IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC09-1279

LOWER TRIBUNAL NO. 4D08-2345

CIRCUIT CASE NO. 501996CF009161BXX

MICHAEL MITCHELL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

AMENDED JURISDICTIONAL BRIEF OF PETITIONER **MICHAEL MITCHELL**

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STATEMENT OF THE ISSUE

WHETHER PETITIONER SHOULD HAVE BEEN RESENTENCED UNDER THE PRINCIPALS ENUNCIATED IN APPRENDI v. NEW JERSEY, 540 U.S. 466 (2000), AND BLAKELY v. WASHINGTON, 524 U.S. 296 (2004), ALTHOUGH HIS ORIGINAL SENTENCING PRECEDED THOSE CASES.

STATEMENT OF THE CASE

MICHAEL MITCHELL had filed in the Circuit Court for the Fifteenth Judicial Circuit in Palm Beach County a pro se Motion to Correct Illegal Sentence Pursuant to Rule 3.800(a) of the Florida Rules of Criminal Procedure challenging upward departure life sentences imposed in Counts I and II of the Indictment for attempted murder with a firearm. MITCHELL had also been convicted of attempted armed robbery with a firearm (Count V), for which he received 23 years.

MITCHELL's conviction and sentence were affirmed in Mitchell v. State, 734 So.2d 450 (Fla. 4th DCA 1999).

On May 26, 2000, MITCHELL filed a pro se Motion to Correct Illegal Sentence alleging that his sentence was illegal under the authority of Heggs v. State, 759 So.2d 620 (Fla. 2000).

The State agreed that MITCHELL's case occurred within the "window" found in Heggs, and agreed he was entitled to be resentenced as to Count V, but

rejected the request for a resentencing as to Counts I and II.

On August 30, 2001, the Circuit Court issued an Order granting in part and denying in part MITCHELL's Motion. MITCHELL was to be resentenced as to Count V, but his request to be resentenced as to Counts I and II was denied.

On September 14, 2001, MITCHELL appeared before the Circuit Court for resentencing as to Count V only. His sentence as to Count V was reduced from 23 to 17 years. MITCHELL filed a Notice of Appeal to the Fourth District.

While that appeal was pending, MITCHELL filed with the Circuit Court another Motion to Correct Sentencing Errors Pursuant to Fla.R.Crim.Pro. 3.800(b)(2). In that Motion, MITCHELL alleged that Count V was an illegal sentence because the 17 years incarceration imposed exceeded the statutory maximum of 15 years. MITCHELL cited as authority Apprendi v. New Jersey, 540 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). On June 27, 2002, the Court granted MITCHELL's Motion and ordered he be resentenced again as to Count V.

On October 6, 2002, MITCHELL again appeared before the Circuit Court for resentencing. The Court reduced his sentence as to Count V from 17 to the statutory maximum 15 years. MITCHELL requested that he also be resentenced as to Counts I and II. The Court denied that request, but invited MITCHELL to file a Motion to bring his request for resentencing under Counts I and II before the Court.

MITCHELL filed another Notice of Appeal. This was assigned Case No. 4D03-352 by the Fourth District.

Counsel was appointed to file a Motion requesting resentencing for Counts I and II. On October 27, 2003, a Motion for Correction of Sentence Pursuant to Fla.R.Crim.Pro. 3.800(b)(2) was filed in the Circuit Court. The Motion requested a complete resentencing on all Counts. The Fourth District was kept advised as to the status of this Motion because it had relinquished jurisdiction to the Circuit Court in Case No. 4D03-352 so it could be heard.

While the Motion was pending, on March 8, 2005, MITCHELL filed an Amended Motion to Correct Illegal Sentence. The Amended Motion contended that principles enunciated by the U.S. Supreme Court in Apprendi v. New Jersey, supra, and, more recently, in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), applied to MITCHELL's resentencings.

Since the Circuit Court never ruled on the pending 3.850(b)(2) Motion, on June 16, 2005, the Fourth District issued an Order declaring it to be denied, and scheduled a due date for the Initial Brief in 4D03-352 challenging that denial. Appointed counsel complied with that scheduling order and submitted an Initial Brief.

At the time that 4D03-352 was pending before the Fourth District, the Court

was bound by its decisions in Garcia v. State, 914 So.2d 29 (Fla. 4th DCA 2005), and Hamilton v. State, 914 So.2d 993 (Fla. 4th DCA 2005), which held that Apprendi/Blakely could not be applied to resentencing hearings. MITCHELL relied upon the First District case of Isaac v. State, 911 So.2d 813 (Fla. 1st DCA 2005), which found that a defendant at resentencing would be entitled to the application of the holding in Apprendi and Blakely. The Fourth District in Hamilton had specifically rejected Isaac's holding and adopted Judge Kahn's dissent. Following the binding precedent of Garcia and Hamilton, Isaac was rejected and the Fourth District affirmed per curiam the decision of the Circuit Court not to apply Apprendi/Blakely to his resentencing. Mitchell v. State, 925 So.2d 1037 (Fla. 4th DCA 2006).

On or about February 22, 2008, MITCHELL filed another pro se Motion to Correct Illegal Sentence Pursuant to Fla.R.Crim.Pro. 3.800(a), which is the Motion whose denial is the subject of this appeal. MITCHELL raised three separate grounds for relief: (1) that the enhancement of Counts I and II to life felonies because of the use of a firearm violated the simple subject rule; (2) that it was improper to enhance Counts I and II for the use of a firearm because a firearm was already incorporated into the Guidelines; and (3) that his resentencing was

unconstitutional under the Apprendi/Blakely.

The Circuit Court summarily denied this pro se 3.800(a) Motion. A pro se Notice of Appeal was filed. It was assigned Case No. 4D08-2345.

MITCHELL filed a pro se Initial Brief and Appendix. On September 10, 2008, the Fourth District affirmed the summary denial of MITCHELL's 3.800(a) Motion. Mitchell v. State, 990 So.2d 656 (Fla. 4th DCA 2008).

At this point, MITCHELL filed Motions for Extension of Time within which to file a Motion for Rehearing; Clarification; Certification pursuant to Rule 9.330. He also solicited counsel's assistance. After counsel filed a Motion, the Fourth District relinquished jurisdiction and returned the case to the Circuit Court for that purpose on MITCHELL's behalf, for an appointment of counsel.

After this was accomplished, a timely Motion for Rehearing; Clarification; Certification was filed. In the Motion for Rehearing; Clarification; Certification, MITCHELL's newly-appointed counsel expanded upon the Apprendi/Blakely issue. MITCHELL noted that since Case No. 4D03-352 was affirmed per curiam, this Court had determined that Apprendi applied to resentencings. Galindez v. State, 955 So.2d 517 (Fla. 2007). MITCHELL further noted that the Fourth District itself had followed Galindez during the pendency of this case. Donohue v. State, 979 So.2d 1058 (Fla. 4th DCA 2008). Nonetheless, the Fourth District denied the

Motion for Rehearing; Clarification; Certification on June 22, 2009.

MITCHELL filed a Notice of Intent to Invoke Jurisdiction of the Florida Supreme Court with the Fourth District. He now submits this Jurisdictional Brief.

SUMMARY OF ARGUMENT

MITCHELL was resentenced on September 14, 2001, and October 6, 2002. At both resentencings, he requested the Circuit Court resentence him as to Counts I and II for which he received an upward departure life sentence. The Circuit Court refused. MITCHELL challenged the second resentencing, on October 6, 2002, with an appeal which was heard and denied by the Fourth District Court of Appeal in 2006. MITCHELL had alleged in the Circuit Court and the Fourth District that Apprendi/Blakely applied to his resentencing. Bound by Fourth District precedent, the Fourth District rejected the application of Apprendi/ Blakely to his resentencings and affirmed per curiam the denial of the Rule 3.800(b)(2) Motion in 2006. In 2007, this Court decided that Apprendi/Blakely did apply to resentencings thereby overruling the precedent which had bound the Fourth District in its earlier ruling to the contrary. MITCHELL is entitled to be resentenced in a manner consistent with Apprendi/Blakely.

ARGUMENT

THAT PETITIONER SHOULD HAVE BEEN RESENTENCED UNDER THE PRINCIPALS ENUNCIATED IN APPRENDI v. NEW JERSEY, 540 U.S. 466 (2000), AND BLAKELY v. WASHINGTON, 524 U.S. 296 (2004), ALTHOUGH HIS ORIGINAL SENTENCING PRECEDED THOSE CASES.

In Galindez v. State, 955 So.2d 517 (Fla. 507), this Court determined that although Apprendi/Blakely did not apply retroactively to a case made final before they were handed down, both cases would apply to a resentencing which occurred after they were decided. By so holding, the Court adopted the position taken by the First District Court of Appeal in Isaac v. State, 826 So.2d 396 (Fla. 1st DCA 2002), and rejected the position taken by the Fourth District Court of Appeal in Garcia v. State, 914 So.2d 29 (Fla. 4th DCA 2005), and Hamilton v. State, 914 So.2d 993 (Fla. 4th DCA 2005).

After holding in Galindez that Apprendi/Blakely applied to any resentencing occurring after those cases were decided, this Court held that any sentencing error would be subject to harmless analysis. Applying this part of the holding, this Court

ordered several pending appeals be remanded to apply harmless error analysis to the resentencings. State v. Monnar, 976 So.2d 581 (Fla. 2008); Hamilton v. State, 976 So.2d 575 (Fla. 2008); State v. Moline, 976 So.2d 576 (Fla. 2008); Weston v. State, 976 So.2d 577 (Fla. 2008); Barron v. State, 976 So.2d 577 (Fla. 2008); State v. Mills, 976 So.2d 578 (Fla. 2008).

Since Galindez, the cases brought before the District Courts of Appeal where a case was originally sentenced before Apprendi/Blakely was resentenced afterwards have uniformly applied Apprendi/Blakely analysis. Johnson v. State, — So.3d —, 2009 WL 2448118 (Fla. 1st DCA August 12, 2009); Cutts v. State, —- So.2d —, 2008 WL 542330 (Fla. 2d DCA December 31, 2008); Isaac v. State, 989 So.2d 1217 (Fla. 1st DCA 2008); Lester v. State, 987 So.2d 724 (Fla. 5th DCA 2008); Monnar v. State, 984 So.2d 619 (Fla. 1st DCA 2008); Hamilton v. State, 981 So.2d 615 (Fla. 4th DCA 2008); Donohue v. State, 979 So.2d 1058 (Fla. 4th DCA 2008); Rouse v. State, 965 So.2d 241 (Fla. 5th DCA 2007). Of particular significance were the Isaac and Hamilton decisions cited in this paragraph. Isaac reaffirmed MITCHELL's use of it in D03-352. Hamilton was one of cases binding the Fourth District during that appeal no longer law.

Both Apprendi and Blakely were decided while MITCHELL's appeal from

his resentencing was pending. When he was resentenced, Apprendi, but not Blakely, had been decided. This Court has issued Orders in State v. Fleming, State v. McGriff, State v. Isaac, 4 So.3d 677 (Fla. 2009), granting review in those cases and directing the parties to address a similar issue: Whether Apprendi and Blakely apply to resentencing proceedings held after Apprendi issued where the resentencing was final before Blakely issued. MITCHELL is better situated then Fleming, McGriff, and Isaac because his resentencing was not final when Blakely was decided.

To the extent that the Fourth District Case No. 4D03-352 was decided against him on precisely the same issue, he should not be denied relief in this case. Because the binding Fourth District case law which mandated the affirmance of that appeal has been overruled by this Court, neither law of the case or collateral estoppel should operate to deny him relief. State v. McBride, 848 So.2d 287, 291-2 (Fla. 2003); Cillo v. State, 913 So.2d 1233 (Fla. 2d DCA 2005).

At the original sentencing hearing on September 9, 1997, the Court stated its reasons for upward departure as follows:

> In regards to Mr. Higgins and Mr. Mitchell, I do plan to exceed the guidelines for the reasons that their conduct was so egregious that it goes beyond that in an ordinary case.
>
> As I have already outlined here today, as the State has outlined,

> also because of the emotional trauma to the victims, I am going to, additionally, add that masks, gloves as concealment were used in committing the crime, but was not used as an enhancement by the State.

(Tr. of 9/9/97 at 858-9).

The Judge based these aggravating circumstances on the assumption that MITCHELL was one of the masked gunmen who shot the victims in the case.

If consistent with Apprendi and Blakely, a jury was impaneled to determine whether the aggravators found by the Court applied, the issue of whether MITCHELL was a gunman or the wheelman could be critical. On direct appeal, the Fourth District rejecting his legal insufficiency of the evidence argument and, held that there was sufficient evidence that he was either a wheelman or a gunman. Mitchell, 734 So.2d at 454. If asked to decide which, there was evidence pointing toward either scenario, but not definitively. If the jury had found that he had been the driver, it might have concluded that he was not masked nor guilty of extraordinarily egregious conduct. A jury considering an upward departure in this case would certainly be influenced by the quantum of proof establishing MITCHELL's involvement as a gunman as opposed to a wheelman.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this

Court accept jurisdiction over this case, apply Galindez, and remand the case for resentencing where Apprendi/Blakely principles can be applied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of September, 2009, to: Office of the Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Jurisdictional Brief of Petitioner was typed in Times New Roman 14.

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CHARLES G. WHITE, ESQ.