IN THE SUPREME COURT OF FLORIDA

CASE NO. 05-1341

ALEXANDER GALINDEZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED DIRECT CONFLICT
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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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, was the Appellant in the proceedings below and the Respondent, the State of Florida, was the Appellee. In this brief, the parties will be referred to as they stood in the lower court, by proper name, or as APetitioner@ and ARespondent.@ The symbol AA.@ will denote the Appendix, which has been filed with this brief on the merits, as a separately bound volume.

STATEMENT OF THE CASE AND FACTS

Preliminary Statement

This case is before this Court because the Third District Court of Appeal, in *Galindez v. State*, 30 Fla. L. Weekly D1743 (Fla. 3d DCA July 20, 2005), certified a direct conflict of decision with *Isaac v. State*, 30 Fla. L. Weekly D1582 (Fla. 1st DCA June 23, 2005). (A. 1, 2). The sole issue presented in this case is a narrow procedural one: Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) apply to the sentence imposed at Mr. Galindez= *de novo* resentencing, when Mr. Galindez= conviction and original, now vacated, sentence were affirmed on direct appeal prior to their issuance.

Statement of the Case

In the proceeding below, Mr. Galindez directly appealed to the Third District Court of Appeal the sentence imposed by the trial court at his *de novo* resentencing hearing. (A. 1). Pursuant to the Third District Court of Appeal=s 2002 decision in *Galindez v. State*, 831 So. 2d 780 (Fla. 3d DCA 2002), the trial court vacated Mr. Galindez= prior sentence and resentenced him. (A. 3, 6). In its 2002 *Galindez* decision, the Third District Court of Appeal reversed and remanded Mr. Galindez= case for resentencing based on the trial court=s erroneous denial of his Florida Rule of Criminal Procedure Rule 3.800(a) motion. (A. 3). The Rule 3.800(a) motion was based on the erroneous assessment of victim injury points on Mr. Galindez= scoresheet. (A. 3). Mr. Galindez= conviction and original

sentence, which is now vacated, were affirmed on direct appeal in *Galindez v. State*, 728 So. 2d 333 (Fla. 3d DCA 1999). (A. 4, 5).

Statement of Facts

Mr. Galindez was charged by information with four counts of lewd assault and one count of child abuse by impregnating a minor female. (A. 6). The jury found Mr. Galindez guilty of lewd assault as charged in count one and count four of the information, and guilty of child abuse as charged in count five of the information. (A. 7). The sole issue presented in the direct appeal of Mr. Galindez= resentencing is the inclusion, on Mr. Galindez= scoresheet, of eighty (80) sex penetration points, for count one, instead of forty (40) sex contact points.

In count one, Mr. Galindez was charged with a violation of section 800.07, Fla. Stat. (1997) by Aplacing his penis **in union with** the vagina of A.M. (a minor) **and/or penetrating** the vagina of A.M. (a minor) with his penis . . . .@ (emphasis added). (A. 6). The jury instruction on this count, in relevant part, provided that the State must prove beyond a reasonable doubt that AALEXANDER GALINDEZ committed an act upon A.M. in which the penis of ALEXANDER GALINDEZ **penetrated or had union with** the vagina of A.M.@ (bold and underlined emphasis added). (A. 8).

A special instruction, requested by the state, that the word Aunion@ means contact, was not given to the jury. (A. 15). The trial court denied the state=s request for this instruction since the meaning of the term union is common knowledge. (A. 15).

In its closing argument, the state argued to the jury that count one could be proven by either **union or penetration**, and that A[u]nion means contact [,] [t]hat is what it means.@ (A. 16). The jury=s verdict found Mr. Galindez AGuilty of Lewd and Lascivious Act as charged in Count 1 of the Information.@ (A. 7).

Including the eighty (80) sex penetration points for count one, the total sentence points on Mr. Galindez= scoresheet equaled 317.2. (A. 9). Based on these total sentence points, Mr. Galindez sentence in state prison months was computed to be 289.2 months (24.10 years). (A. 9). The permissible range of Mr. Galindez sentence was from a minimum prison term of 216.9 months (18.08 years) to a maximum term of 361.5 months (30.12 years). (A. 9).

Utilizing this scoresheet, on October 20, 2003, the trial court sentenced Mr. Galindez to a total cumulative sentence of twenty-four (24) years, which approximated the median recommended sentence of 289.2 months (24.10 years). (A. 9, 10). Mr. Galindez= sentence consists of an eighteen (18) year prison term on count one, a six (6) year term on count four, and a five (5) year term on count five. (A. 10). The sentences on count one and four are consecutive to each other, and the sentence on count five is concurrent to the sentence on count four. (A. 10).

Mr. Galindez timely appealed his sentence. While the appeal was pending, Mr. Galindez filed a motion to correct sentencing error under Florida Rule of Criminal Procedure Rule 3.800(b). (A. 11). This motion was based on the inclusion of victim

injury points on Mr. Galindez= scoresheet in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (A. 11). The trial court denied this motion to correct, and a motion for rehearing. (A. 12, 13, 14).

The Third District Court of Appeal denied Mr. Galindez= appeal finding that the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) were not applicable to the sentences imposed at his 2003 *de novo* resentencing hearing. *See Galindez*, 30 Fla. L. Weekly at D1743. The Third District specifically held:

> *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.

Galindez, 30 Fla. L. Weekly at D1743. Recognizing that its decision directly conflicted with the First District Court of Appeal=s decision in *Isaac*, the Third District certified conflict to this Court.

STANDARD OF REVIEW

The sentencing error at issue in this appeal presents a pure question of law subject to review *de novo*. *See*, *e.g.*, *State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

SUMMARY OF ARGUMENT

In its opinion, the Third District Court of Appeal, held that *Apprendi* and *Blakely* Acannot be applied to alter the effect of a jury verdict and convictions-as well as, in this case, a direct appeal-rendered prior to those decisions, notwithstanding that further resentencing proceedings are pending afterwards.@ *Galindez v. State*, 30 Fla. L. Weekly D1743 (Fla. 3d DCA July 20, 2005). Not only is the Third District=s decision in direct conflict with *Isaac*; it also contravenes long-standing precedent of this Court. This precedent establishes that a resentencing is a *de novo* proceeding, and, as such it is a Aclean slate.@ *See Parker v. State*, 873 So. 2d 270 (Fla. 2004).

In its opinion, the Third District, suggests that *Apprendi* and *Blakely* do not apply to the direct appeal of Mr. Galindez= resentence, since *Apprendi* and *Blakely* are not retroactive. However, the retroactivity of *Apprendi* and *Blakely* has nothing to do with their applicability to Mr. Galindez= *de novo* resentencing. *See Hughes v. State*, 901 So. 2d 837 (Fla. 2005). The Third District=s rationale relies on the fact that Mr. Galindez= conviction and original sentence were final before *Apprendi* and *Blakely* were issued. Since Mr. Galindez= original sentence is a nullity, the operative fact in determining whether or not *Apprendi* or *Blakely* apply to his resentence is the finality of the resentence; it is not the finality of his conviction**B**that is his guilt or innocence. Nor is it the finality of his original sentence. The Third District=s rationale would only apply if *Apprendi* and *Blakely* affected convictions, not sentences. *Apprendi* and *Blakely*,

however, are decisional laws which affect sentences, not convictions. *See Hughes.*

In *Parker v. State*, 873 So. 2d 270 (Fla. 2004), this Court explicitly rejected the Third District=s rationale. Instead, this Court recognized the distinction in finality, between convictions and resentences, in determining whether an intervening decisional law, regarding sentencing, is retroactive. *See also Green v. State*, 907 So. 2d 489 (Fla. April 28, 2005).

In its opinion, the Third District commented that the application of *Apprendi* and *Blakely* to Mr. Galindez= sentences would be unfair. *See Galindez*, 30 Fla. L. Weekly D1743. However, a *de novo* resentencing is fair to both sides. At times it benefits the defense, and at other times it benefits the state. Furthermore, Mr. Galindez= original sentence was vacated pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure, as it was an illegal sentence. At its most basic level, Rule 3.800(a) ensures fairness to both the defendant and the state. The unlimited time for challenging illegal sentences balances the need for finality of sentences Awith the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law.@ *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001). Finally, the application of *Apprendi* and *Blakely* to Mr. Galindez= resentence is fair, as Athe practice of judicial fact-finding has already been sharply limited by this Court=s own long-standing decisions limiting a judge=s authority to determine facts which might have a significant impact on a criminal sentence.@ *Hughes*, 901 So. 2d at 865 (Anstead, J. dissenting).

As Mr. Galindez= resentence is not yet final, this Court should quash the Third District=s decision below, reverse Mr. Galindez= resentence, and remand his case for resentencing in accordance with the mandates of *Apprendi* and *Blakely*.

ARGUMENT

WHETHER THE UNITED STATE SUPREME COURT=S DECISIONS IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) AND *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) APPLY TO THE SENTENCE IMPOSED AT MR. GALINDEZ= *DE NOVO* RESENTENCING, WHEN MR. GALINDEZ= CONVICTION AND ORIGINAL, NOW VACATED, SENTENCE WERE AFFIRMED ON DIRECT APPEAL PRIOR TO THEIR ISSUANCE.

In its opinion, the Third District Court of Appeal, held that *Apprendi* and *Blakely* Acannot be applied to alter the effect of a jury verdict and convictions-as well as, in this case, a direct appeal-rendered prior to those decisions, notwithstanding that further resentencing proceedings are pending afterwards.@ *Galindez v. State*, 30 Fla. L. Weekly D1743 (Fla. 3d DCA July 20, 2005). Recognizing that its holding was in direct conflict with the First District Court of Appeal=s decision in *Isaac v. State*, 30 Fla. L. Weekly D1582 (Fla. 1st DCA June 23, 2005), the Third District certified conflict to this Court.

Not only is the Third District=s decision in direct conflict with *Isaac*; it also contravenes long-standing precedent of this Court. This precedent establishes that a resentencing is a *de novo* proceeding, and, as such it is a Aclean slate.@ *See Parker v. State*, 873 So. 2d 270 (Fla. 2004); *Preston v. State*, 607 So. 2d 404, 408-409 (Fla. 1992). In a resentencing proceeding, Athe full panoply of due process considerations attach.@ *See State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983). A resentencing must proceed *de novo* as the prior sentence has been vacated and therefore, rendered a nullity. *See Trotter*

v. State, 825 So. 2d 362, 367 (Fla. 2002); *Teffeteller v. State*, 495 So. 2d 744, 746 (Fla. 1986).

At a resentencing, both the state and the defendant are entitled to present additional evidence and raise new issues, including those issues for which the decisional law was not rendered until after the defendants= convictions and original sentences were affirmed on appeal. *See State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983); *Street v. State* 899 So. 2d 440 (Fla. 4th DCA 2005); *Isaac*. Long-standing precedent recognizes that the Adecisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial.@ *Wheeler v. State*, 344 So. 2d 244, 245 (Fla. 1977) (citations omitted). *See also Francois v. State*, 695 So. 2d 695, 697 & n.2 (Fla. 1997) (same).

Noting its agreement with *Isaac*=s dissent, in its opinion, the Third District, suggests that *Apprendi* and *Blakely* do not apply to the direct appeal of Mr. Galindez= resentence, since *Apprendi* and *Blakely* are not retroactive. However, the retroactivity of *Apprendi* and *Blakely* has nothing to do with their applicability to Mr. Galindez= *de novo* resentencing. *See Hughes v. State*, 901 So. 2d 837 (Fla. 2005); *Isaac* Mr. Galindez= resentence is currently on direct appeal and, therefore, they are not yet final. *See id.* Pursuant to *Hughes*, when the United States Supreme Court or this Court renders a decision favorable to a criminal defendant, the decision Aapplies in all cases to convictions that are not yet finalBthat is convictions for which an appellate court mandate has not yet

issued. *Id.* at 839. *Accord Griffith v. Kentucky*, 479 U.S. 314, 321 & n.6 & 328 (1987) (holding, *inter alia*, that new rules for the conduct of criminal prosecutions are to be applied to all non-final cases pending on direct review).

The Third District=s rationale relies on the fact that Mr. Galindez= conviction and original sentence were final before *Apprendi* and *Blakely* were issued. This rationale, however, seemingly ignores the fact that Mr. Galindez= original sentence was vacated and, therefore, it is a nullity. *See Trotter v. State*, 825 So. 2d 362, 367 (Fla. 2002). Since Mr. Galindez= original sentence is a nullity, the operative fact in determining whether or not *Apprendi* or *Blakely* apply to his resentence is the finality of the resentence; it is not the finality of his conviction**B**that is his guilt or innocence. Nor is it the finality of his original sentence. The Third District=s rationale would only apply if *Apprendi* and *Blakely* affected convictions, not sentences.

Apprendi and *Blakely*, however, are decisional laws which affect sentences, not convictions. *See Hughes* and *United States v. Price*, 400 F.3d 844 (10th Cir. 2005), petition for cert. filed, (U.S. May 31, 2005) (No. 04-10694). *Hughes* and *Price*, which the Third District cited in support of its argument, very clearly and unequivocally stand for this proposition. In *Price*, the Tenth Circuit Court of Appeals emphasized that *Blakely* does not apply to guilt or innocence. **A**Rather, it addresses only how a court imposes a sentence, once a defendant has been convicted.@ *Price*, 400 F.3d at 848.

In the *Hughes*= opinion, this Court highlighted that *Apprendi* applies to sentences,

not convictions. For example, this Court stated: AApprendi does not affect the determination of guilt or innocence; it only requires that sometimes the jury, not the judge, must factual aspects of the sentencing decision.@ *Hughes*, 901 So. 2d at 841. This Court also repeatedly asserted that the key factor in an *Apprendi* retroactivity analysis is whether the defendant=s sentence was final prior to the its issuance. *See, e.g., Hughes*, 901 So. 2d at 840-841. *See also id. at* 843 & n.6., 844, 850-851.

Additionally, the *Hughes*= opinion repeatedly refers to *Apprendi=s* effect on sentences, not convictions. The following statements exemplify this emphasis: AApprendi affects only the procedure for enhancing the *sentence*[,]@ and ARegardless of the standard used, we find it persuasive that courts unanimously consider *Apprendi* to be a rule of procedure that simply changes who decides certain sentencing issues.@ *Hughes*, 901 So. 2d at 843 (emphasis supplied) (citations omitted) and *id*. at 848-849, respectively.

This Court has previously recognized the distinction in finality, between convictions and resentences, in determining whether an intervening decisional law, regarding sentencing, is retroactive. The case of *Parker v. State*, 873 So. 2d 270 (Fla. 2004) is illustrative of this point. In *Parker*, the defendant directly appealed his resentencing to this Court. The defendant=s conviction and original sentence of death were affirmed on direct appeal in 1985. However, in 1998, the defendant was granted a resentencing proceeding through a post-conviction motion.

At the resentencing, the defendant, based on *Michigan v. Jackson*, 475 U.S. 625 (1986), attempted to suppress the admission of his statement to the police, into the *de novo* penalty phase hearing. The trial court, however, refused to consider the suppression issue since *Jackson* was decided after the defendant=s conviction and original sentence became final, and it did not apply retroactively. This Court explicitly rejected this analysis and held that the trial court should have considered the motion on the merits. *Parker*, 873 So. 2d at 278-280 & n.6. In rejecting the state=s retroactivity argument, this Court emphasized that the defendant=s penalty phase was a new sentencing hearing. Therefore, the defendant was not precluded from applying case law rendered after the original sentencing, as the Aclean slate@ principle discussed in *Preston v. State*, 607 So. 2d 404, 408-409 (Fla. 1992) applies. *See Parker*, 873 So. 2d at 278.

This Court must reverse the Third District=s decision below as *Parker* expressly rejects its rationale. *Parker* is on all fours with Mr. Galindez= case. The convictions and original sentences of both Parker and Mr. Galindez were final before their resentencing. After their convictions and original sentences became final, the United States Supreme Court issued decisional law which affected their sentences. Both Parker and Mr. Galindez= were resentenced subsequent to the issuance of this decisional law. Therefore, as in *Parker*, the intervening decisional law of *Apprendi* and *Blakely* must be applied to Mr. Galindez= sentence.

Interestingly, in *Parker*, the state also contested the defendant=s assertion that

Apprendi and *Ring* should be applied to the defendant=s resentence.[1] This Court, however, seemingly rejected the state=s retroactivity argument by denying the defendant=s *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002) claims on the merits. *See Parker*, 873 So. 2d at 294.

In *Green v. State*, 907 So. 2d 489 (Fla. April 28, 2005), this Court similarly implicitly rejected the state=s claim[2] that *Apprendi* and *Ring* did not apply retroactively to the defendant=s resentencing. In *Green*, just as in *Parker*, the defendant stood in the exact same procedural posture as Mr. Galindez. In *Green*, the defendant=s convictions and death sentences were final prior to *Apprendi* and *Ring=s* issuance. However, the

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[1] In *Parker*, the state explicitly argued that *Apprendi* and *Ring* were not applicable to the defendant=s resentencing, as they are not retroactive. *See* State=s August 26, 2002 Supplemental Answer Brief at 4-5, which can be found at <<http://www.floridasupremecourt.org/clerk/briefs/2001/1-200/01-172_anssupp.pdf>>. The defendant specifically challenged the state=s assertion noting that the defendant=s sentence was not yet final. *See* Defendant=s July 25, 2002 Initial Brief at 2-3, which can be found at <<http://www.floridasupremecourt.org/clerk/briefs/2001/1-200/01-172_inisupp.pdf>>; Defendant=s September 11, 2002 Reply Brief at 5-6, which can be found at <<http://www.floridasupremecourt.org/clerk/briefs/2001/1-200/01-172_repsupp.pdf>>.

[2] In its Answer Brief, the state explicitly argued that the decision in *Ring* was not applicable to the defendant=s resentencing, as *Ring* is not retroactive. *See* State=s Answer Brief at page 50, which can be found at <<http://www.floridasupremecourt.org/clerk/briefs/2002/2201-2400/02-2315_ans.pdf>>.

defendant received a new penalty phase resentencing in 2002, after *Apprendi* and *Ring* were issued. The defendant=s direct appeal of his resentencing was before this Court.

When this Court denied the defendant=s *Apprendi* and *Ring* claims on the merits, this Court implicitly rejected the state=s claim that *Apprendi* and *Ring* did not apply retroactively to the defendant=s resentencing. *See Green*, 907 So. 2d at 502-503. This Court=s implicit acceptance that *Apprendi* and *Ring* were applicable to the defendant=s resentencing is illustrated by the fact that the *Green* opinion was issued the same day as this Court issued its opinions in *Hughes* and *Johnson*. *Hughes* and *Johnson*, respectively, held that neither *Apprendi* nor *Ring* were retroactive to cases on collateral review. *See Hughes v. State*, 901 So. 2d 837 (Fla. April 28, 2005); *Johnson v. State*, 904 So. 2d 400 (Fla. April 28, 2005). Therefore, just as it did in *Hughes* and *Johnson*, this Court, in *Green*, could have rejected the defendant=s *Apprendi* and *Ring* claims based on the fact that these decisions were not retroactive. Yet, this Court chose, instead, to reject the claims on the merits.

In addition to this Court, the District Courts of Appeal have similarly applied intervening decisional law to defendants= resentences, despite the fact that the decisional law was issued after the defendants= convictions and original sentences were final. First, and foremost, the First District, in *Isaac*, explicitly applied this reasoning in the context of an *Apprendi*/*Blakely* challenge. In *Hindenach v. State*, 807 So. 2d 739 (Fla. 4th DCA 2002), the Fourth District, without any discussion that it was retroactively barred, rejected

on the merits the defendant=s claim that his post-*Apprendi* resentencing violated *Apprendi*. In *Altman v. State*, 756 So. 2d 148 (Fla. 4th DCA 2000), however, the Fourth District did explicitly analyze the defendant=s similar claim that the intervening decisional law of *Reyes v. State*, 709 So. 2d 181 (Fla. 5th DCA 1998) should be applied at his resentencing, even though his convictions and original sentence were final in 1997.

The Second District also applied this same reasoning in *Blackwelder v. State*, 570 So. 2d 1027 (Fla. 2d DCA 1990) (advising trial court that it should consider the effect of *State v. Jackson*, 561 So. 2d 554 (1990) at the defendant=s resentencing, even though it was issued after defendant=s conviction and original sentence were affirmed), and *Parker v. State*, 506 So. 2d 86 (Fla. 2d DCA 1987) (advising trial court that it must resentence the defendant based on *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986), which was issued after defendant=s conviction and original sentence were affirmed). The Fifth District has applied this same reasoning in the context of resentences which are imposed at probation violation hearings. *See Taylor v. State*, 801 So. 2d 173 (Fla. 5th DCA 2001) (on revocation of probation trial court should have considered decision in *White v. State*, 714 So. 2d 440 (Fla. 1998), which was issued after defendant=s original sentence of probation was imposed); *Holmes v. State*, 722 So. 2d 240 (Fla. 5th DCA 1998) (same).

In further support of Mr. Galindez= claim that *Apprendi* and *Blakely* should apply to his resentence, is the Minnesota appellate court=s decision in *State v. Beaty*, 696 N.W.2d 406 (Minn. App. 2005). In *Beaty*, the court decided virtually the identical issue

that is present in the case at hand. The defendant=s sentences, in *Beaty*, were imposed, but not executed prior to the issuance of the *Blakely* decision. Following, the defendant=s violation of probation, the trial court executed the sentences. Before the executed sentences became final, *Blakely* was issued.

Finding that *Blakely* was applicable to the defendant=s sentence, the *Beaty* court explained that Athe date the conviction became final was the material date from which to assess retroactivity in *Griffith*. The *Blakely* decision, however, created a new rule governing sentencing departures.@ The Court then explicitly stated: AThus, as in [*United States v. Martin*, 363 F.3d 25, 46 (1st Cir. 2004)], the date the duration of the sentence becomes final is the lodestar for determining retroactivity.@ *Beaty*, 696 N.W.2d at 410.

The *Beaty* decision only affirms the correctness of this Court=s long-standing Aclean slate@ principle of resentencing proceedings, and its application of intervening decisional law to resentences, even though this decisional law was issued after the defendants= convictions and original sentences were final. The Third District=s opinion below should be quashed, as it contravenes long-standing Florida precedent, of this Court, and the other District Courts of Appeal. Most importantly, it conflicts with this Court=s decisions in *Green* and *Parker*.

In its opinion, the Third District commented that the application of *Apprendi* and *Blakely* to Mr. Galindez= sentences would be unfair. *See Galindez*, 30 Fla. L. Weekly D1743. However, a *de novo* resentencing is fair to both sides. At times it benefits the

defense, and at other times it benefits the state. The state is benefitted by the *de novo* resentencing rule, for example, as the trial court can apply aggravators that were not present or found in the original sentencing, and the trial court can enter an upward departure, even though there was no departure at the original sentencing. *See Castro v. State*, 644 So. 2d 987 (Fla. 1994) (at resentencing trial court could apply previously convicted capital felony aggravator, for conviction subsequent to original sentencing, but prior to resentencing); *Preston v. State*, 607 So. 2d 404 (Fla. 1992) (at resentencing state can resubmit to trial court aggravating factors, which were not found by original sentencing judge); *Roberts v. State*, 547 So. 2d 129 (Fla. 1989) (at resentencing court can consider for first time whether upward departure is appropriate).

Furthermore, Mr. Galindez= original sentence was vacated pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure, as it was an illegal sentence. (A. 3). Rule 3.800(a) allows a trial court broad authority to correct an illegal sentence at any time, without imposing any time limitations on the defendant to seek relief. *See, e.g., Wright v. State*, 2005 WL 2095716 *1, *2 (Fla. Sept. 1, 2005); *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001). At its most basic level, Rule 3.800(a) ensures fairness to both the defendant and the state. The unlimited time for challenging illegal sentences balances the need for finality of sentences Awith the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law.@ *Carter v. State*, 786 So. 2d 1173, 1176 (Fla. 2001).

A defendant=s wrongful imprisonment is a fundamental concern of Rule 3.800(a). As this Court quoted in *State v. Montague*, 682 So. 2d 1085 (Fla. 1996): AWhile imperfect, our criminal justice system must provide remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person.@ *Id.* at 1089 & n.6, *quoting* Judge Cowart in *Hayes v. State*, 598 So. 2d 135, 138 (Fla. 5th DCA 1992).

Finally, the application of *Apprendi* and *Blakely* to Mr. Galindez= resentence is fair, as Athe practice of judicial fact-finding has already been sharply limited by this Court=s own long-standing decisions limiting a judge=s authority to determine facts which might have a significant impact on a criminal sentence.@ *Hughes*, 901 So. 2d at 865 (Anstead, J. dissenting). As Justice Anstead, in his *Hughes* dissent, further explained:

> [W]ell before *Apprendi*, we have required explicit jury findings on such issues as possession of a firearm [*see State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984)], the quantity of drugs [*see State v. Estevez*, 753 So. 2d 1 (Fla. 1999)] and other facts that might authorize a greater punishment for the underlying crime [*Weems v. State*, 795 So. 2d 122, 125 (Fla. 1st DCA 2001) (specific jury finding that building was occupied at time of offense was required to sentence defendant convicted of burglary as a Prison Releasee Reoffender]. . . . Outlawing the substantial enhancement of sentences above the statutory maximums based upon judicial fact-finding is not only consistent with *Apprendi*, but consistent with our prior case law. *Apprendi* and *Blakely* are consistent with our own precedent, not disruptive of it.

Hughes, 901 So. 2d at 865-866 (Anstead, J. dissenting).

The *Apprendi* court emphasized: A[I]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.@ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (opinion of Stevens, J.) (internal quotation omitted), and (opinion of Scalia, J.) (internal citation omitted).

The rule of *Apprendi* was announced prior to the imposition of Mr. Galindez= resentence. The rule of *Blakely*, which applied *Apprendi* to guidelines sentences, was announced during the pendency of Mr. Galindez= direct appeal of his resentence. As Mr. Galindez= resentence is not yet final, this Court should quash the Third District=s decision below, reverse Mr. Galindez= resentence, and remand his case for resentencing in accordance with the mandates of *Apprendi* and *Blakely*.

CONCLUSION

Based on the foregoing, Alexander Galindez respectfully requests that this Court quash the decision of the Third District Court of Appeal; reverse his resentence; and remand this case for a *de novo* resentencing based on a scoresheet which only includes forty (40) contact points, not eighty (80) penetration points, for count one.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered by U.S. mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida this 8th day of September, 2005.

By: _____
Shannon P. McKenna
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

By: _____
Shannon P. McKenna
Assistant Public Defender