IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1800

DCA NO. 3D03-2956

WILLIE EARL LUTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, WILLIE EARL LUTON, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner filed a motion for rehearing or clarification or certification, in connection with the lower court's opinion on direct appeal which held his argument under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), was not properly preserved for appellate review. Luton v. State, 934 So.2d 7 (Fla. 3rd DCA 2006). After the appeal had been initiated, Petitioner filed a motion to correct sentencing error pending appeal under Florida Rule of Criminal Procedure 3.800(b)(2). The motion argued that he was entitled to a jury determination on whether he qualified as a habitual violent felony offender ("HVFO"). The trial court denied the Rule 3.800(b)(2) motion and Petitioner addressed the issue in his brief as one of the points on his direct appeal.

On August 9, 2006, the lower court issued a clarifying

opinion, in which it stated:

We adhere to the view that the defendant did not timely raise this issue below. If a defendant believes that he is entitled to a jury trial on the question whether he qualifies for habitualization, logically he must raise that issue before, not after, the sentencing proceeding. The defendant neither requested a jury nor objected to the trial judge sitting as the trier of fact for purposes of habitual offender sentenc-ing.

The defendant may be arguing that he could not have made a Blakely argument at the time of his sentencing because Blakely had not been decided at that time. The Blakely decision was announced after this appeal had commenced. That fact makes no difference. To raise the issue timely, and thus preserve the point for appellate review, the defendant needed to request a jury trial on sentencing, or object to the trial judge sitting as the trier of fact, prior to the sentencing hearing. As stated in an analogous case, "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (citation omitted).

Since the point was not timely raised in the trial court, it is not properly preserved for appellate review. See § 924.051(1)(b), (3), Fla. Stat. Accordingly, we grant clarification to the extent of this opinion, but deny rehearing and certification.

Luton v. State, 2006 Fla. App. LEXIS 13291, 1-3 (Fla. 3rd DCA 2006)

Petitioner then sought this Court's discretionary review.

SUMMARY OF THE ARGUMENT

The Supreme Court of Florida does not have jurisdiction to review the Third District Court of Appeal's decision in the instant case. The lower court's opinion does not expressly and directly conflict with an opinion of this Court or another district court of appeal on the issue of whether a 3.800(b)(2) motion preserves a claim that Blakely requires the jury and not the trial court to determine whether Petitioner qualified as an HVFO where Blakely was decided after the sentence was imposed and Petitioner failed to raise an Apprendi or Blakely issue at the time of sentencing and whether such issue is rendered moot by the fact that the substantive issue is with-

out merit.

The lower court's opinion in the instant case found that a challenge on the basis that the jury rather than the judge had to determine whether Petitioner qualified as an HVFO had to be made at the time of sentencing and that even if the issue had been preserved it is without merit. Petitioner has not cited to a single case from this Court or another district court of appeal which is in direct and express conflict with the subject opinion. Moreover, even if the issue was deemed to be preserved, the outcome would not change as the cases throughout the district have found that the substantive claim is without merit.

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN EDISON v. STATE, 848 SO.2D 498(FLA. 2ND DCA 2003) OR WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN SHEFFIELD v. STATE, 903 SO.2D 1009 (FLA. 4TH DCA 2005) OR WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN PLUMMER v. STATE, 935 So.2D 35 (FLA. 1ST DCA 2006) OR WITH ANY DECISION OF THIS COURT. (REPHRASED).

Petitioner claims that the Court has jurisdiction pursu-

ant to Rule 9.030(a)(2)(A)(iv),Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). Thus, inherent or implied conflict is not a basis for this Court's jurisdiction. Dept of HRS v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent maintains that the Court is without jurisdiction to review this decision, as no such express and direct conflict exists.

The lower court's opinion on clarification in the instant case affirmed the trial court's denial of Petitioner's 3.800(b)(2) motion to correct an illegal sentence in which Petitioner alleged that pursuant to Blakely,[1] his habitual violent felony offender sentence presented an issue that should have been presented to a jury. Specifically, Petitioner argued that for the purpose of habitual violent offender sentencing, Blakely requires that the jury - not the court - must determine that the defendant committed the current offense during or within five years after completion of

incarceration on the qualifying offense and must also determine that the defendant has not received a pardon on the ground of innocence on the qualifying offense, and that a conviction on the qualifying offense has not been set aside in any postconviction proceeding.

Petitioner has cited to Edison v. State, 848 So.2d 498 (Fla. 2nd DCA 2003) for the proposition that the a 3.800(b)(2) motion adequately preserved the issue regarding habitualization, even though an objection was not posed at sentencing. In Edison, the defendant argued that the prior felony convictions used to qualify him for habitual felony offender sentencing were not sequentially and separately obtained. Clearly, such a case is factually distinguishable from the case at bar, as Edison does not involve Blakely. The very nature of the Blakely issue is that the action should have been taken by the jury and not the court, but no objection was made when the court took the allegedly improper action. Thus, there is no direct and express conflict.

Petitioner further alleges conflict with Sheffield v. State, 903 So.2d 1009 (Fla. 4th DCA 2005), in which the defendant raised an Apprendi[2] and Blakely challenge to his habitual violent felony offender sentence pursuant to a rule 3.800 motion. The fourth district court of appeal addressed the

issue on the merits and held that neither case is applicable to habitual offender and/or prison releasee reoffender sentencing. Petitioner argues that because the opinion only addressed the issue on the merits, it necessarily recognized that defendant preserved the issue by raising it in a rule 3.800 motion. Hence, Petitioner is arguing that the court in Sheffield *impliedly* held that preservation was accomplished by virtue of the 3.800 motion. Such an inference does not constitute express and direct conflict. Dept of HRS. Because the opinion does not even mention the issue of preservation, there can be no express and direct conflict with the subject case.

Additionally, unlike the subject case, Sheffield did not involve a 3.800(b)(2) motion. Instead, it involved a 3.800(a) motion, which only applies to illegal sentences, as opposed to 3.800(b)(2), which applies to any sentencing error. This is one more distinction which removes this case from the realm of direct and express conflict with the subject case.

Another essential consideration is the fact that after finding that the matter was not preserved, the lower court in the subject case, like the appellate courts in the districts throughout the State, ultimately held that the matter was without merit.[3] Petitioner has failed to present any argument that the outcome, that the case is without merit, would be any

different if this Court were to find that the issue was preserved. Thus, it would fly in the face of judicial economy to grant jurisdiction in the subject case where there is no dispute that the ultimate outcome would not be changed. Accordingly, review should be denied. Wainwright v. Taylor, 476 So. 2d 669 (Fla. 1985).

Petitioner also argues that the decision in the case at bar is in conflict with Plummer v. State, 935 so.2d 35 (Fla. 1st DCA 2006) to the extent that the lower court's decision finds that sentencing challenges based on Blakely are not preserved when raised for the first time in a 3.800(b)(2) motion to correct sentencing errors. No such express and direct conflict exists, as the cases involve two distinctly different issues. The issue in Plummer was whether a challenge based on the need for jury findings regarding victim injury points must be raised at or prior to sentencing for preservation on appeal. The issue in the subject case is whether a challenge based on the need for jury findings regarding recidivism enhancement must be raised at or prior to sentencing for preservation on appeal. The subject case is not in conflict with Plummer because it involves preservation of a distinctly different issue.

Petitioner's further arguments as to jurisdiction on the

preservation issue are without merit, as there was no case which involved a pipeline case and the question of when a challenge had to be made to preserve a direct appeal claim that qualifications for habitualization had to be decided by a jury rather than a judge. The lower court's opinion does not expressly and directly conflict with an opinion of this Court or another district court of appeal on the issue of whether a 3.800(b)(2) motion preserves a Blakely issue on jury findings of qualifications for habitualization where Blakely was decided after the sentence was imposed and Petitioner failed to raise an Apprendi or Blakely issue at the time of sentencing.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the lower court's opinion does not expressly and directly conflict with Edison v. State, 848 SO.2D 498(Fla. 2nd DCA 2003); Sheffield v. State, 903 So.2d 1009 (Fla. 4th DCA

[1]Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2]Apprendi v. New Jersey, 530 U.S. 466 (2000)

[3] Tillman v. State, 900 So. 2d 633 (Fla. 2d DCA 2005); Frumenti v. State, 885 So. 2d 924 (Fla. 5th DCA 2004);McBride v. State, 884 So. 2d 476, 478 (Fla. 4th DCA 2004); Jones v. State, 900 So.2d 633 (Fla. 1st DCA 2005)(Blakely does not entitle a defendant to have a jury determine whether he has the requisite predicate convictions for a habitual felony offender sentence).

2005); Plummer v. State, 935 So.2D 35 (Fla. 1st DCA 2006) or with any other decision of a district court of appeals or of this Court. Thus, Respondent respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to ANTHONY C. MUSTO, P.O. Box 2956, Hallendale Beach, Florida, 33008-2956 on this 10th day of October, 2006.

LINDA S. KATZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in font Courier New,12 point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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