IN THE SUPREME COURT OF FLORIDA

ALEXANDER GALINDEZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC05-1341
	)	
THE STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____ /		

ON PETITIONER FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This cause is before the Court on a petition for discretionary review on the grounds of express and direct conflict of decisions. The petitioner, Alexander Galindez, hereinafter "Petitioner," was the appellant in the proceedings below and respondent, the State of Florida, hereinafter "the State," was the appellee. The record on appeal will hereinafter be referred to as "R.," the first supplemental record on appeal will hereinafter be referred to as "SR.," the second supplemental record on appeal will hereinafter be referred to as "SR2.," the third supplemental record on appeal will hereinafter be referred to as "SR3.," the State's motion to supplement the record filed with the Third District will hereinafter be referred to as "SR4," Petitioner's motion to supplement the record filed with this Court will hereinafter be referred to as "MSR," and the record on appeal compiled by the Third District for this Court will hereinafter be referred to as "ROA."

STATEMENT OF THE CASE AND FACTS

On April 24, 1998, Petitioner was charged with a lewd assault act by placing his penis in union with the vagina of A.M. (hereinafter "Victim") and/or penetrating the vagina of Victim, a child under age sixteen (16) (count one (1)), a lewd assault act by penetrating the vagina of Victim with his finger, a child under age sixteen (16) (count two (2)), a lewd assault act by placing his mouth in union with the vagina of Victim, a child under age sixteen (16) (count three (3)), a lewd assault act by placing his penis in union with the mouth of Victim, a child under age sixteen (16) (count four (4)), and child abuse/impregnating Victim, a child under age sixteen (16) (count five (5)). (SR3. 1-5).

On April 27, 28, and 29, 1998, a jury trial was held. (MSR. 1-542).[1] Before the trial commenced, a motion to suppress Petitioner's confession hearing was held, where Petitioner admitted having sex with Victim when she was twelve (12) years old. (SR4. 31-78, 69). Petitioner also told police that

[1] The record on appeal transmitted to this Court by the Third District indicated that the State's motion to supplement the record filed with the Third District on February 9, 2005 contained two hundred seven (207) pages. After the State alerted the Third District to the fact that the motion to supplement the record filed by the State on February 9, 2005 actually had five hundred sixty (560) pages, the Third District corrected the index, indicating that the State's motion to supplement the record contained five hundred seventy-six (576) pages. In addition, some of the pages contained in the index overlap, making it impossible for the State to accurately cite to the index in many cases. Because of the confusion regarding the index provided by the Third District to this Court, the State only cites to that index in limited instances.

Victim was carrying Petitioner's child as Petitioner had never had sexual intercourse with anyone other than Petitioner. (SR4. 70). The trial court denied the motion to suppress Petitioner's confession. (SR4. 77-78).

During opening statements, Petitioner did not dispute or question that he and Victim had sexual intercourse. (SR4. 321-322). The thesis of Petitioner's opening statement was that there was "enough blame to go around" in this case and that "the prosecutor's office has only chosen to blame [Petitioner]." (SR4. 321-322).

The State's first witness was the thirteen (13) year old Victim. (SR4. 331). Victim stated that she presently attends the seventh grade at Cope North, a school for pregnant girls. (SR4. 332-333). All the students at Cope North are pregnant. (SR4. 332). Victim said she first met Petitioner when she was ten (10) or eleven (11) years old. (SR4. 333). Victim and Petitioner resided in the same building when they first met. (SR4. 333). Victim's mother's boyfriend knew Petitioner. (SR4. 333-334). When Victim first met Petitioner, she did not speak with him. (SR4. 334). Victim later moved into another apartment in the same building and, at that time, became friends with Petitioner. (SR4. 334-335). They would "just talk." (SR4. 335). Victim said she later moved to a building called "Seaview" when she was twelve (12) years old. (SR4. 336). In late October 1997, Petitioner and Victim became more than friends. (SR4.

336). Victim confirmed that she and Petitioner began to have a sexual relationship. (SR4. 337). The first time Victim had sex with Petitioner, Petitioner spent the night. (SR4. 337). Victim's mother and brother were sleeping. (SR4. 337). Petitioner and Victim talked about the fact that they were going to have sex. (SR4. 337). The first time Petitioner and Victim had sex, Petitioner went to Victim's bed and "put his penis in [Victim's] vagina..." (SR4. 338). Petitioner was a virgin at the time. (MSR. 338). Victim said it hurt and she bled. (SR4. 338-339). Victim's mother saw the bloodied sheets, and Victim said she had her period. (SR4. 339). Petitioner and Victim continued having sex after the initial time. (SR4. 339). In that apartment at Seaview, Victim and Petitioner had sex three (3) or four (4) times. (SR4. 340). Later, Victim moved to Hialeah, and Victim had her own room. (SR4. 340). Petitioner would still visit the new apartment, and Victim was still twelve (12) years old. (SR4. 340-341). Victim said Petitioner was her boyfriend. (SR4. 341). Petitioner would still go over and spend the night at the Hialeah apartment, and they continued to have sex. (SR4. 342). At the Hialeah apartment, Petitioner "put his penis in [Victim's] mouth and [Victim's] vagina in his mouth." (SR4. 343). Petitioner also continued putting his penis into Victim's vagina and his finger as well. (SR4. 343). Victim and Petitioner never used contraception. (SR4. 343). Victim said she knew Petitioner had

another girlfriend and a child in Kansas City. (SR4. 343). Victim did not think they were returning to Miami from Kansas City. (SR4. 344). In January 1998, Victim missed her period and thought she was pregnant. (SR4. 344). Victim told her mother's boyfriend that she thought she was pregnant and that she had been having sex with Petitioner. (SR4. 344, 346). Petitioner wanted Victim to have an abortion. (SR4. 345). Victim wanted to have the baby. (SR4. 345). After that, Petitioner's girlfriend and child returned to Miami from Kansas City. (SR4. 345-346). Victim was not very happy that they returned to Miami. (SR4. 346). After Victim's mother found out Victim was pregnant, Victim, at her mother's suggestion, drank aspirin and a boiled drink. (SR4. 349-350). After this, someone called the police and the police spoke with Victim. (SR4. 350-351). After speaking with the police, Victim went to the rape treatment center, was examined, and determined she was definitely pregnant. (SR4. 351-352). Victim was three (3) months pregnant. (SR4. 353).

Under cross examination, Victim confirmed that the first time she and Petitioner had sex, they were in a studio apartment with Victim's mother sleeping in the same room. (SR4. 357). Victim also confirmed that she and Petitioner made arrangements for him to go to her bed the first time once Victim's mother went to sleep. (SR4. 358). Victim invited Petitioner into her bed. (SR4. 358). When Petitioner went into Victim's bed, she removed her

underwear bottoms. (SR4. 359). Victim said she did not care if she got pregnant. (SR4. 359). Victim also confirmed that Petitioner would have sex with her in her bedroom in the Hialeah apartment. (SR4. 362). When Victim's mother would knock on her bedroom door, Victim would not open the door. (SR4. 362).

Next, the State called Detective Rafael Nazario (hereinafter "Detective Nazario") to testify. (SR4. 397). Detective Nazario was a twelve (12) year veteran of the Hialeah Police Department. (SR4. 398). Detective Nazario took Victim's statement, and Detective Nazario received the details of Victim's treatment at the rape crisis center. (SR4. 399-400). Detective Nazario obtained a warrant for Petitioner's arrest, and Detective Nazario was informed Petitioner was taken into custody that night. (SR4. 402-403). After Petitioner was arrested and signed a Miranda rights' waiver form, Petitioner agreed to speak with the Detectives. (SR4. 410). Detective Nazario said initially Petitioner was "concerned. He was under the understanding that the victim, the child, A.M., had made false allegations against him that he had forced himself upon her." (SR4. 410). Detective Nazario informed Petitioner that Victim had made no such claims and that Victim had said the sex was consensual. (SR4. 410). After Petitioner was told this, Appellant "relaxed" and was "happy it wasn't the other way around." (SR4. 410). Petitioner then told Detective Nazario about

his sexual relationship with Victim. (SR4. 411). According to Detective Nazario, Petitioner said: "I am just a man. At first [Petitioner] said he didn't want to, he didn't want to get into that and he said she just kept after him and he just finally gave into it like, you know, I am just a guy." (SR4. 411-412). Petitioner told Detective Nazario that he was the first and only guy Victim had had sexual intercourse with and that Victim was carrying his child. (SR4. 412). When Detective Nazario asked Petitioner how many times he had sexual intercourse with Victim, Petitioner "smiled, leaned back, and kind of laughed and said, 15, 20 times." (SR4. 414-415). Petitioner confirmed he and Victim had oral and "regular" sex. (SR4. 415). Petitioner also confirmed he was twenty-four (24) years old, and Victim was twelve (12) years old during the course of their sexual relationship. (SR4. 415). Petitioner then provided Detective Nazario with a handwritten statement in his own words.[1] (SR4. 415-416).

Next, the State called Dr. Scott Anthony Silla (hereinafter "Dr. Silla") to testify. (SR4. 456). Dr. Silla specializes in obstetrics and gynecology at

[1] Despite a search through the files of the Office of the Attorney General and the files of the trial court, the State has been unable to locate a copy of Appellant's handwritten statement. The State entered this statement into evidence as well as a translation of this statement from Spanish to English. (MSR. 416-417). The State also published the exhibits to the jury. (MSR. 417-418).

Jackson Memorial Hospital's rape treatment center. (SR4. 456-457). On January 31, 1998, Dr. Silla was working at the rape treatment center and examined Victim. (SR4. 456-457). Victim told Dr. Silla she did not use contraception. (SR4. 463). Victim told Dr. Silla she engaged in "oral penile penetration, vaginal penile and digital vaginal." (SR4. 464). Victim told Dr. Silla: "I was at my house with [Petitioner]. He is my boyfriend and we were having sex. I missed my period and I have been having some nausea and vomiting in the mornings. [¶] My mother gave me a Malta and put an aspirin in it and shook it. I drank it so that I could have an abortion." (SR4. 465). Dr. Silla was concerned that the Malta and aspirin could induce an abortion. (SR4. 465). Dr. Silla examined Victim and determined she was approximately twelve (12) weeks pregnant. (SR4. 466-469).

After Dr. Silla's testimony, the State rested. (SR4. 474). Then, Appellant rested. (SR4. 478-484).

During closing arguments, Petitioner did not debate or question whether he, in fact, had sexual intercourse with Victim. (SR4. 485-495, 506-512). Petitioner's closing argument placed blame on the dysfunctional nature of Victim's home life and acknowledged, at least by implication, that Petitioner had sexual intercourse with Victim. (SR4. 485-495, 506-512).

The jury found Petitioner guilty on counts one (1), four (4), and five (5) and not guilty on counts two (2) and (3). (SR3. 27-31). Petitioner was sentenced to thirty (30) years on all counts. (SR4. 543-546).

On direct appeal, Petitioner argued that the trial court erred in allowing the State to introduce evidence of an uncharged crime over the objection of Petitioner. (SR4. 547-558). On March 10, 1999, the Third District *per curiam* affirmed Petitioner's conviction; mandate issued on March 26, 1999 in Case No. 3D98-1595. (SR4. 559-560).

On December 4, 2002, the Third District reversed the trial court's denial of Petitioner's rule 3.800 and remanded Petitioner's case for resentencing. (MSR. 3). The Third District wrote that Petitioner's scoresheet erroneously reflected eighty (80) victim injury points for count four (4) where the scoresheet should have reflected forty (40) points for count four (4). (MSR. 3). On October 30, 2003, Petitioner's sentence was vacated "PER MANDATE OF THIRD DISTRICT COURT OF APPEAL OF FLORIDA FILED ON 01/14/03." (SR3. 35, ROA 35). At the resentencing hearing, Petitioner acknowledged being "intimate" with Victim and stated that Petitioner's and Victim's "intimacy" was consensual. (SR3. 47, ROA 47). The State also questioned Petitioner regarding Victim's age when Petitioner "had sex with her," and Petitioner did not correct the State's characterization of Petitioner's

and Victim's relationship. (SR3. 48, ROA 48). The newly prepared sentencing scoresheet indicated a permissible sentencing range from 18.08 years to 30.12 years. (R. 26-28, ROA 26-28). Petitioner was sentenced to twenty-four (24) years. (SR3. 36-39, ROA 61-62). Petitioner was sentenced to eighteen (18) years on count one (1), six (6) years on count four (4), and five (5) years on count five (5). (SR3. 36-39, ROA 61-62). The sentences on counts one (1) and four (4) were to run consecutively, and the sentence on count five (5) was concurrent with count four (4). (SR3. 36-39, ROA 61-62). Petitioner appealed. (R. 34, ROA 34). While the appeal was pending, Petitioner filed a motion to correct sentencing error under rule 3.800. (SR1. 1-3). Petitioner argued that the trial court incorrectly included victim injury points on his scoresheet in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). (SR1. 1-3). The trial court denied this motion, and the motion for rehearing. (SR1. 4, SR3. 32-34).

The Third District Court of Appeal affirmed the trial court's resentencing of Petitioner. The Third District wrote:

> The primary issue is the claim that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and, more precisely, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), decided on June 24, 2004, require the invalidation of any points for penetration because they were assessed by the court, rather than by the jury.

> We reject this contention because, as clearly and correctly stated by Judge Kahn in Isaac v. State, ____ So. 2d ____, 2005 Fla. App. LEXIS 9726 (Fla. 1st DCA Case no. 1D03-3438, opinion filed, June 23, 2005)[30 Fla. L. Weekly D1582, D1583](Kahn, J., dissenting), Apprendi and Blakely, which have no retroactive application, *see* Hughes v. State, 901 So. 2d 837 (Fla. 2005), cannot be applied to alter the effect of a jury verdict and conviction - as well as, in this case, a direct appeal - rendered prior to those decisions, notwithstanding that further resentencing proceedings are pending afterwards. *Accord* United States v. Price, 400 F.3d 844 (10th Cir. 2005), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 31, 2005)(No. 04-10694); United States v. Sanders, 247 F.3d 139 (4th Cir. 2001), cert. denied, 534 U.S. 1032, 122 S. Ct. 573, 151 L. Ed. 2d 445 (2001); *see also* Hughes, 901 So. 2d at 838 (Apprendi does not apply retroactively to convictions which were final when Apprendi was decided). *Contra* Isaac v. State, ____ So. 2d ____, 2005 Fla. App. LEXIS 9726 (Fla. 1st DCA Case no. 1D03-3438, opinion filed, June 23, 2005)[30 Fla. L. Weekly D1582].

Galindez v. State, 30 Fla. L. Weekly D 1743 (Fla. 3d DCA 2005). (ROA 336-339). The Third District certified conflict with Isaac v. State, 2005 Fla. App. LEXIS 9726 (Fla. 1st DCA 2005). (ROA 336-339).

SUMMARY OF ARGUMENT

As Apprendi and Blakely do not apply retroactively, Petitioner's sentence does not implicate the holdings in those two (2) cases. Even if Apprendi and Blakely did apply retroactively, any resentencing error here was harmless.

ARGUMENT

PETITIONER IS NOT ENTITLED TO RESENTENCING BECAUSE HIS CONVICTION WAS FINAL BEFORE THE ISSUANCE OF APPRENDI AND BLAKELY AND, EVEN IF HIS CONVICTION WAS NOT FINAL, ANY ERROR IN HIS SENTENCE WAS HARMLESS.

Petitioner argues that Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and Blakely v. Washington, 159 L. Ed. 2d 403, 2004 U.S. LEXIS 4573, 124 S. Ct. 2531 (2004), apply to his resentencing proceeding, as his resentencing was not final until after the United States Supreme Court decided Apprendi and Blakely. It is undisputed that Apprendi and Blakely do not apply retroactively. *See* McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); Ziegler v. Crosby, 345 F.3d 1300, 1312 (11 Cir. 2003); Gisi v. State, 848 So. 2d 1278 (Fla. 2d DCA 2003) ("Apprendi does not apply retroactively to sentences that were final prior to its issuance."); Hughes v. State, 910 So. 2d 837, 848 (Fla. 2005) ("Apprendi does not apply retroactively"); Figarola v. State, 841 So. 2d 576 (Fla. 4th DCA 2003) (Apprendi is not retroactive"); Hicks v. State, 905 So. 2d 990, 991 (Fla. 3d DCA 2005) ("the decision in Blakely is not retroactive"); In re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004) ("Regardless of whether Blakely established a 'new rule of constitutional law' ... the Supreme Court has not expressly declared Blakely to be applied retroactive to case on collateral review."); Tyler v. Cain,

533 U.S. 656, 663, 150 L. Ed. 2d 632, 121 S. Ct. 2478 (2001) (explaining that a new rule in not 'made retroactive to case on collateral review' unless the Supreme Court holds it to be retroactive."). However, for purposes of Apprendi and Blakely, the relevant point in time for determining finality for the purpose of retroactivity is the finality of the conviction, not the finality of the sentence.

While Apprendi and Blakely are obviously related to sentencing questions, in the typical criminal case in Florida (excepting capital cases), a jury hears evidence and makes factual determinations only at the guilt phase of a trial. *See* Florida Statutes § 921.141(1) (2005) (after the conviction of a defendant of a capital felony, the jury is responsible with recommending if the defendant should be sentenced to death or life imprisonment). The jury does not hear evidence and make factual findings during the sentencing proceeding. Thus, once the jury has rendered its verdict in the guilt phase of a non-capital case, and once the resulting conviction has become final (after exhaustion of direct review proceedings), it is no longer possible for a jury to make any determinations which might be required under Apprendi and Blakely. For that reason, the finality of the conviction is the relevant point in time when determining whether the case is a pipeline case entitled to the application of Apprendi and Blakely. *See* Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) ([W]e hold that any decision of this Court announcing a new rule of law, or

merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final."). Petitioner's conviction became final in March 1999, at the conclusion of his direct appeal in Case No. 3D98-1595. (SR4. 559-560).

New decisions of either the United State Supreme Court or this Court which relate to procedures to follow in criminal cases and which apply to "pipeline" cases typically enable the government to proceed anew, whether with a new trial or a new sentencing proceeding. *See, e.g.*, Mitchell v. Moore, 786 So. 2d 521, 530 n.8 (Fla. 2001) (recognizing that the "pipeline" theory allows a defendant to seek application of a new rule of law if the case is pending on direct review or not yet final and the defendant timely objected in the trial court if an objection was necessary to preserve the issue for appellate review); *See also* Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) ("…any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final."); *limited by* Wuornos v. State, 644 So. 2d 1000, 1008 n.4 (Fla. 1994) ("We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this

Court says otherwise."). By contrast, applying Apprendi or Blakely to a non-capital resentencing would have the effect of applying those cases while depriving the State of the ability to present the factual matters to the jury. Since there is no entitlement to a jury in a non-capital sentencing proceeding, the State could not attempt to comply with Apprendi or Blakely if they were applied to resentencing proceedings. That would constitute a unique development in the law regarding the application of new Supreme Court decisions to pipeline cases.

As previously stated, Apprendi and Blakely apply to sentencing issues and not conviction issues. However, the practical application of those cases applies only to the conviction. As the United States Supreme Court wrote in Apprendi, "[o]ther 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." Id. at 490. As juries are not charged with imposing specific sentences, the conviction is the component of the trial to which Apprendi and Blakely apply. As the First District wrote in Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA 2002),

> 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.

The Apprendi and Blakely holdings apply only to the jury findings that occur up until the verdict. As Petitioner's conviction was final well before his resentencing in 2003 and since Apprendi and Blakely do not apply retroactively, Petitioner is not entitled to resentencing.

The Third District's decision below (Galindez v. State, 30 Fla. L. Weekly D 1743 (Fla. 3d DCA 2005)) reflected this reasoning by holding that Apprendi and Blakely do not apply to situations where a conviction was final prior to their issuance. The Third District wrote:

> The primary issue is the claim that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and, more precisely, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), decided on June 24, 2004, require the invalidation of any points for penetration because they were assessed by the court, rather than by the jury.
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> We reject this contention because, as clearly and correctly stated by Judge Kahn in Isaac v. State, ____ So. 2d ____, 2005 Fla. App. LEXIS 9726 (Fla. 1st DCA Case no. 1D03-3438, opinion filed, June 23, 2005)[30 Fla. L. Weekly D1582, D1583](Kahn, J., dissenting), Apprendi and Blakely, which have no retroactive application, *see* Hughes v. State, 901 So. 2d 837 (Fla. 2005), cannot be applied to alter the effect of a jury verdict and conviction - as well as, in this case, a direct appeal - rendered prior to those decisions, notwithstanding that further resentencing proceedings are pending afterwards. *Accord* United

> States v. Price, 400 F.3d 844 (10th Cir. 2005), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 31, 2005)(No. 04-10694); United States v. Sanders, 247 F.3d 139 (4th Cir. 2001), cert. denied, 534 U.S. 1032, 122 S. Ct. 573, 151 L. Ed. 2d 445 (2001); *see also* Hughes, 901 So. 2d at 838 (Apprendi does not apply retroactively to convictions which were final when Apprendi was decided). *Contra* Isaac v. State, ____ So. 2d ____, 2005 Fla. App. LEXIS 9726 (Fla. 1st DCA Case no. 1D03-3438, opinion filed, June 23, 2005)[30 Fla. L. Weekly D1582].

Galindez, 30 Fla. L. Weekly at D1743. The Third District then supported this proposition by citing to Judge Kahn's dissent in Isaac v. State, 30 Fla. L. Weekly D 1582 (Fla. 1st DCA 2005). Judge Kahn wrote:

> Even though appellant was resentenced in June 2001, Apprendi does not apply because [appellant's] conviction became final in 1998. Apprendi, of course, involves a right under the Sixth and Fourteenth Amendments of the United States Constitution for state criminal defendants to have certain facts determined by a jury beyond a reasonable doubt, rather than by a judge. As the Hughes retroactivity analysis instructs, the rule of Apprendi is not "of sufficient magnitude as to require retroactive application." [901 So. 2d at 840]. Here, because Isaac's jury was obviously discharged after the original criminal trial on January 15, 1997, the factual matters underlying the guidelines departure sentences may not be submitted to a jury. Accordingly, Hughes' focus on finality of the conviction is very important, and I would follow that rule until it is altered. Because these convictions were final long before announcement of the Apprendi rule, I would let the twenty-year sentences stand.

Isaac, 30 Fla. L. Weekly at D1583 (Kahn, J., dissenting). Both the Third District's opinion below and the Judge Kahn's dissent in Isaac demonstrate that the Apprendi and Blakely holdings do not apply to Petitioner as his conviction was final on March 26, 1999, prior to the Apprendi and Blakely decisions. The fact that Petitioner was later resentenced does not effect the finality of his conviction.

Two (2) separate panels of the Fourth District have agreed with the Third District and Judge Kahn's dissent in Isaac. None of the judges on the Fourth District have filed dissenting opinions. *See* Hamilton v. State, 2005 Fla. App. LEXIS 16245 (Fla. 4th DCA Oct. 12, 2005); Thomas v. State, 30 Fla. L. Weekly D 2361 (Fla. 4th DCA Oct. 5, 2005). In Garcia v. State, 30 Fla. L. Weekly D 2361 (Fla. 4th DCA Oct. 5, 2005), the Fourth District confronted similar facts to those present here. The defendant was convicted of second degree murder with a firearm in September 1997. He appealed to the Fourth District which affirmed his conviction; the mandate issued in October 1998. The defendant then filed a rule 3.800(a) motion in 2000 due to a Heggs violation. He was resentenced in 2000 because of the Heggs violation. Then, the defendant challenged his new sentence alleging that it was imposed in his absence and the trial court resentenced him once more in December 2004. In June 2005, the defendant filed a rule 3.800(a) motion alleging that his resentencing was illegal

because his sentence was enhanced based on findings made by the trial court and not the jury, thus violating Apprendi and Blakely. The Fourth District wrote:

> Although Garcia was resentenced under Heggs, and post-Blakely, his conviction became final in 1998, long before both Apprendi and Blakely. To the extent the majority opinion in Isaac v. State, 2005 Fla. App. LEXIS 9726, 30 Fla. L. Weekly D1582 (Fla. 1st DCA June 23, 2005), effectively applied Blakely retroactively, we certify conflict and align ourselves with Galindez v. State, 2005 Fla. App. LEXIS 11045, 30 Fla. L. Weekly D1743 (Fla. 3d DCA July 20, 2005), holding that Apprendi and Blakely did not apply retroactively to convictions that became final in 1999, even though resentencing took place in 2003 on a scoresheet error, post-Apprendi.

Id. at *2-*3. Two (2) separate panels of the Fourth District held that the finality of the conviction, despite a later resentencing, was the applicable date when determining the applicability of Apprendi and Blakely.

The Court of Appeals of Minnesota agrees with the Third and Fourth Districts and Judge Kahn's dissent in Isaac. In State v. Losh, 694 N.W.2d 98 (Minn. App. 2005), the Court confronted a situation where a defendant argued that the upward durational departure of her sentence based on the district court's finding of the "vulnerability of the victim" aggravating factor violated her jury-trial rights under Blakely. The defendant was sentenced on September 18, 2003. Her time to file a direct appeal of the final judgment elapsed ninety (90)

days from that date, and she did not directly appeal the final judgment. However, she appealed from the March 8, 2004, revocation of her probation on June 7, 2004. Blakely was decided on June 24, 2004, while that probation-revocation appeal was pending. The Court declined to modify the defendant's sentence, stating:

> Thus, the point at which a judgment becomes final is the critical point for purposes of retroactivity analysis. Protecting the integrity of judicial review does not require extending a new rule of criminal constitutional procedure to a differently situated class, namely those defendants whose convictions have become final. Further, extending the new rule to those challenging the revocation of their probation would treat differently those with stayed sentences from those with executed sentences. n2
>
> n2 We note that the retroactivity analysis of Griffith focuses on when the conviction becomes final, not when the sentence may no longer be modified. In Minnesota, a sentence may be modified at any time. Minn. R. Crim. P. 27.03, subd. 9; *see also* State v. Hockensmith, 417 N.W.2d 630, 632 (Minn. 1988) (allowing a defendant to challenge an upward durational departure at a probation-revocation hearing); State v. Fields, 416 N.W.2d 734, 736 (Minn. 1987) (same). But the fact that modification of a sentence is possible does not mean a judgment is not final for the purpose of precluding the retroactive application of a new rule.

Id. at 101. *Accord* State v. Murphy, 2005 Minn. App. Unpub. LEXIS 222 at *4 (Minn. App., Aug. 16, 2005) ("The point at which a judgment becomes final is the critical point for purposes of retroactivity analysis."). As the Court states,

the date at which the conviction became final is the relevant date to consider. The fact that the defendant can be resentenced later does not change the analysis.

Federal courts have likewise agreed with the Third District and Judge Kahn's dissent in Isaac. In United States v. Sanders, 247 F. 3d 139 (4th Cir. 2001), the Fourth Circuit was confronted with a defendant who contended that his habeas petition was timely under § 2255 subsection (1) and that his Apprendi claims should be considered by the Court. The defendant conceded that if the Court construed the date upon which his judgment of conviction became final to be the date on which the district court entered its judgment from which he chose not to appeal (January 15, 1998), then his motion was untimely. However, the defendant contended that the one (1) year limitations period did not begin to run until the completion of his resentencing under Fed. R. Crim. Pro. 35(b). This occurred on April 16, 1999. Since the defendant filed his § 2255 motion on December 27, 1999, about eight (8) months after he was resentenced, he claimed that his motion was timely. In response to the defendant's argument, the Fourth Circuit wrote:

> We disagree. Congress did not explicitly state in the AEDPA when a "judgment of conviction becomes final" for purposes of § 2255 subsection (1). *See* Torres, 211 F.3d at 838. In Torres, however, this court held that "for purposes of § 2255, the conviction of a federal prisoner whose conviction is affirmed by

> this Court and who does not file a petition for certiorari becomes final on the date that this Court's mandate issues in his direct appeal." Torres, 211 F.3d at 837. Under the reasoning of Torres, Sanders' conviction became final on the date upon which he declined to pursue further direct appellate review. The district court entered Sanders' judgment of conviction on January 15, 1998. Since Sanders did not file a direct appeal, his conviction became final for purposes of § 2255 subsection (1) on that date.
>
> Contrary to Sanders' assertions, Congress did not intend for Fed. R. Crim. Pro. 35(b) motions to prevent convictions from becoming final for § 2255 purposes. The plain language of 18 U.S.C. § 3582(b) establishes that a modification of a sentence does not affect the finality of a criminal judgment.

Accord United States v. Ellis, 2005 U.S. Dist. LEXIS 17882 at *19 (D. Kan. Aug. 23, 2005) ("a defendant whose conviction was final when the Supreme Court decided Blakely on June 24, 2004 cannot obtain relief based on that decision under Section 2255"). Clearly, the Fourth Circuit determined that the modification of a sentence does not affect the finality of a criminal judgment when determining whether the defendant could advance his Apprendi arguments. Despite the defendant in Sanders having been resentenced after the Apprendi decision, the Fourth Circuit did not consider the defendant's arguments because his conviction was long-since final.

The Tenth Circuit Court of Appeals ruled similarly in United States v. Price, 400 F. 3d 844 (10th Cir. 2005). In Price, the defendant sought a rehearing

from the Tenth Circuit's decision denying him a certificate of appealability to appeal the district court's decision denying him 28 U.S.C. § 2255 relief from his federal drug trafficking convictions. In his rehearing petition, the defendant asked the Tenth Circuit to reconsider his claims that Blakely required the Court to vacate his sentences because the jury never found the type and quantity of drugs for which the district court sentenced him, and never found that the defendant killed a government witness, a factual finding the district court made in applying U.S.S.G. § 2A1.1 to enhance his sentence. The Tenth Circuit wrote:

> We must first determine when Price's conviction became final. For Teague purposes, a conviction becomes final when the availability of a direct appeal has been exhausted, and the time for filing a certiorari petition with the Supreme Court has elapsed, or the Court has denied a timely certiorari petition. *See* Caspari v. Bohlen, 510 U.S. 383, 390, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994). In Price's case, we denied his direct appeal on September 11, 2001, *see* Price, 265 F.3d at 1097, and the Supreme Court denied his certiorari petition May 28, 2002, *see* Price v. United States, 535 U.S. 1099, 152 L. Ed. 2d 1056, 122 S. Ct. 2299 (2002). His convictions, therefore, were final on May 28, 2002, prior to the Supreme Court deciding Blakely on June 24, 2004.

Again, the analysis in Price focused on when the defendant's **conviction** became final, not his **sentence**. Since the Blakely decision does not apply

retroactively, the Tenth Circuit denied the relief requested by the defendant in Price.

In Hughes v. State, 901 So. 2d 837 (Fla. 2005), this Court explained part of its rationale for holding that Apprendi did not apply retroactively. This Court wrote:

> To apply Apprendi retroactively would require review of the record and sentencing proceedings in many cases simply to identify cases where Apprendi may apply. In every case Apprendi affects, a new jury would have to be empaneled to determine, at least, the issue causing the sentence enhancement. In most cases, issues such as whether the defendant possessed a firearm during the commission of a crime, the extent of victim injury or sexual contact, and whether a child was present (to support use of the domestic violence multiplier) cannot be considered in isolation. Many, if not all, of the surrounding facts would have to be presented. In others, a jury would have to determine factors unrelated to the case (e.g., whether legal status points may be assessed).

Id. at 845-846. The rationale adopted by this Court in Hughes is likewise applicable here. Petitioner was convicted by a jury in 1998, and his conviction was final in March 1999. While he was resentenced because of a sentencing scoresheet error in 2003, the effect of allowing Apprendi to apply to Petitioner's case would be exactly what this Court foretold in Hughes. Petitioner and many similarly situated defendants would need the record and sentencing proceedings reviewed in order to determine if Apprendi applies. Then, a new jury would

have to be empaneled in order to determine the issue causing the sentencing enhancement.[2] Since many issues cannot be considered in isolation, many, if not all, of the surrounding facts would need to be presented. The judicial upheaval this would create would be substantial, as this Court predicted in Hughes. Further, as stated previously, no such procedure exists in non-capital cases in the State of Florida.

Even if Petitioner's judgment was not final before Apprendi and Blakely, Petitioner still would not be entitled to resentencing as the inclusion of sex penetration points was harmless error. As the United States Supreme Court held in United States v. Cotton, 535 U.S. 625, 152 L. Ed. 2d 860, 122 S. Ct. 1781 (2002), Apprendi error may be deemed harmless where there is "'no basis for concluding that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" Id. at 869. *Citing* Johnson v. United States, 520 U.S. 461, 470, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997). In Cotton, the defendant ran a vast drug organization. The initial indictment charged the defendant with conspiring to distribute and to possess with the intent to distribute five (5) kilograms or more of cocaine and fifty (50) grams or more of cocaine base. A superceding indictment charged five (5) more defendants, charged a conspiracy to distribute and to possess with intent to

[2] As noted previously, no such procedure for empaneling a jury for resentencing purposes in a non-capital case exists in Florida.

distribute a detectable amount of cocaine and cocaine base, but failed to allege any of the threshold levels of drug quantities that would lead to enhanced penalties. In accord with the indictment, the District Court instructed the jury that it was not important to determine the amount of cocaine the defendants' possessed. The defendants were sentenced pursuant to a federal statute that provided enhanced penalties for defendants convicted of drug offenses where more than fifty (50) grams of cocaine base were involved. However, the Cotton court held:

> The evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted." n3 Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base. Baltimore police officers made numerous state arrests and seizures between February 1996 and April 1997 that resulted in the seizure of 795 ziplock bags and clear bags containing approximately 380 grams of cocaine base. 20 Record 179-244. A federal search of respondent Jovan Powell's residence resulted in the seizure of 51.3 grams of cocaine base. 32 id., at 18-30. A cooperating co-conspirator testified at trial that he witnessed respondent Hall cook one-quarter of a kilogram of cocaine powder into cocaine base. 22 id., at 208. Another cooperating co-conspirator testified at trial that she was present in a hotel room where the drug operation bagged one kilogram of cocaine base into ziplock bags. 27 id., at 107-108. Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.

Id. at 633. Here, we have the same situation as the evidence that Petitioner "penetrated" Victim was uncontroverted. At no point during trial did Petitioner question the veracity of Victim's account of the numerous times Petitioner and Victim engaged in sexual intercourse. During opening and closing arguments, Petitioner's arguments focused on the precocious nature of Victim and the dysfunctional home life in which she was raised, never implying that her account of her relationship with Petitioner was anything but truthful. Petitioner wrote a handwritten confession and admitted having sexual intercourse with Victim fifteen (15) or twenty (20) times. Petitioner admitted that the child Victim was carrying was his because Victim had never engaged in sexual intercourse with another man. As in Cotton, surely the jury here would have found that Petitioner "penetrated" Victim when engaging in sexual intercourse with her.

By relying on Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), the courts of appeal have uniformly rejected the argument that Apprendi errors are "structural" and have applied harmless error analysis to Apprendi claims. *See* Coleman v. United States, 329 F.3d 77, 89-90 (2nd Cir. 2003); United States v. Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2002); United States v. Candelario, 240 F.3d 1300, 1307 (11th Cir.), *cert. denied*, 533 U.S. 922, 150 L. Ed. 2d 705 (2001); United States v. Nance, 236 F.3d 820, 825-

26 (7th Cir. 2000), *cert. denied*, 534 U.S. 832, 151 L. Ed. 2d 43 (2001). Florida courts have likewise held Apprendi errors are not structural and have applied harmless error analysis. *See* McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001) (Apprendi error must be preserved for review and such error is not fundamental); Hughes v. State, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002) (an Apprendi error can be harmless). In Neder, the defendant was engaged in a number of schemes involving land development fraud. In accordance with then-extant Circuit precedent and over the defendant's objection, the District Court instructed the jury that, to convict on the tax offenses, it need not consider the materiality of any false statements even though that language is used in the indictment. The question of materiality, the court instructed, "is not a question for the jury to decide." The court gave a similar instruction on bank fraud and subsequently found, outside the presence of the jury, that the evidence established the materiality of all the false statements at issue. In instructing the jury on mail fraud and wire fraud, the District Court did not include materiality as an element of either offense. The defendant again objected to the instruction. The jury convicted the defendant of the fraud and tax offenses, and he was sentenced to one hundred forty-seven (147) months' imprisonment, five (5) years' supervised release, and $25 million in restitution. The United States Supreme Court wrote:

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

Id. at 9. The court held that the omission of an element is subject to harmless error review. Further, the court wrote:

> Having concluded that the omission of an element is an error that is subject to harmless-error analysis, the question remains whether Neder's conviction can stand because the error was harmless. In Chapman v. California, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24; *see* Delaware v. Van Arsdall, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986) ("An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt").

Id. at 15-16. Under the precedent of Neder, it is clear that when reviewing the whole record, any alleged error here was harmless beyond a reasonable doubt since it was uncontroverted that penetration took place.

This Court recently affirmed the Neder decision in Hughes. This Court wrote:

> Nor does the failure to submit an element of a crime to the jury always require a remedy. In Neder v. United States, 527 U.S. 1, 8-9, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), the Supreme Court held that a trial court's determination of materiality in a tax fraud case, which violated United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (holding that materiality is an element for the jury), was not a structural error that rendered the trial fundamentally unfair. Rather, the Court held that although the failure to submit the element to the jury violated the right to a jury trial, the error was subject to harmless error analysis. 527 U.S. at 9, 12. Thus, in the Supreme Court's view, a Sixth Amendment error does not automatically require a retrial even if a jury did not decide all the facts relevant to sentencing.

Id. at 843. As this Court's precedent provides, the failure to submit the "penetration" issue to the jury here is subject to harmless error analysis. Clearly, the facts here demonstrate that any alleged error was harmless. The evidence against Petitioner was overwhelming, including Petitioner's admission to police officers that he engaged in sexual intercourse with Victim, Appellant impregnating Victim, Victim's account of the numerous times Petitioner and Victim engaged in sexual intercourse, Petitioner's failure during opening and closing arguments to question the veracity of Victim's account of their sexual relationship, and Petitioner's handwritten and oral confession, where he admitted having sexual intercourse with Victim fifteen (15) or twenty (20) times.

For more discussion on properly preserved Apprendi and Blakely claims, see United States v. Davison, 2005 U.S. App. LEXIS 7191 (11th Cir. 2005) (Apprendi error is subject to harmless error review); McCoy v. United States, 266 F.3d 1245, 1252 n.9 (11th Cir. 2001) ("Apprendi error is a constitutional error, subject to plain-or harmless-error review, and does not create a structural error."); United States v. Smith, 240 F.3d 927, 930 (11th Cir. 2001) ("Failure to submit the issue of drug quantity to the jury did not affect Defendants' substantial rights. Apprendi did not create a structural error that would require per se reversal."); United States v. Salazar-Samaniega, 2005 U.S. App. LEXIS 7061 (10th Cir. 2005) (Blakely error subject to harmless error analysis where error was properly preserved at trial); United States v. Haynes, 2005 U.S. App. LEXIS 6637 (10th Cir. 2005) ("any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded" on harmless error review of a properly preserved Blakely claim).

Since the fact that sexual penetration occurred here was uncontroverted, any error complained of by Petitioner must be deemed harmless.

CONCLUSION

Based on the foregoing, the Third District's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent on the Merits was mailed this ____ day of November, 2005, to SHANNON PATRICIA McKENNA, Assistant Public Defender, 1320 N.W. 14 Street, Miami, Florida 33125.

_____
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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney certifies that the foregoing Answer Brief of Respondent on the Merits has been typed in Times New Roman, 14-point type.

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