IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC05-2047

v.

LEMUEL E. ISAAC,

Respondent.

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Lemuel E. Isaac, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of one volume, which will be referenced as "R", followed by any appropriate page number in parentheses. The supplemental record in this case consists of nine volumes. The portions of the supplemental record deemed to be necessary for a discussion of the questions posed by this Court are contained in the appendix hereto.[1]

All emphasis through bold lettering is supplied unless the contrary is indicated.

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[1] Portions of the supplemental record are attached hereto as appendices because they are not easily accessible to opposing counsel. The State previously filed its motion to compel service of the record, which was denied by this Court after it permitted supplementation of the record. As noted in that motion, the Florida First District did not serve copies of the record on the parties. Portions of the supplemental record are necessary to explain the procedural history of the case. This Court amended its order as to the matters counsel was required to address to exclude harmless error analysis, however, the portions of the supplemental record are also necessary to a meaningful discussion of this case. The State also notes that it has provided a copy of the record and filings in case number 1D03-3438, as counsel indicated he does not have a copy concurrent with the filing of this brief.

STATEMENT OF THE CASE AND FACTS

The State charged Isaac by information with nine counts of robbery with a firearm, first degree felonies punishable by life imprisonment, kidnapping to facilitate a felony with a firearm, a first degree felony punishable by life, grand theft, a third degree felony, burglary of a dwelling while armed, a first degree felony punishable by life, three counts of false imprisonment by use of a firearm, second degree felonies, and resisting an officer without violence, a first degree misdemeanor. (Ex. B). Isaac proceeded to jury trial on count I, the armed robbery with a firearm of Jason MacDonald, count II, armed robbery with a firearm of Mark MacDonald, count III kidnapping to facilitate a felony with a firearm of Mark MacDonald, count IV, grand theft, and count V, armed burglary of a dwelling with a firearm. Following a jury trial, the jury found Isaac guilty as charged as to all counts. (Exhibit C); See also Isaac v. State, 720 So. 2d 306 (Fla. 1st DCA 1998)(Isaac I). The trial court sentenced Isaac to a term of imprisonment of twenty years on count I, twenty years imprisonment on count II, three years on count III, five years on count IV, and twenty years on count five. (Ex. D). Each of the sentences ran concurrent with count I. (Ex. D). Thereafter, Isaac entered a

plea to the remaining counts of the information. (Ex. E)[2]. The trial courts sentenced Isaac to ten years imprisonment to run consecutive to the sentence on counts I-V, followed by ten years probation on counts VI-VIII, XIII-XIV, and ten years imprisonment followed by five years probation on counts IX-XI, and one year in the county jail on count XII. (Ex. F)[3].

On direct appeal, the First District affirmed Isaac's convictions with the exception of the grand theft count. See Isaac I at 306. The First District reversed grand theft conviction and remanded the case for the trial court to enter a judgment discharging Isaac on that count because the armed robbery conviction involved the same stolen property as in the grand theft conviction. See id. at 306-07. The trial court resentenced Isaac on March 17, 1999 noting the discharge as to count IV only. (R 75-85). Isaac took no direct appeal from that resentencing. See Isaac v. State, 911 So. 2d 813, 814 (Fla. 1st DCA 2005)(Isaac III).

On June 2, 2000, Isaac filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(a). (Ex. G). See Isaac v. State, 826 So. 2d 396 (Fla. 1st DCA 2002)(Isaac II). In his motion, Isaac alleged that the 1995 sentencing guidelines were illegal. (Ex. G at 2-3). Isaac

[2] A full copy of the plea agreement does not appear in the supplemental records.

[3] A full copy of Isaac's judgment and sentence to the remaining counts does not appear in the supplemental record

filed a motion for postconviction relief on November 15, 2000, in which he alleged that trial counsel was ineffective. (Ex. H). Subsequently, the Public Defender entered his appearance on behalf of Isaac filing a motion to correct scoresheet and sentencing error pursuant to the decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000). (Ex. I). The State responded to the motion and conceded that Isaac was entitled to be resentenced attaching a new guideline scoresheet to the response. (Ex. J). The trial court granted the motion for correction of sentence and set a sentencing hearing. (Ex. K).

On June 11, 2001, the trial court held Isaac's resentencing hearing. (Ex. L). At the hearing, the State requested that the trial court impose a departure sentence. (Ex. L at 3-6). The State based its request upon the fact that Isaac was "not amenable to rehabilitation or supervision, as evidenced by an escalating pattern of criminal conduct." (Ex. L at 5). The State presented Isaac's prior criminal record as shown in the PSI, which included:

> a 1992 conviction for resisting an officer without violence, 1993 conviction for petit theft, as well as retail merchant theft and resisting an officer with violence, a 1994 conviction for battery, a 1995 conviction for petit theft, and resisting an officer with violence. As well as 12 days before the defendant committed the crimes that we're here to sentence him on today, the defendant committed four counts of armed robbery with a firearm. And two days before the defendant committed the crimes that we're here to sentence him on today, the defendant committed three count of false imprisonment with a firearm as

> well as an additional three counts of armed robbery with a firearm and one count of resisting an officer without violence.

(Ex. L at 6). The trial court imposed the same sentence as had been originally imposed with the same departure based upon an escalating pattern of criminal activity. (Ex. L at 18-19); (R 86-90). The trial court entered a written departure order as required. (Ex. M). On June 25, 2001, Isaac filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(1). (Ex. N). In his motion, Isaac asserted that the trial court could not find an escalating pattern of criminal activity as a reason for imposing a departure sentence without violating Apprendi v. New Jersey, 530 U.S. (Ex. N at 5-13). No ruling on the motion appears in the available record. On appeal, the First District determined that "[t]he rule of Apprendi v. New Jersey, 530 U.S. 466 [] (2000), does not apply when the sentence does not exceed the statutory maximum permitted by section 775.082, Florida Statutes. Isaac II at at 396.

With respect to postconviction appeal that is the cause of the current case, as discussed earlier, Isaac had filed a motion for postconviction relief on November 15, 2000. (R 1-15). On May 28, 2002, the trial court entered an order to show cause to the State. (R 16-17). The State responded. (R 18-20). On June 2, 2003, Isaac filed an amended motion for postconviction

relief. (R 21-56). Isaac's amendment alleged that the departure reason, which was an escalating pattern of criminal activity was required to be found by a jury beyond a reasonable doubt. (R 26, 31-35, 41-48). As a result, Isaac claimed that, as a result, his Sixth Amendment rights had been violated. (R 26, 31-35, 41-48). The trial court entered its order denying Isaac's motions for postconviction relief. (R 57-60). As to the Apprendi claims, the trial court found that the motion was time-barred. (R 58).

Isaac appealed the summary denial of his motions. (R 119). On February 7, 2005, the First District entered an order pursuant to Toler v. State, 493 So. 2d 489 (Fla. 1st DCA 1986), directing the state to respond to the allegations contained in appellant's amended motion for postconviction relief. (Ex. O). In its order, the First District cited to cases including United States v. Booker, 543 U.S. 220 (2005), Blakely v. Washington, 542 U.S. 296 (2004), Apprendi, 530 U.S., and Horton v. State, 682 So. 2d 647 (Fla. 1st DCA 1996). The State filed its response. (Ex. P).

In Isaac III, the First District found that the motion was timely filed because it was filed within two years of the issuance of the mandate on Isaac's resentencing. Isaac III at 814. The First District further agreed that Apprendi is not to be applied retroactively relying on Hughes v. State, 826 So. 2d

1070 (Fla. 1st DCA 2002). See id. The court continued that "however, as Apprendi was decided prior to appellant's resentencing, the trial court was bound by its holding." Id. The First District continued:

> Although this Court previously affirmed the appellant's departure sentence on the basis that Apprendi does not apply so long as a sentence does not exceed the statutory maximum set forth in section 775.082, Isaac, 826 So. 2d at 396, the statutory maximum has since been revealed to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely [v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537 (2004)]. Therefore, 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.
>
> Under the particular facts of this case, we conclude that reliance on the law of the case doctrine would be manifestly unfair because the United States Supreme Court made clear that the State of Florida's post-Apprendi and pre-Blakely interpretation of the phrase "statutory maximum" violated the appellant's sixth amendment right to a jury trial.

Id. at 814-15. As a result, the First District reversed the summary denial and remanded the case for resentencing. See id. at 815.

Judge Kahn dissented with opinion. See id. Judge Kahn reasoned that the majority's opinion gave retroactive application to Apprendi. Judge Kahn continued that the majority dismissed

> the issue of retroactivity stating that, because Apprendi "was decided prior to appellant's resentencing, the trial court was bound by its

> holding." Slip Op. at 3. Unless Hughes is further refined by the supreme court, however, the majority's reasoning here is not correct. The Hughes court states the issue as "whether such cases can be applied to defendants whose convictions already were final when the decision was rendered." 2005 Fla. LEXIS 753, 30 Fla. L. Weekly at S285. The court stated this as the issue in deference to longstanding policy that, "Once a conviction is final, . . . the State acquires an interest in the finality of the convictions." Id.; see Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). Here, Isaac's convictions were final long before the Apprendi decision.

Id. Judge Kahn continued that no dispute existed with respect to the fact that Isaac's convictions "became final as of this court's appellate decision after the plenary appeal." Id. According to Judge Kahn, Isaac's convictions were final as a result on November 10, 1998, the date of the decision in Isaac I. See id.

Further, Judge Kahn concluded:

> that, even though appellant was resentenced in June 2001, Apprendi does not apply because his conviction became final in 1998. Apprendi, of course, involves a right under the Sixth and Fourteenth Amendments of the United States Constitution for state criminal defendants to have certain facts determined by a jury beyond a reasonable doubt, rather than by a judge. As the Hughes retroactivity analysis instructs, the rule of Apprendi is not "of sufficient magnitude as to require retroactive application." 2005 Fla. LEXIS 753, *8, 30 Fla. L. Weekly at S286. Here, because Isaac's jury was obviously discharged after the original criminal trial on January 15, 1997, the factual matters underlying the guidelines departure sentences may not be submitted to a jury. Accordingly, Hughes' focus on finality of the conviction is very important, and I would follow that rule until it is altered. Because these convictions were final long before announcement of the Apprendi rule, I would let the twenty-year sentences stand.

The State filed its notice invoking the jurisdiction of this Court. Subsequently, since the First District issued the mandate in Isaac III, the trial court again denied Isaac's motion for postconviction relief. See Isaac v. State, 989 So. 2d 1217, 1218 (Fla. 1st DCA 2008)(Isaac IV). In its decision, the First District applied the test set forth by this Court in Galindez v. State, 955 So. 2d 517 (Fla. 2007). See id. As a result, the First District found:

> The record establishes that no reasonable jury would have found that appellant's prior convictions did not constitute an escalating pattern of criminal activity.

Id. Therefore, the court affirmed the trial court's order denying Isaac's motion. See id.

SUMMARY OF ARGUMENT

Neither Apprendi nor Blakely are applicable to Isaac's challenged sentence. First, Isaac's departure sentence was imposed based upon his prior convictions and recidivism. Under Apprendi and Blakely, no jury finding is required to depart on those grounds. Second, Isaac failed to preserve his challenge by objecting at his original trial in 1997. Additionally, Isaac failed to object based upon Apprendi at his resentencing. The courts have held that Apprendi and Blakely do not apply retroactively on collateral challenges. Third, neither Apprendi nor Blakely should be applied to convictions that became final prior to their advent. This Court held in Hughes v. State, 901

So. 2d 837 (Fla. 2005), that Apprendi does not apply retroactively. Likewise, under this Court's decision in Witt v. State, 387 So. 2d 922 (Fla. 1980), Blakely is not subject to retroactive imposition. Fourth, Apprendi and Blakely are not applicable because the judge made no further findings rather than the jury after the Court ruled in Apprendi and Blakely. Fifth, applying Apprendi to Isaac's case essentially gives Apprendi retroactive application thereby destroying the State's interest in the finality of the conviction. Finally, even if Apprendi applies, since Blakely does not apply, Isaac's sentence does not violate Apprendi because it does not exceed the statutory maximum specified in section 775.082, Florida Statutes.

ARGUMENT

ISSUE I

WHETHER APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000), AND BLAKELY V. WASHINGTON, 542 U.S. 296 (2004), APPLY TO ISAAC'S CASE?

In its briefing order, this Court directed the State to address two questions in its brief. First, the court directed the State to discuss the applicability of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), to this case as Isaac's conviction became final before Apprendi was decided, when Isaac was resentenced after Apprendi was issued. Second, this Court directed the State to address the question of whether

the decision in Blakely v. Washington, 542 U.S. 296 (2004), applies retroactively to a resentencing hearing held after the Court's decision in Apprendi, 530 U.S., but which was final before the Court's decision in Blakely issued. The State asserts that neither Apprendi nor Blakely is applicable to Isaac's convictions because his conviction became final before Apprendi was decided. These questions are intertwined, and as such, the State addresses the issues in the proceeding sections.

Standard of Review

The issue of the applicability of the decisions of the United States Supreme Court in Apprendi, 530 U.S., and Blakely, 542 U.S., is a question of law to be determined under the *de novo* standard of review.

Preservation

Because the State was the appellee below and this case comes to this Court on a summary denial of a motion for postconviction relief, the State has not previously been required by the rules of appellate procedure to file a brief in this matter and no further preservation was required for the matters presented by it here. With respect to the State's position as to Isaac's proper preservation and presentation, the State's arguments with respect to those matters are presented in the argument section of this brief.

Argument

Isaac's conviction count I, the armed robbery with a firearm of Jason MacDonald, count II, armed robbery with a firearm of Mark MacDonald, count III kidnapping to facilitate a felony with a firearm of Mark MacDonald and count V, armed burglary of a dwelling with a firearm became final on his original direct appeal thirty days after the trial court "resentenced" Isaac on March 17, 1999, following the First District's opinion in Isaac I. See Gust v. State, 535 So.2d 642 (Fla. 1st DCA 1988)(holding that when a defendant does not appeal his conviction or sentence, the judgment and sentence become final when the 30-day time period for filing an appeal expires). The trial court originally imposed a departure sentence, sentencing Isaac to a term of imprisonment of twenty years on count I, twenty years imprisonment on count II, three years on count III, five years on count IV, and twenty years on count five. (Ex. D). Each of the sentences ran concurrent with count I. (Ex. D). At the March 17, 1999 "resentencing", the trial court entered a judgment discharging Isaac's conviction for grand theft in accordance with the First District's decision. The trial court made no other changes to the judgment and sentence. (RIV 75-85).

Thereafter, on June 2, 2000, Isaac filed a motion to correct sentencing error pursuant to Florida Rule of Criminal

Procedure 3.800 alleging that the 1995 sentencing guidelines were illegal. (Ex. G); see Isaac II. Isaac filed a motion for postconviction relief on November 15, 2000, in which he set forth several grounds alleging that trial counsel was ineffective. (Ex. H). Subsequently, the Public Defender entered his appearance on behalf of Isaac filing a motion to correct scoresheet and sentencing error pursuant to the decision in Heggs v. State, 759 So. 2d 620 (Fla. 2000). (Ex. I).

Following the State's concession of error, the trial court granted the motion for correction of sentence and set a sentencing hearing. (Ex. K). On June 11, 2001, the trial court held Isaac's resentencing hearing. (Ex. L). At the hearing, the State requested that the trial court impose a departure sentence. (Ex. L at 3-6). The State based its request upon the fact that Isaac was "not amenable to rehabilitation or supervision, as evidenced by an escalating pattern of criminal conduct." (Ex. L at 5). The trial court imposed the same sentence as had been originally imposed with a departures based upon an escalating pattern of criminal activity. (Ex. L at 18-19); (R 86-90).

On June 25, 2001, Isaac filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(1). (Ex. N). In his motion, Isaac asserted that the trial court could not find an escalating pattern of criminal

activity as a reason for imposing a departure sentence without violating Apprendi v. New Jersey, 530 U.S. (Ex. N at 5-13). No ruling on the motion appears in the available record. On appeal, the First District determined that "[t]he rule of Apprendi v. New Jersey, 530 U.S. 466 [] (2000), does not apply when the sentence does not exceed the statutory maximum permitted by section 775.082, Florida Statutes. Isaac II at at 396.

With respect to postconviction appeal that is the cause of the current case, as discussed earlier, Isaac had filed a motion for postconviction relief on November 15, 2000. (R 1-15). On May 28, 2002, the trial court entered an order to show cause to the State. (R 16-17). The State responded. (R 18-20). On June 2, 2003, Isaac filed an amended motion for postconviction relief. (R 21-56). Isaac's amendment alleged that the departure reason, which was an escalating pattern of criminal activity was required to be found by a jury beyond a reasonable doubt. (R 26, 31-35, 41-48). As a result, Isaac claimed that, as a result, his Sixth Amendment rights had been violated. (R 26, 31-35, 41-48). The trial court entered its order denying Isaac's motions for postconviction relief. (R 57-60). As to the Apprendi claims, the trial court found that the motion was time-barred. (R 58).

Isaac appealed the summary denial of his motions. (R 119).

In Isaac III, the First District found that the motion was timely filed because it was filed within two years of the issuance of the mandate on Isaac's resentencing. Isaac III at 814. The First District further agreed that Apprendi is not to be applied retroactively relying on Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA 2002). See id. The court continued that "however, as Apprendi was decided prior to appellant's resentencing, the trial court was bound by its holding." Id. The First District continued:

> Although this Court previously affirmed the appellant's departure sentence on the basis that Apprendi does not apply so long as a sentence does not exceed the statutory maximum set forth in section 775.082, Isaac, 826 So. 2d at 396, the statutory maximum has since been revealed to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely [v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 2537 (2004)]. Therefore, 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 814-15. To avoid the law of the case bar, the First District stated that the United States Supreme Court's clarification of what the term "statutory maximum" meant rendered the application of the law of the case doctrine "manifestly unfair." Id.

The First District decision was wrong for several reasons. First, the United States Supreme Court decisions in Apprendi and Blakely are inapplicable to this case because Isaac's departure

sentence was based upon his prior convictions. Second, Isaac failed to preserve his claims for review. Third, neither Blakely nor Apprendi apply to Isaac's sentence because applying either decision constitutes retroactive application of the decisions. Fourth, neither Apprendi nor Blakely is applicable to Isaac because the trial judge made no findings required to be made by a jury after the advent of Apprendi and Blakely. Fifth, Apprendi should not be applied to Isaac's resentencing because application of Apprendi to Isaac's case gives Apprendi retroactive affect and destroys the State's interest in the finality of his conviction. Sixth, even if Apprendi did apply to Isaac's sentence, Blakely does not, and Isaac's sentence did not exceed the statutory maximums expressed in section 775.082, Florida Statutes.

A. The United States Supreme Court Decisions in Apprendi and Blakely Are Inapplicable to This Case Because Isaac's Sentence was Enhanced on the Basis of His Prior Criminal Record.

The essential holding in Apprendi, 530 U.S. at 490, was that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This holding was disturbed in no way by the Court's subsequent decision in Blakely.

The trial court in the original sentencing and Heggs resentencing proceedings departed on the basis of an escalating

pattern of criminal conduct. (Ex. M). In its departure order, the trial court detailed Isaac's criminal history, which included a 1992 conviction for resisting an officer without violence; 1993 convictions for petit theft, retail merchant theft and resisting an officer with violence; a 1994 conviction for battery; and 1995 convictions for petit theft and resisting an officer with violence. (Ex. M at 1-2). The trial court also found that 12 days before Isaac committed the crimes subject to this appeal, Isaac committed four counts of armed robbery with a firearm. (Ex. M at 2). Further, the court found that two days before Isaac committed the crimes that are the subject of this appeal, Isaac committed three count of false imprisonment with a firearm, three counts of armed robbery with a firearm and one count of resisting an officer without violence. (Ex. M at 2). Isaac pled to the charges discussed by the trial court. (Ex. F).

The trial court discussed the fact that Isaac's criminal history escalated because Isaac went from committing nonviolent to violent crimes. (Ex. M at 2). The trial court also found that Isaac's criminal activity became increasingly serious because he went from committing misdemeanors to third degree felonies to second degree felonies to first degree felonies. (Ex. M at 2). The trial court further found a pattern of criminal activity as Isaac had a conviction each year from the time he reached the age of majority, until his incarceration.

The trial court also found a pattern in the nature of the crimes, that being both crimes against property and then crimes against the person. (Ex. M at 3).

Nothing in the trial court's departure reasons relied on any basis other than recidivism, which is specifically excluded by Apprendi and Blakely from the requirement of a jury finding. As such, the First District incorrectly applied Apprendi and Blakely to Isaac's sentence. Therefore, the decision of the First District should be reversed.

B. Isaac Has Failed to Properly Preserve this Issue for Review by this Court.

Isaac's claims were not properly presented to the First District for review because they were not preserved at the time of his original trial in 1997. In Hughes v. State, 901 So. 2d 837, 844 (Fla. 2005), this Court noted that "a claim of Apprendi error must be preserved for review" and "expressly rejected the assertion that such error is fundamental." (citing McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001)). In United States v. Cotton, 535 U.S. 625, 631 (2002), the Court applied it plain-error test of Federal Rule of Criminal Procedure 52(b) in a case involving a claim that an Apprendi error had occurred because the defendant's claim had been forfeited when he failed to make timely assertion of the right before the trial court. (citing United States v. Olano, 507 U.S. 725, 731 (1993); see also Curtis v. United States, 294 F.3d 841 (7th Cir. 2002)(holding

that Apprendi is not retroactive because it is not a substantial change in the law; rather, it "is about nothing but procedure" and it is not so fundamental because it is not even applied in direct appeal without preservation relying on Cotton, 535 U.S.).

Because an Apprendi or Blakely error requires a jury to find certain facts that may enhance a sentence beyond a reasonable doubt, Apprendi and Blakely errors are necessarily errors that occur at the time of the jury trial, but which become manifested at the time of sentencing. As a result, the proper time to object to the lack of inclusion of matters which will eventually be scored, or in this case, departure reasons, was prior to the verdict form being provided to the jury in 1997, such that the jury could make the desired findings.

While dealing with a different matter than the reasons for departure in Isaac's case, in Rosen v. State, 940 So. 2d 1155, 1163 (Fla. 5th DCA 2006), the trial court concluded that the Apprendi objection should be made at trial, rather than at sentencing. The Fifth District's approach in Rosen is based upon sound logic. The Fifth district explained that an untimely objection at sentencing illustrates precisely why the contemporaneous objection rule should apply. The policy behind the contemporaneous objection rule is to eliminate legal trickery and procedural gamesmanship by crafty litigants who intentionally cause error so they can complain about it on

appeal, and "equally important, the rule provides the trial court with a timely opportunity to correct the error and avoid mistrial or reversal on appeal." Rosen, 940 So.2d at 1163 (citing Caldwell v. State, 920 So. 2d 727, 730 (Fla. 5th DCA 2006). The Rosen Court implicitly correctly reasons that a judge can correct an Apprendi error at trial when the jury is present, but not at sentencing when the jury is not.

Additionally, in the instant case, Isaac made no objection based upon Apprendi at his resentencing hearing. Even if this Court found that sentencing was an appropriate time, rather than at trial, to make such an objection, Isaac failed to lodge a timely objection such that the trial court could have reviewed the departure reasons under the harmless error test enunciated by the Court in Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006), and later adopted by this Court in Galindez v. State, 955 So. 2d 517 (Fla. 2007).

Additionally, Isaac's rule 3.800(b), Florida Rules of Criminal Procedure, motion is insufficient. In Jackson v. State, 983 So. 2d 562, 565 (Fla. 2008), this Court stated with respect to rule 3.800(b), Florida Rules of Criminal Procedure:

> The rule was intended to permit preservation of errors in orders entered as a result of the sentencing process--in other words, errors in cost and restitution orders, probation or community control orders, or in the sentence itself. It was not intended to abrogate the requirement for contemporaneous objections.

Discussing the reason for the contemporaneous objection rule, the court quoted the decision in Insko v. State, 969 So. 2d 992, 1001 (Fla. 2007), in which the court stated:

> This requirement is "based on practical necessity and basic fairness in the operation of a judicial system." Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). The rule "not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage." F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003).

Jackson, 983 So. 2d at 568. This court defined sentencing errors as follows:

> "[S]entencing errors include harmful errors in orders entered as a result of the sentencing process. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself." Fla. R. Civ. P. 3.800 court cmt. The commentary thus explains that rule 3.800(b) is intended to permit defendants to bring to the trial court's attention errors in sentence-related *orders,* not any error in the sentencing process.
>
> As we explained in *Amendments I,* rule 3.800(b) was intended to "authorize the filing of a motion to correct *a defendant's sentence." Amendments I,* 696 So. 2d at 1105 (emphasis added). We have never held that *any* error that happens to occur in the sentencing context constitutes a "sentencing error" under the rule. Instead, errors we have recognized as "sentencing errors" are those apparent in *orders* entered as a result of the sentencing process. For example, we have recognized the following as "sentencing errors" subject to the rule: claims that the defendant was improperly habitualized, see Brannon, 850 So. 2d at 454; that the sentence exceeds the statutory maximum, see Terry v. State, 764 So. 2d 571, 572 (Fla. 2000); that the scoresheet was inaccurate, see State v. Anderson, 905 So. 2d 111, 118 (Fla. 2005); that the trial court improperly imposed

a departure sentence, see Thogode v. State, 763 So. 2d 281, 281 (Fla. 2000); that the written order deviated from the oral pronouncement, see State v. Cote, 913 So. 2d 544 (Fla. 2005); that the trial court improperly assessed costs, see Maddox, 760 So. 2d at 101-09; that the trial court improperly sentenced the defendant to simultaneous incarceration and probation, *see* Spencer v. State, 764 So. 2d 576, 577 (Fla. 2000); that the trial court failed to award credit for time served, see Charles v. State, 763 So. 2d 316, 317 (Fla. 2000); that the trial court failed to address in writing its decision to impose adult sanctions, see Cargle v. State, 770 So. 2d 1151, 1152 (Fla. 2000); and that a sentencing statute was unconstitutional, see Salters v. State, 758 So. 2d 667, 669 n.4 (Fla. 2000). While these holdings do not necessarily exhaust the list of errors that can be designated as "sentencing errors" under rule 3.800(b), they all involve errors related to the ultimate sanctions imposed, whether involving incarceration, conditions of probation, or costs.

* * *

In contrast, defendants do have the opportunity to object to many errors that occur during the sentencing process--for example, the introduction of evidence at sentencing. The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b). To the contrary, such a practice undermines the goal of addressing errors at the earliest opportunity. As one court has emphasized,

> The rule was not intended to circumvent rules requiring contemporaneous objections or enforcing principles of waiver. It was not intended to give a defendant a "second bite at the apple" to contest evidentiary rulings made at sentencing to which the defendant could have objected but chose not to do so. It was not intended as a broad substitute for a postconviction claim of ineffective assistance of counsel for counsel's representation at a sentencing hearing.

Griffin, 946 So. 2d at 613.

* * *

> We therefore agree with Judge Stringer that "a 'sentencing error' that can be preserved under rule 3.800(b)(2) is an error in the sentence itself--not any error that might conceivably occur during a sentencing hearing." Jackson, 952 So. 2d at 616 (Stringer, J., specially concurring). We also agree with the court in Griffin that rule 3.800(b) was not intended to circumvent rules requiring contemporaneous objections or to substitute for ineffective assistance of counsel claims.

Jackson, 983 So. 2d at 572-74.

Isaac's claims are not of the character that are permitted to be preserved by a rule 3.800(b), Florida Rules of Criminal Procedure, motion. The error complained of is akin to a failure to object to the admission of evidence at sentencing or failing to object at trial as to matters included on the verdict form or sufficiency of the evidence. As a result, it was improper for the First District to consider Isaac's claims except under a fundamental error standard. When reviewed under the fundamental error standard, as discussed in Hughes and in several federal cases, Isaac is entitled to no relief.

C. Neither Blakely Nor Apprendi Should Be Applied Retroactively.

In Apprendi, 530 U.S. at 490, the defendant fired bullets into the home of an African-American family. Apprendi entered into a plea agreement in which he agreed to plead guilty to three of the twenty-three counts charged. See id. at 469-70. Under the terms of the agreement, the sentences for two counts

would run consecutively and the sentence for the third count would run concurrently with the other two. See id. at 470. Apprendi faced a maximum sentence of twenty years on the two counts without the imposition of a hate-crime enhancement. See id. However, if the hate-crime enhancement was applied, the statute authorized a twenty-year maximum sentence on one count alone. See id. The judge, utilizing a preponderance of the evidence standard, found that the hate-crime enhancement applied. See id. at 471. As a result, Apprendi was sentenced to a twelve-year term on that count and to shorter concurrent sentences on the other two counts. See id.

Before the Supreme Court, the question was whether a jury had to find there had been a hate crime beyond a reasonable doubt. See id. at 468-69. In response to that question, the Court held that any fact other than a prior conviction "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.

In Blakely, the Court applied the Apprendi decision to Washington's presumptive sentencing system. Blakely pled guilty to kidnaping his wife. See Blakely, 542 U.S. at 298. Pursuant to Washington's sentencing statute, Blakely faced a sentence of forty-nine to fifty-three months. See id. at 299. However, the statute allowed for the imposition of a greater sentence if the

judge found substantial and compelling reasons that justified a "exceptional sentence." See id. The judge imposed the greater sentence of ninety months based upon a finding that Blakely acted with "deliberate cruelty." See id. at 300. On review, the Supreme Court concluded 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 (emphasis in original). The Court continued:

> In other words the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

As a result, the Court found that because Blakely's sentence exceeded the presumptive sentence and there was no jury finding of the enhancing factor under the reasonable doubt standard, the sentence violated the Sixth Amendment right to a jury trial. See id. at 305.

In Hughes v. State, 901 So. 2d 837 (Fla. 2005), this Court considered whether or not Apprendi should be given retroactive application. After analyzing the Apprendi decision under the test set forth in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980), this Court concluded that Apprendi should not be applied retroactively. See Hughes 901 So. 2d at 848.

This Court has not yet ruled whether the decision in Blakely should be given retroactive effect. The State

respectfully suggests that Blakely should not be applied retroactively.

In Witt v. State, 387 So. 2d at 931, this Court set forth its test for determining whether or not a change of law requires retroactive application. This Court stated that an alleged change of law will not be considered for retroactive application 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." Id. at 931. Florida based its test for retroactivity on the considerations set forth in Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1967), in which the United States Supreme Court looked to the purpose to be served by the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297. Blakely does emanate for the United States Supreme Court and involves the right to a jury trial; however, Blakely does not constitute a development of fundamental significance. In Witt, 387 So. 2d at 929-930, this Court stated:

> A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application. 387 So. 2d at 929.

The ruling in Blakely does not divest the state of the right to prohibit any conduct or the right to establish punishments for proscribed conduct. Hence, the question is whether it is a change of law which is of sufficient magnitude to require retroactive application. The decision in Gideon v. Wainwright, 372 U.S. 335 (Fla. 1963), is an example of a law change which was of sufficient magnitude to require retroactive application. Witt, 387 So. 2d at 929. However, this Court also said:

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

Witt, 387 So. 2d at 929-930. For example, in Linkletter v. Walker, 381 U.S. 618 (1965), "the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)." Witt, 387 So. 2d at 929 n.26.

Because the Witt test is only applied if there is a new rule, this Court must first determine whether Blakely announced a new rule of law. In Teague v. Lane, 489 U.S. 288, 301 (1989),

Justice O'Connor, stated that "in general . . . a case announces a new rule when it breaks new ground," or stated differently, "if the result was not dictated by precedent existing at the time the defendant's conviction became final." In Beard v. Banks, 542 U.S. 406, 413 (2004), the Court stated with respect to the definition of what constitutes a new rule:

> We must . . . ask "whether the rule later announced . . . was dictated by then-existing precedent -- whether, that is, **the unlawfulness of [the] conviction was apparent to all reasonable jurists.**"

(*quoting* Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997))(emphasis added).

Although Blakely relied on Apprendi, the Blakely decision fundamentally changed understanding of "maximum sentence" in the courts. Blakely redefined the "maximum sentence," not as the maximum allowed by state statute, but as the maximum allowed by the jury's verdict. Before Blakely, the courts consistently held that Apprendi did not apply to sentences within the statutory maximum. See Simpson v. United States, 376 F.3d 679, 681 (7th Cir. 2004) (stating that "before Blakely was decided, every federal court of appeals had held that Apprendi did not apply to guideline calculations made within the statutory maximum" (*citing* United States v. Hughes, 369 F.3d 941, 947 (6th Cir. 2004))).[4] Therefore, the rule in *Blakely* was clearly not

[4] See also United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir.

apparent to all courts, was not dictated by precedent and was subject to debate among reasonable jurists. See Schardt v. Payne, 414 F.3d 1025, 1035 (9th Cir. 2005) (holding that Blakely is new rule and pointing out that "[e]very circuit court of appeals that addressed the question presented in Blakely reached the opposite conclusion from the rule subsequently announced by the Supreme Court"). Because Blakely announced a new rule of law, this Court must apply the Witt test to determine whether Blakely applies to Isaac's sentence.

To determine if a change of law is of significant magnitude, this court applies Stovall/Linkletter test which "requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice." State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995). Crucial to the court's analysis is the purpose to be served by the new rule. Blakely, as the decision in Apprendi, served the purpose of ensuring that once a defendant is found guilty, that defendant does not receive a sentence

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2004); United States v. Alvarez, 358 F.3d 1194, 1211-12 (9th Cir. 2004); United States v. Phillips, 349 F.3d 138, 143 (3d Cir. 2003); United States v. Patterson, 348 F.3d 218, 228-29 (7th Cir. 2003); United States v. Randle, 304 F.3d 373, 378 (5th Cir. 2002); United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001); United States v. Webb, 347 U.S. App. D.C. 162, 255 F.3d 890, 898 (D.C. Cir. 2001); United States v. Angle, 254 F.3d 514, 518 (4th Cir. 2001); United States v. Caba, 241 F.3d 98, 100 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 183-84 (2d Cir. 2001).

higher than the statutory maximum, as redefined by Blakely, unless those factors which are used to impose the above-the-maximum sentence are proven to the jury beyond a reasonable doubt. However, while the Blakely ruling may implicate due process and equal protection concerns, it does not specifically operate to prevent any grievous injustices or disparities in sentencing between equally situated defendants. Rather, Blakely merely changes the procedure employed for determining the appropriate sentence. For example "the plight of a defendant who is serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that of an equally-situated defendant whose sentence was enhanced based on jury-determined factors. In fact, it is conceivable that, if given the opportunity, a jury might find even more enhancing factors than would have been found by the judge." See Hughes v. State, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002). Thus, the due process and equal protection concerns involved in Blakely are so insignificant that it does not require retroactive application.

Indeed, in looking to the significance of Blakely in contrast to decisions which required retroactive application, this Court should consider the fact that had the issue been properly presented and preserved in the trial court, there is very little expectation that the outcome of the sentence would be any different. For example, if a criminal defendant

requested a special verdict regarding the victim's injury, it is unlikely that a jury's findings regarding the severity of a victim's injury would be any different that of a judge. In contrast, there is a strong likelihood of a criminal defendant unfamiliar with the rules of evidence and unaware that crucial evidence against him is subject to suppression, will be convicted when unrepresented and acquitted if represented by competent counsel. Therefore, Gideon v. Wainwright, required retroactive application; however, Blakely, like Apprendi, is not of sufficient magnitude because a Blakely violation causes no harm to the defendant.

In fact, the United States Supreme Court held that a Blakely claim is not plain or fundamental error. See Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553 (2006) (explaining that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"). The Court found that the error presented was subject to harmless-error analysis

> because "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id., at 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35. See also Schriro v. Summerlin, 542 U.S. 348, 355-356, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (rejecting the claim that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which applied Apprendi to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a "'"watershed rul[e] of criminal procedure" implicating

> the fundamental fairness and accuracy of the criminal proceeding,'" in part because we could not "confidently say that judicial factfinding seriously diminishes accuracy").

Recuenco, 126 S. Ct. at 2551-2552. This Court has likewise concluded that Apprendi and Blakely errors are subject to harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007). Therefore, if an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. See United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir. 2002)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi, is not retroactive).

In fact, the United States Supreme Court has even held that the right to a jury trial is not retroactive. See DeStefano v. Woods, 392 U.S. 631 (1968)(refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury); cf. Brown v. Louisiana, 447 U.S. 323, 328 (1980)(holding that because the conviction by non unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts, its holding would apply retroactively).

Every other federal circuit which has addressed the issue

has found that Blakely is not retroactive. The United States Supreme Court has narrowed the test for retroactivity in Teague v. Lane, 489 U.S., holding that a new rule will not be applied in a collateral review unless it falls under one of two exceptions. The Court stated that "[f]irst, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[,]'" and "[s]econd, a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.'" Teague, 489 U.S. at 307. "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, 121 S. Ct. 2478, 2484 (2001). "A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461 (1993), citing, Teague, 489 U.S., at 301.

Although the federal test is now slightly different for this Court's test for retroactivity, it is significant to this

Court's analysis that the federal circuits addressing this issue have held that Blakely is not retroactive.[5] Additionally, state supreme courts that have held Blakely is not retroactive. See State v. Smart, 202 P.3d 1130 (Alaska 2009)(determining that Blakely should not be applied retroactively on collateral review under the state test in Judd v. State, 482 P.2d 273 (Alaska 1971), which employs the Linkletter, 381 U.S., analysis); People v. Johnson, 142 P.3d 722 (Colo. 2006); Carmichael v. State, 927 A.2d 1172 (Me. 2007); Gutermuth v. State, 868 N.E.2d 427, 433 (Ind. 2007); State v. Houston, 702 N.W.2d 268 (Minn. 2005); State v. Evans, 114 P.3d 627 (Wash. 2005).

In agreement with the other courts in this nation, Blakely is a change of procedure that is not of such significance to require retroactive application. As the First District stated stated in Hughes, 826 So. 2d at 1074: "If an Apprendi violation can be harmless, it is difficult to logically conclude that the purpose behind the change of law in Apprendi is fundamentally significant. Thus, analysis of the Apprendi ruling under the first prong of the Stovall/Linkletter test does not weigh in favor of retroactivity." Since the same is true of Blakely, the test does not weigh in favor of Blakely being applied

[5] See Sciulli v. U.S., 142 Fed. Appx. 64 (3d Cir. 2005); U.S. v. Stoltz, 149 Fed. Appx. 567 (8th Cir. 2005); Schardt v. Payne, 414 F. 3d 1025, 1034 (9th Cir. 2005); U.S. v. Price, 400 F.3d 844, 849 (10th Cir. 2005); Michael v. Crosby, 430 F.3d 1310, 1312 (11th Cir. 2005).

retroactively either.

The second prong of the Stovall/Linkletter test is the extent of reliance on the old rule. Trial judges have historically had the ability to determine sentence-enhancing factors. This Court found in Hughes, 901 So. 2d at 845,

> Trial courts have long exercised discretion in sentencing. Moreover, since 1994 our trial courts have been permitted to impose sentences exceeding the statutory maximums based on the judge's factual findings made under the sentencing guidelines and the Criminal Punishment Code. See: § 921.001(5), Fla. Stat. (Supp. 1994); § 921.0024(2), Fla. Stat. (Supp. 1998). Therefore, when Apprendi was decided there had been a considerable period of reliance on this principle in sentencing under both the guidelines and the Code.

The same should be stated of Blakely, as there has been considerable reliance on the ability of judges to impose departure sentences under both the sentencing guidelines and Criminal Punishment Code.

The third prong of the Stovall/Linkletter test is the effect that retroactive application of the rule will have on the administration of justice. The findings of this Court in Hughes, 901 So. 2d at 845-46, are no less applicable to the situation created by the retroactive application of Blakely. To that effect, this Court stated in Hughes:

> Two district courts of appeal have stated that retroactive application of Apprendi would have a far-reaching adverse impact on the administration of justice. As the Fifth District noted,
>
> > virtually every sentence involving a crime

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

McCloud v. State, 803 So. 2d 821, 827 (Fla. 5th DCA 2001) (*en banc*), *review denied*, 821 So. 2d 298 (Fla.), *cert. denied*, 537 U.S. 1036, 154 L. Ed. 2d 455 (2002). In this case, the First District concluded that the impact on the administration of justice "would be monumental." Hughes, 826 So. 2d at 1074. As the court noted, "each and every enhancement factor that was determined by a judge and which resulted in a sentence above the statutory maximum will either have to be stricken completely and the sentences recalculated without the factor (which in itself is a laborious process), or a jury will have to be empaneled to decide those factors." Id.

* * *

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

Because none of the Witt test factors weighs in favor of Blakely being found to be a change of law that constitutes a development of fundamental significance, this Court should find

Blakely, just as it has Apprendi, to not be retroactively applicable. Thus, the State answers the question of whether the decision in Blakely v. Washington, 542 U.S. 296 (2004), applies retroactively to a resentencing hearing held after the Court's decision in Apprendi, 530 U.S., but which was final before the Court's decision in Blakely issued in the negative. To hold otherwise would result in the retroactive application of the Blakely decision.

D. Neither Apprendi Nor Blakely Are Applicable to Isaac's Case Because No Findings Were Made by a Judge Rather Than a Jury After the Advent of the United States Supreme Court Decisions in Either Appprendi or Blakely.

The de novo resentencing proceedings employed by Florida are unique and cause unique problems to arise as demonstrated by the present case. As Justice Cantero noted his concurrence in Galindez, 955 So. 2d at 525, this Court has "traditionally held that 'resentencing should proceed *de novo* on all issues bearing on the proper sentence.'" (*citing* Morton v. State, 789 So. 2d 324, 334 (Fla. 2001)(*quoting* Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986)). Justice Cantero failed to recognize that resentencings are not completely *de novo* proceedings, especially when it comes to the imposition of departure sentences like the sentence at issue in this case. This Court has expressly limited the ability of the State and the trial court to impose a departure sentence on remand. In Shull v. Dugger, 515 So. 2d 748, 749-50 (1987), this Court held explicitly that when a

departure sentenced is reversed because the departure reasons are invalid, the trial court may not again depart based upon new reasons. In essence, the trial court gets only one chance to depart and that is at the time of the defendant's original sentencing. Since the trial court may only mitigate a defendant's sentence and not enhance it thereafter, Florida's resentencings are not completely *de novo* proceedings.

This argument is further supported by the law of the case doctrine. In this case, Isaac had the opportunity to challenge the departure reasons following his original conviction and sentencing in 1998 and 1999. Isaac made whatever challenges he thought were fit to be made, and the First District affirmed his conviction and sentence. Isaac I.

As a result, prior to the decision in Blakely and Apprendi, Isaac had the opportunity to challenge the departure reasons. In fact, Isaac unsuccessfully challenged the trial court's reasons for departure in Isaac II. In Florida, the applicable statutory maximum is found in section 775.082, Florida Statutes, and Isaac's sentence did not exceed the maximum for any of the counts for which he was sentenced. Therefore, neither Apprendi nor Blakely are offended by the sentence reimposed based upon a corrected scoresheet in this case. To hold otherwise, would be to permit a collateral attack on the long ago approved departure reasons which is contrary to the concept that neither Blakely

nor Apprendi are retroactive.

Further, while Isaac was resentenced, the act was more akin to a ministerial action. A departure sentence was imposed that was substantially in excess of either the 1994 or 1995 guidelines. Based upon the facts of the case as demonstrated by the reasons for departure, it was unlikely that the trial court would not have imposed the same or substantially the same departure sentence on remand. Therefore, neither Apprendi nor Blakely should be applied to Isaac's sentence.

E. Apprendi Should Not Be Applied to Isaac's Resentencing Proceedings Because Applying Apprendi to such a Proceeding Essentially Applies Apprendi Retroactively to Isaac's Conviction which Became Final in 1999 Prior to the Decision in Apprendi.

Finally, neither Apprendi nor Blakely should be given what amounts to retroactive application in cases such as Isaac's. Once a case is final on its original direct appeal, the State has an interest in the finality of the conviction. Applying the rules of Apprendi and Blakely to cases such as Isaac's eviscerates that interest by allowing the defendant to challenge the methodology of his sentencing long after he was originally sentenced and his challenges, if any, to the departure sentence are affirmed during his original direct appeal. The State is further disadvantaged by the passage of time in that its witnesses may no longer be available to testify live, exhibits may no longer exist a decade or more after the conviction became

final on direct appeal, witnesses memories will have faded, etc. As a result, even if this Court creates a process permitting the State to empanel a new jury for purposes of finding the departure reasons beyond a result, the State's interest in finality is undermined.

Justice Cantero's logic in his concurrence in Galindez, is compelling, if this Court interprets Blakely and Apprendi in such a manner as to restrict the findings to the original jury findings at the time the defendant was originally convicted, then the application in fact is retroactive. Justice Cantero stated:

> **Under such an interpretation, Apprendi and Blakely no longer affect only the sentencing; they affect the conviction as well because the facts found at that time dictate the sentence.** If that is the case, then applying Apprendi and Blakely to a resentencing *would* "alter the effect of a jury verdict and conviction." Galindez v. State, 910 So. 2d 284, 285 (Fla. 3d DCA 2005). **Stated another way, if Apprendi and Blakely reverberate backward to the defendant's conviction, applying those cases to defendants whose convictions already were final constitutes a retroactive application, contrary to our decision in Hughes.** Such an approach also would be misguided as a matter of policy (retroactivity, after all, is more a policy question than anything else) **because it penalizes the State for pursuing the conviction in accordance with then prevailing law without allowing it a remedy, and because it allows the defendant to benefit from a conviction he has shown no right to reopen.**

Galindez, 955 So. 2d at 525 (J. Cantero concurring)(bold emphasis added). Applying the new law set forth in Blakely and Apprendi to Isaac's case, "would 'destroy the stability of the

law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state . . . beyond any tolerable limit.'" Id. at 527-28 (*quoting* Witt, 387 So. 2d at 929-30. As Justice Cantero further pointed out, application of the finality principle

> avoids those dire consequences by allowing retroactive application only when new rulings "so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of postconviction relief is necessary to avoid individual instances of obvious injustice." Id. at 925. We have already evaluated Apprendi under the Witt standard and held that it does not apply retroactively. See Hughes, 901 So. 2d at 837. It is safe to assume that Blakely, which "appl[ied] the rule . . . in Apprendi," 542 U.S. at 301, will not apply retroactively, either. Thus, the defendant clearly has no right to retroactive relief under Apprendi or Blakely.

Id. at 528 (*quoting* Witt, 387 So. 2d at 925).

These statements lead to the discussion of when finality attaches in a criminal case. This Court has stated that finality attaches when the defendant's conviction becomes final. For instance, in Johnson v. State, 904 So. 2d 400, 407 (Fla. 2005), this Court stated "that once a conviction has been upheld on appeal, the State acquires a strong interest in finality." See also Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999)(providing that "once a conviction has been affirmed on direct appeal 'a presumption of finality and legality attaches to the conviction and sentence.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 633 (1993)).

Additionally, in this Court's opinion in Hughes, 901 So. 2d at 83-40, this Court "emphasized the affirmance of the *conviction* as the critical moment for retroactivity purposes." Galindez, 955 So. 2d at 528 (J. Cantero concurring). It should also be noted, as Justice Cantero did in Galindez, 955 So. 2d at 528 n.3, that the United States Supreme Court placed emphasis on the conviction in its plurality opinion in Teague v. Lane, 489 U.S. at 309, when it stated that the "[a]pplication of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

If this Court intends to apply Apprendi and Blakely to cases such as Isaac's, then at the least, this Court should create a methodology for permitting the State to empanel a jury for purposes of finding the sentencing enhancements beyond a reasonable doubt. Otherwise, the decision of this Court will grant the defendant a windfall to which he is not entitled for simply delaying his proceedings until the rules of the game became more favorable to him. Finally, as Justice Cantero noted in his concurrence in Galindez, 955 So. 2d at 529,

> In fact, applying Apprendi and Blakely without a new jury is even more disruptive than most retroactive applications. It creates a bizarre paradox: **the State is faulted for failing to prove sentence-enhancing facts to the jury at a time when it was not required to do so, yet is barred from proving those facts to a**

> **jury once such a requirement has been created.** The result is that defendants will obtain relief (i.e., lighter sentences than their behavior warrants) because of defects in the process leading to their convictions, despite the continued finality of those convictions. **That is the very essence of retroactive application. It violates the principle of finality that we so adamantly defended in Hughes and contradicts its express language.**

(emphasis added). As a result, the State answers this Court's question as to whether applicability of the decision in Apprendi, 530 U.S. applies to this case as Isaac's conviction became final before Apprendi was decided, when Isaac was resentenced after Apprendi was issued in the negative.

F. Even if Apprendi Did Apply to Isaac's Sentence, Blakely Does Not, and Isaac's Sentence Did Not Exceed the Statutory Maximums Expressed in Section 775.082, Florida Statutes.

As discussed in previous sections, until the decision in Blakely, the understanding of the courts was that Apprendi applied only in cases where the trial court imposed a sentence in excess of the statutory maximum as set forth in state law. In Florida, section 775.082, Florida Statutes, sets forth the applicable maximums. Isaac's conviction for armed robbery with a firearm as charged in count I was a first degree felony punishable by life imprisonment. (RI 86). Isaac was sentenced to twenty years imprisonment which is less than the maximum sentence or forty-years or life imprisonment. (RI 86). Isaac's conviction for armed robbery with a firearm as charged in count II was a first degree felony punishable by life imprisonment.

(RI 86). Isaac was sentenced to twenty years imprisonment which is less than the maximum sentence or forty-years or life imprisonment. (RI 86). Isaac's conviction for kidnapping to facilitate a felony as charged in count III was a first degree felony punishable by life imprisonment. (RI 86). Isaac was sentenced to twenty years imprisonment which is less than the maximum sentence or forty-years or life imprisonment. (RI 86). Finally, Isaac's conviction for burglary of a dwelling while armed as charged in count V was a first degree felony punishable by life imprisonment. (RI 86). Isaac was sentenced to twenty years imprisonment which is less than the maximum sentence or forty-years or life imprisonment. (RI 86). As a result, no violation of Apprendi occurred in this case.

Conclusion

Based on the foregoing, the State respectfully submits that neither Apprendi or Blakely are applicable to Isaac's sentencing. Therefore, the decision of the First District in Isaac III should be reversed. Finally, even if this Court rules that Respondent can challenge his sentence and/or Apprendi and Blakely is applicable, this case has been fully resolved. The trial court completed its harmless error analysis and the matter has been adjudicated in the State's favor on appeal. See Isaac v. State, 989 So. 2d 1217, 1218 (Fla. 1st DCA 2008)(Isaac IV). As a result, Isaac is entitled to no relief from this Court.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Isaac Ramon Ruiz-Carus, Esq., Wilkes & McHugh, P.A., One North Dale Mabry Hwy., Suite 800, Tampa, Florida 33609-2755, by MAIL on this 12th day of May, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Christine Ann Guard
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

Case No. SC05-2047

v.

LEMUEL E. ISAAC,
Respondent.

APPENDIX

Ex. A First District's Opinion

Ex. B Information

Ex. C Verdicts

Ex. D Original Judgment and Sentence as to Counts I-V

Ex. E Plea Form as to Counts VI-XVI

Ex. F Original Judgment and Sentence as to Counts VI-XVI

Ex. G July 2, 2000 Motion to Correct Illegal Sentence

Ex. H November 15, 2000 Motion for Postconviction Relief

Ex. I March 7, 2001 Motion to Correct Scoresheet and Sentencing Error

Ex. J State's Response to Motion to Correct Sentence

Ex. K Order Granting Motion to Correct Sentence

Ex. L Resentencing Transcript

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Ex. N Motion to Correct Sentencing Error Pursuant to Florida Rule of Criminal Procedure

Ex. O First District Order Directing State to File Response

Ex. P State's Response to Order to Show Cause