IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO.: SC05-2047**

LEMUEL E. ISAAC,

Respondent.

Respondent's Answer Brief on the Merits

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TABLE OF CONTENTS

Table of Authorities…………………………………………………...iii

Preliminary Statement………………………………………………….1

Statement of the Case and Facts………………………………………..1

Standard of Review……………………………………………………….5

Summary of Argument…………………………………………………6

Argument………………………………………………………………….6

I. *APPRENDI V. NEW JERSEY* APPLIES TO RESENTENCING PROCEEDINGS HELD AFTER *APPRENDI* ISSUED, IN CASES IN WHICH THE CONVICTIONS WERE FINAL BEFORE *APPRENDI* ISSUED…………………………...…6

II. *BLAKELY V. WASHINGTON* APPLIES TO RESENTENCING PROCEEDINGS HELD AFTER *APPRENDI* ISSUED, BUT WHICH WERE FINAL BEFORE *BLAKELY* ISSUED………...11

A. According To The Concept of Federalism, This Court's Analysis In *Witt v. State,* 377 So.2d 922 (Fla. 1980), Is Inapplicable To The Instant Case, Unless It Is Read In Accordance With Or More Expansively Than *Teague v. Lane*, 489 U.S. 288 (1989)……………………………...12

B. *Blakely* Did Not Announce A "New Rule."………………...17

C. *Blakely* Simply Applied the Rule Already Announced in *Apprendi*……………………………………………...19

D. Assuming *Arguendo* That *Blakely* Did Announce A New Rule, It Announced A Watershed Rule Of Criminal Procedure…………………………………………….25

Conclusion……………………………………………………………….28

TABLE OF CONTENTS (CONT.)

Certificate of Service……………………………………………………….29

Certificate of Compliance……………………………………………………30

TABLE OF AUTHORITIES

State Cases **Page(s)**

Galindez v. State, 955 So.2d 517 (Fla. 2007)………………………..…passim

Griffin v. State, 517 So.2d 669 (Fla. 1987)………………………………….7

Heggs v. State, 759 So.2d 620 (Fla. 2000)…………………………………..3

Hughes v. State, 901 So.2d 837 (Fla. 2005)………………………………..13

In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990)…………………………10 n. 3

Isaac v. State, 826 So.2d 396 (Fla. 1st DCA 2002)………………………….2

Morton v. State, 789 So.2d 324 (Fla. 2001)…………………………………6

Smith v. State, 598 So.2d 1063 (Fla. 1992)………………………………...13

State v. Barnum, 922 So.2d 513 (Fla. 2005)………………………………15

State v. Collins, 985 So.2d 985 (Fla. 2008)……………………………….6, 7

State v. Gould, 271 Kan. 394 (Kan. 2001)…………………………………22

State v. Klayman, 835 So.2d 248 (Fla. 2003)…………………………..14, 15

State v. Scott, 439 So.2d 219 (Fla. 1983)…………………………………7, 9

Teffeteller v. State, 495 So.2d 744 (Fla. 1986)……………………………6

Trotter v. State, 825 So.2d 362 (Fla. 2002)…………………………………7

Walker v. State, 988 So.2d 6 (Fla. 2d DCA 2007)…………………………..7

Wike v. State, 698 So.2d 817 (Fla. 1997)……………………………………6

Witt v. State, 377 So.2d 922 (Fla. 1980)……………………….12, 14, 15, 16

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000)……………………….passim

Blakely v. Washington, 542 U.S. 206 (2004)……………………………passim

Bousby v. United States, 523 U.S. 614 (1998)……………………………..25

Eddings v. Oklahoma, 455 U.S. 104 (1982)………………………………..18

Fiore v. White, 531 U.S. 225 (2001)…………………………………...14, 15

Francis v. Franklin, 471 U.S. 307 (1985)…………………………………18

Godfrey v. Georgia, 446 U.S. 420 (1980)…………………………………18

Hankerson v. North Carolina, 432 U.S. 233 (1977)………………………26

In re Winship, 397 U.S. 358 (1970)……………………………….26, 27, 28

Ivan V v. City of New York, 407 U.S. 203 (1972)…………………………26

Kuhn v. Fairmont, 215 U.S. 349 (1910)……………………………………16

Linkletter v. Walker, 381 U.S. 618 (1965)…………………………14, 16, 17

Lockett v. Ohio, 438 U.S. 586 (1978)………………………………………18

Maynard v. Cartright, 486 U.S. 356 (1988)………………………………..18

Mistretta v. United States, 488 U.S. 361 (1989)…………………………...24

Penry v. Lynaugh, 492 U.S. 302 (1989)……………………………………18

Sandstrom v. Montana, 442 U.S. 510 (1979)………………………………18

Schardt v. United States, 414 F.3d 1025 (9th Cir. 2005)…………………...23

Schriro v. Summerlin, 542 U.S. 348 (2004)……………………………17, 26

Stovall v. Denno, 388 U.S. 293 (1967)……………………………………..14

Strickland v. Washington, 466 U.S. 668 (1984)……………………………19

Stringer v. Black, 503 U.S. 222 (1992)…………………………………….18

Tyler v. Cain, 533 U.S. 656 (2001)………………………………………...25

Teague v. Lane, 489 U.S. 288 (1989)…………………………………passim

U.S. v. Booker, 543 U.S. 220 (2005)………………………………………23

Washington v. Recuenco, 126 S.Ct. 2546 (2006)………………………….27

Williams v. Taylor, 529 U.S. 362 (2000)………………………………18, 19

Yates v. Aikens, 484 U.S. 211 (1988)…………………………………..18, 21

Other

Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221(2005)……………………………………………………..22

PRELIMINARY STATEMENT

Petitioner, the State of Florida, shall be referenced throughout as "the State." Respondent, Lemuel E. Isaac, shall be referenced as "Mr. Isaac."

Respondent's Counsel was appointed by this Court to handle this appeal. The First District Court of Appeal refused to serve a copy of the record on appeal on the parties. After determining that it did not want the parties to address the issue of harmless error under *Galindez v. State*, 955 So.2d 517 (Fla. 2007), this Court denied the motion to compel service of the supplemental record on the parties. Accordingly, all references to items of record in this brief shall be to Petitioner's Appendix and cited as (App. ____).

STATEMENT OF THE CASE AND FACTS

This Court has previously recited the facts of the instant case in its *per curiam* decision in *Galindez v. State*, 955 So.2d at 520-521. The Respondent takes the opportunity here to supplement this Court's iteration of the facts.

Based on factual findings it made by a preponderance of the evidence, the trial court gave Mr. Isaac a departure sentence enhancing his sentence by ten years more than was allowed by his jury verdict alone. Before Mr. Isaac's sentence became final, in fact, before the State even sought the departure sentence, the U.S. Supreme Court decided in *Apprendi v. New*

Jersey, 530 U.S. 466 (2000), that the Sixth and Fourteenth Amendments of the U.S. Constitution prohibit courts from making their own findings to impose sentences above the "statutory maximum" permitted by "the jury verdict alone." *Id*. at 483, 490. These facts must be proven to a jury beyond a reasonable doubt. *Id*. at 390. Initially, Mr. Isaac was unable to convince the First District Court of Appeal that *Apprendi* rendered his sentence unconstitutional. *Isaac v. State,* 826 So.2d 396 (Fla. 1st DCA 2002). Accordingly, he sought collateral relief through a rule 3.850 motion in which he renewed his claim that the departure sentence violated the Sixth and Fourteenth Amendments. While that motion worked its way through the courts, the U.S. Supreme Court confirmed *Apprendi* in *Blakely v. Washington*, 542 U.S. 296 (2004). The issues presented here are: (1) Whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to resentencing proceedings held after *Apprendi* issued, in cases in which the convictions were final before *Apprendi* issued; and (2) Whether *Blakely v. Washington*, 542 U.S. 296 (2004), applies retroactively to such sentencing proceedings held after *Apprendi* issued, but which were final before *Blakely* issued.

Mr. Isaac was originally sentenced in 1997. (App. D). Under the 1995 guidelines in effect at the time of the sentencing, Mr. Isaac was scored to

223.4 points on his scoresheet. (App. I). This called for a sentence between 146.5 and 244.2 months. (*Id.*). The State did not seek an enhancement at the original sentencing, nor did the Court enter a departure sentence. (App. D). Rather, Mr. Isaac was sentenced to concurrent terms of 20 years (240 months) on four counts, with a three year mandatory minimum, and to a concurrent term of five years on a fifth count. (*Id*.).

Mr. Isaac filed a timely plenary appeal to the First District Court of Appeal. *Isaac v. State*, 720 So.2d 306 (Fla. 1st DCA 1998). The First District reversed on an issue not germane to the instant appeal, and remanded for a resentencing consistent with its decision. (*Id*.). Mr. Isaac was resentenced on March 17, 1999. Again, the State did not seek an enhancement at the resentencing, nor did the Court enter a departure sentence.

Subsequently, Mr. Isaac filed a rule 3.800(a) motion on the basis of *Heggs v. State*, 759 So.2d 620 (Fla. 2000). (App. I). The State conceded the error and the trial court vacated Mr. Isaac's sentence. (App. J, K). Attached to the State's concession of error was a proposed scoresheet under the 1994 guidelines. (App. J). Under the proposed scoresheet, Mr. Isaac was scored to 123.4 points. (App. J). This called for a sentence between 71.55 and 119.25 months. (App., J).

Apprendi v. New Jersey, 530 U.S. 466 (2000), was decided on June 26, 2000.

Subsequent to the U.S. Supreme Court's decision in *Apprendi*, Mr. Isaac was resentenced on June 11, 2001. (App. L). ***For the first time in the case, at the resentencing hearing***, the State orally sought a departure sentence. (App. L). The State's request was premised on Mr. Isaac "not [being] amenable to rehabilitation or supervision, as evidenced by an escalating pattern of criminal conduct." (App. L, p. 5). The State indicated that his "prior record and current charges illustrate a pattern of increasingly serious criminal activity as well as a movement from nonviolent to violent crimes." (*Id*.). The Defense objected and presented argument as to why the facts and law did not support a finding of "[an] escalating pattern of criminal conduct." (App. L, pp. 8-11). The Court then asked, "When did he come to this country? He came from the Virgin Islands, right?" (App. L, p. 13). The Court further inquired, "Didn't he begin committing crimes the same year that he arrived here?" (*Id*.).

While the guidelines maximum was 119.25 months, the trial court imposed a departure sentence of 20 years (240 months) based on finding the aforementioned facts by a preponderance of the evidence. (*Id*.). The sentence

imposed exceeded the maximum sentence allowed by a jury verdict alone by ten years. (*Id*).

As this Court pointed out in *Galindez*, during the pendency of Mr. Isaac's appeal on the resentencing, he filed motions under Fla. R. Civ. P. 3.850 and 3.800(b) raising claims of *Apprendi* error. *Galindez*, 955 So.2d at 520.

In reviewing the trial court's summary denial of Mr. Isaac's rule 3.850 motion, the First District held that "as *Apprendi* was decided prior to the appellant's resentencing, the trial court was bound by its holding." *Isaac v. State*, 911 So.2d 813, 814 (Fla. 1st DCA 2005). The First District further held that,"[A] departure sentence imposed pursuant to the trial court determining a fact by merely a preponderance of the evidence violates the holding of *Apprendi* as explained by *Blakely*." *Id*. at 815.

This Court granted review.

STANDARD OF REVIEW

The applicability of *Apprendi* and *Blakely* to resentencing proceedings held after *Apprendi* issued, but before *Blakely* issued is a pure question of law, and the applicable standard of review is *de novo*.

SUMMARY OF THE ARGUMENT

Apprendi applies to a resentencing hearing held after *Apprendi* issued, in cases in which the conviction was final before *Apprendi* issued. The resentencing hearing is a new proceeding in which the full panoply of due process considerations attach, including rights announced in *Apprendi*. Moreover, *Blakely* applies to a resentencing hearing held after *Apprendi* issued, but before *Blakely* issued. The United States Supreme Court's decision in *Blakely* merely applied the rule announced in *Apprendi*, and did not announce a "new rule" triggering application of a retroactivity test. Even if this Court were to find that *Blakely* announced a "new rule," it nevertheless meets the applicable test and therefore demands retroactive application.

ARGUMENT

I. *APPRENDI V. NEW JERSEY* APPLIES TO RESENTENCING PROCEEDINGS HELD AFTER *APPRENDI* ISSUED, IN CASES IN WHICH THE CONVICTIONS WERE FINAL BEFORE *APPRENDI* ISSUED.

This Court has traditionally held that resentencing must proceed "as an entirely new proceeding." *Wike v. State*, 698 So.2d 817, 821 (Fla. 1997); *State v. Collins*, 985 So.2d 985, 989 (Fla. 2008); *Morton v. State*, 789 So.2d 324, 334 (Fla. 2001). This Court has further held that "resentencing should proceed *de novo* on all issues bearing on the proper sentence." *Teffeteller v.*

State, 495 So.2d 744, 745 (Fla. 1986). In fact, as Justice Cantero observed in *Galindez*, "We have consistently held that resentencing proceedings must be a 'clean slate,' meaning that the defendant's vacated sentence becomes a 'nullity' and his 'resentencing should proceed *de novo* on all issues bearing on the proper sentence.'" *Galindez*, 955 So.2d at 525 (citation omitted). Accordingly, either side may present "evidence anew" regarding the sentence. *Walker v. State*, 988 So.2d 6, 8 (Fla. 2d DCA 2007). This Court recently held in *Collins* that because a resentencing is a new proceeding the State may present additional evidence at the resentencing not presented at the original sentencing. *Collins*, 985 So.2d at 990.

It is well-established that due process principles apply to a resentencing. *Griffin v. State*, 517 So.2d 669, 670 (Fla. 1987)("The pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach whether the sentence is the immediate result of adjudication of guilt, or, as here, the sentence is the result of an order directing the trial court to resentence the defendant."). This Court has also held that resentencing entitles a defendant to the full array of due process rights. *Trotter v. State*, 825 So.2d 362, 367-68 (Fla. 2002); *State v. Scott*, 439 So.2d 219, 220 (Fla. 1983)(holding that a resentencing entitles the defendant to the "full panoply" of existing due

process considerations). In his concurrence in *Galindez*, Justice Cantero correctly observed that the "full panoply" of due process considerations available to a criminal defendant on resentencing includes "any new constitutional protections that have been recognized since the defendant's original sentencing." *Galindez*, 955 So.2d at 525.

The facts of the instant case illustrate why Justice Cantero's observation is correct. The State never sought a departure sentence at Mr. Isaac's original sentencing, rather, Mr. Isaac's original sentence was allowed by his jury verdict alone. (App. D). *Apprendi* was decided on June 26, 2000. *Apprendi*, 530 U.S. at 466. Mr. Isaac was resentenced on June 11, 2001, after *Apprendi* was decided. (App. L). At the resentencing hearing, the State orally sought a departure sentence for the first time in the case. (*Id*.). The trial court permitted the State to present evidence in support of its request for a departure sentence. (*Id*.). Thereafter, the trial court made factual findings by a preponderance of the evidence. (App. M). The sentence imposed exceeded the amount allowed by Mr. Isaac's jury verdict alone by ten years. (*Id*.).

As the facts make clear, the threshold issue for application of *Apprendi* should not be when the conviction becomes final, but rather when the "offending" sentence becomes final. Because the State had never sought

a departure sentence until the resentencing, any of Mr. Isaac's rights under *Apprendi* were not implicated until the resentencing. Clearly, on the date of the resentencing, *Apprendi* was the law of the land. In spite of *Apprendi*, the State nevertheless sought to introduce evidence and have the trial court impose a departure sentence on the basis of a factual finding by a preponderance of the evidence.

In his concurring opinion in *Galindez*, Justice Cantero conditions the application of *Apprendi* to a resentencing such as the one in the instant case[1] on the availability of empanelling a new jury at the resentencing. *Galindez*, 955 So.2d at 524-525. However, such a condition is inconsistent with this Court's prior precedent as well as the realities of the case.

First, this Court has never conditioned the applicability of fundamental constitutional rights on the availability of a new jury.[2] *See e.g.*, *Scott*, 439 So.2d at 220. The imposition of a sentence of imprisonment necessarily entails the loss of liberty, and hence implicates due process considerations. Accordingly, whether the full panoply of due process considerations is available to a criminal defendant at a resentencing does not

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[1] That is, one occurring after *Apprendi*, but where the conviction was final before *Apprendi*.
[2] Neither the U.S. Supreme Court's decisions nor the Federal Constitution itself contain such a condition.

flow from the presence of a jury, but rather is demanded by the potential loss of liberty.

Second, the trial court permitted the State to introduce evidence at the resentencing, and to seek a departure sentence not previously sought. In fact, the trial court imposed a departure sentence beyond that allowed by the jury's verdict. In Justice Cantero's view, as expressed in *Galindez*, the application of *Apprendi* is only appropriate if the resentencing is *de novo*. As setout above, Justice Cantero defines *de novo* resentencing in terms of the presence of a new jury.[3] However, the realities of this case are that, regardless of whether a jury was present or not, the State sought to introduce new evidence at the resentencing, and the trial court permitted new evidence to be introduced. It is the introduction of new evidence at a resentencing that makes it *de novo*, not whether a new jury was empanelled or not. The introduction of new evidence to support a departure sentence that was never previously sought by the State introduced wholly new considerations into the case that were not present at earlier stages. In fact, the trial court

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[3] The Respondent agrees that this Court and the Florida Legislature have the authority to fashion remedies, including empanelling new juries at resentencing proceedings. *See e.g. In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1133 (Fla. 1990). However, the Respondent disagrees that the availability of a new jury at a resentencing determines the application of *Apprendi* to the resentencing.

deprived Mr. Isaac of his liberty by imposing a sentence greater than that allowed by the jury verdict according to the extant law as of the date of the resentencing. The trial court's imposition of an illegal sentence was based on the State's ability to introduce new evidence at the resentencing, and to seek a departure for the first time. Therefore, regardless of the availability of a new jury, **the trial court in fact conducted a *de novo* resentencing**. As a result, Mr. Isaac should have had the full panoply of rights available to him, including *Apprendi*.

II. *BLAKELY V. WASHINGTON* APPLIES TO RESENTENCING PROCEEDINGS HELD AFTER *APPRENDI* ISSUED, BUT WHICH WERE FINAL BEFORE *BLAKELY* ISSUED.

This Court asked the Respondent to address "[w]hether *Blakely v. Washington*, 542 U.S. 296 (2004), applies retroactively to such resentencing proceedings held after *Apprendi* issued but which were final before *Blakely* issued." This Court's question presupposes that application of *Blakely* to the instant case would constitute "retroactive" application. However, Mr. Isaac does not seek the benefit of a new rule; he seeks only the benefit of the rule of *Apprendi* as it was straightforwardly applied in *Blakely*. Even if application of *Blakely* would be retroactive under applicable precedent, it constitutes a watershed rule to which Mr. Isaac would be entitled to benefit.

A. According To The Concept of Federalism, This Court's Analysis In *Witt v. State,* 377 So.2d 922 (Fla. 1980), Is Inapplicable To The Instant Case, Unless It Is Read In Accordance With Or More Expansively Than *Teague v. Lane*, 489 U.S. 288 (1989).

The concept of federalism clearly dictates that while a state constitutional protection can be more expansive than its federal counterpart, the State Constitution cannot be more restrictive than its federal counterpart without running afoul of the Federal Constitution. This precise principle and its corollaries informed this Court's analysis in *Witt* that Florida "is not obligated to construe [its] rule concerning post-conviction relief in the same manner as its federal counterpart, **at least where fundamental federal constitutional rights are not involved**." *Witt*, 387 So.2d at 928-929 (emphasis added). Under federalism, a State has the leeway to construe its own rules, statutes and constitution separately and distinctly from federal counterparts, so long as the State's construction does not interfere with federal constitutional rights.

Apprendi and *Blakely* are concerned with fundamental federal constitutional rights, namely, those derived from the Sixth and Fourteenth Amendments of the Federal Constitution. According to the concept of federalism, then, the State is free to interpret its rules and statutes with respect to *Apprendi* and *Blakely* distinctly from their federal counterparts, so

long as the application does not infringe on those rights conferred by *Apprendi*.

According to the concepts setout above, then, a State is free to apply its test for retroactivity with respect to *Apprendi/Blakely* so long as the test does not run afoul of the constitutional protections afforded under the Federal Constitution. In particular, a State is free to apply *Blakely* retroactively, in a more expansive manner than under existing federal constitutional law. A State cannot refuse to apply *Blakely* in a situation in which it would be applicable under Federal law. In this sense, the application of *Blakely* cannot depend on the law of retroactivity in the jurisdiction in which application is sought.

Within the framework of the foregoing ideas, then, this Court's retroactivity test demands analysis. This Court has held that "[w]hen the United States Supreme Court renders a decision favorable to criminal defendants, the question becomes: who may benefit from the decision." *Hughes v. State*, 901 So.2d 837 (Fla. 2005). According to *Smith v. State*, 598 So.2d 1063, 1066 (Fla. 1992), such decisions apply to all cases to convictions not yet final—that is, for which a mandate has not issued on the plenary appeal. If a defendant is seeking review through rule 3.850, or other collateral review, this Court has held that a change of law would not be

deemed retroactive "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. Two categories of cases were highlighted by the *Witt* Court as "constituting a development of fundamental significance," those "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," and those "which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]." *Id*. at 929. The three-fold test of *Stovall* and *Linkletter* is: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (3) the effect of retroactive application of the rule on the administration of justice. *Id*. at 926.

In *State v. Klayman*, 835 So.2d 248 (Fla. 2003), this Court, following the United States Supreme Court's analysis in *Fiore v. White*, 531 U.S. 225 (2001), distinguished between "clarifications in the law" and "changes in the law" for purposes of application of the *Witt* test for retroactivity. The *Witt* test appears to only apply to "changes in the law." That is, if a decision is not a change in the law, at least on its face, *Witt* would appear to not apply. This was the reasoning of the *Klayman* Court. This Court, thus concluded

that if a decision is a clarification of the law, due process considerations dictate that the decision be applied in all cases, whether pending or final. *Klayman*, 835 So.2d at 252. In *State v. Barnum*, 921 So.2d 513 (Fla. 2005), this Court retracted the “clarifications in the law”/“changes in the law” distinction of *Klayman*, and appeared to apply *Witt* to all new decisions. In discussing the due process concerns of *Fiore*, the Court indicated that “the pertinent question from a due process perspective is the state of the law at the time of the petitioner’s conviction.” *Id*. at 522.

The line of cases ending with *Barnum* dealt with application of new judicial interpretations of state criminal statutes at the time of conviction, rather than application of federal constitutional rights at the time of resentencing. Accordingly, whether the *Witt* retroactivity test must be applied to a decision of the United States Supreme Court, which does not announce a new rule, but merely applies an existing rule of federal constitutional law appears to be an unsettled question in Florida law. The foregoing analysis of federalism makes clear, however, that in no event can the retroactivity test applied by Florida be more restrictive than the retroactivity test applied by the United States Supreme Court, since fundamental constitutional rights are at stake. It also follows that if a decision of the United States Supreme Court, which does not announce a

new rule, but rather applies an existing rule of federal constitutional law does not implicate the United States Supreme Court's retroactivity test, then it cannot implicate the *Witt* test.

In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court announced its test for when a "new" constitutional rule applies after a conviction becomes final. The *Teague* test provides that collateral relief is unavailable on the basis of "new" constitutional rules announced after a conviction became final, unless the rule at issue (1) "forbid[s] criminal punishment of certain primary conduct [or] prohibit[s] a certain category of punishment for a class of defendants because of the status of their offense," or (2) is a "watershed" rule. *Id*. at 311.

The modern *Teague* test was not an overnight innovation, rather it was the result of a long evolution. Prior to the 1960's, the United States Supreme Court subscribed to Blackstone's view that "judges do not pretend to make new law, but to vindicate the old one from misrepresentation." William Blackstone, 1 Commentaries *70. Accordingly, the Court applied all decisions retroactively. *Kuhn v. Fairmont*, 215 U.S. 349, 372 (1910)(Holmes, J., dissenting)("Judicial decisions have had retrospective operation for near a thousand years."). Beginning with *Linkletter* in 1965, the Court began a retreat from its universal retroactivity. In *Linkletter*, the

Court was faced with the retroactive application of *Mapp v. Ohio*, in which the exclusionary rule was made applicable to state criminal proceedings through the Fourteenth Amendment. *Linkletter*, 381 U.S. at 619. In a stark departure from its earlier precedent, the Court concluded that retroactive application was inappropriate in part based on the increased burden on the administration of justice. *Id*. at 637. In the subsequent years, *Linkletter* lead to inconsistent results. *Teague*, 489 U.S. at 302. As a result, the Court replaced the *Linkletter* test with: (1) new constitutional rules apply to all cases pending direct review; (2) new rules of criminal procedure do not apply to collateral proceedings, unless the rules are "watershed rules of criminal procedure," and (3) substantive rules do apply to collateral proceedings. *Id*. at 322; *Id.* at 310-311; *Schriro v. Summerlin*, 542 U.S. 348 (2004). Notably absent from the Court's *Teague* test were the concerns for the burden on the administration of justice found in *Linkletter*.

According to the concept of federalism, Florida is free to apply its own retroactivity test to *Blakely*, so long as the test is not more stringent, or restrictive than the *Teague* test. Because the *Teague* test sets the "high-water mark" for application of *Blakely*, the proceeding argument will focus on *Teague*.

B. *Blakely* Did Not Announce A "New Rule."

A decision does not announce a new rule when it is “merely an application of the principle that governed” a prior United States Supreme Court case. *Teague*, 489 U.S. at 307.

In *Yates v. Aikens*, 484 U.S. 211, 216-217 (1988), the Supreme Court gave an example of a decision that did not announce a new rule (cited in *Teague*) noting that its decision in *Francis v. Franklin*, 471 U.S. 307 (1985) did not announce a new rule because it “was merely an application of the principle that governed our decision in *Sandstrom v. Montana* [442 U.S. 510 (1979)].”

Supreme Court decisions after *Teague* reinforce that “merely appl[ying] a rule announced in a prior decision does not announce a new rule.” In *Stringer v. Black*, 503 U.S. 222 (1992), the Supreme Court held that *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it “applied the same analysis and reasoning” found in the prior case of *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Stringer*, 503 U.S. at 228. Moreover, in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court ruled that the relief sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Lastly, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court confirmed that application of past decisions to a new set of

facts does not implicate the *Teague* test. In *Williams*, the Court applied *Strickland v. Washington*, 466 U.S. 668 (1984) to a new set of facts. In his concurrence, Justice Kennedy observed that such an application should not detract from the "extent to which the rule must be seen as 'established' by this Court." *Id*. at 391.

As the foregoing section establishes, Mr. Isaac was entitled to the application of *Apprendi* at his resentencing. To the extent that *Blakely* is merely an application of *Apprendi*, Mr. Isaac is entitled to application of *Blakely* as well.

C. *Blakely* Simply Applied the Rule Already Announced in *Apprendi*.

Blakely and *Apprendi* clearly demonstrate that *Blakely* simply applied the rule already announced in *Apprendi*. *Blakely* did not "break new ground" in holding Washington's procedure for finding "aggravating facts" to support a departure sentence unconstitutional.

In *Apprendi*, the Supreme Court considered the constitutionality of New Jersey's enhanced sentence scheme. *Apprendi*, 530 U.S. at 468-469. Under a New Jersey Statute, a defendant convicted of an offense is subject to a statutory maximum sentence. *Id*. A separate statute provides for "an extended term of imprisonment if the trial judge finds, by a preponderance of the evidence, that the 'the defendant in committing the crime acted with a

purpose to intimidate an individual or group of individuals because of race, color, gender…." *Id*.

The Supreme Court held that New Jersey's statutory scheme ran afoul of the Sixth and Fourteenth Amendments in that, "[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. The Supreme Court explained that the "statutory maximum" is the "maximum [a defendant] would receive **if punished according to the facts reflected in the jury verdict alone**." *Id*. at 483 (emphasis added); *Id*. at 483 n. 10 (the statutory maximum is the statutory "outer limit" based on the "facts alleged in the indictment and found by the jury"). "[T]he relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id* at 494.

Four years later, in *Blakely*, the Supreme Court considered the constitutionality of Washington's enhanced sentence scheme. *Blakely*, 542 U.S. at 299-300. Under a Washington Statute, a defendant convicted of an offense is subject to a "standard range." *Id*. A second statute permits the trial court to impose a departure sentence if it finds one or more "aggravating facts" beyond those encompassed in the guilty verdict. *Id*. The Supreme

Court found the Washington scheme unconstitutional in the same way as the New Jersey scheme in *Apprendi*.

The language of *Blakely* itself clearly shows that the Court did nothing more than apply *Apprendi*. For example, the Court observed:

> This case requires us to **apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)**: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Blakely, 542 U.S. at 301 (emphasis added). The Court further observed:

> Our **precedents make clear**…that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

Id. at 303 (first emphasis added); Compare *Yates*, 484 U.S. at 216-217. In asserting this statement, the *Blakely* Court quoted *Apprendi*'s statement that the "statutory maximum" is "the maximum [a defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Blakely*, 542 U.S. at 303 (quoting and citing *Apprendi*, 530 U.S. at 483).

The Court further explained that "'[t]he maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime)." *Blakely*, 542 U.S. at 304. The Supreme Court iterated its "commitment to *Apprendi* in this

context" reflected nothing more than "respect for longstanding precedent" and a continuing need to "give intelligible content to the right of jury trial." *Id*. at 305.

Even the dissenters in *Blakely* buttressed the idea that it merely applied *Apprendi*. As Justice Breyer noted, in *Blakely*, the Court made clear "it mean[t] what it said in *Apprendi*." *Id*. at 328 (Breyer, J., dissenting). Nothing about the Supreme Court's "making clear what it said" in *Apprendi* transforms *Blakely* into "breaking new ground."

In fact, nothing about *Blakely* was transformational. *See* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 Sup. Ct. Rev. 221, 252-55 (2005)("All the Court had to do to decide *Blakely* was to apply the rule exactly as *Apprendi* had stated it."). In fact, in 2001—three years before *Blakely* was decided, the Kansas Supreme Court struck down the Kansas Sentencing Guidelines for imposing enhanced sentences recognizing that "under *Apprendi*" the "statutory maximum" is the maximum sentence "authorized by a jury's verdict." *State v. Gould*, 271 Kan. 394, 410, 23 P.3d 801 (Kan. 2001).

In its Initial Brief, the State asserts that *Blakely* must be a "new rule" because it was not apparent to courts applying *Apprendi*. (Initial Brief, pp. 28-29). In support of this assertion, the State cites to list of federal cases,

including *Schardt v. United States*, 414 F.3d 1025, 1035 (9th Cir. 2005). (*Id*.) However, the federal cases cited by the State are inapplicable to the question posed by this Court. In *Schardt*, the Ninth Circuit reasoned that *Blakely* announced a new rule because "[e]very [federal] circuit court of appeals that addressed the question presented in *Blakely* reached the opposite conclusion from the rule subsequently announced by the Supreme Court." *Id*. at 1035. However, the State overlooks that these federal decisions, including *Schardt*, were reviewing the Federal Sentencing Guidelines. Accordingly, the Ninth Circuit, as asserted in *Schardt*, believed that *Blakely* announced a new rule because it did not presage the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), that the Federal Sentencing Guidelines's enhancement of sentences was unconstitutional.

The *Schardt* Court's analysis is inapplicable to the instant case because the issue presented in this case is not the application of *Booker*. Moreover, the State's reliance on *Schardt* ignores the differences between the state sentencing schemes in *Apprendi/Blakely* and the Federal Sentencing Guidelines in *Schardt/Booker*.

The Washington sentencing scheme in *Blakely*, just like *Apprendi*, and just like the instant case, involved two statutory maximums: one for committing the crime without any aggravating circumstances, and one for

committing the crime with at least one aggravating circumstance. And, just like *Apprendi* and just like the instant case, the judge was empowered to find facts to impose a higher maximum sentence. To decide *Blakely*, all the Supreme Court had to do was to reiterate that the "statutory maximum" for purposes of federal constitutional protections is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 483). Because Washington imposed a departure sentence based on findings made by the judge beyond the facts reflected in the jury's verdict, the scheme violated the Sixth and Fourteenth Amendment just as the scheme in *Apprendi* did.

The Federal Sentencing Guidelines do not have two statutory maximums. For a given offense, the Code establishes a single maximum sentence. The pre-*Booker* Guidelines limited judicial discretion to impose sentences up to the single maximum on the basis of rules enacted by an independent commission. *Mistretta v. United States*, 488 U.S. 361, 393 (1989). In fact, Justice Thomas highlighted the "unique status" of the Federal Guidelines in his concurrence in *Apprendi*, and raised the possibility that they might be exempt from the rule of *Apprendi*. *Apprendi*, 530 U.S. at 523 n. 11. Accordingly, the State's reliance on federal cases preceding

Booker involving the Federal Sentencing Guidelines do not provide guidance in the instant case.

The question presented in this case is whether *Blakely* applies to a resentencing held after *Apprendi* issued, but which was not final before *Blakely* issued. Because *Blakely* merely applied the rule of *Apprendi* that the "statutory maximum" under the Sixth and Fourteenth Amendments is the maximum sentence a judge can impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, there can be no doubt that the answer is yes.

D. Assuming *Arguendo* That *Blakely* Did Announce A New Rule, It Announced A Watershed Rule Of Criminal Procedure.

Courts must apply "watershed" rules of criminal procedure to address the impermissibly large risk that a person may be serving prison time for something he did not do. *See Bousley v. United States*, 523 U.S. 614, 620 (1998). To fall within this exception, a new rule must meet two requirements: "(1) Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001).

The rule of *Apprendi*/*Blakely* is two-fold: (1) facts supporting an enhancement sentence must be found beyond a reasonable doubt, and (2) the facts must be found by a jury. *Apprendi*, 530 U.S. at 476-78, *Blakely*, 542 U.S. at 301. In *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court held that the jury-prong does not seriously diminish the likelihood of obtaining an accurate conviction. However, the Supreme Court did not address the first prong—namely whether infringing the beyond a reasonable doubt standard seriously diminishes the likelihood of obtaining an accurate conviction.

The Supreme Court has repeatedly held that failing to apply the beyond a reasonable doubt standard "substantially impairs [a trial's] truth-seeking function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Ivan V v. City of New York*, 407 U.S. 203 (1972), *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977). The Court observed that the "purpose" of the beyond a reasonable doubt standard is "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Ivan V*, 407 U.S. at 205. It follows that application of the preponderance of the evidence standard presents "a far greater risk of factual errors that result in convicting the innocent." *In re Winship*, 397 U.S. 358, 371 (1970).

When this long-standing precedent is combined with the holding of *Apprendi* that a sentence enhancement is "the functional equivalent of an element of a greater offense than the one covered by the jury's verdict," the conclusion cannot be avoided that the use of the preponderance of the evidence standard to determine a sentence enhancement seriously diminishes the likelihood of obtaining an accurate conviction. *Apprendi*, 530 U.S. at 494 n. 19. In fact, for purposes of the Sixth Amendment, the Supreme Court has held that "elements and sentencing factors must be treated the same." *Washington v. Recuenco*, 126 S.Ct. 2546, 2552 (2006).

The rule of *Blakely* also alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The use of the beyond a reasonable doubt standard is a defining feature of our criminal jurisprudence.

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law….[A] person accused of a crime…would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

Winship, 397 U.S. at 363. The use of the beyond a reasonable doubt standard is no less important when exposing a defendant to a harsher sentence than allowed on the basis of the jury's verdict as it is with respect to other elements of an offense. A sentence enhancement entails the same loss of liberty as a conviction—and both are in need of protection by the bedrock principle of "beyond a reasonable doubt."

Accordingly, even if this Court were to conclude that *Blakely* announced a new rule—it announced a watershed rule of criminal procedure that must be applicable to rule 3.850 proceedings.

CONCLUSION

The Respondent, Lemuel E. Isaac, respectfully requests that this Court finds that *Apprendi* does apply to resentencing proceedings held after *Apprendi* issued, in cases in which the convictions were final before *Apprendi* issued; and find that *Blakely* does apply to such resentencing proceedings held after *Apprendi* issued, but which were final before *Blakely* issued. Accordingly, the Respondent respectfully requests that this Court affirm the First District's opinion below in *Isaac v. State*, 911 So.2d 813 (Fla. 1st DCA 2005), and remand for proceedings consistent with this decision.

Respectfully submitted,

_____/s/_____________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by U.S. Mail to: Trisha Meggs Pate, Esq. and Cristine Ann Guard, Esq., of the State Attorney General's Office, Pl-01, the Capitol, Tallahassee, FL 32399, this __6th____day of August, 2009.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief comports with the font requirements of Fla. R. App. P. 9.210.

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