IN THE SUPREME COURT OF FLORIDA

CASE NO. 05-1341

ALEXANDER GALINDEZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

AMENDED REPLY 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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SUMMARY OF ARGUMENT[1]

In its Answer Brief, the State fails to address Petitioner's arguments regarding the long-standing precedent of this Court which establishes that a resentencing hearing must proceed *de novo* as the prior sentence has been vacated and therefore, rendered a nullity. The state also fails to distinguish the cases cited in Petitioner's Initial Brief which offer direct support for the argument that the decisions in *Apprendi* and *Blakely* apply to Mr. Galindez' *de novo* resentencing.

Seemingly unable to rebut this long-standing precedent, the state instead posits that, for the purposes of *Apprendi* and *Blakely*, the relevant point for determining finality in the retroactivity context is the finality of the conviction as it relates to the defendant's guilt, not the finality of his sentence. The state's conclusion is incorrect. In *Hughes v. State*, 901 So. 2d 837 (Fla. 2005), this Court repeatedly highlighted that *Apprendi* and *Blakely*, affect sentences, not convictions.

The federal and out-of-state cases the state cites in support of its argument are not persuasive authority. The context of these cases clearly shows that the operative fact in analyzing the retroactivity of *Apprendi* and *Blakely* claims is the finality of the defendant's current sentence, not the finality of his conviction as it relates to his guilt.

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[1] All references to the parties' briefs will be to their briefs on the merits. The symbol "A." will be used to denote the Appendix which was filed with Petitioner's Initial Brief. As utilized by the state in its Answer Brief, the symbol "SR4." will denote the State's motion to supplement the record filed with the Third District.

These cases are aligned with, not against Florida's long-standing precedent.

The state next argues that even if *Apprendi* and *Blakely* apply to Mr. Galindez' resentence, he is still not entitled to relief as the inclusion of sex penetration points was harmless error. Again, the state is incorrect. In its argument, the state completely ignores well-established Florida law, based on *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984), and its *progeny*, that when a fact must be found by the jury, the jury must actually make that factual finding.

The Third District's decision should be quashed, and this case should be reversed and remanded for resentencing in accordance with *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.

The finality of the sentence under appeal, not the finality of the conviction is the operative fact in determining the retroactivity of *Apprendi* and *Blakely*.

In its Answer Brief, the State fails to address Petitioner's arguments regarding the long-standing precedent of this Court. This precedent establishes that a resentencing hearing must proceed *de novo* as the prior sentence has been vacated and therefore,

rendered a nullity. As such, the resentencing is a clean slate to which the full panoply of due process considerations attaches. Furthermore, the decisional law in effect at time of the appeal of the resentence is applicable even if there has been an intervening change in the decisional law.

The state also fails to distinguish the cases cited in Petitioner's Initial Brief which offer direct support for the argument that the decisions in *Apprendi* and *Blakely* apply to Mr. Galindez' *de novo* resentencing, even though his conviction and original, now vacated, sentence were final prior to their issuance.[2] These cases clearly hold that if a defendant is resentenced *de novo*, he is entitled to the benefit of intervening decisional law which affects his sentence, even though his original conviction and sentence were final prior to the issuance of the intervening decisional law. These cases also clearly recognize

[2] *See Parker v. State*, 873 So. 2d 270 (Fla. 2004) (applying *Michigan v. Jackson*, 475 U.S. 625 (1986), which was issued after defendant's conviction and original sentence were final, to defendant's resentencing hearing); *Green v. State*, 907 So. 2d 489 (Fla. 2005) (implicitly accepting application of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584 (2002), to defendant's resentencing hearing even though conviction and original sentence were final prior to their issuance); *Hindenach v. State*, 807 So. 2d 739 (Fla. 4th DCA 2002) (same); *Altman v. State*, 756 So. 2d 148 (Fla. 4th DCA 2000) (applying *Reyes v. State*, 709 So. 2d 181 (Fla. 5th DCA 1998) to post-*Reyes de novo* resentencing hearing even though convictions and original sentence were final in 1997); *Blackwelder v. State*, 570 So. 2d 1027 (Fla. 2d DCA 1990) (advising trial court that it should consider the effect of *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985) at the defendant's resentencing, even though it was issued after defendant's conviction and original sentence were affirmed); *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).

that there is a distinction between the finality of convictions related to the determination of guilt and the finality of sentences.

Seemingly unable to rebut the precedent of this Court and the other District Courts of Appeal, the state instead posits that, for the purposes of *Apprendi* and *Blakely*, the relevant point for determining finality in the retroactivity context is the finality of the conviction as it relates to the defendant's guilt, not the finality of his sentence. The state concludes that *Apprendi* and *Blakely* apply to convictions, not sentences, as the jury, once it renders its verdict in a non-capital proceeding, is not able to make any additional factual determinations for sentencing purposes.[3]

The state's conclusion is incorrect. As detailed in Petitioner's Initial Brief, in *Hughes v. State*, 901 So. 2d 837 (Fla. 2005), this Court repeatedly highlighted that *Apprendi* and *Blakely* are decisional laws which affect sentences, not convictions. In an attempt to justify its conclusion, the state cites to the Third District's decision below,[4] several Fourth District decisions[5] which align themselves with the Third District's decision

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[3] It should be noted that the state's concerns are not specific to defendants who were resentenced post-*Apprendi/Blakely*. These concerns would apply to any defendant whose conviction and sentence were not yet final when *Apprendi* and/or *Blakely* were issued.

[4] Since *Galindez*, the Third District has affirmed two additional cases with only a citation to the *Galindez* decision. *See Samboy v. State*, 917 So. 2d 303, (Fla. 3d DCA 2005); *Cornet v. State*, 915 So. 2d 239 (Fla. 3d DCA 2005).

[5] *See Hamilton v. State*, 914 So. 2d 993 (Fla. 4th 2005); *Thomas v. State*, 914 So.

below, and Judge Kahn's dissent in *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005). However, these cases offer no real support for the state's position. These cases simply state, without any analysis, that *Apprendi* and *Blakely* due not retroactively apply to resentencing proceedings, when the defendant's conviction and original sentence were final prior to their issuance. None of these cases discuss this Court's precedent which establishes that a resentencing proceeding is a *de novo* proceeding to which the full panoply of due process considerations attaches, and that the decisional law in effect at time of the appeal of the resentence is applicable even if there has been an intervening change in the decisional law.

The state then alleges that the federal courts agree with its position. However, the federal cases cited by the state: *United States v. Price*, 400 F.3d 844 (10th Cir. 2005), *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001), and *United States v. Ellis*, 2005 WL 2035055 (D.Kan. 2005) (unpublished opinion), are easily distinguishable. First, and foremost, all of the defendants in *Price*, *Sanders*, and *Ellis* are appearing before their respective courts on post-conviction motions for collateral relief. In contrast, Mr. Galindez is before this Court on the direct appeal of his resentence.

Second, unlike Mr. Galindez' case, the *Price* and *Ellis* cases, do not involve resentencing proceedings. Therefore, the fact that the *Price* and *Ellis* courts used the terminology that the finality of the conviction is the relevant point for *Apprendi/Blakely*

2d 27 (Fla. 4th DCA 2005); *Garcia v. State*, 914 So. 2d 29 (Fla. 4th DCA 2005).

retroactivity purposes is not persuasive authority. Quite simply, the courts had no need to differentiate between the defendants' determination of guilt, their original sentence, and any subsequent sentence. Furthermore, *Price* contradicts the state's conclusion, as the Tenth Circuit clearly emphasizes that *Blakely* does not apply to the determination of guilt; "[r]ather, it addresses only how a court imposes a sentence, once a defendant has been convicted." *Price*, 400 F.3d at 848.

Third, the *Sanders* case actually supports, and does not contravene Mr. Galindez' position that the finality of the sentence at issue, not the finality of the conviction as it relates to guilt, is the operative fact for *Apprendi/Blakely* retroactivity purposes. In *Sanders*, the defendant's original conviction and sentence became final in 1998. One year later, the defendant's sentence was modified for his provision of substantial assistance, pursuant to Federal Rule of Criminal Procedure Rule 35(b). One year after his sentence modification, and almost two years after his original conviction and sentence, the defendant filed a post-conviction motion. In this motion, he claimed that his sentence violated *Jones v. United States*, 526 U.S. 227 (1999).

At issue in *Sanders* was whether the defendant's post-conviction motion was timely filed within the applicable statute of limitations, which requires filing within one year of the defendant's final judgment of conviction. In order to rule on this issue, the Fourth Circuit examined whether the date of defendant's original sentence or his modified sentence was the operative date for determining the finality of his conviction. After

reviewing 18 U.S.C. § 3582(b), regarding the finality of judgments, the Fourth Circuit determined that the defendant's conviction was final the date of his original sentence, not the date of his modified sentence. The court came to this conclusion as 18 U.S.C. § 3582(b) specifically states that notwithstanding the fact that a sentence can be modified for substantial assistance "a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b)(3).

Interestingly enough, in its analysis, the Fourth Circuit examined both the date of defendant's original conviction as it relates to guilt and sentencing, and the date of his subsequent sentencing in determining whether his conviction was final for purposes of filing a post-conviction motion. The Fourth Circuit did not simply look to the date that the defendant's conviction of guilt was entered. Yet, this is what the state wants this Court to do in the case at hand.

Sanders supports Mr. Galindez' position as it holds that the operative fact in the retroactivity analysis of a case, which involves the defendant's sentence, is whether the defendant's sentence is final. If the defendant's sentence is final, then retroactivity principles bar the case's application to the defendant. It the defendant's sentence is not final, retroactivity principles permit the case's application to the defendant. This principle contradicts the state's position.

This point is clearly illustrated by the case of *United States v. Eli*, 227 F.Supp.2d 90 (D.D.C. 2002). In *Eli*, the defendant's plea and original sentence were final in 1998.

Subsequently, the defendant filed post-conviction motions raising ineffective assistance of counsel claims and *Apprendi* claims. The court ruled that the defendant's original sentence would be vacated based on ineffective assistance of counsel and that the defendant would be entitled to a new sentencing proceeding. The court then held that it had to address defendant's *Apprendi* claims on the merits, since the defendant was going to be resentenced.

The *Eli* court did not look to the finality of the defendant's original conviction and sentence to determine whether retroactivity principles would bar *Apprendi's* application. Instead, the *Eli* court looked to the finality of the subsequent sentence to determine *Apprendi's* application. This case is on all fours with the present case. Similar to the defendant in *Eli*, Mr. Galindez must be resentenced in accordance with *Apprendi* and *Blakely* as his resentence is not yet final. *See also Rennick v. United States*, 2005 WL 3481366 (E.D.Ky 2005) (noting that after vacation of original sentence, resentencing process will enable defendant to avail himself of the *Blakely* decision, even though his original conviction and sentence were final prior to its issuance.).

Finally, the state asserts that the Minnesota Court of Appeals' decisions, in *State v. Losh*, 694 N.W.2d 98 (Minn.App. 2005), *review granted* (Minn. 2005) and *State v. Murphy*, 2005 WL 2008929 (Minn.App. 2005) (unpublished decision), support its position. Once again, however, the state misconstrues the relevant decisions. In *Losh*, the trial court imposed sentences of a specific duration on the defendant, but it stayed

their execution. After the defendant violated probation, the trial court executed the previously imposed sentences of a specific duration and rejected the defendant's claim that the sentences violated *Blakely*.

The Minnesota Court of Appeals affirmed the trial court's decision holding that the "point at which a judgment becomes final is the critical point for purposes of retroactivity analysis." *Losh*, 694 N.W.2d at 101. The state utilizes this language to support is position that the defendant's original conviction and sentencing date, not his subsequent sentencing date is the operative fact in the *Blakely* retroactivity analysis.

However, the decision in *Losh*, as explained by the Minnesota Court of Appeal's subsequent decision, in *State v. Beaty*, 696 N.W.2d 406 (Minn. App. 2005), should not be read so broadly. In *Beaty*, the imposition of the duration of the defendant's sentence, as well as, the execution of the defendant's sentence was stayed prior to the issuance of the *Blakely* decision. Following, the defendant's violation of probation, the trial court imposed sentences of specific duration and it 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 unlike most new rules of law, which concern guilt, *Blakely* created a new rule of law concerning sentencing. The Court then explicitly stated: "Thus, 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 court then distinguished *Losh*. It noted that while both trial courts stayed the execution of the defendants' sentences, in *Losh*, the trial court imposed sentences of a specific duration, while in *Beaty*, the trial court imposed sentences without a specific duration. Under Minnesota law, an imposed, but unexecuted sentence of specific duration is appealable, whereas, an imposed, but unexecuted sentence without a specific duration is not yet appealable. For that reason, the sentence in *Losh* became final when the time to appeal expired, while the sentence in *Beaty* did not become final until it was executed for a specific duration. Therefore, despite the "finality of conviction" language used by the *Losh* court, the operative fact in determining whether *Blakely* applies to a sentence is the finality of the sentence, not the finality of the conviction as it relates to guilt.

In support of its argument, the state also cites the case of *State v. Murphy*, 2005 WL 2008929 (Minn.App. 2005) (unpublished decision), *review denied* (Minn. 2005). This case is also easily distinguishable. In *Murphy*, while the court uses the language that the finality of the judgment is the critical point for purposes of retroactivity analysis, on the facts the defendant's original conviction and sentence were final pre-*Blakely*. The defendant raised his *Blakely* claim in a post-conviction motion alleging that at some point in the future his sentence may be vacated. The court held that such possibilities do not negate the finality of his sentence.

As discussed, the cases cited by the state in support of its argument are not

persuasive authority. Some of these cases may use the language that the finality of the conviction is the relevant point in time for determining the retroactivity of *Apprendi* and *Blakely* claims. However, once the facts of the individual cases are examined, it becomes clear that this language is often used haphazardly. Therefore, the language's meaning must be determined from the context of the individual cases. Once the context of these cases is examined, it becomes clear that operative fact in analyzing the retroactivity of *Apprendi* and *Blakely* claims is the finality of the defendant's current sentence, not the finality of his conviction as it relates to his guilt. These cases are aligned with, not against, Florida's long-standing precedent.

Furthermore, principles of fairness and equity dictate that *Apprendi* and *Blakely* should apply to Mr. Galindez' *de novo* resentencing. *Apprendi* clearly holds that 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*, 530 U.S. at 490 (citations omitted). Mr. Galindez was resentenced in *de novo* proceeding with the full panoply of due process protections. It is unpalatable for the trial court to employ procedures which it now knows are in violation of the constitution's Sixth Amendment right to a jury trial.

Even more so, it is inequitable and unfair for Mr. Galindez to be treated differently than other similarly situated defendants. He should stand equal with all other defendants

who were sentenced at the same time. As this Court stated in *Smith v. State*, 598 So. 2d 1063 (Fla. 1992): "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review. . . . Moreover, selective application of new rules violates the principle of treating similarly situated defendants the same, because selective application causes actual inequity when the court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule." *Id.* at 1066 (internal quotations and citations omitted).

This Court should follow the mandates of well-established Florida law and reject the state's proposition that the harmless error standard applies to *Apprendi/Blakely* violations.

The state next argues that even if *Apprendi* and *Blakely* apply to Mr. Galindez' resentence, he is not entitled to relief as the inclusion of sex penetration points was harmless error, as the jury surely would have found that penetration took place.[6] Again, the state is incorrect. The erroneous inclusion of penetration points is not rendered harmless by an appellate court's determination of what the jury surely would have found. The state's argument is completely unsupported by and, in fact, directly contradicted by well-established Florida law.

In its argument, the state completely ignores this well-established Florida law. It also fails to cite any Florida case which holds that the harmless error standard is

[6] The Third District did not address this issue in either its opinion or in its certification of direct conflict of decisions to this Court. (A. 1).

applicable to *Apprendi/Blakely* violations. Of the Florida cases cited by the state, one holds that an *Apprendi* error must be preserved, as it is not fundamental, *McGregor v. State*, 789 So. 2d 976 (Fla. 2001), and the remaining two merely comment that the fact that an *Apprendi* error could be harmless weighs against a finding that *Apprendi* can be deemed fundamentally significant for retroactivity purposes, *Hughes v. State*, 901 So. 2d 837 (Fla. 2005) and *Hughes v. State*, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002). Contrary to the state's assertion, none of the cases it cites even apply much less analyze the harmless error standard to *Apprendi/Blakely* violations.

Well-established Florida law holds that when a fact must be found by the jury, the jury must actually make that factual finding. If the jury does not specifically make the required factual finding, the court is not allowed to substitute its own finding, even if evidence of the fact is overwhelming and uncontroverted. This rule of law has been consistently and repeatedly applied whenever the jury must make specific factual findings. Such situations arise when the jury must make a finding regarding whether a firearm was possessed, whether an assault took place during a burglary, whether a dwelling was occupied during a burglary, and whether the defendant possessed a certain quantity of drugs.[7]

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[7] *See State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984) (rejecting proposition that jury finding as to the presence of a firearm is not required where the evidence is uncontroverted); *Gonzalez v. State*, 876 So. 2d 658 (Fla. 3d DCA 2004) (finding

This same reasoning should apply to *Apprendi/Blakely* violations. While this Court has not directly ruled on the application of the harmless error standard to *Apprendi/Blakely* violations, the Second and Fourth District Courts of Appeal have expressly rejected this proposition. Most recently, in *Behl v. State*, 898 So. 2d 217 (Fla. 2d DCA 2005), the Second District considered an *Apprendi/Blakely* violation that is virtually identical to the violation in the case at hand. In *Behl*, the defendant was charged with one count of sexual battery and two counts of sexual battery on a person in familial or custodial authority. One of the familial authority counts charged that the defendant committed the offense by penetration or union. The jury was instructed according to the information and it found the defendant guilty as charged.

The Second District rejected the state's assertion that the jury necessarily concluded that penetration took place and reversed the defendant's sentence based on the *Apprendi/Blakely* violation. In finding an *Apprendi/Blakely* violation, the Second District emphasized that the jury's finding of guilt did not embody a finding that penetration took place as the defendant was charged with committing the offense either with penetration or

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Apprendi violation as jury's verdict that defendant was guilty of burglary with intent to assault was insufficient to prove that the defendant committed a burglary with an assault); *Weems v. State*, 795 So. 2d 122, 125 (Fla. 1st DCA 2001) (finding that defendant convicted of burglary of a dwelling did not qualify as a Prison Releasee Reoffender since their was no specific jury finding that the building was occupied at the time of the offense, even if evidence of occupancy was undisputed); *State v. Estevez*, 753 So. 2d 1 (Fla. 1999) (rejecting proposition that court may direct a verdict as to the amount of cocaine, even where the evidence is uncontroverted).

without penetration. *See also Whalen v. State*, 895 So. 2d 1222 (Fla. 2d DCA 2005) (finding *Apprendi/Blakely* violation for the scoring of sex penetration points on count which alternatively charged either union or penetration, even though the victim's testimony established penetration).

Similarly, in *Mathew v. State*, 837 So. 2d 1167 (Fla. 4th DCA 2003), the Fourth District specifically rejected the contention that overwhelming evidence of guilt renders an *Apprendi/Blakely* violation harmless. The Fourth District emphasized: "*Apprendi* mandates that a jury find that the facts necessary to impose the domestic violence multiplier exist beyond a reasonable doubt. It does not matter that all of the evidence may support that proposition. The jury must make the determination." *Id*. at 1171. In its Answer Brief, the state fails to address the cases of *Behl*, *Whalen*, or *Mathew*, even though they are directly on point regarding the applicability of the harmless error standard to *Apprendi/Blakely* errors.

In the case at hand, the jury's verdict, for count one, only found Mr. Galindez guilty of lewd assault as charged in the alternative, either by union or penetration. Penetration and union are not synonymous terms. *See Anthony v. State*, 854 So. 2d 744, 748 (Fla. 2d DCA 2003). This general verdict only indicated that at least one of the alternative elements, either union or penetration, was proven beyond a reasonable doubt. It was not a verdict which proved that penetration took place. *See Behl*, *Whalen*, *McCloud v. State*, 803 So. 2d 821 (Fla. 5th DCA 2001) (Harris J., concurring in part and

dissenting in part); *Gilson v. State*, 795 So. 2d 105 (Fla. 4th DCA 2001).

Since the jury never determined whether penetration took place, the court cannot now guess at what the jury was thinking. *See Torna v. State*, 742 So. 2d 366 (Fla. 3d DCA 1999). At the most, the court can only find that the jury found Mr. Galindez guilty of the lesser union alternative. Since the jury's verdict may only be construed as a finding that union was proven, the court was only authorized to impose victim injury points for contact. *Apprendi* and *Blakely* require this conclusion, as the inclusion of every single point on Mr. Galindez' scoresheet increases his maximum sentence. *See* 921.0014(2), Fla. Stat. (1997); Rule 3.703 (27), (28) & (31), Fl. Rule Crim. P. (1997).

This conclusion is also consisted with and supported by the Third District Court of Appeal's earlier decision in *Galindez v. State*, 831 So. 2d 780 (Fla. 3d 2002), regarding the imposition of sex penetration points for the assault in count four. In this earlier decision, the Third District reversed Mr. Galindez' sentence as the trial court erroneously imposed penetration points for count four, since the jury only found Mr. Galindez guilty as charged with a lewd assault by union. The Third District made this decision despite "overwhelming evidence" that the assault in count four was by penetration, not union. (SR4. 343, 415, 464).

The state suggests that based on the overwhelming evidence of guilt the jury surely would have found penetration. Despite the state's confidence regarding the jury's verdict in its Answer Brief, during the trial, the state requested a special jury instruction advising

the jury that the word "union" means contact. (A. 15). Further, after the court denied this request, in its closing argument, the state advised the jury that union means contact, and it argued that count one could be proven by either union or penetration. (A. 16). Finally, it seems unlikely that the state can accurately predict the jury's verdict, since the jury actually acquitted Mr. Galindez of two related lewd assault counts, despite the "overwhelming evidence of guilt" of these counts. (A. 6, 7).

This Court should follow the mandates of well-established Florida law. It should reject the state's proposed application of the harmless error standard to *Apprendi/Blakely* errors. The sole support proffered by the state for its argument is federal law. Yet, even under federal law, the state's argument must fail. Mr. Galindez' jury rendered a general verdict based on alternative conduct. Federal courts recognize that general verdicts based on alternative conduct are different. Under federal law, for example, when a jury returns a verdict that a defendant was guilty of a conspiracy to traffic drugs based on alternative controlled substances, the defendant may only be sentenced in accordance with the conspiracy to traffic in the lesser alternative controlled substance. *See e.g., United States v. Allen*, 302 F.3d 1260 (11th Cir. 2002). This holding remains true even in the face of overwhelming evidence that the conspiracy also involved the higher alternative controlled substance. *See id.*

Additionally, contrary to the state=s assertion, the United States Supreme Court, has not yet ruled on the application of the harmless error standard to *Apprendi*

violations.[8] In *United States v. Cotton*, 535 U.S. 625 (2002), the court analyzed the unpreserved *Apprendi* error for plain error, not for harmless error. Relying on *Neder v. United States*, 527 U.S. 1 (1999), the state further asserts that *Apprendi* errors can be deemed harmless in the face of overwhelming evidence of guilt. However, as pointed out by several state courts, the application of the *Neder* harmless error standard of review may be short-lived.[9] Moreover, as highlighted by the North Carolina Supreme Court, in *State v. Allen*, 615 S.E.2d 256 (N.C. 2005), the *Neder* harmless error standard cannot be applied to *Blakely* violations. *Allen*, 615 S.E.2d at 271 (quotation omitted).[10] Finally, the State Supreme Court's of North Carolina, Washington, and Kansas have rejected the application of the harmless error standard to *Apprendi*/*Blakely* errors, even in the face of overwhelming evidence of the fact to be proved. *See State v. Allen*, 615 S.E.2d 256 (N.C. 2005); *Hughes v. State*, 110 P.3d 192 (Wash. 2005); *State v. Gould*, 23 P.3d 801,

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[8] The court, however, has granted certiorari to review this question. *See Washington v. Recuenco*, 110 P.3d 188 (Wash. 2005), *cert. granted* (Oct. 17, 2005).

[9] *See Freeze v. State*, 827 N.E.2d 600 (Ind. App. 2005); *People v. Nitz*, 820 N.E.2d 536 (Ill. Ct. App. 5th 2004), *appeal allowed*, 820 N.E.2d 536 (Ill. Mar 30, 2005). In *Neder*, Justice Scalia wrote the dissent which was joined in part by Justice Stevens, and joined fully by Justices Ginsburg and Souter. These four justices, along with Justice Thomas, formed the five member majority in *Apprendi* and *Blakely*. With *Apprendi*, it appears that Justice Thomas has joined Justice Scalia=s broad view of the right to jury trial. *See Freeze*, 827 N.E.2d at 605.

[10] In a *Neder* scenario, the jury actually returns a guilty verdict which can be reviewed for harmless error. In contrast, with a *Blakely* violation, the jury necessarily did not return a verdict regarding the specific sentencing facts at issue.

814 (Kansas 2001).

This Court should follow the mandates of well-established Florida law and reject the state's proposition that the harmless error standard applies to *Apprendi/Blakely* violations. An appellate court cannot substitute itself for the trier of fact, even in the face of overwhelming evidence of guilt. As the United States Supreme Court recently emphasized: "dispensing with a jury trial because a defendant is obviously guilty . . . is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

CONCLUSION

Based on the foregoing reasons, as well as those in the Initial Brief, Mr. Galindez respectfully requests that this Court quash the lower court's decision, reverse and vacate his resentence, and remand this case for a *de novo* resentencing based on a scoresheet which only includes forty (40) contact 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 650, Miami, Florida this 15th day of February, 2006.

By: _____
Shannon P. McKenna
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CERTIFICATE OF FONT COMPLIANCE

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

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