18-910 ORIGINAL

No. 18A40

IN THE SUPREME COURT OF THE UNITED STATES

CORRY MENCY,
Petitioner,

V.

STATE OF FLORIDA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEALS FOR FLORIDA

PETITION FOR WRIT OF CERTIORARI

CORRY MENCY
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Petitioner, Pro Se

QUESTION PRESENTED

Mr. Mency contended Florida Statutes (2004) section 775.084(3)(a)6 was unconstitutional under Apprendi v. New Jersey and Blakey v. Washington as applied to his sentences because the statutory provision grants the trial judge the sole and exclusive authority to impose enhanced penalties beyond his offenses statutory maximum based on an additional findings of fact other than a prior conviction by a preponderance of the evidence instead of upon proof beyond a reasonable doubt by a jury that Mency posed a danger to the public. The Circuit Court denied relief relying on Almendarez-Torres which addressed the recidivist exception and the First District Court of Appeals relied upon that case to uphold the denial.

Did the First District err in deferring to the Circuit Court's finding that section 775.084 is not unconstitutional as applied to the facts of Mency's case and/or did the State courts properly address the merits of Mency's issue?

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PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEALS FOR FLORIDA

The Petitioner, Corry Mency, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the First District Court of Appeals in and for the State of Florida rendered in these proceedings on April 6, 2018.

OPINION BELOW

First District Court of Appeal per curiam affirmed Petitioner's sentences without giving a written opinion in its cause no. 1D17-3042. The opinion is unpublished, and is reprinted in the appendix to this petition at page infra. No. 41a rehearing was filed.

JURISDICTION

The opinion of the First District was entered on April 6, 2018. A mandate consequently issued on May 4, 2018. Justice Thomas, who on July 11, 2018, extended the time to and including August 4, 2018, in which to file a Petition for Writ of Certiorari.

Jurisdiction of this Supreme Court is invoked under 28 U.S.C.S. § 2101(d) in conjunction with Supreme Court Rules 13(1) & 30(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST. AMEND. V

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLA. STAT. § 775.082 (2004)

(3)(b) 1. For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(3)(e) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(10) If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a non-State prison sanction. However, if the court makes written findings that a non-State prison sanction could present a danger to the public, the court may sentence the offender to a State correctional facility pursuant to this section.

FLA. STAT. § 775.084 (2004)

(1)(a) "Habitual felony offender" means a defendant for whom the court

may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:

1. The defendant has previously been convicted of any combination of two or more felonies in this State or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or

b. Within 5 years of the date of the conviction of the Defendant's last prior felony or other qualified offense, or within 5 years of the Defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.

4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.

5. A conviction of a felony or other qualified offense necessary to the

operation of this paragraph has not been set aside in any postconviction proceeding.

(3)(1) 1. In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons...

(4)(a) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual felony offender as follows:

1. In the base of a life felony or a felony of the first degree, for life.

3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(4)(e) If the court finds, pursuant to paragraph (3)(a) or paragraph (3)(c), that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

FLA. STAT. § 775.084 (1985)

(4)(a) The court, in conformity with the procedure established in subjection (3) and upon a finding that the imposition of sentence under this section is necessary for the protection of the public from further criminal activity by the defendant, shall sentence the habitual felony offender as follows:

1. In the case of a felony of the first degree, for life.

3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(4)(c) If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is an habitual felony offender or an habitual misdemeanant the court shall make that determination as provided in subsection (3).

STATEMENT OF THE CASE

The State of Florida charged Corry Mency[1] via information instrument with committing two criminal offenses against a Mrs. Lambert in Duval County Florida: Unarm Carjacking, contrary to section 812.133(2)(b), Florida Statutes (2004), a first degree felony ordinarily punishable by a maximum term of 30 years in prison, s. 775.082(3)(b), Fla. Stat. (2004); and Battery on a Person 65 years old or older, contrary to s. 775.08(2)(b), Fla. Stat. (2004), a third degree felony, ordinarily punishable by a maximum term of 5 years in prison, s. 775.082(3)(e), Fla. Stat. (2004).

Mr. Mency, thru counsel, plead not guilty and subsequently, following a 2-day jury trial, he was found guilty as charged on January 11, 2006, for both offenses. 30a & 31a. Nearly 4 weeks later the State sought to enhance Mency's expected maximum penalty on both offenses pursuant to Florida's Habitual Felony Offender [HFO herein] sentencing enhancement scheme under s. 775.084, Fla. Stat. (2004). Hence the trial judge first determine that Mency met HFO criteria and then exercised his discretion to impose HFO sanctions, sentencing Mency to life in prison for the carjacking and a concurrent term of 10 years for the battery offense. The trial judge also found Mency to be a Prison Releasee Reoffender pursuant to s. 775.082(9), Fla. Stat. (2004) and imposed a concurrent mandatory minimum term

[1] Corry Mency is the Petitioner in this cause whom was the defendant in the case and he will be referred to as the "Petitioner" otherwise by last name.

of 30 years on the life sentence for the carjacking. 33a-38a.

In November of 2016 Mency filed a Petition For Writ of Habeas Corpus with his trial court, 2a-12a, challenging the constitutionality of the HFO Act as applied to his sentences. Mency specifically contended that's. 775.084(3)(a) 6. Fla. Stat. was unconstitutional in violation of his rights to trial by jury and due process of laws, relying on Apprendi v. New Jersey, 530 US 466, 120 S. Ct. 2348, 148 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 US 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), 4a-11a, because Mency received enhanced sentences beyond his offense statutory maximum based on an additional finding of fact other than a prior conviction that was made solely by the trial judge rather than a jury.

In June of 2017 the trial court first explained the improper uses of a petitioner for writ of habeas corpus as well as a motion for postconviction relief. The court then held that Mency's claim was procedurally barred as a petition for writ of habeas corpus and that it would be untimely as a postconviction motion. The court alternately addressed the merits of Mency's claim stating that section 775.084, Florida Statutes, does not violate Apprendi, relying on West v. State, 82 So. 3d 987, 989 (Fla. 1st DCA 2011). 27a. The court thereby denied Mency's petition.

Mency then sought a timely appeal with the First District Court of Appeal from the trial court's decision denying his petition. On April 6, 2018 the First

District upheld that decision without giving a written opinion. 41a.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURT'S MISAPPLICATION OF THE ALMENDAREZ-TORRES RULE WARRANTS THIS COURT'S ATTENTION

The trial court under the Fourth Judicial Circuit by relying on West v. State, 82 So. 3d 987, 989 (Fla. 1st DCA 2011) misapplied the rule established in Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Accord, the First District upheld the trial Court's decision without giving a written opinion and thus it's presumed the First District relied solely on trial court's decision.

The first question before this court is whether the State courts were correct in its reliance on the holding in West, supra, in light of the issue presented in the State Court proceeding to rule that section 775.084 is not unconstitutional under Apprendi. Therefore, this Court's analysis must begin with West v. State.

In West, the appellant's first point on appeal was that section 775.084 under which his sentence was imposed was unconstitutional according to federal law as determined by the Supreme court of the United States in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because it permits the sentencing court rather than a jury to determine whether a defendant "qualifies" as a Habitual Felony Offender [HFO herein] by a preponderance of the evidence and

not by proof beyond a reasonable doubt.

The appellant in West specifically argued that the "recidivist exception" violated his Sixth and Fourteenth Amendment rights under the United States Constitution. Id. at 988-89. The district court there only confirmed the question on the recidivist issue having been rejected already by Almendarez-Torres in which the Supreme Court has never receded from nor overruled. Id. at 989.

The issue Mency presented in the State court proceeding is clearly distinguishable, whereas Mency did not contest the recidivist exception nor whether he qualified as a HFO under subsection 775.084(1)(a). Instead, in respect of federal law as interpreted by the Supreme Court in Apprendi and Blakely v. Washington, 542 US 296, 124 S. Ct. 2531, 154 L. Ed. 2d 403 (2004), Mency contested the constitutionality of subdivision 775.084(3)(a) 6. on whether under the facts of his case he should have received enhanced HFO sentences beyond his offenses statutory maximum because the statutory scheme vests the sentencing judge with the authority to impose a more onerous penalty based on a finding of fact by preponderance of the evidence that he posed a danger to the public and not based on proof found by a jury beyond a reasonable doubt.

Therefore, the State courts erroneously relied on West because the district court there nor the Supreme Court in Almendarez-Torres had addressed the underlying issue Mency presented in the State Court proceeding on whether an

offender's dangerousness to society which subjects him to enhanced sentences can be found by a judge upon a preponderance of the evidence and not by proof beyond a reasonable doubt from a jury.

In addition, since the trial court decided, alternately, the merits of Mency's issue rather than dismissing it on procedural grounds the State Court cannot now claim non-exhaustion based on a procedural flaw that it let pass earlier.

Before Apprendi and Blakely, Florida courts has consistently held that the trial court is charged with the duty under Florida Statutes, section 775.084 to make the necessary finding that a enhanced sentence is necessary to protect the public. See Eutsey v. State, 383 So. 2d 219, 226 (Fla. 1980); Wright v. State, 476 So. 2d 325, 327 (Fla. 2d DCA 1985); Rosemond v. State, 489 So. 2d 1185, 1186 (Fla. 1st DCA 1986); Brown v. State, 497 So. 2d 887 (Fla 5th DCA 1986); see generally section 775.084(4)(a) Fla. Stat. (1986).

In the early 90's the Florida legislature merely changed the written record requirement under subdivision 775.084(3)(a)6. Which require the trial court to make written record only when it determines such a sentence is not necessary for the protection of the public. But, it did not delete the fact that a finding must be made to respect legislative intent to authorize enhanced penalties to protect society from habitual criminals who persist in the commission of crime after having been therefore convicted and punished for crimes previously committed. See Joyner v.

State, 158 Fla. 806, 809, 30 So. 2d 304, 306 (1947).

The First District in Adams v. State, 376 So. 2d 47 (Fla. 1st DCA 1979) explained that the finding that it is necessary to protect the public, although essentially a prediction, depends on certain identifiable discrete facts other than a prior conviction such as the offender's general course of behavior, his family, his education, vocation and so on. See also Woods v. State, 214 So. 3d 803, 809 (Fla. 1st DCA 2017).

WHEREFORE, as this Petitioner has demonstrated the State Court misapplied the Almendarez-Torres rule only to avoid addressing the merits of his issue that this court should grant certiorari to give the State Court one opportunity to address the merits of Mency's issue. O'Sullivan v. Boerekel, 526 US 838, 119 S. Ct. 1728 (1999) The Merits of the issue is not before this court because the State Court never addressed it.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the State Courts.

Respectfully,

/s/ _____

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