upon the motion made by counsel and did not include the objected to argument in its brief. It, however, because of the short time permitted by this Court in which to file its brief coupled with additional pending cases and their deadlines, in an attempt to meet the deadline inadvertently failed to change the section's header. The State has restated the header to comport with the argument made in the Amended Brief above. The State notes that opposing counsel did not make contact with the State such that this matter could have been cured. The error was obvious and the text in the argument section is substantially different.

To be clear, in its original brief filed with this Court, the State argued in Section C that McGriff failed to preserve this issue at trial or at sentencing. McGriff objected once again arguing that the State should not be permitted to rely upon the supplemental record. McGriff objected to the State's argument that McGriff had failed to preserve his claim at the time of trial. McGriff's reasoning was that the actual record in this case did not include documents supporting such an argument and that the supplemental record should be stricken.

McGriff made no reference to any other argument made by the State in that section. As a result, this Court's order could only have granted McGriff the relief he requested.

The State has made no argument regarding preservation in its Amended Initial Brief. The State has argued that Florida Rule of Criminal Procedure 3.800(a) is not appropriate vehicle by which to obtain the remedy given to McGriff and Apprendi/Blakely challenges are not properly made through collateral challenge. This is not the argument that Petitioner requested be stricken.

The State has essentially argued that the sentence is an illegal sentence when it exceeds the maximum period set forth by law for a particular offense without regard to the guidelines. See Gartrell v. State, 626 So. 2d 1364 (Fla. 1993). Further, the State argued the role of rule 3.800(a), Florida Rules of Criminal Procedure, and the definition of an illegal sentence within the meaning of the rule. See Carter v. State, 786 So. 2d 1173, 1175 (Fla. 2001).

McGriff argues that he is entitled to relief by his motion pursuant to Florida Rule of Criminal Procedure 3.800(a) **because the trial court failed to comply with the procedural safeguards** set forth in Apprendi and Blakely. As this Court discussed in Carter, 786 So. 2d at 1180-81, this is not an appropriate basis

for relief under the rule. Further, McGriff's request does not meet the criteria of the "short-list" identified in Blakely v. State, 746 So. 2d 1182 (Fla. 4th DCA 1999). Because McGriff's sentence does not impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances, rule 3.800(a), Florida Rules of Criminal Procedure, does not provide him a vehicle by which to obtain relief. As a result, the State has made a wholly separate argument unrelated to preservation.

C. Neither Blakely Nor Apprendi Apply Retroactively.

To the contrary of McGriff's assertions, McGriff seeks a completely retroactive application of Apprendi and Blakely in this case. McGriff's conviction became final long ago when his trial and the direct appeal therefrom concluded. Because his conviction became final and the time for having a jury decide matters related to the departure reasons passed many years prior to any resentencing, McGriff now seeks the application of the decisions which came about many years thereafter.

This Court in Hughes v. State, 901 So. 2d 837 (Fla. 2005), this Court considered whether or not Apprendi should be given retroactive application. After analyzing the Apprendi decision under the test set forth in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980), this Court concluded that Apprendi should not be

applied retroactively. See Hughes 901 So. 2d at 848.

The State relies on the additional argument contained in its Amended Initial Brief and asks that this Court find that because none of the Witt test factors weighs in favor of Blakely being found to be a change of law that constitutes a development of fundamental significance, this Court should find Blakely, just as it has Apprendi, to not be retroactively applicable.

D. Neither Apprendi Nor Blakely Are Applicable to McGriff's Case Because No Findings Were Made by a Judge Rather Than a Jury After the Advent of the United States Supreme Court Decisions in Either Appprendi or Blakely.

The State relies on the arguments presented in its Amended Initial Brief. However, the State again points that all that occurred in the current case was a ministerial action, the removal of the habitual offender designation from the sentence. McGriff did not receive a different sentence with respect to length at that time. Affording McGriff new rights under newly created law affords him a windfall to which he is not entitled. It also affords him a windfall for delay by waiting well over ten years to file his motion to correct his sentence to attempt to obtain a benefit not available when his sentence became final. The State is entitled to have a conviction become final at some point close in time to the conviction date.

While the remedy addressed by McGriff ignores the applicability of the Galindez decision to his case requiring the

application of a harmless error analysis after any decision in his favor by this Court, addressing McGriff's argument related to empanelling a new jury, the State points out the impracticality of such a procedure. In this case, the conviction is more than twenty years old and require the State to locate witnesses long since disassociated from the case and the facts of the case. The State is disadvantaged by the passage of time in that its witnesses may no longer be available to testify live, exhibits may no longer exist a decade or more after the conviction became final on direct appeal, witnesses memories will have faded, etc. As a result, even if this Court creates a process permitting the State to empanel a new jury for purposes of finding the departure reasons beyond a result, the State's interest in finality is undermined.

It is even more impractical when placed in the true context of what McGriff admits should be available to the State after the defendant establishes that Apprendi and Blakely are applicable and after harmless error analysis fails to produce a result indicating that the record demonstrates that a rational jury would not have found the existence of the sentencing enhancement factors beyond a reasonable doubt, that each and every resentencing completed and every case where a ministerial correction is admitted would be subject to the empanelling of a

new jury. In fact, each Heggs resentencing and every case where the district courts found a HFO or PRR sentence to have been improperly notated on the sentencing document could be subject to requiring the empanelment of a jury. The result is an overwhelming number of sentencing phase proceedings in noncapital cases. This is one of the factors weighing against the retroactive application on collateral review under a Witt analysis.

E. Applying Blakely and Apprendi to McGriff's Case Destroys the State's Interest in the Finality of McGriff's Conviction.

To be clear, this case is before this Court on collateral relief. McGriff did not challenge the process used in either his original direct appeal decided in 1989 or in his appeal from resentencing. McGriff waited to challenge this matter until he filed a collateral challenge to his sentence. McGriff argues that the Blakely should be given full retroactivity which would allow him to challenge this matter now. Giving Blakely full retroactivity would destroy the State's interest in the finality of the conviction and in the finality of the resentencing proceeding. No court has found Blakely to be fully retroactive. McGriff ignores this fact fully in his brief and attempts to place himself in the same position as an individual on direct appeal. McGriff is not entitled to collaterally challenge this

sentence because applying Apprendi and Blakely to cases such as McGriff's eviscerates that interest by allowing the defendant to challenge the methodology of his sentencing long after he was originally sentenced and his challenges, if any, to the departure sentence are affirmed during his original direct appeal, and his right to challenge his new sentence had long since passed.

It is important to note, as Justice Cantero pointed out, interpreting Blakely and Apprendi as proposed by McGriff would make

> **Apprendi and Blakely no longer affect only the sentencing; they affect the conviction as well because the facts found at that time dictate the sentence.** If that is the case, then applying Apprendi and Blakely to a resentencing *would* "alter the effect of a jury verdict and conviction." Galindez v. State, 910 So. 2d 284, 285 (Fla. 3d DCA 2005). **Stated another way, if Apprendi and Blakely reverberate backward to the defendant's conviction, applying those cases to defendants whose convictions already were final constitutes a retroactive application, contrary to our decision in Hughes.** Such an approach also would be misguided as a matter of policy (retroactivity, after all, is more a policy question than anything else) **because it penalizes the State for pursuing the conviction in accordance with then prevailing law without allowing it a remedy, and because it allows the defendant to benefit from a conviction he has shown no right to reopen.**

Galindez, 955 So. 2d at 525 (J. Cantero concurring)(bold emphasis added). Additionally, despite McGriff's protestations

to the contrary, applying Blakely and Apprendi to McGriff's case and cases such as his, "would 'destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state . . . beyond any tolerable limit.'" Id. at 527-28 (*quoting* Witt, 387 So. 2d at 929-30.

Conclusion

Based on the foregoing, the State respectfully submits that this Court should reverse the ruling of the First District and find that neither Apprendi nor Blakely apply to resentencings such as the resentencing of the Respondent on collateral challenge. Even if this Court rules that Respondent can collaterally challenge his sentence and/or Apprendi and Blakely is applicable, this case is not fully resolved. The case **must** be remanded for the completion of a harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007)(concluding that harmless error analysis applied to Apprendi/Blakely error and determining that the failure to submit the issue of victim injury points to the jury was harmless); see also Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006)(explaining that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"). Under a harmless error analysis, the

lower court must determine if the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factors. Alternatively, this Court should permit the State the opportunity to empanel a jury for purposes of finding the sentencing enhancements beyond as reasonable doubt, should the lower court be unable to determine from the record that the error, if any, was harmless.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to John Stewart Mills, Esq., Mills & Creed, P.A., 865 May Street, Jacksonville, Florida 32204, by MAIL on 19th day of January, 2010.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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