IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL HUGHES, :

Petitioner, :

v. : CASE NO. SC02-2247
1D02-1258

STATE OF FLORIDA, :

Respondent. :

_____/

ON A CERTIFIED QUESTION
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This brief is filed in reply to the brief of respondent, which will be referred to as "RB." This brief is printed in 12 point Courier New font and submitted on a disk. The opinion of the lower tribunal has been reported as Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA 2002).

ARGUMENT

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE DECISIONS ANNOUNCED IN APPRENDI v. NEW JERSEY AND RING v. ARIZONA MUST BE APPLIED RETROACTIVELY TO PETITIONER, WHOSE SENTENCE HAD BECOME FINAL, BUT WHOSE SENTENCING GUIDELINES SCORESHEET CONTAINS POINTS FOR FACTORS WHICH WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Respondent does not dispute that petitioner was convicted of battery on a jail detainee by another jail detainee and sentenced to 80.4 months in state prison, on a 1995 sentencing guidelines scoresheet which contained four points for legal status and 40 points for severe victim injury. Respondent does not dispute that petitioner's pro se motion to correct sentence alleged that his 80.4 month state prison sentence, in excess of the statutory maximum, was illegal because no jury had found the legal status and victim injury points, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), and without those 44 points, his guidelines range would be 27.3 to 45.5 months. Respondent does dispute that Apprendi announced a new rule of law of constitutional significance which should be applied retroactively.

The standard of review is de novo, since this is purely a question of state law.

Respondent admits that the Florida test for retroactivity of a new constitutional decision was expressed by this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980) (RB

at 9), but continues to rely on the federal test as stated in Teague v. Lane, 489 U.S. 288 (1989) (RB at 13-15). As argued in petitioner's initial brief at 19-23, the federal Teague test is not applicable in Florida; rather, the Witt test states the proper expression of Florida law, and contains an element of fundamental fairness not present in the federal test.

Respondent also argues that since United States v. Cotton, 563 U.S. ___, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), held that an Apprendi violation could be harmless error, then Apprendi should not be applied retroactively on collateral attack (RB at 13). As noted in petitioner's initial brief at 14, Cotton is totally distinguishable. The question there was whether a federal indictment must allege the quantity of drugs where the judge imposed a statutorily-required mandatory minimum sentence for that quantity. The issue had not been raised at trial, but rather was raised for the first time on appeal after Apprendi was decided Moreover, as noted in petitioner's initial brief at 14, Florida has always had a state requirement, requiring the information to specifically allege the quantity of drugs, and the jury to specifically find the quantity in its verdict.

Respondent next argues that two states have held that Apprendi is not retroactive on collateral attack, citing Whisler v. State, 36 P.3d 290 (Ark. 2001), and Sanders v. State, 815 So. 2d 590 (Ala. 2001) (RB at 15). But in both of those states, the courts

relied on the federal Teague test for retroactivity, which is not applicable in Florida.[1] Respondent has failed to point out that Illinois does apply Apprendi retroactively to a timely-filed petition for collateral attack, because Illinois, like Florida, has not adopted the federal Teague test. People v. Carter, 773 N.E.2d 1140 (Ill. 1st DCA 2002); People v. Lee, 762 N.E.2d 18 (Ill. 3rd DCA 2001); and People v. Rush, 757 N.E.2d 88 (Ill. 5th DCA 2001).[2]

Respondent continues to agree with the lower tribunal that the retroactive application of Apprendi would be "monumental," and a "windfall" to people in petitioner's situation (RB at 17-18). Not so. Respondent disagrees with the four year and nine month "window period" calculated in petitioner's initial brief at 25. Respondent believes the window period would extend to the date Apprendi was decided, June 26, 2000, or six years, five months and 26 days.

No matter how one calculates the window period, respondent has submitted nothing

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[1]But Alabama does apply *Apprendi* to pipeline cases pending direct appeal. *Poole v. State*, 2001 WL 996300, ___ So. 2d ___ (Ala. Ct. Crim. App. Aug. 31, 2001).

[2]Illinois has also applied *Apprendi* to pipeline cases pending direct appeal. *People v. Ford*, 761 N.E.2d 735 (Ill. 2001). So have Arizona, *State v. Tschilar*, 27 P.3d 331 (Ariz. Ct. App. 2001), and North Carolina, *State v. Guice*, 541 S.E. 2d 474 (N.C. Ct. App. 2000).

to this Court to demonstrate how many people would be subject to a retroactive application of Apprendi. Moreover, respondent neglects to mention that this Court believed the six year window period for attacking consecutive habitual offender sentences in State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995), did not create a "windfall" for those "criminal defendants who had the misfortune to be sentenced during the six year window" and did not have an adverse effect on the court system.

Again, respondent has not informed us how many people had received a sentence in excess of the statutory maximum under the former sentencing guidelines, and so would be entitled to a retroactive application of Apprendi.

Finally, respondent declines to address the effect of Ring v. Arizona, 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), on petitioner's claim for relief (RB at 25). This is the most telling defect in respondent's position. As argued in petitioner's initial brief at 15-19, Ring demonstrates that Apprendi did announce a new rule of law of constitutional significance.

Thus, after Apprendi and Ring, only a jury is authorized to find victim injury and legal status points. Here, petitioner received a sentence of 20.4 months above the normal statutory maximum, based upon facts which were not found by the jury. This sentence is illegal.

As an alternative to the above argument that Apprendi must be retroactively applied under the Witt test, petitioner will also argue that he is entitled to the benefit of this Court's recent decision in State v. Klayman, 27 Fla. L. Weekly S951 (Fla. Nov. 14, 2002).[3]

In State v. Klayman, the defendant was convicted of trafficking in hydrocodone in an amount under 15 milligrams per dosage. After his conviction became final, this Court decided Hayes v. State, 750 So. 2d 1 (Fla. 1999), and held that the trafficking statute did not apply to a mixture of that dosage unit. Mr. Klayman filed a motion for post conviction relief and alleged that he was entitled to the benefit of the retroactive application of Hayes.

Because the intervening Hayes decision was only a "clarification" of the law and not a "change" in the law, it did not meet the Witt test and so it could not be applied retroactively.

However, this Court relied on Fiore v. White, 531 U.S. 225 (2001), and held that due process required that Mr. Klayman was entitled to the benefit of this Court's Hayes decision, even though his conviction and sentence were final at the time Hayes

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[3]Since this argument has arisen since petitioner filed his initial brief, he would not object to respondent filing a supplemental answer brief addressing it.

was decided:

> It thus is clear under *Fiore* that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, that were decided under the same version (i.e., the clarified version) of the applicable law. Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature.

State v. Klayman, *supra*, 27 Fla. L. Weekly at S952.

The same is true in the instant case. Even if Apprendi and Ring are not "changes" in the law under the Witt test, it is a violation of due process to deny petitioner the benefit of this "clarification" in the law of sentencing.

Although the Florida Legislature may have intended that a judge alone may find legal status and victim injury points to add to the sentencing guidelines scoresheet, the nation's highest court, through Apprendi and Ring, have clarified the law and now require that they be found by a jury beyond a reasonable doubt. Otherwise, petitioner is denied due process and has no other method of receiving the benefit of those decisions.

Thus, after Apprendi and Ring, only a jury is authorized to find victim injury and legal status points. Here, petitioner received a sentence of 20.4 months above the normal statutory maximum, based upon facts which were not found by the jury. This

sentence is illegal.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, as well as those expressed in the initial brief, petitioner requests that this Court quash the decision of the district court, and remand with directions to resentence petitioner in accord with its disposition of the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James W. Rogers and Trisha E. Meggs, Assistant Attorneys General, The Capitol, Tallahassee, FL., and by U.S. Mail to Petitioner, this ___ day of December, 2002.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the forgoing has been prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER