IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. LEMUEL E. ISAAC, Respondent.	SC05-2047

PETITIONER'S JURISDICTIONAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner or the State. Respondent, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The facts are contained in the opinion of the First District Court of Appeal, Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), which is attached hereto as an appendix.

SUMMARY OF ARGUMENT

The decision below is in express and direct conflict with Hughes v. State, 901 So. 2d 837 (Fla. 2005) on the same point of law. Moreover, the decision expressly and directly conflicts with Hamilton v. State, 30 Fla. L. Weekly D2417 (Fla. 4th DCA Oct. 12, 2005); Garcia v. State, 30 Fla. L. Weekly D2361 (Fla. 4th DCA Oct. 12, 2005); Thomas v. State, 30 Fla. L. Weekly D2361 (Fla. 4th DCA Oct. 12, 2005) and Galindez v. State, 910 So. 2d 284 (Fla. 3d DCA 2005). The decision below makes the doctrine set out in Apprendi v. New Jersey, 530 U.S. 466 (2000) operate retrospectively; the other authorities cited above have rejected Apprendi's retroactive application.

ARGUMENT

ISSUE I

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW.

In its decision the First District Court of Appeal retroactively applied the rule announced in Apprendi, but did so in such a way as to obscure the effect of its ruling. As the Court below set out the facts:

> The procedural history of this case is complex. Following a jury trial, the appellant was convicted and sentenced for kidnaping to facilitate, grand theft, burglary of a dwelling while armed, and armed robbery with a firearm. This Court affirmed his convictions and sentences, with the exception of reversing his conviction for grand theft and remanding to the trial court with directions to discharge that offense. See *Isaac v. State*, 720 So. 2d 306, 306-07 (Fla. 1st DCA 1998). The appellant was resentenced on March 17, 1999; the appellant did not appeal his resentencing. In response to a rule 3.800(a) motion, the trial court resentenced the appellant under the 1994 guidelines to a departure sentence, and this Court affirmed his sentences on July 23, 2002; mandate issued on October 10, 2002. *See Isaac v. State*, 826 So. 2d 396, 396 (Fla. 1st DCA 2002). While his appeal of the resentencing was pending in this Court, the appellant filed his initial rule 3.850 motion on November 9, 2000. On July 23, 2002, this Court affirmed the appellant's resentencing, and he filed an amendment to his rule 3.850 motion on May 30, 2003, prior to the trial court ruling on his original motion. The amendment pertains to his resentencing.

Isaac at p. 1-2.

In deciding the case the two-judge majority focused on whether the law of the case doctrine should apply or whether Respondent should be remanded for resentencing consistent with Apprendi and Blakely v. Washington, 124 S.Ct. 2531 (2004). In ruling that it would be "manifestly unfair" to not let Respondent take advantage of Apprendi, the panel majority acknowledged the Court's own opinion in Hughes v. State, 826 So. 2d 1070, 1071 (Fla. 1st DCA 2002) approved, 901 So. 2d at 848, and yet proceeded to give Respondent access to Apprendi/Blakely through a motion for postconviction relief. Judge Kahn's dissent pointed this out:

> Although it may not seem so at first, the court's analysis in the present case gives *Apprendi* retroactive application. The court acknowledges this court's correct decision in *Hughes v. State*, 826 So. 2d 1070 (Fla. 1st DCA 2002), *aff'd*, 30 Fla. L. Weekly S285 (Fla. Apr. 28, 2005), but dismisses 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.

Isaac at 5, (dissenting opinion of Kahn, J.).

This Court's opinion in Hughes does not refine the lower court's holding, however. Rather, it adopts the decision and is explicit that Apprendi is not to be applied retroactively. The decisions in with Hamilton, Garcia, Thomas, and Galindez likewise recognize that there is a different rule in the First

District than elsewhere in the state. Conflict is express and direct and apparent from the face of the opinion. In those circumstances, this Court may exercise its discretionary jurisdiction in order to resolve this conflict. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

Wherefore the State urges the Court to exercise its discretion to take jurisdiction over this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been furnished by United States Mail to Lemuel E. Isaac, #N01706, Jefferson Correctional Institution, 1050 Big Joe Rd., Monticello, FL 32344-0430 on November 22, 2005.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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