IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC06-1173**

CHRISTIAN FLEMING,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR RESPONDENT

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RESPONDENT'S ANSWER BRIEF

I. PRELIMINARY STATEMENT

CHRISTIAN FLEMING, was the defendant in the trial court, appellant in the appellate court, and will be referred to in this brief as either "respondent," "appellant," or by his proper name.

References to the Record on Appeal will be by the volume number in Roman numerals followed by the appropriate page number, all in parentheses.

II. STATEMENT OF THE CASE AND FACTS

An Amended Information filed in the Circuit Court for Columbia County on April 21, 1997, charged Christian Fleming with aggravated battery, shooting within a dwelling, and false imprisonment. (I R 1-2). A jury found him guilty as charged (I R 9-10), and on June 30, 1997, the court sentenced him to serve consecutive terms of 10 years in prison on the two second-degree felonies and a consecutive term of five years on the false imprisonment (I R 12-33).

Fleming later filed a motion to correct illegal sentence as permitted by Rule 3.800(a), Fla. R. Crim. P., which the trial court denied. In 2002, the First District Court of Appeal reversed and remanded for resentencing under Heggs v. State, 759 So. 2d 620 (Fla. 2000) and Trapp v. State, 760 So. 2d 924 (Fla. 2000)(I R 35-36); Fleming v. State, 808 So. 2d 287 (Fla. 1st DCA 2002).

At the April 3, 2003 resentencing, Fleming's corrected scoresheet reflected the following:

Primary offense, agg battery, level 7		42.0 points
Additional offenses:		
Shooting in dwelling, level 6	7.2	
False imprisonment, level 6	7.2	14.4
Victim injury, severe		**40.0**
Prior record, level 7		5.6
TOTAL POINTS		102.0

This called for a sentence in the range of 55.5 to 92.5 months (I R 39-40).

The judge departed from that recommendation and resentenced the defendant to 10 years in prison for the aggravated battery, five years in prison for the shooting in a dwelling, and five years in prison for the false imprisonment. All sentences are to run consecutively to one another, so Fleming has a total prison sentence of 20 years in prison (I R 42-47; II R 108-12).

Justifying this departure sentence, the judge checked off four reasons:

> Offense was one of violence and was committed in a manner that was especially heinous, atrocious or cruel.
>
> Victim suffered extraordinary physical or emotional trauma or permanent physical injury, or was treated with particular cruelty.
>
> Offense committed in order to prevent or avoid arrest, to impeded or prevent prosecution for the conduct underlying the arrest, or to effect an escape from custody.
>
> Primary offense is scored at level 7 or higher and the defendant has been convicted of one or more offenses that scored, or would have scored, at an offense level 8 or higher. (I R 38).

Fleming failed to file a timely notice of appeal, but on March 16, 2005, the First DCA granted him a belated appeal from the resentencing order. Fleming v. State, 895 So. 2d 538 (Fla. 1st DCA 2005). Before he submitted his Initial Brief he filed a motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)(2), alleging that the 40 points awarded him for severe victim injury should not have been scored, and that the reasons for departure were invalid, because Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington,

542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), required victim injury and reasons for departure to be found by a jury (III SR 114-22). The trial court never entered an order on this motion, so Fleming filed his Initial brief, as permitted by Rule 3.800(b), Fla. R. Crim. P., arguing the same issues as he had presented in his 3.800(b) motion. The State contested the claim that the trial court had incorrectly scored the 40 points, but it conceded that the three reasons used to justify departing from the guideline sentence were invalid.

The First District Court of Appeal found that the court had correctly scored the 40 points, but it reversed the defendant's sentence and remanded for resentencing because the reasons used to justify the departure sentence were invalid. Fleming v. State, 31 Fla. L. Weekly D1112 (Fla. 1st DCA April 21, 2006).

At the State's request, the First District certified conflict with other appellate courts on the issue of whether the United States Supreme Court decisions in Blakely and Apprendi apply to resentencing proceedings.

This Court accepted jurisdiction in this case, and in an order dated February 11, 2009, essentially asked Fleming and the State to consider the retroactive application of those cases to Fleming's situation.

IV. SUMMARY OF THE ARGUMENT

While Fleming's sentence was final for most purposes, it was not so for purposes of Rule 3.800(a), Fla. R. Crim. P. That rule allows a trial court to correct an illegal sentence at any time, and that time may, as this Court has recognized, occur years and even decades later. Because the respondent's sentence was not final when Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), were decided, he gets the benefit of their holdings.

The State argues that Fleming failed to preserve the issue this Court is considering. Yet, it never objected to the First District's ruling, and indeed, it conceded before the First District the errors made by the trial court. Just as defendants have to object to court rulings to preserve them for appeal, the State has to do so also.

Using the analysis presented in Witt v. State, 387 So. 2d 922 (Fla. 1980), even if Fleming's sentence was final, this Court should nonetheless apply Apprendi and Blakely retroactively.

Finally, the fundamental question posed by this case is the continued viability of Rule 3.800(a). Nothing in this case or any recent changes in the law, however, warrants any need to alter it. It has worked well for almost 40, and its

meaning, application, and limits have been clearly articulated. As such, this Court should reconsider whether it should have accepted jurisdiction in this case.

V. ARGUMENT

ISSUE I:

WHETHER APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000), AND BLAKELY V. WASHINGTON, 542 U.S. 296 (2004), APPLY TO RESENTING PROCEEDINGS HELD AFTER APPRENDI ISSUED WHERE THE RESENTENCING WAS FINAL AFTER BLAKELY ISSUED, IN CASES WHICH THE CONVICTIONS WERE FINAL BEFORE APPRENDI ISSUED.

The State has gone to considerable analytical effort to argue why Apprendi and Blakely should not retroactively apply to this case. (Appellee's brief at pp. 11-25). That analysis, however, hinges on its conclusion that Fleming's sentence was final. As argued here, it was not, and that makes all the difference.

The issue, as framed by this Court, is a bit difficult to understand. Placing the critical events in a timeline might help illuminate the problem.

June 30, 1997-Fleming is adjudged guilty and sentenced.

2000 Apprendi v. New Jersey is decided by the United States Supreme Court

2002-Fleming files a 3.800(a) motion and the First DCA reverses for resentencing

April 3, 2003- Fleming is resentenced

2004- Blakely v. Washington is decided.

March 16, 2005 belated appeal granted by First DCA

2006-First DCA decides Fleming, relying on Apprendi and Blakely.

The issue at first blush involves the question of whether Fleming should get the benefit of Apprendi and Blakely. As will be explained, however, they fully apply because the trial court resentenced him after Apprendi, and the nation's high court had decided Blakely by the time the First District reversed the lower court's sentence.

A. The law on retroactive application of the law.

Retroactive application of the law falls into two broad categories: statutory and decisional. Normally changes in statutory law apply prospectively unless the legislature has shown a clear intent that it does so retroactively. Bates v. State, 750 So. 2d 6, 10 (Fla. 1999)("[W]ithout clear legislative intent to the contrary, a law is presumed to apply prospectively.")

Applying changes in the law as announced in opinions of courts retroactively is a bit more complicated. Normally, as with legislative changes, the law applies prospectively. The problem arises regarding cases that are pending or "nonfinal" when the change occurs. This Court in Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), declaring that "principles of fairness and equal treatment . . . compel us to adopt [an]. . . evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinal cases, said:

> Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation must be given retrospective application the courts of this state in every case pending on direct review or not yet final.[1]

Cases which were "final" could also be affected by changes in the law, but the analysis was much more strict because of the State's strong, legitimate interest in the finality of cases. Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). At some point, as this Court said in Witt, litigation must come to an end, and "The importance of finality in any justice system, including the criminal justice system, cannot be understated. Id. at 925. Hence, the three part test articulated in Witt established a significant threshold a defendant had to meet to get the benefit of some decisional change in the law if his or her case was final at the time of that change. Johnson v. State, 904 So. 2d 400, 408 (Fla. 2005).[2]

B. The status of Fleming's case at the time of the 2006 opinion.

Thus, the critical first question presented to this Court focuses on the status of Fleming's case. Was it final or not? This question, in turn, begs the question of what finality means.

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[1] In Johnson v. State, 904 So. 2d 400, 407 (Fla. 2005), this Court also included the decisions by the United States Supreme Court as a source of new law.

[2] This Court in Johnson showed just how hard it is for a party to meet that three factor test. In that case, it refused to apply Ring v. Arizona, 536 U.S. 584 (2002) retroactively to cases which were final at the time that decision issued.

Finality, as that term has been used in motions for post conviction relief under Rule 3.850, Fla. R. Crim. P., occurs "when any such direct review proceedings have concluded and jurisdiction to entertain a motion for post-conviction relief returns to the sentencing court." Ward v. Dugger, 508 So.2d 778, 779 (Fla. 1st DCA 1987); see also Cardali v. State, 794 So.2d 719, 721 (Fla. 3d DCA 2001). This Court has given finality a slightly more practical definition. "For purposes of [Rule 9.140(j)(3) Fla. R. App. P.] a conviction becomes final after issuance of the mandate or other final process of the highest court to which direct review is taken, including review in the Florida Supreme Court and United States Supreme Court." In re Amendments to Florid Rule of Appellate Procedure 9.140(c)(1), 901 So. 2d 109, 118 (Fla. 2005). Illegal sentences appear to be the single exception to these definitions, as Rule 3.800(a), Fla. R. Crim. P., recognizes. If a defendant received an illegal sentence, he can raise a claim alleging that illegality years or even decades after the conviction and sentence have otherwise become final. Jackson v. State, 983 So. 2d 562, 573-74 (Fla. 2008); Maddox v. State, 760 So. 2d 89, 100, fn. 8 (Fla. 2000)(Illegal sentences that can be raised decades after the sentence has become final are a narrower class of errors than fundamental error.)[3] If so, just as principles of fairness and equal treatment

[3] Williams v. State, 957 So.2d 600, 602 (Fla. 2007) ("We have generally defined an 'illegal sentence' as one that imposes a punishment or penalty that no judge

require the defendant receive the benefit of any change in law that has occurred in that intervening period in Smith's "pipeline" cases, those same principles require defendants who have been illegally sentenced also receive their benefit. See, Bedford v. State, 617 So. 2d 1134, 1135 (Fla. 4th DCA 1993)(Anstead, dissenting); reversed, Bedford v. State, 633 So. 2d 13, 14 (Fla. 1994).[4]

And that happened in this case. Fleming was convicted and sentenced in 1997. Four or five years later, and certainly long after his case had become final, he used Rule 3.800(a) to challenge the legality of his sentence. The First DCA agreed with him. Under this Court's rulings in Trapp v. State, 760 So. 2d 924, 928 (Fla. 2000), and Heggs v. State, 759 So. 2d 620, 627 (Fla. 2000), he had been illegally sentenced in 1997, which meant that in 2002 he was entitled to a resentencing. Fleming v. State, 808 So. 2d 287 (Fla. 1st DCA 2002). At that point, the direct review process for the 1997 conviction was reinstated or resurrected, but because it happened in 2003 Fleming had the benefit of the advances in the law since 1997. It was as if the 1997 hearing had been transported to 2003 so the court

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under the entire body of sentencing statutes and laws could impose under any set of factual circumstances.")

[4] In dissent in Bedford, then Judge Anstead quoted from Hayes v. State, 598 So. 2d 135, 138 (Fla. 5th DCA 1992) which explained why illegal sentences can be challenged at any time: "Certainly in imposing the sanctions of the law upon a defendant for illegal conduct the judicial system itself must follow and obey the law and not impose an illegal sentence, and, when one is discovered, the system should willingly remedy it."

could sentence him as if he had never been sentenced, which, in a sense, he never had.

But by 2002, of course, the United States Supreme Court had decided Apprendi, so that case clearly applied to Fleming's resentencing. Moreover, by the time the First DCA entered its last opinion in this case in 2006, which is the one before this Court, the national high court had also decided Blakely, which means that it also applies to this case, which further means that it would not even fall into Smith as a pipeline case. Hence, both United States Supreme Court cases applied to Fleming's sentence. By 2006, when the First DCA ruled in Fleming's case, Apprendi and Blakely had been decided, so that state court had no retroactivity concerns to consider. It merely had to apply the holdings of those cases, which it did.

C. Other issues raised by the State's brief.

On pages 25-35 of its brief, the State argues that Fleming failed to "properly preserve this issue for review by this Court." Similarly, on pages 38-39, it argues that "Two of the Departure reasons contained in Fleming's Original and Resentencing Departure orders were inherent in the Jury's verdict." These are strange arguments because it never raised this objection when it had the

opportunity to do so before the First District Court of Appeal. Indeed, it conceded the Apprendi error.

> Appellant also argues that the first three grounds for upward departure entered by the trial court were found by the trial judge and not the jury in violation of Apprendi, and also that the fourth ground is invalid on its face, as appellant does not have any present or prior convictions at level 8 or higher. The State concedes error on all four grounds relating to the upward departure.

Fleming, 31 Fla. L. Weekly D1112 (Fla. 1st DCA April 21, 2006).

Just as defendants must object to preserve issues for appeal, the State must also alert the court of the alleged error in its rulings to preserve them for appellate review. State v. Mae, 706 So. 2d 350 (Fla. 2nd DCA 1998); Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993)(State procedural default rules apply to the State.) ; State v. Dupree, 656 So. 2d 430 (Fla. 1995)(Issue not previously raised at the trial court or the district court levels is not properly before this Court). Here, not only did it not preserve these issues for appeal with an appropriate objection, it conceded the errors. As such, it has waived any preservation claim that may have applied to Fleming.

The State argues on pages 39-43 of its brief that "Applying Blakely and Apprendi to Fleming's case destroys the State's interest in finality of Fleming's conviction." This would be a good argument if Fleming's sentence were final. But, as argued above, it was not.

Finally, the State, as mentioned at the beginning of this argument, spends considerable time arguing against the retroactive application of Apprendi and Blakely to this case. As also mentioned, that argument assumes that when the court resentenced him in 2003, his case was final. Now, if appellate counsel had an undaunted courage, he would simply rely on the argument already made that Fleming's sentence was not final. But lacking that confidence, he cowardly suggests that if his sentence were final Apprendi and Blakely should nonetheless apply retroactively. To reach that conclusion, he must use the analysis articulated in Witt v. State, 87 So. 2d 922 (Fla. 1980) and applied in Johnson v. State, 904 So. 2d 400 (Fla. 2005). In Johnson, this Court held that Ring v. Arizona, 536 U.S. 584 (2002), a death application of Apprendi, did not apply retroactively in Florida. Because "death is different," a different result appears in this noncapital case.

In Witt, this Court established a three part test to use in determining whether a change in statutory law applies to cases which have become final.

> Witt held that a change in the law does not apply retroactively in Florida "unless the change: (a) emanates fro this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Johnson at p. 408, citing Witt at p. 931.

In Johnson, this Court held that Ring met the first two requirements of the Witt test: the decision came from the nation's high court and the new rule was constitutional in nature. As such, the same conclusion holds true for Apprendi and

Blakely, so the focus narrows to the third prong of the Witt test, whether this change in the law is a development of fundamental significance.

Whether that is so, in turn, depends on the analysis of three more factors:

> (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice.

Johnson at 409.[5]

a. The Purpose served by Apprendi and Blakely. Those two cases preserve the fundamental, constitutional right to a jury determination of factual issues. Indeed, as the United States Supreme Court said in Apprendi, that decision was enforcing "constitutional protections of surpassing importance." Apprendi at 476. The right to a jury trial is one of those basic protections constitutionally guaranteed, and before the State can imprison a person for sixty days or twenty years a jury must determine the facts justifying that deprivation of one's liberty. Johnson at p. 426 (Anstead, dissenting.)

(b) Reliance on prior rule. Without any question courts, in good faith, could have departed from the recommended guideline sentence based on what is now a clear violation of a defendant's right to a jury trial. Id. at 410. Good faith reliance however, does nothing to clarify this factor because we assume courts always act

[5] Actually, this three prong analysis focuses on the derivative question of whether the change is of sufficient magnitude to necessitate retroactive application. Johnson at p. 409.

in good faith in making rulings, applying the law, and imposing appropriate sentences. Moreover, as the next factor reveals, reliance on pre-Apprendi law to the small class of affected defendants will have little effect on the overall administration of justice in this state.

(c) The effect of retroactive application of Apprendi and Blakely on the administration of justice. That effect would be minor. First, Fleming's case is one of only a few that arose in the 18 month window created by Trapp. While, undoubtedly hundreds and maybe thousands of defendants were sentenced during that period also undoubtedly most received a sentence within the recommended guideline range. Moreover, because that window opened and closed more than ten years ago we should also expect that a significant number of those who might have an Apprendi and Blakely claim have already served their time in prison and have been released. While these conclusions are largely speculative, we should, nonetheless, expect the retroactive application of those cases to have a minimal, even de minimus affect on the administration of justice.

Thus, even if Fleming's case is final, Apprendi and Blakely apply.

D. The real question posed by this case.

If we step back from this case for a moment and view it at a distance, the real question posed by this case emerges: whether this Court should amend or

further interpret Rule 3.800(a). That rule provides: "A court may at any time correct an illegal sentence imposed by it, . . ."(Emphasis added.) Justice Quince, in her concurring and dissenting opinion in Amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800 Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600, 761 So. 2d 1015, 1020 (Fla. 1999) provided the justification for 3.800(a) that remains true today:

> Rule 3.800(a), in one form or another, has been a part of Florida's criminal jurisprudence since 1968 . . . The bench, bar, and defendants have operated for thirty-two years under a rule which allows the filing of a motion to correct an illegal sentence at any time. The reason for the rule, that a defendant should not have to serve even one day more than his or her legal sentence, is a valid today as it was when the rule was formulated. See Gonzalez v. State, 392 So. 2d 334 (Fla. 3d DCA 1981). [6]

That observation still applies. Members of the bench and bar have worked for almost 40 years to define the meaning and limits of Rule 3.800(a), and, judging by the length of the annotations to that rule, they have succeeded. The law is well settled and understood. Unlike the revision to Rule 3.800(b), there has been no recent changes in the law that would prompt a similar need to reinterpret it. Jackson v. State, 983 So. 2d 562 (Fla. 2008)(defining the limits of motions to correct sentencing error, 3.800(b)). Rule 3.800(a) works just fine and should be left alone. Moreover, even if this Court were to limit the scope of what it considers an

[6] Actually, that law had been effective since at least 1961. Ch. 61-39, Sections 1, 2, Laws of Fla., and was codified as Section 921.24, Florida Statutes. In 1967, it was repealed and replaced by Rule 3.800(a).

illegal sentence to just the sentencing order, Fleming would still get relief because that order in this case included the reasons he used to deviate from recommended sentence.

Thus, this Court can approve the First District's ruling in this case, but in light of its routine nature, it should dismiss it for a lack of jurisdiction.

CONCLUSION

Based on the arguments presented here, Christian Fleming respectfully requests this Honorable Court affirm the First District's decision in his case or dismiss the case for lack of jurisdiction.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to , Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1060, and **CHRISTIAN FLEMING**, #I01134, Mayo Correctional Institution, 8784 U.S. Highway 27 West, Mayo, Florida 32066, on this ____ day of June, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT