IN THE SUPREME COURT OF FLORIDA

MICHAEL RAY CLINES,

Petitioner,

v. CASE NO. SC04-1882

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the defendant before the trial court and the appellant in the lower tribunal. Respondent's answer brief will be referred to as "AB," followed by the appropriate page number in parentheses. The opinion of the lower tribunal has been reported as Clines v. State, 881 So. 2d 721 (Fla. 1st DCA 2004). This brief is also being submitted on a disk.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF DUAL SENTENCES AS AN HABITUAL OFFENDER AND A VIOLENT CAREER CRIMINAL FOR THE SAME CRIME IS ILLEGAL.

The judge imposed a 10 year sentence on the resisting arrest charge as an habitual offender, with a 10 year mandatory minimum as a violent career criminal. The standard of review is de novo, since this issue involves only a question of law.

Respondent is incorrect to reject the position of this Court and the Second and Fourth Districts that such a dual designation is contrary to legislative intent (AB at 10-11). Respondent is incorrect to rely on the contorted discussion of the lower tribunal concerning the Legislature's use of the term "or" in the recidivist statute (AB at 11-14).

In Grant v. State, 770 So. 2d 655 (Fla. 2000) this Court held that the imposition of concurrent 15 year sentences, both as an habitual offender [HO] and prison releasee reoffender [PRR], were improper. This Court determined that such dual sentences were authorized only if the HO sentence was greater than the PRR sentence, because the PRR sentence was in the nature of a mandatory minimum.

Here, petitioner received a 10 year sentence as an

habitual offender and a 10 year mandatory minimum as a violent career criminal [VCC]. Under this Court's clear expression in Grant, these dual sentences are not authorized because the HO sentence is not greater than the VCC sentence, and the VCC sentence is in the nature of a mandatory minimum.[1] This Court need not read any further.

In Oberst v. State, 796 So. 2d 1263 (Fla. 4th DCA 2001), the court extended Grant to petitioner's situation and held that one may not be sentenced on the same crime as an HO and VCC:

> *Using legislative intent as our guide*, **we conclude that the dual designation in this case is not proper.** A HFO is defined in section 775.084(1)(a), Florida Statutes (1999), and a VCC is defined in subsection (d). Subsections 775.084(3)(a), (b), and (c) all require that the court make certain findings in a separate proceeding which will qualify the defendant as either a HFO, three- time violent felony offender, or a VCC. However, subsection (4)(f) states that "[a]t any time when it appears to the court that the defendant is eligible for sentencing under this section, the court shall make that determination as provided in paragraph (3)(a), paragraph (3)(b), ***or*** paragraph (3)(c)." (Emphasis added). Further, (4)(g) and (h), both refer to "a" sentence imposed under this section. Thus, the legislative language is in the disjunctive in section (4)(f) and the singular in sections (g) and (h). In

[1]Respondent has admitted as much at AB at 10, footnote 1.

> contrast, in *Grant*, the court noted that in the PRRA the language was in the conjunctive and ordered that an offender "be punished to the fullest extent of the law and as provided in this subsection." *Grant*, 770 So.2d at 658 (emphasis added). The use of the disjunctive "or" in section 775.084(4) reflects a **legislative intent to require the court to designate a defendant as either a HFO or a three-time violent felony offender or a VCC, but not any combination.**
>
> Because there are differences between the provisions for discretionary early release, designation as both a HFO and a VCC does make some difference to appellant. Therefore, the trial court must choose one or the other but not both. Unlike the PRRA, there is no mandatory duty on the court to sentence as a VCC. *Compare* § 775.082(9)(a)(3), Fla. Stat. (1999), *with* 775.084(3)(c)(5), Fla. Stat. (1999).
>
> We therefore reverse and remand for resentencing of appellant as either a HFO *or* a VCC on the three burglary counts involved in these proceedings.

Id. at 1264-65; italics in original; bold emphasis added.

Thus, notwithstanding respondent's view to the contrary, the Fourth District has properly concluded that the Legislature, by the use of the term "or," has plainly expressed its intent that one may not be sentenced as an HO and a VCC under the statute. The Second District reached the same conclusion in Works v. State, 814 So. 2d 1198 (Fla. 2nd DCA 2002). *See also* Frazier v. State, 877 So. 2d 838 (Fla. 3rd

DCA 2004), in which the Third District held that Grant prohibits concurrent life sentences as a PRR and a VCC.

Therefore, petitioner's dual sentences on the resisting charge are improper under Grant, Oberst and Works, *supra*, because the 10 year habitual offender sentence is no greater than the 10 year mandatory violent career criminal sentence. This Court must adopt the position of the Second and Fourth Districts, approve Oberst and Works, *supra*, quash the opinion of the lower tribunal, and vacate these dual sentences.

ISSUE II

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF HABITUAL OFFENDER AND VIOLENT CAREER CRIMINAL SENTENCES BY THE JUDGE WITHOUT A JURY IS ILLEGAL UNDER BLAKELY v. WASHINGTON, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (June 24, 2004).

The Florida recidivist statute, §775.084, Fla. Stat., is invalid in light of Blakely v. Washington.

The standard of review is de novo, since this issue involves only a question of law.

Petitioner admittedly did not raise this issue in his direct appeal below, because the prevailing authority was against his position,[2] but asks this Court to address it in the interest of judicial economy. This Court has the power to go beyond the certified question, address other issues, and even reverse on them. *See, e.g.*, Weiand v. State, 732 So. 2d 1044 (Fla. 1999).

Respondent correctly observed that no court had, prior to Blakely, accepted the argument that Apprendi v. New Jersey, 530 U.S. 466 (2000), was applicable to habitual offender or other enhanced sentences (AB at 18-21). However, respondent's simplistic view, that Blakely and Apprendi affect only sentencing guidelines (AB at 21), fails to recognize that the

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[2]*See, e.g.*, *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004); and *Smith v. State*, 793 So. 2d 889 (Fla. 2001).

entire sentencing landscape has changed after Blakely.

The court in State v. Mitchell, 687 N.W.2d 393 (Minn. Ct. App. 2004), has recognized that Blakely applies to enhanced recidivist sentences. In that case, the defendant was convicted of felony theft, and received an enhanced sentence because the judge found that he had "five or more prior felony convictions and that his offense was part of a pattern of criminal conduct." *Id.* at 395. The court held that the judge alone could no longer constitutionally find a "pattern of criminal conduct" without a jury:

> The *Apprendi* court emphasized that the "prior conviction" recidivism factor is a "narrow exception" to the general rule that all facts essential to the maximum punishment must be found by the jury. 530 U.S. at 491, 120 S.Ct. at 2362. This exception is justified in part by "the certainty [of] procedural safeguards attached to any 'fact' of prior conviction." *Id.* at 488, 120 S.Ct. at 2362. The bare fact of a prior conviction, however, does not establish the motive behind the crime, its purpose, results, participants, or victims. As to those aspects of the prior conviction, so essential to the determination of a "pattern of criminal conduct" under *Gorman,* the earlier criminal prosecution has provided no "procedural safeguards." We, therefore, conclude that the career-offender statute's finding of "pattern of criminal conduct" is beyond the scope of the recidivism exception recognized in *Apprendi.* **Because the sentencing judge, not a jury, determined facts other than the**

> **fact of Mitchell's prior convictions, which were essential to Mitchell receiving an enhanced sentence under the career-offender statute, the sentence was imposed in violation of the Sixth Amendment.** Accordingly, we vacate the sentence imposed and remand for resentencing in a manner not inconsistent with this opinion.

Id. at 400; bold emphasis added.

The same is true in the instant case. While our habitual offender statute does not require the judge to find a "pattern of criminal conduct," it allows the judge alone to find: (1) that the instant offense was committed within five years of a prior offense or release from prison; (2) the necessary two prior convictions are for "qualified offenses;" (3) the necessary two prior convictions were not entered on the same date; and (4) the prior convictions have not been set aside or subject to a pardon. §775.084(1)(a), (e), and (5), Fla. Stat. Moreover, the HO statute allows the judge alone to make that finding by a preponderance of the evidence. §775.084(3)(a)4., Fla. Stat.

In Brown v. Greiner, 258 F.Supp.2d 68 (E.D.N.Y. 2003), the defendant was convicted of a crime with a maximum seven year sentence. He was sentenced to an enhanced term of 25 years to life as a "persistent felony offender," upon a finding by the judge alone, by a preponderance of the

evidence, that the "history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." *Id.* at 87.

The court found an Apprendi violation because no jury had found beyond a reasonable doubt that extended incarceration and life-time supervision would best serve the public interest:

> Brown received a sentence that far exceeded the statutory maximum for his offense of conviction based on numerous facts, other than the fact of his prior convictions, that were found by the sentencing court and were not submitted to a jury or proved beyond a reasonable doubt.
>
> * * *
>
> The question following *Apprendi* is whether the findings regarding the history and character of the defendant and the nature and circumstances of his criminal conduct exposed Brown to greater punishment than that authorized by the jury's verdict. *Id.* Because the answer to that question is "yes," Brown's sentence violated his rights under the Due Process Clause of the Fourteenth Amendment. The contrary conclusions of the New York courts violated the clear mandate of *Apprendi*.

Id. at 90; 91.

Significantly, our HO statute requires the judge to impose an HO sentence if the state proves that the defendant

meets the statutory criteria, unless the judge alone determines that the HO sentence "is not necessary for the protection of the public." §775.084(3)(a)6., Fla. Stat.

As recognized by the Minnesota and New York courts, Apprendi and Blakely now require such factual recidivist findings to be made by a jury, using the standard of beyond a reasonable doubt.

Petitioner argued in his initial brief at 14-16 that because the HO statute doubles the normal statutory maximum from five to 10 years for a third degree felony, the HO determination is no longer a "sentencing factor" for the judge alone under McMillan v. Pennsylvania, 477 U.S. 79 (1986), but rather is subject to a jury finding, beyond a reasonable doubt, under Blakely. Respondent continues to believe that Blakely is limited only to sentencing guidelines and so failed to address this argument at all.

Petitioner argued in his initial brief at 16-17 that because the VCC statute triples the normal statutory maximum from five to 15 years for a third degree felony, and requires a 10 year mandatory minimum without any possibility of early release, the VCC determination is no longer a "sentencing factor" for the judge alone under McMillan v. Pennsylvania, *supra*, but rather is subject to a jury finding, beyond a

reasonable doubt, under Blakely. Again, respondent continues to believe that Blakely is limited only to sentencing guidelines and failed to address this argument at all.

While our VCC statute does not require the judge to find a "pattern of criminal conduct," it allows the judge alone to find: (1) that the instant offense was committed within five years of a prior offense or release from prison; (2) the necessary three prior enumerated convictions are for "qualified offenses;" (3) the necessary three prior enumerated convictions were not entered on the same date; and (4) the prior enumerated convictions have not been set aside or subject to a pardon. §775.084(1)(d),(e), and (5), Fla. Stat. Again, the VCC statute allows the judge alone to make that finding by a preponderance of the evidence. §775.084(3)(c)3., Fla. Stat.

Significantly, our VCC statute also requires the judge to impose a VCC sentence if the state proves that the defendant meets the statutory criteria, unless the judge alone determines that the VCC sentence "is not necessary for the protection of the public." §775.084(3)(c)5., Fla. Stat.

Again, as recognized by the Minnesota and New York courts, Apprendi and Blakely now require recidivist findings to be made by a jury, using the standard of beyond a

reasonable doubt.

Petitioner argued in his initial brief at 17-18, on authority of State v. Johnson, 766 A.2d 1126 (N.J. 2001), that any sentencing statute which causes the defendant to serve more time in prison than he would have served without the enhancement is subject to a jury finding, beyond a reasonable doubt, under Blakely. Again, respondent continues to believe that Blakely is limited only to sentencing guidelines and failed to address this argument at all.

The VCC statute requires a mandatory minimum 10 year sentence, without any possibility of early release. It is hardly a novel idea for the Florida courts to require a specific finding by a jury to support the imposition of a mandatory minimum sentence, because this Court has required that finding for at least 20 years. *See* State v. Overfelt, 457 So. 2d 1385 (Fla. 1984).

The HO and VCC statute, §775.084, Fla. Stat., suffers from the same constitutional infirmity under Apprendi and Blakely, because it is based on a finding by the judge alone that the defendant qualifies as an HO or a VCC and also constitutes a danger to the community. Thus, the Florida recidivist statute is unconstitutional in light of Apprendi and Blakely.

CONCLUSION

Based upon the arguments presented here and in the initial brief, the petitioner respectfully asks this Court to hold that petitioner cannot be sentenced as an habitual offender and a violent career criminal for the same crime. Petitioner also asks this Court to hold that the judge alone cannot find a defendant to be an habitual offender or a violent career criminal by a mere preponderance of the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Trisha Meggs Pate, Assistant Attorney General, The Capitol, Tallahassee, Florida; and to petitioner, #727883, Liberty C.I., 11064 N.W. Dempsey Barron Road, Bristol, Florida 32321; on this ___ day of November, 2004.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief was prepared in Courier New 12 point type.

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P. DOUGLAS BRINKMEYER