



No. _____

THE SUPREME COURT OF THE UNITED STATES

MARCUS ADAM SNIPES – Petitioner

v.

STATE OF FLORIDA – Respondent

On Petition for writ of Certiorari to
The District Court of Appeal of the State of Florida – Second District

PETITION FOR WRIT OF CERTIORARI

PETITIONER:

Marcus Adam Snipes, DC# 528259
Mayo Correctional Institution Annex
8784 U.S. Highway 27 West
Mayo, FL 32066-3458

QUESTION PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond reasonable doubt.”

The question presented is:

WHETHER THE STATE CAN AVOID *APPRENDI'S* REACH BY WRITING ITS PENAL STATUTES SO THAT A FACT THAT INCREASES THE PENALTY FOR A CRIME INSTEAD BECOMES A FACT THAT DECREASES THE PENALTY.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The Petitioner, Marcus Adam Snipes (“Snipes”), respectfully petitions the Honorable Court for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida for the Second District.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition, but is not yet reported in the Southern Reporter.

JURISDICTION

The date on which the highest state court decided Snipes' case was January 8, 2021. A copy of the decision appears at Appendix A. A timely motion for rehearing was denied on March 11, 2021, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment 6 states:

In all criminal prosecutions, the accused shall enjoy the right to a... trial by an impartial jury.

Amendment 14 states:

Nor shall any state deprive any person of life, liberty, or property without due process of law.

Florida Statutes:

Section 775.084(1)(d), Florida Statutes (2012) states:

“Violent career criminal” means a defendant for whom the court must impose imprisonment pursuant to paragraph (4)(d), if it finds that:

1. The defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is:

- a. Any forcible felony, as described in s. 775.08;
- b. Aggravated stalking, as described in s. 784.048(3) and (4);
- c. Aggravated child abuse, as described in s. 827.03(2)(a);
- d. Aggravated abuse of an elderly person or disabled person, as described in s. 825.102(2);
- e. Lewd or lascivious battery, lewd or lascivious molestation, lewd or lascivious conduct, or lewd or lascivious exhibition, as described in s. 800.04 or s. 847.0135(5);
- f. Escape, as described in s. 944.40; or
- g. A felony violation of chapter 790 involving the use or possession of a firearm.

2. The defendant was incarcerated in a state prison or a federal prison.

3. The primary felony offense for which the defendant is to be sentenced is a felony enumerated in subparagraph 1. and was committed on or after October 1, 1995, and:

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 an enumerated felony; or

b. Within 5 years after the conviction of the last prior enumerated felony, or within 5 years after 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 an enumerated felony, whichever is later.

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

Section 775.084(4)(d) provides:

The court, in conformity with the procedure established in paragraph (3)(c), shall sentence the violent career criminal as follows:

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

2. In the case of a felony of the second degree, for a term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment.

3. In the case of a felony of the third degree, for a term of years not exceeding 15, with a minimum mandatory term of 10 years' imprisonment.

Section 775.084(4)(e), provides:

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 violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

STATEMENT OF THE CASE

1. The State of Florida charged Snipes under section 790.23(1), Florida Statutes (2012), with the crime of being a felon in possession of a firearm.

2. The crime of being a felon in possession of a firearm is a second degree felony punishable by up to 15 years imprisonment.

3. Snipes was convicted of the crime after a jury trial.

4. Snipes sentencing scoresheet under the Criminal Punishment Code yielded a lowest permissible sentence of 45.5 months prison and a maximum sentence of 15 years prison. *Appendix F*.

5. The State moved the trial court to sentence Snipes as a violent career criminal under section 775.084(1)(d), Florida Statutes (2012).

6. The trial court found that Snipes qualified to be sentenced as a violent career criminal.

7. Pursuant to section 775.084(4)(d), the court sentenced Snipes to imprisonment for 32 years with a minimum mandatory prison term of 30 years.

8. The state appellate affirmed Snipes conviction and sentence on direct appeal. *Snipes v. State*, 166 So.3d 784 (Fla. 2nd DCA 2014).

9. Snipes filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a), and argued his 32 year prison sentence with a 30 year mandatory minimum term under the violent career criminal statute is illegal

because the statute placed the burden on him to prove that it was not necessary for the protection of the public to exceed the statutory maximum for his crime.

Appendix E.

10. The state trial court denied Snipes motion, explaining “the violent career criminal statute does not allow for the court to increase a defendant’s maximum sentence based a “dangerousness” finding; rather, it only allows the court to refrain from sentencing the defendant a a violent career criminal if the court determines “that it is not necessary for the protection of the public to sentence the defendant as a violent career criminal.” *Appendix B.*

11. The state appeals court affirmed the decision of the trial court.
Appendix A.

REASONS FOR GRANTING THE WRIT

The question presented appears to be one the Court has not previously considered. The question is whether the state may avoid *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by writing a statute so that a fact necessary to an increased sentence instead becomes a fact necessary to a decreased sentence.

In *Apprendi* the Court held that “other than the 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 reasonable doubt.” *Id.*, 490. At issue in the case was New Jersey’s hate crime statute that provides for “an ‘extended term’ of imprisonment if the trial judge finds by a preponderance of the evidence that the ‘defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.’” *Id.*, 468-69. The Court held this statutory scheme was unconstitutional because it allowed a judge—and not a jury—to find by a preponderance of the evidence a fact necessary to an increased sentence. *Id.* 491.

Now what if New Jersey had written its hate crime statute so that the extended term of imprisonment was the normal statutory maximum, and allow for a decreased sentence if the trial judge finds the defendant did *not* act with a purpose to intimidate one of the specified groups. That is, could a state avoid

Apprendi by framing a fact in the negative so that it is a sentence decreasing fact and not a sentence increasing fact.

At issue in Snipes' case is the operation of section 775.084(4)(e), stating:

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 violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

The question is whether the fact of "not necessary for the protection of the public is an adjudicatory fact within the meaning of *Apprendi* given that the fact decreases the sentence, not increases it.

In *Robbinson v. State*, 784 So.2d 1246 (Fla. 3rd DCA 2001), the district court considered whether the fact of "not necessary for the protection of the public" was "an adjudicatory fact within the meaning of *Apprendi*." The district court held it was not because

Apprendi is triggered by a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." The trial court's option under subsection 775.084(4)(c) to impose a non-habitual offender sentence is an option to stay within the ordinary statutory maximum, not to increase it.

Id., 1247.

In *Brown v. State*, 260 So.3d 147 (Fla. 2018), the state supreme court held that section 775.082(10), Florida Statutes, violated the jury trial guarantee of the Sixth Amendment to the United States Constitution, as interpreted by *Apprendi* and *Blakely*¹, where the statute required the court—and not the jury—to make the finding of dangerousness to the public. Section 775.082(10), Florida Statutes states:

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 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 nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

The supreme court determined this section “unambiguously sets the statutory maximum penalty, for *Apprendi* purposes as defined by *Blakely*, as a ‘nonstate prison sanction’.” *Id.*, 150. The supreme court, however, added “it would have been possible for the Legislature to have written this statute as a ‘mitigation statute,’ giving the court discretion to impose up to five years unless the defendant proves non-dangerousness...” *Id.*

¹ *Blakely v. Washington*, 542 U.S. 296 (2004)

As suggested by these cases, the state could avoid *Apprendi* by writing or rewriting its criminal statutes so that a fact for an increased sentence becomes a fact for a decreased sentence.

However, the fact of “not necessary for the protection of the public” stated in the negative is, in effect, no different from the fact of “necessary for the protection of the public” stated in the positive. The legislature cannot avoid the twin pillars of jury factfinding and proof beyond reasonable doubt by simply adding the word “not” in front of a fact that would otherwise increase the penalty for a crime beyond the statutory maximum. The fact of “necessary for public protection”—whether stated in the negative or in the positive—is “a fact that increases the penalty for a crime beyond the prescribed statutory maximum.”

Here, the prescribed statutory maximum for Snipes’ crime of being a felon in possession of a firearm was 15 years prison. The violent career criminal statute, however, increased that penalty to 40 years prison with the requirement that this Court impose a minimum mandatory term of 30 years prison. However, if Mr. Snipes proved that it was not necessary for the protection of the public to exceed the prescribed statutory maximum for his crime, then his sentence would have been no more than 15 years prison. Snipes’ sentence of 32 years prison with a 30 year minimum mandatory violates *Apprendi*.

CONCLUSION

Mr. Snipes asks the Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marcus Adam Snipes", is written over a horizontal line.

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