IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

HENRY MAYNARD BARNUM,

Respondent.

CASE NO. SC03-1315

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Parties (such as the State and Respondent, Henry Maynard Barnum), emphasis, and the record on appeal will be designated as in the Initial Brief, and "IB" will designate Petitioner's Initial Brief, "AB," will designate Respondent's Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts set forth in the initial brief.

ARGUMENT

ISSUE I

WHETHER THE ANALYSIS OF STATE v. KLAYMAN, 835 So.2d 248 (Fla.2002), APPLIES WHEN AN ISSUE THAT THE SUPREME COURT HAS CLARIFIED REQUIRES RESOLUTION OF A DISPUTED FACTUAL MATTER?

The issue before this Court is whether Thompson v. State, 695 So.2d 691 (Fla. 1997), should be applied retroactively.

Standard of Review

The issue of whether a case is applied retroactively is a question of law, and therefore is subject to de novo review.

Argument

Respondent was convicted of attempted first-degree murder of a law-enforcement officer in 1993. At issue is Section 784.07(3), Florida Statute (1991), which provided that:

> Notwithstanding the provisions of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempt was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.

This Court, in Thompson v. State, 695 So. 2d 691 (Fla. 1997), held that knowledge of the victim's status as a law-enforcement officer is a necessary element of the offense. However, this Court has limited the holding in Thompson by finding section 784.07 operates as a reclassification statute, and it does not create a new substantive offense. Merritt v. State, 712 So.2d 384 (Fla. 1998); Mills v. State, 822 So.2d 1284 (Fla. 2002).

Thus, at best an Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), issue is present because Respondent was sentenced based upon a factor which was not submitted to the jury although this factor could have been used to increase the statutory maximum for the offense.[1] Apprendi is not entitled to retroactive application. In United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002), the United States Supreme Court held 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 Apprendi errors were not plain or fundamental error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002). Thus, the due process concerns occurring when the jury fails to make a finding regarding a sentencing factor are not the same concerns present in State v. Klayman, 835 So. 2d 248, 250 (Fla. 2003) or Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

Respondent asks this Court what is more acceptable, convicting a defendant of a crime where the State failed to prove a prima

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[1] Nevertheless, respondent's sentence does not violate Apprendi because he was sentenced to twenty-seven years in prison for the attempted murder of the law enforcement officer. (I.31). Although Section 784.07(3), reclassified the offense to a life felony, attempted murder without an enhancement is a first degree felony. § 775.04(4)(a), Fla. Stat. (1991); § 782.04, Fla. Stat. (1991). The statutory maximum for a first degree felony is thirty years. § 775.082, Fla. Stat. (1991). Therefore, the twenty-seven year sentence is within the statutory maximum for a first degree felony.

facie case or where the jury was not instructed on an issue which is disputed and later determined to be an element of the crime. AB at 3. By asking this question, Respondent demonstrates a lack of understanding of the significant magnitude of due process concerns of Fiore and Klayman. Fiore was charged with operating a facility without a permit. Although Fiore had a permit, the Commonwealth argued that he had so deviated from his permit it was the equivalent of acting without a permit. 531 U.S. at 228-229, 121 S.Ct. at 714. However, the state high court, in a subsequent case, interpreted the statute to mean that one who deviates from his permit is not operating without a permit. 531 U.S. at 227, 121 S.Ct. at 713. Thus, Fiore had not violated the law, and under no circumstances could his conviction stand.

In Hayes v. State, 750 So.2d 1 (Fla.1999), this Court held that "the trafficking statute, since the time of enactment, was intended to apply only to Schedule I and II drugs or to mixtures containing Schedule I or II drugs." State v. Klayman, 835 So.2d 248, 251 (Fla. 2002). "Because the mixture possessed by Hayes did not contain a Schedule I or II drug, she could not be convicted of trafficking." Id. In State v. Klayman, Klayman argued that the decision in Hayes should be applied retroactively. This Court noted that the key reason why it should be applied retroactively is that the prior cases "in construing the statutes contrary to legislative intent, the courts imposed criminal sanctions without statutory

authority--i.e., they imposed criminal sanctions where none were intended. The rulings thus violated the Due Process Clause and all defendants convicted or sentenced without statutory authority were entitled to relief." Id. at 254.

Such concerns are not present in the case at bar. In all likelihood, Respondent would have been convicted of attempted murder of a law enforcement officer just the same, if the jury had been instructed that they must find respondent knew the victim was a law enforcement officer. The Thompson decision does not entitle Respondent to an acquittal as the retroactive application of the cases at issue in Fiore and Klayman did. Thus, due process concerns in the case at bar are not the equivalent of a conviction of crime when the state cannot prove a prima facia case.

Respondent also contends that fundamental fairness mandates retroactive application lest we are left with inconsistent results. Respondent overlooks the fact that inconsistent results are inherent in any retroactivity analysis. For example, in State v. Woodley, 695 So.2d 297 (Fla.1997), this Court held that State v. Gray, 654 So.2d 552 (Fla.1995), in which this Court had held that attempted felony murder was no longer a criminal offense was not entitled to retroactive application. Thus, criminals whose convictions were final the week before Gray was decided must continue to serve their sentence while criminals whose appeals were in the pipeline at the time this Court issued Gray were granted relief. This type

of disparity is inherent in the process. Accordingly, cases like Moreland v. State, 582 So.2d 618 (Fla.1991), must be limited to its very unique factual circumstance.[2]

In fact, in a recent case very similar to the case at hand, this Court held that its decision in Delgado v. State, 776 So.2d 233 (Fla. 2000), was not entitled to retroactive application. In his direct appeal, Jimenez argued that the State had failed to prove the elements of burglary "because there was no proof of forced entry, or that [the victim] refused entry, or that she demanded that he leave the apartment." Jimenez v. State, 703 So.2d 437, 440 (Fla. 1997). This Court found that "[t]here is ample circumstantial evidence from which the jury could conclude that [the victim] withdrew whatever consent she may have given for him to remain when he brutally beat her and stabbed her multiple times in her neck, abdomen, side, and through her heart." Id. at 441. However, in Delgado v. State, this Court held that the "remaining in" language of the burglary statute "applies only in situations where the remaining in was done surreptitiously." Id. at 240. This Court specifically

[2] Respondent's reliance on Smith v. State, 598 So.2d 1063 (Fla. 1992), for the proposition that fundamental fairness requires retroactive application is misplaced. In Smith, this Court held that new rules of law or changes in the law should be given retrospective application in every case pending on direct review or not yet final. This Court did not address the retrospective application of a new rule of law to cases which were final. Therefore, Smith is irrelevant to this Court's analysis.

overruled Jimenez v. State, 703 So.2d 437 (Fla. 1997), in Delgado. Id. at 241. This Court has also held that the failure to instruct the jury that the defendant 'surreptitiously' remained inside the property is fundamental error when the issue is in dispute. Floyd v. State, 850 So. 2d 383, 402 (Fla. 2002). Nevertheless, when Jimenez, like Respondent, filed a motion for postconviction, claiming that his conviction must be reversed based upon Delgado, this Court denied relief. Jimenez v. State, 810 So.2d 511 (Fla. 2001). This Court found that:

> We determine that Jimenez is not entitled to relief. His convictions were final prior to the release of our opinion in Delgado. Retroactivity is therefore determined by the criteria set forth in Witt v. State, 387 So.2d 922 (Fla.1980). In order for Delgado to have retroactive application, it must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Id. at 929-30. We have determined that Delgado does not meet the second or third prongs of the Witt test; hence it is not subject to retroactive application.

Jimenez v. State, 810 So.2d 511, 512 -513 (Fla. 2001). Delgado v. State, 776 So.2d 233, 241 (Fla. 2000)("This opinion will not, however, apply retroactively to convictions that have become final[.]").[3] Likewise, in the case at bar, even if Thompson had remained good law, pursuant to the principles set forth in

[3] Although not critical to this issue, the State notes that the Legislature passed Section 810.015, Florida Statute (2002), which provided that Delgado was contrary to the Legislative intent and the burglary statute should be construed in conformity with Jimenez v. State, 703 So.2d 437 (Fla. 1997).

Delgado, respondent is not entitled to retroactive application of the Thompson decision.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 849 So. 2d 371 should be disapproved, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on October _____, 2003.

Respectfully submitted and served,

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[AGO# L03-1-23992]

CERTIFICATE OF COMPLIANCE

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

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Trisha Meggs Pate
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