

No. _____

21-6174

IN THE

SUPREME COURT OF THE UNITED STATES

Antonio Smith

(Your Name)

— PETITIONER

vs.

State of Arkansas

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Arkansas Supreme Court

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antonio Smith

(Your Name)

2501 State Farm Rd.

(Address)

Tucker, AR 72168

(City, State, Zip Code)

(Phone Number)

FILED

OCT 30 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

I. Does The Fact That Arkansas Code Annotated 16-90-804 And 16-97-101(6) Use Discretionary Language As It Applies To Departure Hearings And Jury Sentencing In Plea Cases Instead Of The Mandatory Language Of Blakely vs. Washington, 542 U.S. 296, (2004) And Apprendi vs. New Jersey, 530 U.S. 466, (2000) Render Those Statutes Unconstitutional?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- (1) Smith vs. State, Case No. ~~60~~CR01-3918,
Pul. Co. Cir. Ct., 1st Dv.
- (2) Smith vs. State, 2021 Ark. 131, Ark. Sup.
Ct., June 10, 2021

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	25

INDEX TO APPENDICES

APPENDIX A	Opinion of the Arkansas Supreme Court	1a-4a
APPENDIX B	Orders of the Pulaski County Circuit Court	5a-12a
APPENDIX C	Petition To Correct An Illegal Sentence And Brief In Support	13a-34a
APPENDIX D	Judgment and Commitment Order	35a-37a
APPENDIX E		
APPENDIX F		

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Apprendi vs. New Jersey</u> , (530 U.S. 466, 2000).....	13, 21
<u>Blakely vs. Washington</u> , (124 S.Ct. 2531, 2004).....	12, 15
<u>Brock vs. State</u> , (90 Ark. App. 164, 2005).....	15, 20
<u>Ford vs. State</u> , (99 Ark. App. 119, 2007).....	8
<u>Hill vs. State</u> , (318 Ark. 408).....	16
<u>Johns vs. State</u> , (2014 Ark. App. 560).....	15
<u>Muhammad vs. State</u> , (2021 Ark. 129).....	12
<u>Owens vs. Payne</u> , (2020 Ark. 413).....	11
 STATUTES AND RULES	
A.C.A. 16-90-111(a).....	5,
A.C.A. 16-90-804.....	Arts. 9, 11, 12, 13
A.C.A. 16-90-804 (b)(1)(A)+(B).....	10
A.C.A. 16-97-101(b).....	6,
Amend. VI, U.S. Const.....	20
Rule 26.1(a), Ark. R. Crim. P.....	10
Rule 37.2(c), Ark. R. Crim. P.....	23
Rule 24.4(e), Ark. R. Crim. P.....	16
A.C.A. 16-90-111(b)(1).....	23
 OTHER	
<u>Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas</u> , 110 Yale L.J. 1097 (2001).....	21

Table Of Authorities cont'd

Cases

	<u>Page</u>
<u>Ring vs. Arizona</u> , (536 U.S. 584, 2002).....	20
<u>Smith vs. State</u> , (2021 ArkL 131).....	11
<u>Van Kirk vs. State</u> , (2011 ArkL 428).....	16
<u>Van Winkle vs. State</u> , (2016 ArkL 98).....	20
<u>Wallace vs. State</u> , (2010 ArkL App. 706).....	16
<u>Waller vs. State</u> , (2020 ArkL 381).....	11
<u>Wilson vs. State</u> , (2019 ArkL App. 7).....	8

Other Authorities

<u>Freya Russell, Note, Limiting The Use Of Acquitted and Uncharged Conduct at Sentencing</u> , 89 Cal. L. Rev. 1199, 1202-08 (2001).....	22
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at 2021 Ark. 131; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was June 10, 2021.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amend. VI, U.S. Constitution states: In all criminal prosecutions, the accused shall have the assistance of counsel for his defence.

A.C.A. 16-90-111(a) states: (a) Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

A.C.A. 16-90-111(b)(1) states: The circuit court may reduce a sentence within ninety (90) days after the sentence is imposed or within sixty (60) days after receipt by the circuit court of a mandate issued upon affirmance of the judgment or dismissal of the appeal.

A.C.A. 16-90-804(b)(1)(A)+(B) states: When sentencing is done by the court following

a trial before the court, either party or both parties may present evidence to justify a departure from the voluntary presumptive sentence range determined under 16-90-803; (B) The court may allow argument during the sentencing phase of a trial or at a separate hearing on the matter of departing from the voluntary presumptive sentence range determined under 16-90-803 if the court finds that argument would be helpful

A.C.A. 16-97-101 (b) states: After a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the Court, may be sentenced by a jury impaneled for purposes of sentencing only,

STATEMENT OF THE CASE

On July 31, 2002, Petitioner pled guilty in Pulaski County Circuit Court, First Division to one (1) count of first degree murder and was sentenced to 636 months in the Arkansas Department of Correction. (Appendix D) He pursued no other state or federal postconviction remedies.

Since pleading guilty, Petitioner discovered that the Judgment and Commitment Order was violative of Blakely vs. Washington, 124 S.Ct. 2531, (2004) and Apprendi vs. New Jersey, 530 U.S. 466, (2000). Therefore, he filed a Petition To Correct An Illegal Sentence Pursuant To A.C.A. 16-90-111(a) in the circuit court. (Appendix C) In that petition, he alleged that his sentence was illegal because it exceeded the "statutory maximum" as that term is defined in Blakely and Apprendi; that in order to upwardly depart, he had to be afforded the opportunity to challenge the departures

Statement Of The Case cont'd

in a departure hearing pursuant to A.C.A. 16-90-804.

Further, he alleged that any aggravating factor, other than a prior conviction, that increases a sentence beyond the prescribed "statutory maximum" must be submitted to a jury and proven beyond a reasonable doubt. He contended that A.C.A. 16-97-101(b) affords a petitioner like himself the opportunity to request that a jury sentence him in the event of a plea. However, he contends that because A.C.A. 16-90-804 and 16-97-101(b) use discretionary language when it comes to departure hearings and jury sentencing in plea cases instead of the mandatory language found in Blakely and Apprendi, those statutes are unconstitutional and should be struck down.

On November 13 and November 23, the Pulaski County Circuit Court denied the

Statement Of The Case, cont'd

petition, (Appendix B) In neither order did the court address the Blakely / Apprendi claims. The court seemed to equate a waiver of a jury trial with a waiver of jury sentencing in plea cases.

Petitioner appealed to the Arkansas Supreme Court raising the same issues. On June 10, 2021, the Court denied relief. (Appendix A) That Court also did not address the Blakely / Apprendi matter.

From these efforts, this petition originates.

REASONS FOR GRANTING THE PETITION

I. The Fact That Arkansas Code Annotated 16-90-804 And 16-91-101(6) Use Discretionary Language As It Applies To Departure Hearings And Jury Sentencing In Plea Cases Instead Of The Mandatory Language Of Blalock vs. Washington, 542 U.S. 296, (2004) And Apprendi vs. New Jersey, 530 U.S. 466, (2000) Renders Those Statutes Unconstitutional

In Arkansas, sentencing is entirely a matter of statute, (Wilson vs. State, 2019 Ark. App. 17) Arkansas law affords state courts broader discretion in sentencing than that afforded by federal courts, (Ford vs. State, 99 Ark. App. 119, 2007) In Appendix D, which is the Judgment and Commitment Order, it indicates that a duration of departure occurred as to the count of first-degree murder. The Arkansas Sentencing Guidelines Manual defines a duration of departure when the imposed months are

higher or lower than the presumptive ADC time. These departure reasons or aggravating factors were to be submitted to a jury and proven beyond a reasonable doubt pursuant to Blakely and Appendi.

As to the count of first degree murder, there is an indication that a departure occurred from the presumptive sentence of 432 months. It would seem to be a durational departure. However, the Order does not cite the reasons for the departure or even that a durational departure was sought. An upward departure occurred because the presumptive sentence of 432 months was increased to 636 months.

What is problematic is the fact that given that departures occurred, Petitioner should have been afforded the opportunity to argue against an upward departure as provided in A.C.A. 16-90-804. This highlights the

problem with Arkansas' plea negotiation procedures, Rule 26.1 of the Arkansas Rules of Criminal Procedure provides that in order to withdraw a plea it must be done "before entry of judgment" (Rule 26.1(a), Ark. R. Crim. P.). In theory, what this was supposed to accomplish was that a plea would be offered, the prosecutor would draw up the worksheet indicating where a defendant would fall on the Sentencing Standards Grid, the prosecutor would give the worksheet to Defendant's counsel who would then advise the Defendant about the departures and whether there were grounds for challenging them. If there were such grounds, then counsel would ask for a hearing under A.C.A. 16-90-804(b)(1)(A) & (B).

In practice, however, the plea and sentencing take place on the same day, usually within minutes of each other. This does not comport

with Arkansas law,

Even more problematic is the fact that the above referenced statutes contain discretionary language regarding when departure hearings occur, that language violates the mandatory language in the reasoning and holding of Blalock and Apprendi, especially where aggravating factors are found for departure purposes. Those statutes are unconstitutional and should be struck down.

On June 10, 2021, the Arkansas Supreme Court issued its ruling in Petitioner's case that challenged A.C.A. 16-90-804, (See Smith vs. State, 2021 Ark. 131) In that ruling, the Court stated that when a defendant voluntarily agrees to the sentence before entering a guilty plea, 16-90-804 does not apply. (Id. at *4) (citing Owens vs. Payne, 2020 Ark. 413; Waller vs. State, 2020 Ark. 381) On that same date, the Court also

decided Muhammad vs. State, 2021 Ark. 129. Muhammad was a challenge to A.C.A. 16-90-804 and 16-97-101(6) in the context of a larger Blakely / Apprendi challenge, like Petitioner here. In Muhammad, the Court ruled the same way on 16-90-804 that it did in Petitioner's case, (Id. at *2) rev'd & remanded on other grounds. Those rulings run contrary to Blakely and Apprendi.

Aggravating factors for departure purposes must be found by a jury absent waiver or stipulation, (Blakely vs. Washington, 542 U.S. 296, 2004) If more than one departure is imposed, separate reasons must be clearly stated on the record justifying the departure for each particular offense.

In this case, a close reading of the record shows that the trial court at the time did not state on the record the reasons justifying each departure. At the

time of plea, Apprendi vs. New Jersey, 530 U.S. 466 (2000) was the law of the land. The trial court should have been familiar with this ruling and adhered to it.

Petitioner's plea statement did not constitute the explicit waiver or stipulation required by Blakely and Apprendi. Petitioner had to stipulate to the facts of the crime in order to get the plea off of the ground. However, this is not an Apprendi or Blakely waiver. Petitioner must specifically state that he wanted the trial court to decide all matters, including departures and enhancements, and that he specifically was waiving sentencing by a jury. He had to state this on the record.

The Arkansas Supreme Court had ruled in Owens, Waller, and Muhammad that once a defendant accepts a sentence prior to entering a plea, then the provisions of A.C.A.

16-90-804 do not apply, The plain language of that statute does not say this. In addition, the rulings in the 3 cases above conflict with Blakely and Apprendi's provisions that any factor other than a prior conviction that increases a sentence beyond the prescribed statutory maximum (i.e. presumptive sentence) must be submitted to a jury and proven beyond a reasonable doubt.

Additionally, Petitioner never waived sentencing by a jury, nor did he stipulate as to any sentencing departures. In fact, Petitioner was never advised by the trial court that he could seek to be sentenced by a jury and never explicitly executed a jury waiver on the record or stipulated to such. Petitioner did not "waive his constitutional rights and consent to judicial factfinding as to

sentence enhancements." (See Johns vs. State, 2014 Ark. App. 560) (citing Brook vs. State, 90 Ark. App. 164, 2005)

Consenting to judicial fact finding is not found where Petitioner pleads guilty and signs a plea statement. Judicial fact finding consent in this context refers to specifically stating on the record that Petitioner has no objection to the court making the sole decision as to sentence enhancements. The record is bereft of this, Blakely vs. Washington, 124 S. Ct. 2531 (2004) stated that when a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either "stipulates to the relevant facts or consents to judicial fact finding." If the trial court unilaterally ruled on enhancements, and it appears that it did, without Petitioner

consenting to it, such an act would violate the spirit and letter of Blakely and Apprendi.

Petitioner was never advised by the trial court at any stage that he could seek to be sentenced by a jury. Section 2 of Act 535, codified as A.C.A. 16-91-101(b), specifically provides that in the event of a plea of guilty, the defendant, with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for the purpose of sentencing only. (VanLark vs. State, 2011 Ark. 428) (citing Hill vs. State, 318 Ark. 408) [overruling Wallace vs. State, 2010 Ark. App. 706]

Rule 24.4(c) of the Ark. R. Crim. P. provides that a defendant who pleads guilty waives his right to a trial by jury and other corresponding trial rights. However, the Arkansas Supreme Court did state that this particular rule

did not contemplate the bifurcated procedure that allows one who pleads guilty to be sentenced by a jury, so therefore that rule did not apply to situations like Petitioner's, (VanLurk at 147, *4) VanLurk also cited Hill in support of the bifurcated sentencing procedure that attaches when a defendant pleads guilty.

In Smith, the Arkansas Supreme Court ruled that the Petitioner's argument that he did not waive his right to be sentenced by a jury failed because he had waived his right to a jury trial. However, that Court in VanLurk recognized that this does not apply where a person pleads guilty, just like the Petitioner here.

In Arkansas, it is well recognized that the plea is the trial, so therefore the

biturcated sentencing procedures recognized in Vanhook, including the jury sentencing, apply as well,

Additionally, A.C.A. 16-97-101(6) specifically applies to plea cases. The Arkansas Supreme Court has not struck down the statute, yet it is rarely employed. This statute uses discretionary language as applied to jury sentencing in plea cases. This places it in direct conflict with the mandatory language of Blakely and Apprendi. To the extent that this statute conflicts with the mandatory language of Blakely and Apprendi, the Court should strike it down as unconstitutional.

In the circuit court's orders denying relief, it was stated that the Petitioner waived his right to a jury trial, so he also waived his right to be sentenced by a jury on the charges.

(See Appendix B,) Right above that finding, the circuit court quotes Blakely, yet it appears that the court completely misapprehends that case. The court quoted from Pettit's brief when it quoted Blakely, yet ruled completely opposite to it. It is apparent that this particular court has either had no prior Blakely challenges, or it has just chosen to ignore the rulings.

In analyzing the defendant's sentence in Blakely, this Court strictly applied the Appendi vs. New Jersey rule. This Court found that the sentencing judge in Blakely violated Appendi by imposing without benefit of jury findings or the defendant's admission, a sentence that was more than 3 years longer than the 53 month sentence prescribed as the maximum of the "standard range" (49-53 months) for second-degree kidnapping with a firearm. (Id. at 2537) This Court found a violation of the defendant's Sixth Amendment rights despite

the fact that the sentence was within the statutory maximum term of 10 years for Class B felons, (Amend. VI, U.S. Const.)

The State argued that Blakely's sentence was consistent with Apprendi because the relevant "statutory maximum" was ten years. This Court rejected that argument. Instead, this Court said "Our precedents make clear that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by defendant." (Id.) (citing Ring vs. Arizona, 536 U.S. 584, 2002) Even the Arkansas Supreme Court has stated that "other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (See Van Winkle vs. State, 2016 Ark. 98; Brock vs. State, 90 Ark. App. 164)

(citing Apprendi v. New Jersey, 530 U.S. 466, 2000)
The plain implication is that judicial fact finding that increases a sentence is barred, regardless of whether the increase is pursuant to statute or a narrower Guidelines-type provision. As this Court explained: "The relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (Blakely at 2531)

This Court's decision in Apprendi set the stage for Blakely. In Apprendi, which other scholars and commentators have thoroughly analyzed, this Court invalidated a sentencing enhancement that was based upon a judicial finding that Apprendi committed a hate crime. (Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L.J. 1097, 1115-23, 2001) This Court held that juries, rather than judges, must

find any facts, other than those related to recidivism, that lead to an increase in the statutory maximum penalty for a crime,

As commentator Freya Russell notes, "Appendi drew on two lines of Supreme Court cases that grapple with the issues of what must be proven in order to sentence a defendant, when and by whom it must be proven, and what standard of proof should govern the proceeding." (Freya Russell, Note, Limiting The Use of Acquitted and Uncharged Conduct at Sentencing, Appendi vs. New Jersey and its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines, 89 Cal. L. Rev. 1199, 1202-08, 2001.) The first line of cases deals with what the government must prove at trial; the second treats sentencing proceedings as requiring different constitutional protections. (Id. Russell at 1208.)

Basically, these articles and the caselaw cited by the Petitioner stand for the proposition

that if the State relied on any other fact besides his prior convictions, those facts had to be submitted to a jury. Since they were not, the sentences are illegal, are violative of Blakely and Apprendi, and must be vacated.

It should be noted that Rule 37.2(c), Ark. R. Crim. P. governs when petitions for postconviction relief may be filed. Those petitions are used to allege that trial counsel was ineffective. Petitions under A.C.A. 16-90-111(a), on the other hand, do not allow IATC claims in them, yet the courts of Arkansas place a 90 day limit on the filing of petitions to correct an illegal sentence, and equate them with a Rule 37 petition.

Also, the courts misread A.C.A. 16-90-111(b)(1). The courts read it to include (b)(1) as a continuation of subsection (a) of the statute as though the word "and" is there. This is an incorrect reading. 16-90-111(a) has 2 parts and discusses 2 entirely different types of petitions.

One, the type that Petitioner filed, can be filed at any time. The second one is a petition to correct a sentence imposed in an illegal manner. This type of petition is governed by the 60 and 90 day rule of (b)(1). The first one is not, yet the courts are consistently misapplying the statute in order to do an end run around the Blakely argument.

To the extent that the departures were not submitted to a jury and that the statutes referenced - A.C.A. 16-90-804 and 16-97-101(b) - only use discretionary language in those regards, Petitioner maintains that they are unconstitutional and should be struck down. This Court should grant certiorari review to determine if Arkansas' current sentencing scheme as it applies to plea cases violates this Court's holdings in Blakely and Apprendi and whether that scheme passes constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Antonia Smith #105546

Date: 10/25/21

Appendix

- Appendix A - Opinion of the Arkansas Supreme Court 11a-4a
- Appendix B - Opinions of the Pulaski County Circuit Court 5a-12a
- Appendix C - Petition To Correct An Illegal Sentence
And Brief In Support 13a-34a
- Appendix D - Judgment and Commitment Order 35a-37a