IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL HUGHES, :

Petitioner, :

v. : CASE NO. SC02-2247
1D02-1258

STATE OF FLORIDA, :

Respondent. :

_____/

ON A CERTIFIED QUESTION
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Assistant Public Defender

Second Judicial Circuit
Fla. Bar No. 197890
301 S. Monroe, Suite 401
Tallahassee, FL 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

This case is before the Court on a certified question from the First District

Court of Appeal. Jurisdiction arises under Art. V, §3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(v). The issue is whether the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), applies retroactively.

A 16-page record on appeal will be referred to as "I R," followed by the appropriate page number in parentheses.

This brief is printed in 12 point Courier New font and submitted on a disk. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Hughes v. State, 27 Fla. L. Weekly D2169 (Fla. 1st DCA Oct. 2, 2002).

STATEMENT OF THE CASE AND FACTS

On March 7, 2001, petitioner filed a pro se motion to correct sentence under Fla. R. Crim. P. 3.800(a), in which he alleged that he had been convicted of battery on a jail detainee by another jail detainee, a third degree felony, and sentenced to 80.4 months in state prison, on a 1995 sentencing guidelines scoresheet which contained four points for legal status and 40 points for severe victim injury. (I R 10-13). Petitioner alleged that his 80.4 month state prison sentence, in excess of the statutory maximum, was illegal because no jury had found the legal status and victim injury points, in violation of Apprendi v. New Jersey, *supra*, and without those 44 points, his guidelines range would be 27.3 to 45.5 months (I R 1-7).

On July 10, 2001, the judge summarily denied petitioner's motion, and found that Apprendi was not to be applied retroactively to petitioner's crime, and that Apprendi did not overrule this Court's decision in Mays v. State, 717 So. 2d 515 (Fla. 1998),[1] which allowed a sentence to exceed the normal statutory maximum if the sentencing guidelines scoresheet so required (I R 14-15).

On July 23, 2001, petitioner filed a timely pro se notice of appeal (I R 16). By unreported order dated June 6, 2002, the lower tribunal ordered the state to respond

[1]Mis-cited as volume 715 So. 2d in the opinion below.

to the question of whether Apprendi required a reversal of the judge's order. The state filed its response on July 17, 2002.

By unreported order dated July 19, 2002, the lower tribunal appointed this Office to represent petitioner and requested it to file a reply to the state's response. This Office filed its reply on August 1, 2002, and argued that both Apprendi and Ring v. Arizona, 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), required a reversal of petitioner's sentence.

The lower tribunal announced five holdings in its opinion. It first held that Rule 3.800(a) was the proper vehicle to raise the Apprendi claim. Appendix at 2. The lower tribunal then held that the assessment of four legal status points did not violate Apprendi because the jury necessarily found that petitioner was under legal status when it found him guilty of the crime. Appendix at 2.

The lower tribunal then held that the assessment of 40 points for severe victim injury did violate Apprendi, since they were not found by the jury. Appendix at 2. The lower tribunal then held that Apprendi had effectively overruled Mays v. State, *supra*. Appendix at 2.

The lower tribunal finally held that Apprendi was not applicable to petitioner's

sentence, which became final before Apprendi was decided on June 26, 2000.[2] The lower tribunal applied the three-prong test for retroactivity as announced by this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980). The lower tribunal found that Apprendi satisfied the first two prongs, because it was a constitutional change in the law from the U.S. Supreme Court. Appendix at 3.

The lower tribunal then applied the three-part test of Stovall v. Denno, 386 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1965), found that Apprendi was not a development in the law of fundamental significance, and so refused to apply it retroactively to petitioner's sentence. Appendix at 4-5. The lower tribunal did, however, certify the following question to this Court:

> DOES THE RULING ANNOUNCED IN APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000), APPLY RETROACTIVELY?

Appendix at 5.

Notice of Discretionary Review was timely filed.

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[2]The lower tribunal did not mention the effect of *Ring v. Arizona, supra*, which was decided on June 24, 2002.

SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the decision in Apprendi v. New Jersey, *supra*, must be applied retroactively to allow petitioner to attack his 80.4 month sentence, which was in excess of the statutory maximum. In Apprendi, the Court held that any fact which increases the penalty for a state crime beyond the statutory maximum, except for the existence of prior convictions, must be submitted to the jury and found by the jury beyond a reasonable doubt, because to allow the judge to make such finding would be a violation of due process.

The standard of review is de novo, since the test for retroactivity is purely a question of state law under Witt v. State, *supra*. The federal view of which decisions should be applied retroactively is not applicable, since we are free to adopt our own test, and have done so in Witt. The Witt test contains an element of fairness not present in the federal test.

The lower tribunal properly found that Apprendi was entitled to retroactive application because it emanated from the U.S. Supreme Court and was constitutional in nature. However, the lower tribunal erred in finding that it was not a fundamental change in the law of sentencing.

Apprendi did announce a change in the law of fundamental significance, since it

outlawed the long-standing practice of the judge considering sentencing factors without a determination of those factors by a jury. Allowing a judge alone to assess points on the sentencing guidelines scoresheet is no longer constitutionally permitted.

The lower tribunal also failed to consider the effect of Ring v. Arizona, *supra*, on petitioner's sentence. In Ring, the Court held that an aggravating circumstance to support a death sentence must be found by a jury, because to allow the judge to make such finding would be a violation of the right to trial by jury. In deciding Ring, the Court cited Apprendi with approval and noted that if the state seeks to increase the penalty beyond what the jury's verdict would authorize, the factors supporting the increase must be found by the jury beyond a reasonable doubt.

Thus, assessing points for victim injury and legal status, just like an aggravating circumstance in a capital case, increases the defendant's sentence beyond the normal maximum authorized penalty. A judge alone may no longer constitutionally make a finding of fact to support a sentence in excess of the normal statutory maximum. Thus, after Apprendi and Ring, only a jury is authorized to find victim injury and legal status points.

One need only read the separate acrimonious opinions of the justices in these two

cases to see that these are fundamentally significant, and not the type of evolutionary changes in the law which would militate against retroactive application.

The lower tribunal's main concern was that a retroactive application of Apprendi would have a monumental impact on the administration of justice, for it would open the floodgates and require judges to recalculate many sentencing guidelines scoresheets.

The lower tribunal's concerns are unfounded, because the decision applies only to those defendants who were sentenced under the former sentencing guidelines statute which permitted a sentence in excess of the statutory maximum. That statute was only in existence for four years and nine months, and there are only nine reported decisions discussing it. The class of such inmates is further limited by two more factors -- if a defendant enters a plea and admits that he seriously injured the victim, or if the jury necessarily found victim injury in finding the defendant guilty of the charge, then he cannot later challenge the assessment of victim injury points.

Courts will only have to look at the scoresheets to determine if the defendant received a guidelines sentence in excess of the normal statutory maximum and then to

determine if they assessed points for something other than prior record (such as legal status or victim injury). The courts will not have to be concerned that the retroactive application of Apprendi will lead to new trials being awarded or convictions being vacated.

The administrative of justice would be more detrimentally affected if criminal defendants, such as petitioner, had the misfortune of receiving guidelines sentences in excess of the normal statutory maximum during this four year and nine month period. Fundamental fairness requires that this significant change in the law be applied retroactively to petitioner's benefit.

Petitioner's pro se motion satisfies the requirements for pleading in a motion to correct or vacate a sentence -- it alleges an illegal sentence, which is apparent on the face of the record, and entitles him to relief. The proper remedy is to reverse the decision of the lower tribunal and remand with directions that petitioner's sentencing guidelines scoresheet be corrected and that he be resentenced in accord with a properly-prepared scoresheet.

ARGUMENT

THE DECISIONS ANNOUNCED IN APPRENDI v. NEW JERSEY AND RING v. ARIZONA MUST BE APPLIED RETROACTIVELY TO PETITIONER, WHOSE SENTENCE HAD BECOME FINAL, BUT WHOSE SENTENCING GUIDELINES SCORESHEET CONTAINS POINTS FOR FACTORS WHICH WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Petitioner was convicted of battery on a jail detainee by another jail detainee and sentenced to 80.4 months in state prison, on a 1995 sentencing guidelines scoresheet which contained four points for legal status and 40 points for severe victim injury. This crime is a third degree felony, normally punishable by a maximum of five years in state prison.[3]

Petitioner pro se motion to correct sentence alleged that his 80.4 month state prison sentence, in excess of the statutory maximum, was illegal because no jury had found the legal status and victim injury points, in violation of Apprendi v. New Jersey, *supra*, and without those 44 points, his guidelines range would be 27.3 to 45.5 months.

The lower tribunal found that the assessment of 40 severe victim injury points by the judge alone was no longer permitted under Apprendi, but refused to apply Apprendi retroactively to correct petitioner's scoresheet and sentence.

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[3]§§775.082(3)(d) and 784.082(3), Fla. Stat. (1997).

The standard of review is de novo, since this is purely a question of state law.

A. APPRENDI ANNOUNCED A NEW RULE OF LAW OF CONSTITUTIONAL SIGNIFICANCE.

In Apprendi v. New Jersey, *supra*, the Court held that any fact which increases the penalty for a state crime beyond the statutory maximum, except for the existence of prior convictions, must be submitted to the jury and found by the jury beyond a reasonable doubt, because to allow the judge to make such finding would be a violation of due process:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones* [v. *United States*, 526 U.S. 227, 119 S.C. 1215, 143 L.Ed.2d 311 (1999)]. 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**. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S., at 252-253, 119 S.C. 1215 (opinion of STEVENS, J.); *see also id.*, at 253, 119 S.C. 1215 (opinion of SCALIA, J.). [FN16]
>
> [FN16] The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. Post, at 2388-2390. While a State could, hypothetically, undertake to

revise its entire criminal code in the manner the dissent suggests, post, at 2389 –- extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range –- this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequence, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. *Patterson v. New York*, 432 U.S., at 228-229, n. 13, 97 S.C. 2319 (Powell, J., dissenting). So exposed, "[the political check on potentially harsh legislative action is then more likely to operate." *Ibid*. In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, post, at 2390), we would be required to question whether the revision was constitutional under this Court's prior decisions. *See Patterson*, 432 U.S., at 210, 97 S.C. 2319; *Multan v. Wilbur*, 421 U.S. 684, 698-702, 95 S.C. 1881, 44 L.Ed.2d 508. Finally, the principal dissent ignores the distinction the Court has often recognized, *see, e.g., Martin v. Ohio,* 480 U.S. 228, 107 S.C. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. *See* post, at 2389-2390. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the

> defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. *See supra*, at 2359. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

120 S.Ct. at 2362-63; bold emphasis added.

The Apprendi majority did not overrule, but severely limited, the Court's prior decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), in which the Court coined the term "sentencing factor," and held that the judge could find use of a firearm (not found by the jury) to impose a statutory minimum mandatory sentence. The Apprendi majority found that even though the hate crime factor, which enhanced the defendant's sentence beyond the normal statutory maximum, appeared in a penalty statute and not in the statute defining the elements of the crime, that did not matter, because the Due Process Clauses of the Fifth and Fourteenth Amendments, U.S. Const., required that factor to be submitted to the jury and found by the jury beyond a reasonable doubt.

Justice Thomas, concurring, expressed the view that McMillan was wrongly decided, and the Court should adopt a broader common law rule that: "If a fact is by law the

basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.)" 120 S.Ct. at 2379.

Justice O'Connor, dissenting, stated that Apprendi "will surely be remembered as a watershed change in constitutional law." 120 S.Ct. at 2380. In her view, McMillan has been effectively overruled by Apprendi, because: "In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder." 120 S.Ct. at 2381.

Justice Breyer, dissenting, noted that: "In modern times the law has left it to the sentencing judge to find those facts which (within broad sentencing limits set by the legislature) determine the sentence of a convicted offender." 120 S.Ct. at 2397. In his view, Apprendi is contrary to the recent trend to adopt sentencing guidelines, in which judges are permitted to consider certain factors not found by the jury.

The lower tribunal cited United States v. Cotton, 563 U.S. ___, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), for the proposition that an Apprendi violation could be harmless error.

That statement is true as far as it goes. But Cotton is totally distinguishable. The question there was whether a federal indictment must allege the quantity of drugs where the judge imposed a statutorily-required mandatory minimum sentence for that quantity. The issue had not been raised at trial, but rather was raised for the first time on appeal after Apprendi was decided.

Moreover, Florida has always had a state requirement, requiring the information to specifically allege the quantity of drugs, and the jury to specifically find the quantity in its verdict. *See, e.g.*, Ankiel v. State, 479 So. 2d 263 (Fla. 5th DCA 1985); and Rickman v. State, 642 So. 2d 846 (Fla. 4th DCA 1984).

There is no doubt that Apprendi constitutes a significant change in the constitutional law of sentencing. Allowing a judge alone to find legal status and victim injury under §921.0011(3) and (7), Fla. Stat. (1997), and to assess additional points on the scoresheet for these two factors, is no longer constitutionally valid after Apprendi.[4]

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[4]The state may argue that this position was rejected by this Court in *Hall v. State*, 823 So. 2d 757 (Fla. 2002). Not so. *Hall* was a criminal punishment code case, where the sentence was *within* the normal statutory maximum, not a sentencing guidelines case, in which the sentence is *beyond* the normal statutory maximum. Nor is the lower tribunal's decision in *Isaac v. State,* 27 Fla. L. Weekly D1680 (Fla. 1st DCA July 23, 2002), controlling, because in that case the departure sentence was *within*

B. RING ANNOUNCED A NEW RULE OF LAW OF CONSTITUTIONAL SIGNIFICANCE.

This Court must also consider the effect of Ring v. Arizona, *supra*, on petitioner's 80.4 month sentence. Ring lends support to petitioner's argument that Apprendi does apply retroactively to allow a collateral attack on petitioner's sentence.

In Ring, the Court held that an aggravating circumstance to support a death sentence must be found by a jury, because to allow the judge to make such finding would be a violation of the Sixth Amendment right to trial by jury. In Arizona, the presumptively-correct and maximum penalty available for a verdict of first degree murder by the jury is life in prison. The judge must impose a life sentence unless he alone finds aggravating circumstances to support the death penalty.[5] In Ring, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), a decision only two years old, which had approved Arizona's death penalty sentencing scheme, because it was

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the normal statutory maximum.

[5]This Court has declined to decide the effect of *Ring* on Florida's death penalty statute. *See Bottoson v. Moore*, 27 Fla. L. Weekly S___ (Fla. Oct. 24, 2002), and *King v. Moore*, 27 Fla. L. Weekly S___ (Fla. Oct. 24, 2002).

irreconcilable with Apprendi.

In deciding Ring, the Court cited Apprendi with approval and noted that if the state seeks to increase the penalty beyond what the jury's verdict would authorize, the factors supporting the increase must be found by the jury beyond a reasonable doubt:

> We held that Apprendi's sentence violated his right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.*, at 477, 120 S.Ct. 2348 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). That right attached not only to Apprendi's weapons offense but also to the "hate crime" aggravating circumstance. New Jersey, the Court observed, "threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race." *Apprendi*, 530 U.S., at 476, 120 S.Ct. 2348. "Merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Ibid*.
>
> **The dispositive question, we said, "is one not of form, but of effect**." *Id.*, at 494, 120 S.Ct. 2348. **If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.** See *id.*, at 482-483, 120 S.Ct. 2348. A defendant may not be "expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483, 120 S.Ct. 2348; see also *id.*, at 499, 120 S.Ct. 2348 (SCALIA, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment

must be found by the jury.").

* * *

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C)(West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. See Brief for Respondent 9-19. This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," *Apprendi*, 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C)("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added)). If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541, 120 S.Ct. 2348 (O'CONNOR, J., dissenting).

Ring, *supra*, 122 S.Ct. at 2439-40; emphasis added.

Justice O'Connor again dissented because Apprendi was a "serious mistake," 122 S.Ct. at 2449, and should be overruled. There is no doubt that Apprendi and Ring

constitute a significant change in the constitutional law of sentencing.[6]

Here, the jury found petitioner guilty of battery on a jail detainee, but his sentencing guidelines scoresheet contained 40 points for severe victim injury and 4 points for legal status, neither of which was found by the jury. As a result, his presumptively-correct guidelines sentence was 80.4 months under §921.0016(1), Fla. Stat. (1997), which was the sentence he received. In Florida, just like in Arizona's unconstitutional death penalty procedure, the judge must impose the presumptively-correct guidelines sentence, unless he alone finds some valid reason to depart upward. As noted in Ring, the question is not of form but rather of effect.

Thus, assessing points for victim injury and legal status, just like an

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[6]The state may argue that the decision in a companion case to *Ring* changes this result. Not so. In *Harris v. United States,* 586 U.S. ___, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), the Court held, consistent with *McMillan v. Pennsylvania, supra*, that a federal judge may find that the defendant "brandished a firearm" and use that sentencing factor to impose a statutorily-required mandatory minimum sentence. *Harris* did not involve assessing points on a sentencing guidelines scoresheet for factors which were not found by the jury. Moreover, Florida has always had a state requirement, totally apart from *McMillan*, requiring the jury to specifically find the firearm element in its verdict. *See, e.g., State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984).

aggravating circumstance in a capital case, increases the defendant's sentence beyond the normal maximum authorized penalty. A judge alone may no longer constitutionally make a finding of fact to support a sentence in excess of the normal statutory maximum. Thus, after Apprendi and Ring, only a jury is authorized to find victim injury and legal status points. Here, petitioner received a sentence of 20.4 months above the statutory maximum, pursuant to §921.0014(2), Fla. Stat. (1997), based upon facts which were not found by the jury. This sentence is illegal.

C. THE FEDERAL TEST FOR RETROACTIVITY DOES NOT APPLY IN FLORIDA.

The state below relied on Teague v. Lane, 489 U.S. 288 (1989), Graham v. Collins, 506 U.S. 461 (1993), and Tyler v. Cain, 533 U.S. 656 (2001), for testing the retroactivity of Apprendi. In those cases, the Court announced a restrictive test for determining whether a change in the law must be applied retroactively in federal habeas corpus cases. None of these cases had anything to do with the retroactive application of a constitutional change in the law announced by the United States Supreme Court to a state court collateral attack.[7]

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[7]While it is true that the majority of the lower federal courts have held that *Apprendi* is not retroactive on *federal* collateral attacks, that opinion is not unanimous. See the collection of cases in *United States v. Mena*, ___ F.Supp.2d ___,

Moreover, the federal Teague test for retroactivity has never been adopted in Florida. This is because there are competing interests between federal habeas corpus review of a state court conviction and sentence and a state's own rules of collateral attack. The federal courts are concerned with comity with the states, and the finality of a state court judgment. The state courts are more concerned about fundamental fairness as it affects their citizens. As one commentator has noted:

> The tension in federal habeas between the vindication of individual rights and federal concerns over comity and finality remains, although the balance favoring one over the other oscillates. It is evident, however, **that these competing views are peculiar only to the federal system, where comity and the federal-state balance play a major role in the Court's limiting the reach of federal habeas. When these factors are subtracted, all that remains is a competition between the interest in protecting individual rights and the state's interest in finality. That difference is crucial in examining state postconviction remedies in contrast to federal remedies, for the absence of the need for comity creates a compelling case for asymmetry in federal and state responses to postconviction relief.**

Hutton, "Retroactivity in the States: the Impact of Teague v. Lane on State

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2002 WL 384467 (N.D. Texas, March 7, 2002). *See also McCoy v. United States*, 266 F.3d 1245, 1271-72 (11th Cir. 2001), Barkett, J., dissenting (*Apprendi* announced a new substantive rule of law and the *Teague* test applies only to new procedural rules); and *United States v. Clark*, 260 F.3d 382, 383-89 (5th Cir. 2001), Parker, J., dissenting (same).

Postconviction Remedies," 44 ALA. L. REV 421, 436-37 (Winter, 1993) (emphasis added). Thus, the state's reliance below on the Teague test is erroneous, and the judge below erred in relying on the federal cases in determining that petitioner was not entitled to relief.

D. PRINCIPLES OF FEDERALISM PERMIT FLORIDA TO ADOPT ITS OWN TEST FOR RETROACTIVITY.

The state and the judge below cited lower federal court cases which hold that Apprendi is not retroactive on federal habeas corpus. These do not matter, because the principles of federalism dictate that we need not blindly follow what the federal courts have done. For example, in Smith v. Robbins, 528 U.S. 259, 272 (2000), the Court held that the states are free to establish procedures to process an indigent's direct criminal appeal as a matter of right, when counsel files a no-merit brief, because that Court had an "established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy." Smith v. Robbins, 528 U.S. at 272. In Smith v. Robbins, the Court announced a "hands-off" policy with regard to how the states conduct their business: "[I]t is more in keeping with our status as a court, and particularly with our status as a court in the federal system, to avoid imposing a single solution on the States from the top down." Smith v. Robbins, 528 U.S. at 275.

In Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), the Court stated that the Anders procedure is not "an independent constitutional command," but rather only a "prophylactic framework." In Griffin v. Illinois, 351 U.S. 12 (1956), the Court expressly disclaimed any rule-making authority over the states in their treatment of indigent appeals.

In Martinez v. Court of Appeal of California, 528 U.S. 152, 163 (2000), the Court held that the principles of federalism allow the states to develop their own rules to permit an appellant in a criminal case to represent himself on appeal in state court. Likewise, in Addington v. Texas, 441 U.S. 418, 431-32 (1979), this Court held that the principles of federalism allow the states to develop their own burden of proof for the standard of civil commitment:

> That some states have chosen –- either legislatively or judicially –- to adopt the criminal law standard gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. **The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.** As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. (emphasis added; footnote 5 omitted).

As noted above, the federal test for retroactivity has never been adopted in Florida. Rather, this Court in Witt v. State, *supra*, 387 So. 2d at 928, developed

its own solution to the problem of how to apply later decisions of constitutional significance retroactively, and such a procedure does not offend the federal constitution:

> First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post- conviction relief machinery. Second, we know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute.

Thus, it matters not what the federal courts have said about the retroactivity of Apprendi and Ring.

E. THE WITT TEST FOR RETROACTIVITY CONTROLS IN FLORIDA.

In Witt v. State, *supra*, 387 So. 2d at 931, this Court announced the following test for retroactive application of a later decision to a case which has become final:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (C) constitutes a development of fundamental significance.

Both Apprendi and Ring announced new rules of law, and changed the existing law on sentencing practices in non-capital and capital cases. Applying the Witt test, it

is obvious that petitioner's situation meets that test. Both decisions were promulgated by the United States Supreme Court. Both were constitutional in nature -- Apprendi based its holding on the Fifth and Fourteenth Amendments' Due Process Clauses and Ring on the right to trial by jury under the Sixth Amendment, U.S. Const. Both decisions have fundamental significance -- Apprendi totally changed what a judge could consider as a "sentencing factor" without input from a jury; and Ring declared that the jury must be the sentencer in capital cases.

One need only read the separate acrimonious opinions of the justices in these two cases to see that these are fundamentally significant, and not the type of "evolutionary changes in the law" which would militate against retroactive application. The lower tribunal was incorrect to hold that Apprendi should not be applied retroactively.

It is the third prong of the Witt test, whether Apprendi announced a "fundamentally-significant" rule of law, in which the lower tribunal erred. Citing Stovall v. Denno and Linkletter v. Walker, *supra,* the Witt Court stated:

> [W]e note that the essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and © the effect on the administration of justice of a retroactive application of the new rule.

Witt v. State, *supra*, 387 So. 2d at 926.

Here, the purpose of the new rule announced in Apprendi is to require the jury to find sentencing factors previously found by the judge. The second element of the Stovall test is met if the amount of reliance on the old rule was minimal.

The lower tribunal erroneously believed that Apprendi does not implicate any fundamental fairness concerns. As noted above, one need only read the separate acrimonious opinions of the justices in Apprendi and Ring cases to see that they are fundamentally significant. The lower tribunal's main concern was that a retroactive application of Apprendi would have a monumental impact on the administration of justice, for it would open the floodgates and require judges to recalculate many sentencing guidelines scoresheets.

The statute at issue here came into being on January 1, 1994, in §921.001(5), Fla. Stat. (1993), and disappeared on October 1, 1998, when the guidelines were abolished and the criminal punishment code enacted pursuant to §921.002(1), Fla. Stat. (1997). Thus, the window period is four years and nine months, and the effect of the retroactive application of Apprendi is minimal, not monumental.

This Court faced a similar problem in State v. Callaway, 658 So. 2d 983 (Fla.

1995). There the question was whether this Court's decision in Hale v. State, 630 So. 2d 521 (Fla. 1993), *cert. denied* 513 U.S. 909 (1994), prohibiting consecutive habitual offender sentences imposed for the same criminal episode, should be applied retroactively on collateral attack to those sentences which had become final prior to the Hale decision.

This Court held that while the retroactive application of Hale have would have a effect on the administration of justice, that effect was limited to only those sentenced to consecutive habitual offender sentences in the six years between the 1988 habitual offender statute and the 1994 decision in Hale. The window period here is four years and nine months, less that the six year period at issue in State v. Callaway.

Here, the lower tribunal was concerned that a retroactive application of Apprendi would have a monumental effect on the court system. The lower tribunal's concerns are unfounded.

First, the decision applies only to those defendants who were sentenced under the former sentencing guidelines statute which permitted a sentence in excess of the statutory maximum if the scoresheet called for a sentence in excess of the statutory maximum.

Moreover, in State v. Callaway, *supra*, 658 So. 2d at 987, this Court stated:

> Courts will not be required to overturn convictions or delve extensively into stale records to apply the rule. The administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of section 775.084 and the decision in *Hale* are required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after *Hale.*

Likewise, in order to give this limited class of defendants relief on their scoresheets, courts will not have to overturn convictions or delve into stale records. Courts will only have to look at the scoresheets to determine if the defendant received a guidelines sentence in excess of the normal statutory maximum and then to determine if they assessed points for something other than prior record (such as legal status or victim injury).

The administrative of justice would be more detrimentally affected if criminal defendants, such as petitioner, had the misfortune of receiving guidelines sentences in excess of the normal statutory maximum during this four year and nine month period.

Second, the lower tribunal has cited nothing to support its assumption that the number of defendants who would benefit from a retroactive application of Apprendi is monumental. It is important to note that only those whose presumptively-correct

sentence exceed the statutory maximum would benefit from Apprendi. Of that group, only those who received points for something other than prior record (such as legal status or victim injury) would benefit from Apprendi.

In addition to Mays, *supra*, and the instant case, the undersigned has been able to locate only seven reported decisions in which the guidelines sentence exceeded the statutory maximum.[8]

Moreover, the class of inmates who were sentenced under the former sentencing guidelines in excess of the normal statutory maximum and who fall within the four year and nine month window period created by Apprendi is further limited by two more factors. First, if a defendant enters a plea and admits that he seriously injured the victim, then he cannot later challenge the assessment of victim injury points. Hindenach v. State, 807 So. 2d 739 (Fla. 4th DCA 2002).

Second, if the jury necessarily finds victim injury in finding the defendant

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[8]*McCloud v. State*, 803 So. 2d 821 (Fla. 2nd DCA 2001), *rev. denied* 821 So. 2d 298 (Fla. 2002); *Gayton v. State*, 725 So. 2d 1179 (Fla. 1st DCA 1998); *Floyd v. State*, 721 So. 2d 1163 (Fla. 1998); *Green v. State*, 715 So. 2d 259 (Fla. 1998); *Wilkins v. State*, 713 So. 2d 1014 (Fla. 1998); *Myers v. State*, 696 So. 2d 893 (Fla. 4th DCA 1997), *quashed*, 713 So. 2d 1013 (Fla. 1998); and *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995). The opinions in *McCloud* and *Myers* reflect that those two defendants had victim injury points assessed on their scoresheets; it is not clear from the other opinions whether those defendants' scoresheets were inflated by victim injury points.

guilty of the charged crime beyond a reasonable doubt, then the defendant cannot claim that the judge should not have assessed victim injury points on the scoresheet. Searles v. State, 816 So. 2d 793 (Fla. 2nd DCA 2002) (jury's verdicts of guilty on three counts of DUI manslaughter and one count of DUI with serious bodily injury supported the judge's assessment of points for death and severe victim injury); and Cameron v. State, 804 So. 2d 338 (Fla. 4th DCA 2001) (jury's verdicts of guilty on six counts of BUI manslaughter and one count of BUI with serious bodily injury supported the judge's assessment of points for death and moderate victim injury).

Thus, the effect on the administration of justice is minimal, not monumental, if only a handful of defendants received a sentence in excess of the statutory maximum, and some of those are precluded from challenging their scoresheets.

Although the Witt court may have borrowed some principles of retroactivity from its federal brethren, the Witt test is purely a Florida test, and it contains an element of fairness which is not necessarily contained in the federal test for retroactivity:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, **society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a** final conviction and **sentence that the machinery of post-conviction relief is**

> **necessary to avoid individual instances of obvious injustice.** Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt v. State, *supra*, 387 So. 2d at 925; emphasis added; footnote 4 omitted.

This Court later reaffirmed the Witt fairness test in State v. Callaway, *supra*, 658 So. 2d at 987:

> The concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality.

Thus, Florida recognizes the need for fairness for its citizens not present in federal habeas corpus proceedings, as pointed out in the Alabama Law Review article, quoted *supra*.

In Ferguson v. State, 789 So. 2d 306, 312 (Fla. 2001), this Court stated: “The final consideration of the retroactivity equation requires a balancing of the justice system’s goals of fairness and finality ... .” In State v. Stevens, 714 So. 2d 347, 348 (Fla.), *cert. denied* 525 U.S. 985 (1998), this Court relied on State v. Callaway, *supra*, and observed that: “Indeed, imposition of a hefty criminal sentence pursuant to a patently ‘irrational’ sentencing scheme ‘could not withstand a due process analysis’ of any sort.”

Moreover, as former Justice Harding stated in State v. Stevens, the window period of a little over six years at issue there would constitute "only a slight impact on the administration of justice" because "The change would not require new trials or affect convictions, but would only require the trial courts to repentance the defendants who were sentenced under the old rule." *Id.* at 350.

In the instant case, the scale tips in favor of fairness over finality. The retroactive application of Apprendi to the narrow class of inmates described above would not take a great toll on the judicial system. Such an application would not require new trials and would not affect the validity of any convictions. The only people who will be able to take advantage of a retroactive application of Apprendi are the few who have received sentences in excess of the normal statutory maximum between January 1, 1994, and October 1, 1998, a window period less than the six year periods at issue in the other cases in which this Court decided in favor of the retroactive application of new rules of sentencing law..

As argued above, a judge in Florida can no longer assess victim injury and legal status points on the sentencing guidelines scoresheet, without a finding on those factors by a jury. Both Witt and fundamental fairness require that this significant change in the law be applied retroactively to petitioner's benefit.

F. PETITIONER'S RULE 3.800(a) MOTION CHALLENGING VICTIM INJURY AND LEGAL STATUS POINTS SETS FORTH A MERITORIOUS CLAIM FOR RELIEF.

As noted above, petitioner's sentencing guidelines scoresheet contained 40 points for severe victim injury and 4 points for legal status, a total of 108.4 points, and a recommended guidelines sentence of 80.4 months (I R 10-13). If one deducts the 44 points, because they were not found by a jury beyond a reasonable doubt, the new point total becomes 64.4, the recommended sentence 36.4 months, and the guidelines range from 27.3 to 45.5 months.

Petitioner's pro se motion satisfies this Court's requirements for pleading in a motion to correct or vacate a sentence -- it alleges an illegal sentence, which is apparent on the face of the record, and entitles him to relief. Baker v. State, 714 So. 2d 1167 (Fla. 1st DCA 1998). The proper remedy is to reverse the decision of the lower tribunal and remand with directions that petitioner be resentenced within the corrected range.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Court quash the decision of the district court, and remand with directions to resentence petitioner in accord with its disposition of the issues.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
P. DOUGLAS BRINKMEYER #197890
ASSISTANT PUBLIC DEFENDER
301 S. Monroe, Suite 401
Tallahassee, FL. 32301

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Trisha E. Meggs, Assistant Attorney General, The Capitol, Tallahassee, FL., and by U.S. Mail to Petitioner, this ___ day of October, 2002.

_____
P. DOUGLAS BRINKMEYER

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the forgoing Brief on the Merits has been prepared in Courier New 12 point type.

_____
P. DOUGLAS BRINKMEYER

IN THE SUPREME COURT OF FLORIDA

JAMES MICHAEL HUGHES, :

Petitioner, :

v. : CASE NO. SC02-2247
1D02-1258

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Fla. Bar No. 197890
301 S. Monroe, Suite 401
Tallahassee, FL 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

Criminal law -- Sentencing -- Correction -- Claim that sentence violated ruling of United States Supreme Court in *Apprendi v. New Jersey,* because victim injury points which were assessed on scoresheet were made on basis of determination by judge rather than jury, and points caused sentence to exceed statutory maximum for offense -- Although addition of points by judge which caused sentence to exceed statutory maximum violated rule announced in *Apprendi,* defendant is not entitled to relief because rule announced in *Apprendi* does not apply retroactively, and defendant's sentence was already final when *Apprendi* was decided -- Question certified: Does the ruling announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), apply retroactively?

JAMES MICHAEL HUGHES, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D02-1258. Opinion filed October 2, 2002. An appeal from the Circuit Court for Washington County. Russell A. Cole, Jr., Judge. Counsel: Nancy Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.)

The appellant challenges the trial court's summary denial of his motion to correct illegal sentence, filed pursuant to Florida Rule of Criminal Procedure 3.800(a). The appellant claims that he has suffered a violation of the ruling announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because points were added to his scoresheet based on factors that were determined by a judge rather than a jury, and because those points caused his sentence to exceed the statutory maximum for his offenses. The appellant is correct that the Supreme Court held in *Apprendi* that any fact, other than the fact of prior convictions, that is used to enhance a sentence beyond the prescribed statutory maximum must be submitted and proven to a jury beyond a reasonable doubt. However, the appellant's sentence was already final when *Apprendi* was decided. Because we hold that the rule of law announced in *Apprendi* does not apply retroactively to the appellant's sentence, we affirm.

On February 18, 1999, the appellant was found guilty after a jury trial of battery on a jail detainee by a detainee. The appellant's guidelines range provided for a sentence in excess of the 60-month statutory maximum after points were assessed for his

prior criminal record, his legal status at the time of the offense, and the severe injury suffered by his victim. In accordance with his scoresheet and section 921.001(5), Florida Statutes (1997),[1] the trial court sentenced the appellant to 80.4 months in state prison. The appellant's conviction and sentence were affirmed on direct appeal, and mandate issued on December 29, 1999.

On June 26, 2000, the Supreme Court decided *Apprendi*. 530 U.S. at 466. On March 7, 2001, the appellant filed the instant motion to correct illegal sentence in which he claims that the trial court's assessment of 4 legal status points and 40 severe victim injury points caused his sentence to exceed the statutory maximum in violation of *Apprendi*. The trial court summarily denied the motion, ruling that the defendant's sentence is authorized by *Mays v. State*, 71[7] So. 2d 515 (Fla. 1998), in which the Florida Supreme Court construed section 921.001(5), Florida Statutes, to permit a sentence in excess of the statutory maximum for an offense when the offender's scoresheet recommended an above-the-maximum sentence. The trial court also opined that the rule of law announced in *Apprendi* does not apply retroactively to convictions that occurred prior to June 26, 2000, the date *Apprendi* was decided. This timely appeal followed.

We note initially that rule 3.800(a) is an appropriate procedural vehicle for raising an *Apprendi* claim, since such a violation would produce a sentence in excess of constitutional and statutory maximums and would be apparent from the face of the record. *See State v. Mancino*, 714 So. 2d 429 (Fla. 1998). We find no merit in the appellant's claim that legal status points were assessed in violation of *Apprendi* because the appellant's conviction for battery on a jail detainee by a detainee necessarily required the jury to determine that the appellant was a detainee at the time of the offense, which is a legal status violation. *See* § 921.0011(3), Fla. Stat. (1997). Thus, the points which were added because of the appellant's legal status were found by a jury and do not violate *Apprendi*. However, the trial judge, not the jury, found that severe victim injury existed to support the assessment of 40 points. Because the addition of these victim injury points caused the appellant's sentence to exceed the statutory maximum, the addition of these points by the judge violates the rule announced in *Apprendi*. Contrary to the trial court's ruling that the appellant's sentence is authorized under *Mays v. State*, we conclude that the United States Supreme Court effectively overruled *Mays* as to scoring factors that are neither alleged in the information nor found by a jury beyond a reasonable doubt. Thus, the only remaining question is whether the rule in *Apprendi* applies retroactively to the appellant's

sentence, which became final prior to the date *Apprendi* was decided.

In Florida, the state supreme court retains the authority to decide which changes in the law will be given retroactive effect to cases that are already final. *See Witt v. State*, 387 So. 2d 922, 928 (Fla. 1980). The doctrine of finality is abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. *Id.* at 925. Thus, a change in the law will not be considered retroactive unless the change: (1) emanates from the state supreme court or the United States Supreme Court, (2) is constitutional in nature, and (3) constitutes a development of fundamental significance. *Id.* at 931. *Apprendi* satisfies the first two prongs of *Witt* in that it emanates from the United States Supreme Court and broadens the constitutional right to a jury trial in criminal cases. The remaining issue is whether the change of law created by *Apprendi* constitutes a development of fundamental significance.

A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application. *Id*. at 929. In contrast to changes of law that constitute developments of fundamental significance

> are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would . . . destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Id. at 929-930.

Because it is clear that the *Apprendi* ruling does not divest the state of the right to prohibit any conduct or the right to establish punishments for proscribed conduct, the pertinent inquiry is further narrowed to whether *Apprendi* announced a

change of law that is of sufficient magnitude to require retroactive application. Such a determination is ascertained by performance of the three-part test set forth in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). The *Stovall/Linkletter* test requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice. *See State v. Calloway*, 658 So. 2d 983, 987 (Fla. 1995).

Turning to the first prong of the three-part test, we observe that *Apprendi* serves the purpose of ensuring that once a defendant is found guilty, that defendant may not receive a sentence higher than the statutory maximum unless those factors which are used to impose that above-the-maximum sentence are charged in the indictment and proven to the jury beyond a reasonable doubt. Although the *Apprendi* ruling implicates due process and equal protection concerns, it does not specifically operate to prevent any grievous injustices or disparities in sentencing between equally situated defendants. Rather, this change of law merely changes the procedure employed for determining the appropriate sentence. *Cf. State v. Callaway*, 658 So. 2d 983, 987 (Fla. 1995) (finding a change of law that prevented the consecutive stacking of already enhanced sentences was fundamentally significant and warranted retroactive application because equally situated defendants could suffer vast disparity in their ultimate sentences). While application of the rule in *Apprendi* removes some sentencing discretion from trial judges, the potential prejudices that might be suffered from an *Apprendi* violation are so varied that they do not implicate issues of fundamental fairness. Thus, although due process and equal protection concerns are inherent in the *Apprendi* ruling, the impact on these constitutional protections is not significant. Indeed, the plight of a defendant who is serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that of an equally-situated defendant whose sentence was enhanced based on *jury*-determined factors. In fact, it is conceivable that, if given the opportunity, a jury might find even more enhancing factors than would have been found by the judge. For example, where a judge may have found that a defendant's actions resulted in only moderate injury to the victim, a jury may find that the victim suffered *severe* injury. Under this very possible scenario, the defendant would have fared far better had he suffered the *Apprendi* violation.

We are further persuaded that the purpose of the rule announced in *Apprendi* does not implicate such due process and equal protection concerns as to require

retroactivity because *Apprendi* still allows a judge to assess points for any guidelines factor so long as the resulting sentence is within the statutory maximum. *See Isaac v. State*, 27 Fla. L. Weekly D1680 (Fla. 1st DCA July 23, 2002). Indeed, although the curtailment of the sentencing judge's discretion is historically significant, this curtailment has been relegated to a harmless error analysis in the federal courts. *See United States v. Cotton*, 122 S. Ct 1781, 1786 (2002). If an *Apprendi* violation can be harmless, it is difficult to logically conclude that the purpose behind the change of law in *Apprendi* is fundamentally significant. Thus, analysis of the *Apprendi* ruling under the first prong of the *Stovall/Linkletter* test does not weigh in favor of retroactivity.

The second consideration under the *Stovall/Linkletter* test is the extent to which the old rule has been relied upon by the courts. *Apprendi* affects the long-exercised freedom of trial courts to determine the existence of sentence-enhancing factors by a preponderance of the evidence. Thus, it is axiomatic that courts have relied on this freedom to a great extent and for a long time. Again, such historical reliance on the old rule does not weigh in favor of applying the new rule retroactively.

The third factor that must be weighed is the possible adverse effect on the administration of justice if the *Apprendi* decision is held to be retroactive. In this respect, the impact would be monumental. Each and every enhancement factor that was determined by a judge and which resulted in a sentence above the statutory maximum will either have to be stricken completely and the sentences recalculated without the factor (which in itself is a laborious process), or a jury will have to be empaneled to decide those factors. As the Fifth District observed in *McCloud v. State*, 803 So. 2d 821, 827 (Fla. 5th DCA 2001):

> (V)irtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score. Justice O'Connor's observation that the effect of *Apprendi* to guidelines sentencing would be “colossal” barely describes the cataclysm in Florida if such sentences are invalidated because the jury did not make the “victim injury” finding.

Thus, we find that the disruption to the administration of justice weighs against

retroactivity.

Because we find that (1) the *Apprendi* ruling does not operate to prevent any individual miscarriages of justice, (2) the courts have long-enjoyed the freedom to find sentence-enhancing factors beyond a preponderance of the evidence, and (3) retroactive application of the rule would result in an administrative and judicial maelstrom of postconviction litigation, we hold that the decision announced in *Apprendi* is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status. Accordingly, we affirm the trial court's summary denial of the appellant's motion to correct illegal sentence. However, we recognize that the issue presented is one of great public importance and accordingly certify the following question to the supreme court:

> DOES THE RULING ANNOUNCED IN *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000), APPLY RETROACTIVELY?

AFFIRMED; QUESTION CERTIFIED.

(ALLEN, C.J., WOLF and POLSTON, JJ., CONCUR.)

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[1]Section 921.001(5), Florida Statutes (1997), provides in pertinent part: "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure."

* * *