IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

APPEAL NUMBER: 1D06-_____

KEVIN MACK

Defendant-Petitioner,

v.

STATE OF FLORIDA

Plaintiff-Respondent.

DEFENDANT-PETITIONER MACK'S PETITION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.141(c) FOR HABEAS CORPUS RELIEF FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

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DEFENDANT-PETITIONER MACK'S PETITION FOR HABEAS CORPUS RELIEF FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1. BASIS FOR INVOKING JURISDICTION

Comes now the Defendant-Petitioner, KEVIN MACK, by and through his undersigned attorney, pursuant to Rule 9.141(c), Florida Rules of Appellate Procedure, and petitions this honorable Court to grant a writ of habeas corpus for ineffective assistance of appellate counsel.

2. THE FACTS ON WHICH THE PETITIONER RELIES

In support thereof, the Petitioner, Kevin Mack, would state the following facts:

The original appeal in this case, as to which Mack is asserting he had ineffective assistance of appellate counsel, arose out of an appeal from the judgment and sentence for one count of possession of a firearm by a convicted felon. The trial proceedings were held in the Circuit Court for Duval County, Judge Lawrence Haddock, circuit court judge, presiding.

By information filed September 11, 2003, appellant Kevin Mack was charged with one count of possession of a firearm by a convicted felon, in contravention of section 790.23, Florida Statutes. (R.I, 7).[1] Petitioner subsequently entered a plea of guilty. (R.I, 28). The plea agreement called for a sentence of 38 months in prison with a minimum mandatory term of three (3) years.[2] (R.I, 28). The plea agreement also provided, however, that sentencing would be deferred and that if Mack failed to appear for sentencing or committed "a new crime supported by probable cause," petitioner could be sentenced to any lawful term. (R.I, 28). There was no provision

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[1] Record citations are to the previous record on appeal or to the applicable transcript of sentencing.

[2]The plea actually provided that appellant would be sentenced as an habitual felony offender. (R.I,28). The state, however, subsequently abandoned its request for the enhanced sentence and withdrew the habitual offender notice. (R.II,216).

in the plea agreement as to the mechanism for making the determination that a new crime had been committed if there were a later allegation of a new crime by Mack.

At sentencing, the state argued that Mack had committed a new offense: battery against his twenty year old daughter, Kellisha Priester. (R.I, 192, 194). The defense denied the allegation. At what amounted to a probable cause hearing, the state and defense presented witnesses, following which the judge alone, without a jury, made a finding that Mack had committed the alleged new offense while awaiting sentencing.

Defense counsel objected that there was no probable cause to determine that Mack had committed a new crime. [July 30, 2004 sentencing hearing, p. 26] At the conclusion of the evidentiary hearing defense counsel made a form of *Blakely* objection, stating:

> [I]f the Court finds that the plea agreement has been violated in any way, I think at that time I would be filing a *Blakely* motion that I have been filing in all the other cases because I think the State would then try to proceed with a sentencing up to the HO maximum. And so, then I would ask the Court to - - that we have the *Blakely* hearing which we have already set for the 13th, I informed Mr. O'Keefe about it.
>
> . . .

It was contemplated HFO but the difference being under *Blakely* if you - - if you agree to a sentence - - if you agree that you meet the qualifications that's like entering a plea to anything, so you're then admitting that. And so I think if everything was to go - - if the Court said, all right, I'm still finding the agreement as is, then we would be - - we would then be stipulating to the fact he does qualify as an habitual felony offender. If not, then the sentence is all gone and then our position is that the Court - - *that's something that has to be made determination by the jury.*

[July 30, 2004 sentencing hearing, pp. 27-28]

The sentencing was postponed to August 13, 2004. At that time having made a judicial fact finding that Mack had committed a new offense while awaiting sentencing, the trial court determined that it was no longer bound by the 38 month agreed upon sentence. Thereupon the trial court sentenced Mack to a term of eight years in prison with credit for time served. (R.II, 232). The trial court also imposed a minimum mandatory term of three years. (R.II, 232).

Before imposition of sentence defense counsel objected:

Judge, first I would like to point out that it's still our opinion that Mr. Mack did not violate the agreement between himself, the state and the

court, that - - and we believe he should be sentenced based upon his plea agreement that he entered before the court.

Judge, it's always - - I think it's always dangerous to start sentencing people and taking in light stuff that hasn't been proven before a jury, such as this allegation that was made against Mr. Mack.

. . .

And if we now go back and start looking at things that happened after that [after the plea agreement] *that haven't been proven to a jury,* then we start getting into circumstances where people may get wrongfully punished for things that they didn't do.

[Sentencing hearing, August 13, 2004, p. 9; p. 11]

A timely notice of appeal was filed and the public defender was appointed for purposes of appeal. In a letter from Ward L. Metzger, Esq., assistant public defender in Jacksonville to Douglas Brinkmeyer, assistant public defender in Tallahassee, dated October 6, 2004, attorney Metzger expressly noted in all capital bold type letters that the issue was that "THE COURT ERRED IN VIOLATING THE PLEA AGREEMENT." This was also the only issue listed in the statement of judicial acts to be reviewed which was filed with the court.

However the appellate public defender instead addressed two unrelated issues

in the initial appeal brief:

> Issue I - Whether Appellant's Spontaneous Statement to Officer McKinley Constituted Fruit of an Illegal Arrest Erroneously Admitted by the Trial Court?

and

> Issue II - Whether Appellant's Statement to Officer Bible Constituted the Fruit of an Illegal Arrest Erroneously Admitted by the Trial Court.

This Court affirmed the conviction and sentence per curiam without published opinion August 11, 2005.

3. NATURE OF THE RELIEF SOUGHT

Defendant-Petitioner Mack requests this honorable Court grant his petition for habeas corpus relief for ineffective assistance of counsel, and that he either be granted relief on the basis of the arguments presented herein, that is, that the lower court erred under *Blakely v. Washington*, 542 U.S. 296 (June 24, 2004) and *Richardson v. State*, 915 So.2d 766 (Fla. 2nd DCA 2005) in using judicial fact finding to determine a factor which increased Mack's sentence from the agreed upon 38 months to eight years, or alternatively, that he be permitted to file a belated appeal as to this *Blakely* issue.

4. ARGUMENT IN SUPPORT OF THE PETITION AND CITATIONS OF AUTHORITY

Ineffective Assistance of Appellate Counsel For Failing to Argue that Mack Was Denied His Sixth Amendment Right to Trial by Jury When His Sentence Was Increased from the Agreed Upon 38 Months to Eight Years Imprisonment Based on Judicial Fact-finding Instead of the Disputed Fact Being Determined By a Jury of His Peers.

A. BASIC PRINCIPLES APPLICABLE TO INEFFECTIVE APPELLATE COUNSEL GENERALLY

In ascertaining the merit of a habeas petition based on a challenge of ineffective assistance of appellate counsel, it is appropriate to determine:

> [F]irst, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Teffeteller v. Dugger,* 734 So.2d 1009, 1027 (Fla.1999); *see also Wilson v. Wainwright,* 474 So.2d 1162, 1163 (Fla.1985). Under this analysis, appellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal. *See Medina v. Dugger,* 586 So.2d 317, 318 (Fla.1991).

Spencer v. State, 842 So.2d 52, 73 (Fla. 2003)

A petition for writ of habeas corpus is the proper vehicle for asserting the ineffectiveness of appellate counsel. See *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000). In considering the petition for habeas relief on the basis of ineffective assistance of appellate counsel, the Court is called upon to determine:

> Whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); see also *Freeman*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). Moreover, "the defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 761 So. 2d at 1069; see also *Knight v. State*, 394 So. 2d 997, 1001 (Fla. 1981).

Gorby v State, 819 So.2d 664 (Fla. 2002).

The appellate counsel guaranteed by the Sixth Amendment:

> must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. See

Anders v. California, 386 U.S. 738 (1967); see also *Entsminger v. Iowa*, 386 U.S. 748 (1967), cited in *Evitts v. Lucey*, 469 U.S. 387 (1985).

Nominal representation on an appeal as of right - like nominal representation at trial - does not suffice to render appellate proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. The promise of *Douglas v. California*, 372 U.S. 353 (1963), that a criminal defendant has a right to counsel on his first appeal as of right - like the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963), that a criminal defendant has a right to counsel at trial - would be a futile gesture unless it comprehended the right to effective assistance of counsel. *Evitts v. Lucey,* at 391-400.

B. THE ISSUE IN MACK'S CASE - FAILURE OF APPELLATE COUNSEL TO MAKE A *BLAKELY* ARGUMENT WHICH, HAD IT BEEN MADE, WOULD HAVE RESULTED IN A SENTENCE REDUCTION FROM EIGHT YEARS IMPRISONMENT TO THIRTY-EIGHT MONTHS, INSTEAD.

The issue here is the fact that the judge alone and not the jury made the fact-finding that Mack had committed the new offense of battery on his daughter while awaiting sentencing which in turn increased Mack's sentence from 38 months to 8

years. At sentencing, Assistant Public Defender Joseph DeBelder objected to the judge alone, and not the jury, determining whether Mack had committed the alleged new crime.[3] The basis for this objection was *Blakely v. Washington*, 542 U.S. 296 (2004), which held that it violated the Sixth Amendment to the United States Constitution for a judge to increase a sentence above the applicable guidelines if the increased sentence was based on a factor found by the judge alone at sentencing, and not by a jury verdict, unless the defendant stipulated to the determinative fact in a plea agreement.

There was no stipulation in this case that Mack had committed a new criminal offense, rather the fact was hotly contested, and a fair view of the evidence is that it was at least in equipoise. The lower court judge was of the view that he alone and not a jury was entitled to make the fact finding necessary to determine and increase

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[3] Attorney DeBelder did not use the term "object" or "objection" but instead said that the failure to have the jury make this finding was "dangerous." This may not have constituted sufficient objection to preserve the issue for appeal, but if that were the case, Rule 3.800 allows appellate counsel to go back to the trial court with unpreserved sentencing objections, and make the objection for the first time after sentencing but before filing the initial appeal brief, to allow the trial court an opportunity to respond to the objection. Then if the trial court overrules the objection, the issue is preserved and can be raised on appeal. We suggest that the issue was sufficiently preserved, but if the Court disagrees, it does not affect the merits of our ineffective assistance argument, but merely requires the Court to further find that appellate counsel should have exhausted the Rule 3.800 process before filing the initial appeal brief.

Mack's sentence.[4]

Judicial fact-finding which results in an increase in sentence when the sentence exposure was otherwise limited, is flatly prohibited by *Blakely v. Washington*:[5]

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "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 a reasonable doubt." . . .
>
> Our precedents make clear, however, 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 the defendant.* See *Ring, supra,* at 602, 122 S.Ct. 2428 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone'' (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d

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[4] The judicial fact-finding was done under a sentencing standard of preponderance of the evidence, rather than by the heightened standard required under the Sixth Amendment jury right of proof beyond a reasonable doubt.

[5] *Blakely* provides an exception for a "prior conviction." Mack was not convicted of the battery in question. The lower court did not rely upon a "prior conviction" as that term is used in *Blakely*.

524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra,* § 87, at 55, and the judge exceeds his proper authority.

. . . Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.

Blakely v. Washington, 542 U.S. 296, 301; 303-304, 124 S.Ct. 2531, 2536-2537 (2004).

In the context of Mack's plea agreement his sentence was limited to thirty-eight months. The only was the judge could impose a sentence in excess was if Mack committed a new criminal offense prior to sentencing. Whether Mack committed a new criminal offense at sentencing could readily have been determined without the application of the *Blakely* strictures, had Mack been convicted of a new criminal offense, then under the *Blakely* exception for prior convictions, the lower court could have imposed the eight year sentence upon proof to the judge alone, without a jury,

of the prior conviction.

But when the state instead chose to seek a sentence in excess of the agreed upon thirty-eight months, then under *Blakely* the state was required to submit that issue to a jury for a jury verdict.

In this instance the jury process was readily available had the state had sufficient evidence to prove the alleged new offense beyond a reasonable doubt, because the *Blakely* factor was a triable offense. This did not require any novel judicial proceeding for jury fact-finding to be used. Both the state and Mack had a right to trial by jury on the new offense. The state instead elected to submit the question of the alleged new offense to the judge alone, under a preponderance standard, rather than fulfill its Sixth Amendment burdens.

The "*Apprendi*" maximum sentence in this case was the thirty-eight months Mack and the state agreed to, absent a new criminal offense. Whether Mack had committed a new criminal offense was a "fact" that resulted in the imposition of a sentence in excess of that otherwise permitted under the terms of his plea agreement. Absent Mack admitting the new offense, that "fact" had to be determined by jury verdict under a proof beyond a reasonable doubt standard.

Mack's sentence was imposed on August 13, 2004. *Blakely* was decided June 24, 2004, therefore *Blakely* governed this sentencing and appeal. *Griffith v.*

Kentucky, 479 U.S. 314 (1987). Defense counsel expressly cited *Blakely* in making his objection. Appellate counsel was on notice on this record that there was a *Blakely* issue to be argued.

Support for this position is found in *Richardson v. State*, 915 So.2d 766, 766-767 (Fla 2nd DCA 2005). In *Richardson*, the Second District Court of Appeal reversed a sentence and remanded for further proceedings, holding that a trial judge could not impose an upward departure based on findings made by the judge alone and not by a jury.

Richardson claimed a *Blakely* violation because the trial court imposed an upward departure sentence based on its finding that Richardson occupied a leadership role in a criminal organization. The State conceded error, and the Second DCA reversed and remanded for resentencing.

Richardson had entered an open guilty plea to violating the Florida RICO Act and to conspiring to traffic in cocaine for events occurring in 1997 and 1998. During the plea colloquy, Richardson did not stipulate to occupying a leadership role in a criminal organization or consent to judicial fact-finding. The court sentenced him to an upward departure sentence of 120 months' imprisonment. The court listed as its reason for departure, "leadership role by Def." *See* § 921.0016(3)(f), Fla. Stat. (1995) (providing for an upward departure if "[t]he defendant occupied a leadership

role in a criminal organization").

On November 23, 2004, while his appeal was pending, Richardson filed a 3.800(b)(2) motion, arguing that the court's upward departure sentence violated *Blakely.*[6] In its order denying relief on the Rule 3.800 motion, the trial court addressed Richardson's claimed *Blakely* violation, concluding that Richardson "may be entitled to relief." But the trial court made no further ruling and the motion was therefore deemed denied. The Second DCA held that the Rule 3.800 motion preserved the *Blakely* issue for review.

The *Richardson* court held that according to *Blakely,* 542 U.S. at 310, 124 S.Ct. 2531:

> 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 factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence

[6] As noted above, had the appellate counsel in Mack's case thought the *Blakely* issue to not be fully preserved below, he was entitled to file a Rule 3.800 motion to protect the record, as was done in *Richardson.*

would prejudice him at trial.

According to the Second DCA's view, although Richardson entered a guilty plea, he did not stipulate to the fact that he occupied a leadership role in a criminal organization or consent to judicial factfinding. Therefore, the court's upward departure sentence violated *Blakely* and reversed and remanded for resentencing.

We submit that Mack is entitled to the same relief.

The complete failure to argue this meritorious issue that arguably was properly preserved for appeal (or if not, could have been fully preserved by use of a Rule 3.800 motion) was a denial of effective assistance of appellate counsel. Mack had only nominal appellate counsel. He was entitled to counsel who would vigorously advocate this meritorious issue. That was not done in Mack's case. In its absence there can be no confidence beyond a reasonable doubt that this Court would have reached the same result on his appeal and indeed, it is clear, that the Court would have been required to reverse Mack's sentence and remand for resentencing had this issue been properly presented on appeal.

Mack is entitled to remand with instructions that his sentence be vacated or alternatively, this habeas for ineffective appellate counsel should be granted and Mack permitted a new appeal to more fully argue this issue.

CONCLUSION

Wherefore, based on the facts and law set forth above, Defendant-Petitioner KEVIN MACK, respectfully requests this honorable Court grant the relief requested.

Respectfully submitted,

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Pursuant to Florida Rule of Appellate Procedure 9.141(c)(3)(F), counsel swears that the facts alleged herein that constitute ineffective assistance of counsel are true based on the record herein.

_____

William Mallory Kent

TABLE OF CITATIONS

CASES

STATUTES

RULES

OTHER

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail, first class, postage prepaid, on the Honorable L. Page Haddock, Circuit Court Judge, Duval County Courthouse,330 East Bay Street, Room 206, Jacksonville, Florida, 32202 and on the office of the State Attorney, Felony Division CR-F, 330 East Bay Street, Jacksonville, Florida, 32202, and on the Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida, 32399, this the ___ of August, 2006.

_____

William Mallory Kent