IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL HUGHES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC02-2247

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, James Michael Hughes, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

The United States Supreme Court held in Apprendi v. New Jersey, infra, that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury. However, Apprendi does not apply retroactively to post-conviction proceedings. A change of law will not be considered for retroactive application unless the change emanates from this Court or the United States Supreme Court, is constitutional in nature, and constitutes a development of fundamental significance. Apprendi does emanate for the United States Supreme Court and involves constitutional rights; however, Apprendi does not constitute a development of fundamental significance.

The purpose of the rule announced in Apprendi is to ensure that once a defendant is found guilty, he or she may not receive a sentence higher than the statutory maximum unless those factors which are used to impose that above-the-maximum sentence are found by the jury. Although the due process and equal protection concerns are involved, Apprendi does not prevent any grievous injustices or disparities in sentencing between equally situated defendants, but instead, it merely changes the procedure employed for determining the appropriate sentence. A defendant serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that an equally-situated defendant whose sentence was enhanced based on jury-determined factors. There is not a reasonable

probability that a jury's finding regarding a sentencing factor will be any different from that of a judge. Thus, the due process and equal protection concerns involved in Apprendi are insignificant.

Moreover, an Apprendi error is not fundamental and must be raised in the trial court to be argued on direct appeal. Because Apprendi error can be harmless, the purpose behind the change of law is not fundamentally significant or of sufficient magnitude to be a candidate for retroactive application. In fact, nine federal circuit courts and two state supreme courts have found that Apprendi is not retroactive.

In addition, the trial judges have historically had the ability to determine sentencing factors, which weighs against applying Apprendi retroactively to post-conviction proceedings. Indeed, if this Court did give retroactive application to the Apprendi decision the impact on the administration of justice would be monumental. Petitioner is incorrect in arguing that there is only a window period of four years and nine months in which cases could be effective by the retroactive application of Apprendi. The period is much larger, and the fact that one can calculate a window period does not change the fact that the retroactive application of Apprendi would be monumental. Additionally, the retroactive application of Apprendi would result in a windfall to criminal defendants because there is not a reasonable probability that had the sentencing factor been presented to a jury rather than a judge the results would have

been different. In fact, retroactive application of Apprendi would place criminal defendants whose convictions were final in a better position that defendants who were convicted after the United States Supreme Court issued Apprendi because defendants raising the issue in post-conviction proceedings could have the points automatically deducted from their scoresheet, while a defendant raising an Apprendi violation on direct appeal would NOT be entitled to relief if he or she had not preserved the issue. Accordingly, the First District was correct in finding that Apprendi was not a change of law that constituted a development of fundamental significance which required retroactive application, and its opinion should be approved.

ARGUMENT

ISSUE I

DOES THE RULING ANNOUNCED IN APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000), APPLY RETROACTIVELY? (Restated)

Introduction

There are several preliminary points which must be recognized prior to addressing the narrow issue of whether Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), should be applied retroactively in post-conviction proceedings as the petitioner contends.

These proceedings were initiated by a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a) alleging that the sentence imposed was illegal because it exceeded the maximum five-year sentence authorized by the legislature for a third degree felony. The trial court denied the motion because it found that the sentence was within the statutory maximum created by the Florida Legislature in section 921.0014(2), Florida Statutes and upheld by this Court in Mays v. State, 717 So.2d 515 (Fla. 1998). The trial court rejected petitioner's argument that Mays had been overruled by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) noting that there was no support for such an argument and that inferior Florida courts could not overrule decisions of the Florida Supreme Court.

The very narrow issue on appeal in the district court from the summary denial of a rule 3.800(a) motion, pursuant to Florida Rule of Appellate Procedure 9.141(b) was whether the abbreviated record on appeal shows conclusively that no relief was appropriate, or, as phrased by this Court, are the claims "either facially invalid or conclusively refuted by the record." McLin v. State, 827 So.2d 948 (Fla. 2002). There is no provision for an evidentiary hearing on a rule 3.800(a) motion and there were no attachments to the trial court order denying relief. Thus, the issue came down to whether the claim was facially valid in alleging that the trial court record and Apprendi showed on their face that Apprendi had overruled Mays and retroactively declared section 921.0014(2) to be unconstitutionally applied.

The district court correctly held, as shown below, that Apprendi is not retroactively applicable to postconviction proceedings. However, despite having disposed of the case by its decision that Apprendi was inapplicable to postconviction proceedings, the district court gratuitously held that Apprendi had overruled Mays and that section 921.0014(2) was unconstitutionally applied. This was done without the benefit of the trial court record. The state disagrees for the following reasons.

First, the ruling was not necessary to the disposition of the appeal. It is too elementary to require citation that an

appellate court should not gratuitously declare statutes unconstitutional and overrule decisions of superior courts.

Second, as the trial court correctly recognized, no inferior state court has the constitutional authority to overrule decisions of this Court. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level." .... District courts "are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change." .... A "District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida."

Third, because this was an appeal of a summary denial of a rule 3.800(a) motion pursuant to rule 9.141(b), the record on appeal was truncated and it cannot be confidently asserted that section 921.0014(2) was unconstitutionally applied to the trial facts contained in the trial court record, but not the appellate, record. For instance, if the trial court record showed that it was uncontroverted that the evidence presented to the jury showed that the battery on which conviction was had was so violent that the victim's jaw was broken on both sides, it could be confidently concluded that any error, assuming there was error, in not obtaining a jury finding that the injury was severe was harmless under the Supreme Court's application of Apprendi. See, United States v. Cotton, et al, 122 S.Ct. 1781

(2002) (Even assuming plain error, there is no prejudice in not submitting a factual question to the jury when the evidence is overwhelming and uncontroverted)[1].

Fourth, the Florida Legislature, subject only to the cruel **and** unusual punishments clauses of the United States and Florida constitutions, has the plenary authority to prescribe maximum, and minimum, punishments for criminal offenses. Section 921.0014(2) prescribes indeterminate maximum and minimum sentences. If the Florida Legislature wishes to prescribe the maximum statutory sentence, using an indeterminate sentencing guidelines scoresheet, it has the constitutional authority to do so and the **new** maximum statutory sentence falls within the prescribed statutory maximum of Apprendi.

Fifth, even if one assumes that victim injury points should be determined by the jury and not the judge under Apprendi, and the state suggests it does not as argued below, that does not cause section 921.0014(2) to be unconstitutional nor does it overrule Mays. It only requires that this Court exercise its rulemaking authority under article V, section 5 of the Florida Constitution to formulate a rule for instructing the jury on all

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[1]The First District, contrary to rule 9.141(b), somewhat like the Third District in McLin, regularly ignores the narrow scope of review in rule 9.141(b) and the truncated record on appeal by directing the state pursuant to Toler v. State, 493 So.2d 489 (Fla. 1st DCA 1986) to address issues which cannot be adequately addressed in a rule 9.141(b) appeal. Here, for example, the state has the record on appeal from the direct appeal and knows well that there is no factual basis for arguing that victim injury was at issue.

crimes involving victim injury where the injury does not inhere in the crime.

The state turns now to the certified question.

Standard of Review

The issue of whether Apprendi v. New Jersey, is applied retroactively is a question of law, and therefor is subject to de novo review.

Argument

In Apprendi v. New Jersey, the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S.Ct. 2348. Petitioner contends that his sentences is illegal in violation of Apprendi because the assessment of victim injury points caused his sentence to exceed the statutory maximum pursuant to section 921.0014(2), Florida Statutes (1997).[2] However, petitioner's conviction was final on December 29, 1999, and the United States Supreme Court issued Apprendi on June 26, 2000. Hughes v. State, 826 So.2d 1070, 1072 (Fla. 1st DCA 2002). Therefore, the question before this Court is whether Apprendi qualifies for retroactive application.

[2] Section 921.0014(2) allows for an increase in the statutory maximum to the maximum guideline sentencing range when a criminal defendant's guidelines score raises the sentencing range beyond the statutory maximum set forth in Section 775.082, Florida Statutes.

In *Witt v. State*, 387 So.2d 922, 931 (Fla.1980), this Court set forth its test for determining whether or not a change of law requires retroactive application. This Court stated that an alleged change of law will not be considered for retroactive application unless the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. Florida based its test for retroactivity on the considerations set forth in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1967), in which the United States Supreme Court looked to the purpose to be served by the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297, 87 S.Ct at 1967. Apprendi does emanate for the United States Supreme Court and involves the right to a jury trial; however, Apprendi does not constitute a development of fundamental significance.

"A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application." Hughes v. State, 826 So.2d 1070, 1073(Fla. 1st DCA 2002). "[T]he Apprendi ruling

does not divest the state of the right to prohibit any conduct or the right to establish punishments for proscribed conduct[.]" Id. Hence, the question is whether it is a change of law which is of sufficient magnitude to require retroactive application. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (Fla. 1963), is an example of a law change which was of sufficient magnitude to require retroactive application. Witt, at 929. However, this Court also said:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Witt, at 929-930. For example in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), "the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)." Witt, at 929 n.26.

To determine if a change of law is of significant magnitude this court applies Stovall/Linkletter test which "requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice." Hughes at 1073. Crucial to the

court's analysis is the purpose to be served by the new rule. "Apprendi serves the purpose of ensuring that once a defendant is found guilty, that defendant may not receive a sentence higher than the statutory maximum unless those factors which are used to impose that above-the-maximum sentence are charged in the indictment and proven to the jury beyond a reasonable doubt." Hughes at 1073. However, the court noted that "[a]though the Apprendi ruling implicates due process and equal protection concerns, it does not specifically operate to prevent any grievous injustices or disparities in sentencing between equally situated defendants. Rather, this change of law merely changes the procedure employed for determining the appropriate sentence." Id. The court explained that for example "the plight of a defendant who is serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that of an equally-situated defendant whose sentence was enhanced based on jury-determined factors. In fact, it is conceivable that, if given the opportunity, a jury might find even more enhancing factors than would have been found by the judge." Hughes at 1074. Furthermore, Apprendi still allows the trial judge to access points for sentencing factors as long as the sentences falls within the statutory maximum. Id. Thus, the due process and equal protection concerns involved in Apprendi are so insignificant that it does not require retroactive application.

Indeed, in looking to the significance of Apprendi in contrast to other violations which required retroactive application, this Court should consider the fact that had the issue been properly presented and preserved in the trial court, there is very little expectation that the outcome of the sentence would be any different. For example, if a criminal defendant requested a special verdict regarding the victim's injury, it is unlikely that a jury's findings regarding the severity of a victim's injury would be any different that of a judge. Whereas there is a strong likelihood of a criminal defendant unfamiliar with the rules of evidence and unaware that crucial evidence against him is subject to suppression, will be convicted when unrepresented and acquitted if represented by competent counsel. Therefore, Gideon v. Wainwright, required retroactive application; however, Apprendi is not of sufficient magnitude because an Apprendi violation causes no harm to the defendant. The Sixth Circuit Court of Appeals stated:

> The accuracy that is improved by the Apprendi requirement is the better imposition of a proper sentence. In contrast, the accuracy that is improved by the rule of Gideon involves the basic determination of the defendant's guilt or innocence. By requiring that all defendants being charged with a serious crime are represented by counsel, Gideon protects the innocent from conviction. Apprendi merely limits the potential penalty to be imposed on a defendant.

Goode v. United States, 305 F.3d 378, 385 (6th Cir. 2002).

In fact, the United States Supreme Court recently held that an Apprendi claim is not plain or fundamental error. In United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002), the high court

found that an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error. If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir. 2002)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi, is not retroactive). In fact, the United States Supreme Court has even held that the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d (1968)(refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury); Cf. Brown v. Louisiana, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980)(holding that the right to a jury trial was retroactive because the conviction by non unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts).

Every other federal circuit which has addressed the issue has found that Apprendi is not retroactive. The United States Supreme Court has narrowed the test for retroactivity in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989),

holding that a new rule will not be applied in a collateral review unless it falls under one of two exceptions. The Court stated that "[f]irst, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[,]'" and "[s]econd, a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.' " 489 U.S. at 307, 109 S.Ct. at 1073. "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, __U.S.__, 121 S.Ct. 2478, 2484, 150 L.Ed.2d 632 (2001). "A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), citing, Teague, supra, 489 U.S., at 301, 109 S.Ct., at 1070.

Although the federal test is now slightly different for this Court's test for retroactivity, it is significant to this Court's analysis that the federal circuits addressing this issue have held that Apprendi is not retroactive. United States v. Sanders, 247 F.3d 139 (4th Cir. 2002); Curtis v. United States,

294 F.3d 841 (7th Cir. 2002)(holding that Apprendi is not retroactive because it is not a substantial change in the law; rather, it "is about nothing but procedure" and it is not so fundamental because it is not even applied in direct appeal without preservation relying on United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002)); United States v. Brown, 305 F.3d 304(5th Cir. 2002); Goode v. United States, 305 F.3d 378, 385 (6th Cir. 2002); United States v. Moss, 252 F.3d 993 (8th Cir. 2001); Jones v. Smith, 231 F.3d 1227 (9th Cir. 2001); United States v. Sanchez-Cervantes, 282 F.3d 664, 668 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir.2002); Untied States v. Aguirre, 2002 WL 188972 (10th Cir. Feb. 7, 2002). Additionally, state supreme courts that have held that Apprendi is not retroactive. Whisler v. Kansas, 36 P.3d 290 (Kan. 2001); Sanders v. Alabama, 815 So.2d 590 (Ala. 2001).

In agreement with the other courts in this nation, Apprendi is a change of procedure which is not of such significance to require retroactive application. As the First District stated: "If an Apprendi violation can be harmless, it is difficult to logically conclude that the purpose behind the change of law in Apprendi is fundamentally significant. Thus, analysis of the Apprendi ruling under the first prong of the Stovall/Linkletter test does not weigh in favor of retroactivity." Hughes at 1074.

The second prong of the Stovall/Linkletter test is the extent of reliance on the old rule. Trial judges have historically had

the ability to determine sentence-enhancing factors. The First District found that "Apprendi affects the long-exercised freedom of trial courts to determine the existence of sentence-enhancing factors by a preponderance of the evidence. Thus, it is axiomatic that courts have relied on this freedom to a great extent and for a long time. Again, such historical reliance on the old rule does not weigh in favor of applying the new rule retroactively." Hughes, at 1074.

The third prong of the Stovall/Linkletter test is the effect that retroactive application of the rule will have on the administration of justice. "[I]f the Apprendi decision is held to be retroactive ... the impact would be monumental." Hughes at 1074. "Each and every enhancement factor that was determined by a judge and which resulted in a sentence above the statutory maximum will either have to be stricken completely and the sentences recalculated without the factor (which in itself is a laborious process), or a jury will have to be empaneled to decide those factors." Id. See McCloud v. State, 803 So.2d 821, 827 (Fla. 5th DCA 2001)(finding that effects of Apprendi on guidelines sentences would be beyond colossal because "(V)irtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score.").

Petitioner argues that because the window period for the defendants effective by Section 921.0014(2), Florida Statutes,

which would be from the enactment of the provision in 1994 until the enactment of the criminal punishment code in 1998, is only a period of four years and nine months, the effect of the retroactive application of a Apprendi would be minimal. IB at 25. First, petitioner is incorrect because the Criminal Punishment also contains a provision which allows the sentence to exceed the statutory maximum in Section 775.082, Florida Statutes based upon the defendant's guidelines score. See § 921.0024(2), Fla. Stat. (2002). Thus, the period ranges from 1994 until the date Apprendi was issued. Furthermore, Apprendi violations are not limited to those who were sentenced pursuant to Section 921.0014(2). In any event, the fact that one can calculate a window period does not change the fact that the retroactive application of Apprendi would be monumental. Furthermore, as stated previously, the retroactive application of Apprendi would result in a windfall to criminal defendants because there is not a reasonable probability that had the sentencing factor been presented to a jury rather than a judge the results would have been different. Moreover, because Apprendi errors must be preserved, retroactive application of Apprendi would place criminal defendants whose conviction were final in a better position that defendants who were convicted after the United States Supreme Court issued Apprendi but who failed to preserved the issue in the trial court. Criminal defendants raising the issue in post-conviction proceedings could have the points automatically deducted from their

scoresheet, while a defendant raising an Apprendi violation on direct appeal would NOT be entitled to relief if he or she had not preserved the issue.

Accordingly, the First District correctly found that "(1) the Apprendi ruling does not operate to prevent any individual miscarriages of justice, (2) the courts have long-enjoyed the freedom to find sentence-enhancing factors beyond a preponderance of the evidence, and (3) retroactive application of the rule would result in an administrative and judicial maelstrom of postconviction litigation[.]" Hughes, at 1074-1075. Therefore, Apprendi is not a change of law that constitutes a development of fundamental significance which requires retroactive application.

Petitioner also argues that Ring v. Arizona, 122 S.Ct 2428, 153 L.Ed.2d 556 (2002), should be applied retroactively. However, this issue is beyond the certified question, and should not be addressed. Crocker v. Pleasant, 778 So.2d 978, 990-991 (Fla. 2001)(declining to address an issue because it was beyond the scope of the certified question and was not decided or discussed in the district court's opinion); Goodwin v. State, 634 So.2d 157 (Fla. 1994)(declining to address "the other issues raised by the parties, which lie beyond the scope of the certified question."). Furthermore, Ring v. Arizona, is not applicable to the case at bar as it involves the application of the death penalty and the case at hand is a non capital case. Accordingly, the State declines to address this issue.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 826 So. 2d 1070 should be approved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on November ____, 2002.

Respectfully submitted and served,

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[AGO# L02-1-15906]

CERTIFICATE OF COMPLIANCE

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

_____
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IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC02-2247

APPENDIX

Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA 2002)