IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC06-1173

v.

CHRISTIAN FLEMING,

Respondent.

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS..... i

TABLE OF CITATIONS..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF ARGUMENT..... 6

ISSUE I 7

WHETHER APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000), AND BLAKELY v. WASHINGTON, 542 U.S. 296 (2004), APPLY TO RESPONDENTS SENTENCE?..... 7

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE..... 45

CERTIFICATE OF COMPLIANCE..... 46

TABLE OF CITATIONS

CASES PAGE(S)

FEDERAL CASES

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

Blakely v. Washington, 542 U.S. 296 (2004).....*passim*

Beard v. Banks, 542 U.S. 406 (2004).....22

Brecht v. Abrahamson, 507 U.S. 619 (1993).....48

Brown v. Louisiana, 447 U.S. 323 (1980).....26

Curtis v. United States, 294 F.3d 841 (7th Cir. 2002.....32

DeStefano v. Woods, 392 U.S. 631 (1968).....26

Gideon v. Wainwright, 372 U.S. 335 (Fla. 1963).....21, 25

Graham v. Collins, 506 U.S. 461 (1993).....28

Lambrix v. Singletary, 520 U.S. 518 (1997).....22

Linkletter v. Walker, 381 U.S. 618 (1967).....20, 21, 23, 28, 29

Mapp v. Ohio, 367 U.S. 643 (1961).....21

Michael v. Crosby, 430 F.3d 1310 (11th Cir. 2005).....28

Ring v. Arizona, 536 U.S. 584 (2002).....26

Schardt v. Payne, 414 F.3d 1025 (9th Cir. 2005).....23, 28

Schriro v. Summerlin, 542 U.S. 348 (2004).....25

Sciulli v. U.S., 142 Fed. Appx. 64 (3d Cir. 2005).....28

Shepard v. United States, 544 U.S. 13 (2005).....45

Simpson v. United States, 376 F.3d 679 (7th Cir. 2004).....22

Stovall v. Denno, 388 U.S. 293 (1967).....20, 23, 29

Teague v. Lane, 489 U.S. 288 (1989).....21, 27, 28, 48

Tyler v. Cain, 121 S. Ct. 2478 (2001).....27

United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004).....22

United States v. Angle, 254 F.3d 514 (4th Cir. 2001).....23

United States v. Booker, 543 U.S. 220 (2005).....11, 16

United States v. Caba, 241 F.3d 98 (1st Cir. 2001).....23

United States v. Cotton, 535 U.S. 625 (2002).....31, 32

United States v. Francis, 367 F.3d 805 (8th Cir. 2004).....22

United States v. Garcia, 240 F.3d 180 (2d Cir. 2001).....23

United States v. Hughes, 369 F.3d 941 (6th Cir. 2004).....22

United States v. Jardine, 364 F.3d 1200 (10th Cir. 2004).....22

United States v. Olano, 507 U.S. 725 (1993).....32

United States v. Patterson, 348 F.3d 218 (7th Cir. 2003).....22

United States v. Phillips, 349 F.3d 138 (3d Cir. 2003).....22

United States v. Randle, 304 F.3d 373 (5th Cir. 2002).....23

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001).....23

United States v. Sanders, 247 F.3d 139 (4th Cir. 2002).....26

U.S. v. Stoltz, 149 Fed. Appx. 567 (8th Cir. 2005).....28

United States v. Webb, 255 F.3d 890 (D.C. Cir. 2001).....23

U.S. v. Price, 400 F.3d 844 (10th Cir. 2005).....28

Washington v. Recuenco, 548 U.S. 212 (2006).....25, 26, 33, 50

STATE CASES

Arrowood v. State, 843 So. 2d 940 (Fla. 1st DCA 2003).....11

Behl v. State, 898 So. 2d 217 (Fla. 2d DCA 2005).....12

Blakely v. State, 746 So. 2d 1182 (Fla. 4th DCA 1999).....*passim*

Caldwell v. State, 920 So. 2d 727 (Fla. 5th DCA 2006).....33

Cargle v. State, 770 So. 2d 1151 (Fla. 2000).....39

Carmichael v. State, 927 A.2d 1172 (Me. 2007).....28

Carter v. State, 786 So. 2d 1173 (Fla. 2001).....35, 36, 37

Castor v. State, 365 So. 2d 701 (Fla. 1978).....38

Charles v. State, 763 So. 2d 316 (Fla. 2000).....39

Davis v. State, 661 So. 2d 1193 (Fla. 1995).....34, 36, 37

F.B. v. State, 852 So. 2d 226 (Fla. 2003).....38

Fleming v. State, 740 So. 2d 531 (Fla. 1st DCA 1999)....9, 15, 42

Fleming v. State, 808 So. 2d 287 (Fla. 1st DCA 2002).....9, 15

Fleming v. State, 31 Fla. L. Weekly D 1112
(Fla. 1st DCA 2006).....12

Galindez v. State, 910 So. 2d 284 (Fla. 3d DCA 2005).....11, 47

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

Gartrell v. State, 626 So. 2d 1364 (Fla. 1993).....34

Goodwin v. State, 751 So. 2d 537 (Fla. 1999).....48

Griffin, 946 So. 2d at 613.....40

Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007).....28

Heggs v. State, 759 So. 2d 620 (Fla. 2000).....15, 42, 44

Hopping v. State, 708 So. 2d 263 (Fla. 1998).....35, 37

Hughes v. State, 826 So. 2d 1070 (Fla. 1st DCA 2002).....passim

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

Insko v. State, 969 So. 2d 992 (Fla. 2007).....38

Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005).....11

Jackson, 952 So. 2d at 616.....40

Jackson v. State, 983 So. 2d 562 (Fla. 2008).....38, 39, 41

Johnson v. State, 904 So. 2d 400 (Fla. 2005).....48

Judd v. State, 482 P.2d 273 (Alaska 1971).....28

Maddox, 760 So. 2d at 101-09.....39

Mancino v. State, 714 So. 2d 429 (Fla. 1998).....35, 37

McCloud v. State, 803 So. 2d 821 (Fla. 5th DCA 2001).....30

McGregor v. State, 789 So. 2d 976 (Fla. 2001).....31

Morton v. State, 789 So. 2d 324 (Fla. 2001).....41

People v. Johnson, 142 P.3d 722 (Colo. 2006).....28

Rosen v. State, 940 So. 2d 1155 (Fla. 5th DCA 2006).....32, 33

Salters v. State, 758 So. 2d 667 (Fla. 2000).....40

Shull v. Dugger, 515 So. 2d 748 (1987).....42

Spencer v. State, 764 So. 2d 576 (Fla. 2000).....39

State v. Anderson, 905 So. 2d 111 (Fla. 2005).....39

State v. Callaway, 658 So. 2d 983 (Fla. 1995).....23, 34, 37

State v. Cote, 913 So. 2d 544 (Fla. 2005).....39

State v. Evans, 114 P.3d 627 (Wash. 2005).....28

State v. Houston, 702 N.W.2d 268 (Minn. 2005).....28

State v. Smart, 202 P.3d 1130 (Alaska 2009).....28

Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986).....41

Terry v. State, 764 So. 2d 571 (Fla. 2000).....39

Thogode v. State, 763 So. 2d 281 (Fla. 2000).....39

Witt v. State, 387 So. 2d 922 (Fla. 1980).....*passim*

FLORIDA STATUTES

§ 775.0082, Fla. Stat.....43

§ 921.0024, Fla. Stat.....29

§ 921.001, Fla. Stat.....29

OTHER

Fed. R. Crim. P. 52(b).....32

Fla. R. Crim. P. 3.800.....passim

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, Christian Fleming, 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 three volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses. 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.

STATEMENT OF THE CASE AND FACTS

[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 charged Fleming by amended information with aggravated battery with a deadly weapon, a firearm, shooting into a dwelling, and false imprisonment. (Ex. B). Following a jury trial, the jury returned a verdict of guilty to the charge of aggravated battery by causing great bodily harm, permanent disability or permanent disfigurement. (Ex. C at 1). The jury returned verdicts of guilty as charged to the shooting into a dwelling and false imprisonment counts. (Ex. C).

As a result, the trial court, on June 30, 1997, adjudicated Fleming guilty and sentenced Fleming to ten years imprisonment on count I, ten years imprisonment on count II to be served consecutively to the sentence in count I, and five years on count III to be served consecutively to the sentences in counts I and II. (Ex. D); (R 32-33). A copy of the 1995 guidelines scoresheet is included with the sentencing documents. (Ex. D). The trial court found four reasons for departure. (Ex. D); (R 33). First, the trial court found that the crime was committed in a manner which was heinous, atrocious, or cruel. (Ex. D). Second, the victim suffered permanent physical injury. (Ex. D). Third, the offense was committed in order to prevent or avoid arrest. (Ex. D). Fourth, the primary offense was scored at level 7 or higher and Fleming had been convicted of one or more offenses that scored or would have scored at level 8 or higher. (Ex. D); (Ex. E). Fleming appealed, and on August 2, 1999, the

First District *per curiam* affirmed Fleming's judgment and sentence without written opinion. See Fleming v. State, 740 So. 2d 531 (Fla. 1st DCA 1999).

On June 1, 2001, Fleming filed a motion to correct illegal sentence on the grounds that the 1995 sentencing guidelines were unconstitutional. (Ex. F at 1-3). The trial court denied the motion. (Ex. F at 4). Fleming appealed. (Ex. F at 18). On appeal, the First District issued an order to show cause why the order of the trial court should not be reversed. (Ex. G). The State responded. (Ex. H). On March 6, 2002, the First District reversed and remanded the trial court's order. See Fleming v. State, 808 So. 2d 287, 287 (Fla. 1st DCA 2002). The First District noted that the sentence was an upward departure supported by valid reasons. See id. However, the court found that Fleming was entitled to have his scoresheet recalculated under the 1994 guidelines. See id.

On April 3, 2003, the trial court held a resentencing proceeding. (R 37). A new guideline scoresheet was prepared. (R 39-40). At the resentencing, the trial court sentenced Fleming to ten years on count I, and five years each on counts two and three with the sentences to run consecutive to each and count I. (R 42-46); (RII 110-12). During the resentencing hearing, defense counsel specifically stated that there was no dispute that the injury was severe. (RII 106). The defense

argued that the points were not properly scored because it was dealt with otherwise on the scoresheet. (RII 106). The departure order reflects the same reasons for departure as found at the original sentencing proceeding. (R 38); (RII 109). A belated appeal was granted as to Fleming's resentencing. (R 72-73).

On December 17, 2004, Fleming filed a second motion to correct sentencing error. (R 48-53). In his motion, Fleming alleged that fundamental error occurred when victim injury points were imposed based upon facts not found by a jury based upon the decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004). (R 49). The trial court denied the motion finding that the scoring of victim injury points did not enhance Fleming's sentence beyond the statutory maximum for the offense. (R 70). Further, the trial court found that even if Apprendi was to be applied, the fact had been found by the jury when it found that Fleming committed aggravated battery by infliction of great bodily harm, permanent disfigurement, or permanent disability. (R 71).

Thereafter, Fleming filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). (RIII 114-22). In the motion, Fleming attacked the imposition of victim injury points in light of the decisions in Apprendi and Blakely. Additionally, Fleming attacked one of

the departure reasons as being factually invalid, and the other departure reasons as being invalid under Apprendi, Blakely and United States v. Booker, 543 U.S. 220 (2005). After briefing, the First District issued its opinion in which it stated:

> Because Apprendi was decided prior to appellant's resentencing, appellant brings this appeal pursuant to Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005)(providing that Apprendi applies where an appellant is resentenced subsequent to that decision), review pending, No. SC05-2047 (Fla. filed Oct. 31, 2005). But see, e.g., Galindez v. State, 910 So. 2d 284 (Fla. 3d DCA 2005) (certifying conflict with Isaac), *review pending*, No. SC05-1341 (Fla. filed July 29, 2005).
>
> Appellant first argues that the jury did not find "severe victim injury," and therefore, the trial court erred in scoring 40 points on this basis. Although the jury must make a finding of severe victim injury pursuant to Apprendi, in this case severe victim injury was found by the jury when it convicted appellant of aggravated battery by causing great bodily harm, permanent disability, or permanent disfigurement. Cf. Arrowood v. State, 843 So. 2d 940, 941 (Fla. 1st DCA 2003) (stating, "[t]he jury's findings of DUI manslaughter and DUI serious bodily injuries support the imposition of the death and severe victim injury points"). Accordingly, the trial court's assessment of 40 points for severe victim injury was not error in this case.
>
> Appellant also argues that the first three grounds for upward departure entered by the trial court were found by the trial judge and not the jury in violation of Apprendi, and also that the fourth ground is invalid on its face, as appellant does not have any present or prior convictions at level 8 or higher. The State concedes error on all four grounds relating to the upward departure. Because of this concession, we reverse appellant's

sentence and remand for resentencing.

Fleming v. State, 31 Fla. L. Weekly D 1112 (Fla. 1st DCA 2006). In its opinion, the court cited its decision in Behl v. State, 898 So. 2d 217 (Fla. 2d DCA 2005) (applying the ruling in Apprendi to a trial court's assessment of victim injury points). The State filed its notice invoking the jurisdiction of this Court.

SUMMARY OF ARGUMENT

The United States Supreme Court decisions in Apprendi, 530 U.S., and Blakely, 542 U.S., are inapplicable to Fleming's sentence. First, this Court has previously found that Apprendi is not to be applied retroactively to convictions that have become final on in Hughes v. State, 901 So. 2d 837 (Fla. 2005). Likewise, under the analysis required by Witt v. State, 387 So. 2d 922 (Fla. 1980), Blakely is not subject to retroactive application. Additionally, Fleming has not properly preserved and presented this issue for review by the First District because Fleming did not raise this issue at the time of his original trial. Further, Florida Rules of Criminal Procedure 3.800(a) and 3.800(b) are not proper vehicles for bringing Apprendi and Blakely challenges to a departure order.

Third, neither Apprendi nor Blakely are applicable because no judicial findings were made by the trial court after the decision in those cases. The necessary findings for the

departure sentence were made at the time of Fleming's original sentencing, well prior Apprendi and Blakely. Fourth at least two of the departure reasons contained in the departure orders were inherent in the jury's verdict convicting Fleming of the crimes of aggravated battery and false imprisonment. Finally, neither Apprendi nor Blakely should be given what would amount to retroactive application because such an application would destroy the State's interest in the finality of Fleming's conviction.

ARGUMENT

ISSUE I

WHETHER APPRENDI v. NEW JERSEY, 530 U.S. 466 (2000), AND BLAKELY v. WASHINGTON, 542 U.S. 296 (2004), APPLY TO RESPONDENTS SENTENCE?

In its order accepting jurisdiction in this matters, this Court directed the parties to address the question of "[w]hether Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), apply to resentencing proceedings held after Apprendi issued where the resentencing was final after Blakely issued, in cases in which the convictions were final before Apprendi issued. The State respectfully suggests that both Blakely and Apprendi are inapplicable to such resentencings.

Standard of Review

The issue of the applicability of the Apprendi and Blakely decisions to Fleming's case is a question of law to be determined under the *de novo* standard of review.

Preservation

As the State was the appellee below, no further preservation was required for the matters presented by it here. With respect to the State's position as to Fleming's proper preservation and presentation, the State's arguments with respect to those matters are presented in the argument section of this brief.

Argument

On June 30, 1997, the trial court adjudicated Fleming guilty and sentenced Fleming to ten years imprisonment on count I, ten years imprisonment on count II to be served consecutively to the sentence in count I, and five years on count III to be served consecutively to the sentences in counts I and II, using the 1995 guidelines. (Ex. D); (R 32-33). The trial court found four reasons for departure in 1997. (Ex. D); (R 33). First, the trial court found that the crime was committed in a manner which was heinous, atrocious, or cruel. (Ex. D). Second, the victim suffered permanent physical injury. (Ex. D). Third, the offense was committed in order to prevent or avoid arrest. (Ex. D). Fourth, the primary offense was scored at level 7 or higher

and Fleming had been convicted of one or more offenses that scored or would have scored at level 8 or higher. (Ex. D); (Ex. E). Fleming appealed, and on August 2, 1999, the First District *per curiam* affirmed Fleming's judgment and sentence without written opinion. See Fleming v. State, 740 So. 2d 531 (Fla. 1st DCA 1999).

On June 1, 2001, Fleming filed a motion to correct illegal sentence on the grounds that the 1995 sentencing guidelines were unconstitutional pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000). (Ex. F at 1-3). The trial court denied the motion. (Ex. F at 4). On March 6, 2002, the First District reversed and remanded the trial court's order. See Fleming v. State, 808 So. 2d 287, 287 (Fla. 1st DCA 2002). The First District noted that the sentence was an upward departure supported by valid reasons. See id. However, the court found that Fleming was entitled to have his scoresheet recalculated under the 1994 guidelines. See id.

On April 3, 2003, the trial court held a resentencing proceeding. (R 37). A new guideline scoresheet was prepared. (R 39-40). At the resentencing, the trial court sentenced Fleming to ten years on count I, and five years each on counts two and three with the sentences to run consecutive to each and count I. (R 42-46); (RII 110-12). The departure order reflects the same reasons for departure as found at the original

sentencing proceeding. (R 38); (RII 109).

On December 17, 2004, Fleming filed a second motion to correct sentencing error. (R 48-53). In his motion, Fleming alleged for the first time that fundamental error occurred when victim injury points were imposed based upon facts not found by a jury based upon the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004). (R 49). The trial court denied the motion finding that the scoring of victim injury points did not enhance Fleming's sentence beyond the statutory maximum for the offense. (R 70). Further, the trial court found that even if Apprendi was to be applied, the fact had been found by the jury when it found that Fleming committed aggravated battery by infliction of great bodily harm, permanent disfigurement, or permanent disability. (R 71). A belated appeal was granted appeal of the resentencing. (R 72-73).

Thereafter, Fleming filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). (RIII 114-22). In the motion, Fleming attacked the imposition of victim injury points in light of the decisions in Apprendi and Blakely. Additionally, Fleming attacked fourth departure reason as being factually invalid, and the other departure reasons as being invalid under Apprendi, Blakely and United States v. Booker, 543 U.S. 220 (2005).

On appeal, the First District found Apprendi and Blakely to be applicable to Fleming's resentencing. The First District's conclusion was improper for several reasons. First, neither Blakely or Apprendi apply retroactively. Second, Fleming has not properly preserved this issue for review. Third, neither Apprendi nor Blakely are applicable to Fleming's case because no findings were made by a judge rather than a jury after the advent of the two United States Supreme Court decisions. Fourth, at least two of the departure reasons contained in Fleming's original and resentencing departure orders were inherent in the jury's verdict. Finally, neither Apprendi nor Blakely should be given what amounts to retroactive application in cases such as Fleming's.

A. Neither Blakely Nor Apprendi Apply 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))); United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir. 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). Therefore, the rule in *Blakely* was clearly **not** 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 Fleming'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 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 the conviction by non

unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts, and, therefore, the right was retroactively applied).

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. 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). 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 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. Additionally, this Court should decline to apply the Blakely decision to Fleming's case as set forth in the following sections of this brief.

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

Fleming'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 Fleming'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, Fleming 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, Fleming 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).

While Fleming filed a motion pursuant to Florida Rule of

Criminal Procedure 3.800(a), the case law is clear that Apprendi and Blakely challenges are not properly made on collateral review. As discussed *supra*, neither Apprendi nor Blakely should be applied retroactively. As a result, Fleming's rule 3.800(a) motion is of no assistance to him in this matter.

Furthermore, Florida Rule of Criminal Procedure 3.800(a) is not appropriate vehicle by which to obtain such a remedy. In Davis v. State, 661 So. 2d 1193, 1196-97 (Fla. 1995), this Court rejected the contention that a departure sentence that had been imposed without a contemporaneous written order providing the reasons for departure was an illegal sentence that could be corrected at any time. This Court reiterated its holding in Gartrell v. State, 626 So. 2d 1364 (Fla. 1993), "concluding that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Id. at 1196. This Court further explained that "a departure sentence that is beyond the guidelines may be an erroneous sentence when written reasons are not properly filed, but it is not an illegal sentence when it is still within the maximum allowed by law." Id. at 1197.

In State v. Callaway, 658 So. 2d 983, 988 (Fla. 1995), this Court faced the issue of whether consecutive habitual felony offender sentences for multiple offenses arising out of the same criminal episode constitute an illegal sentence. This Court

rejected the contention stating

> A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed, and as such, its subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination.... Resolution of th[is] issue will require an evidentiary determination and thus should be dealt with under rule 3.850 which specifically provides for an evidentiary hearing.

Id.

In Hopping v. State, 708 So. 2d 263, 264 (Fla. 1998), this Court resolved the issue of whether a sentence was illegal because the sentence had been enhanced after it was imposed in violation of the double jeopardy clause. This Court determined that a defendant could challenge such a sentence because the challenge could be determined as a matter of law. See id. at 265.

In Mancino v. State, 714 So. 2d 429, 433 (Fla. 1998), this Court concluded that

> The entitlement to time served is not a disputed issue of fact in the sense that an evidentiary hearing is needed to determine whether there is such an entitlement. Hence, if the record reflects that a defendant has served time prior to sentencing on the charge for which he was tried and convicted, and a sentence that does not properly credit the defendant with time served, then that sentence may be challenged under rule 3.800 much in the way that the double jeopardy issue was raised in Hopping.

In Carter v. State, 786 So. 2d 1173, 1175 (Fla. 2001), this Court resolved the issue of whether a habitual offender sentence

may be corrected as an illegal sentence pursuant to rule 3.800(a), Florida Rules of Criminal Procedure, motion when the habitual offender statute in effect at the time of the defendant's offense did not permit habitualization for life felonies. In its opinion, this Court also clarified the role of rule 3.800(a), Florida Rules of Criminal Procedure, and the definition of an illegal sentence within the meaning of the rule. This Court explained:

> Rule 3.800(a) is intended to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law.

Id. at 1176. As a result, the Carter court cited with approval the definition set out by Judge Farmer in Blakely v. State, 746 So. 2d 1182 (Fla. 4th DCA 1999). In Blakely, 746 So. 2d at 1186-87, Judge Farmer wrote:

> To be illegal within the meaning of rule 3.800(a) the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. On the other hand, if it is possible under all the sentencing statutes--given a specific set of facts--to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it.

In finding that Carter could challenge his sentence by means a motion pursuant to Florida Rule of Criminal Procedure 3.800(a), this Court emphasized "that this is not a case, as in Davis,

where the error was in a failure to comport with statutory procedural safeguards employed in the imposition of the sentence." Carter, 786 So. 2d at 1180-81.

The Fourth District in Blakely, 746 So. 2d at 1184, further explained the differences between this Court's precedents stating,

> The difference between [the situations in Hopping and Calloway] is significant, and not just because no evidentiary hearing is necessary to ascertain the illegality. Separate sentences for each of multiple crimes committed during a criminal episode may not amount to unconstitutional enhancements as such if the statute prescribing the crime and penalty expressly provide for and allow this kind of multiple punishment. No judge, however, can increase a sentence once it has been imposed and the prisoner has begun to serve it.

Additionally, the Fourth District stated:

> From Davis, Calloway, Hopping and Mancino, we discern that the short list still has only three members: (1) those sentences in excess of the statutory maximum; (2) those sentences that fail to give credit for record jail time; and (3) those sentences that violate double jeopardy by a post sentencing enhancement clear from the record.

Id. at 1185-86.

In Fleming's case, he essentially argues that he is entitled to relief by his motion pursuant to Florida Rule of Criminal Procedure 3.800(a) because the trial court failed to comply with the procedural safeguards set forth in Apprendi and Blakely. As this Court discussed in Carter, 786 So. 2d at 1180-81, this is not an appropriate basis for relief under the rule.

Further, Fleming's request does not meet the criteria of the "short-list" identified in Blakely, 746 So. 2d. Because Fleming's sentence does not "impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances," rule 3.800(a), Florida Rules of Criminal Procedure does not provide him a vehicle by which to obtain relief.

Additionally, Fleming's rule 3.800(b)(2), Florida Rules of Criminal Procedure, motion is likewise 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.
>
> ...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.

Fleming's claims are not of the character that are permitted to be preserved by a rule 3.800(b)(2), 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 Fleming's claims except under a fundamental error standard. When reviewed under the fundamental error standard, as discussed in Hughes and in several federal cases, Fleming is entitled to no relief.

C. Neither Apprendi Nor Blakely Are Applicable to Fleming'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, Fleming had the opportunity to challenge the departure reasons following his original conviction and sentencing in 1997. Fleming made whatever challenges he thought were fit to be made, and the First District affirmed his conviction and sentence. Fleming, 740 So. 2d. Again in June 1, 2001, following his motion to correct illegal sentence pursuant to Heggs, 759 So. 2d, the First District in its opinion specifically noted that Fleming's original sentence was an upward departure sentence supported by

valid reasons and remanded the case for the completion of a new guidelines scoresheet. See Fleming, 808 So. 2d at 287.

As a result, on two separate occasions prior to the decision in Blakely, and on one occasion prior to both Blakely and Apprendi, the trial court's reasons for departure were approved by the appellate court and are, therefore, law of the case. Therefore, the later decision in Blakely is of no consequence because the trial judge did not make new departure findings in violation of the Apprendi or Blakely holdings. Further, Apprendi itself is of no consequence because Apprendi merely held that the sentence could not exceed the statutory maximum for the crime without separate jury findings. In Florida, the applicable statutory maximum is found in section 775.082, Florida Statutes, and Fleming'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.

Finally, while Flemming 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. Fleming is not entitled to receive a second windfall because he simply waited long enough to challenge his sentence under Heggs such that Blakely came to pass.

D. Two of the Departure Reasons Contained in Fleming's Original and Resentencing Departure Orders Were Inherent in the Jury's Verdict.

The trial court found four reasons for departure in 1997. (Ex. D); (R 33). First, the trial court found that the crime was committed in a manner which was heinous, atrocious, or cruel. (Ex. D). Second, the victim suffered permanent physical injury. (Ex. D). Third, the offense was committed in order to prevent or avoid arrest. (Ex. D). Fourth, the primary offense was scored at level 7 or higher and Fleming had been convicted of one or more offenses that scored or would have scored at level 8 or higher. (Ex. D); (Ex. E). The same departure reasons were approved at Fleming's resentencing.

It is obvious that the heinous, atrocious and cruel reason was not found by the jury as a part of jury verdict.[2] However, the second factor, that the victim suffered permanent physical

[2] It should be noted that if this Court applies Blakely and Apprendi to Fleming's resentencing, then this case must be remanded for harmless error analysis. See Galindez. The lower courts could find that a reasonable jury would have found this departure reason beyond a reasonable doubt.

injury, was found by the jury when it found Fleming guilty of the aggravated battery. Aggravated battery in this case required proof that Fleming's actions caused great bodily harm, permanent disability or permanent disfigurement. As admitted by defense counsel at the resentencing, the evidence was that a gun was used in the offense and the victim "suffered permanent injury because she had her ear shot off." (RII 101); see, e.g., Shepard v. United States, 544 U.S. 13, 24-25 (2005)(providing that the defendant's admissions of fact may be used to raise the limit of a federal sentence under the Armed Career Criminal Act). As a result, the jury did find the departure reason beyond a reasonable doubt.

The jury also found the third aggravator beyond a reasonable doubt, that Fleming committed the offense of false imprisonment in order to prevent or avoid arrest. As stated by defense counsel at the resentencing, the basis of the false imprisonment charge was the fact that Fleming held the victim against her will for forty-five minutes before he let her go. (RII 103-04); see, e.g., Shepard, 544 U.S. As a result, the jury did find the departure reason beyond a reasonable doubt.

E. Applying Blakely and Apprendi to Fleming's Case Destroys the State's Interest in the Finality of Fleming's Conviction.

Finally, neither Apprendi nor Blakely should be given what amounts to retroactive application in cases such as Fleming'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 Fleming'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 Fleming'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. 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 Fleming'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).

Conclusion

Based on the foregoing, the State respectfully submits that this Court should reverse the ruling of the First District and find that neither Apprendi nor Blakely apply to resentencings such as the resentencing of the Respondent. Even if this Court

rules that Respondent can challenge his sentence and/or Apprendi and Blakely is applicable, this case is not fully resolved. The case must be remanded for the completion of a harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007)(concluding that harmless error analysis applied to Apprendi/Blakely error and determining that the failure to submit the issue of victim injury points to the jury was harmless); see also Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (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"). Under a harmless error analysis, the lower court must determine if the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factors. Alternatively, this Court should permit the State the opportunity to empanel a jury for purposes of finding the sentencing enhancements beyond as reasonable doubt, should the lower court be unable to determine from the record that the error, if any, was harmless.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Dave Davis, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, 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.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC06-1173

v.

CHRISTIAN FLEMING,

Respondent.

APPENDIX

Ex. A Opinion of the First District

Ex. B Amended Information

Ex. C Verdict

Ex. D Original Judgment and Sentence Entered by the Trial Court

Ex. E Prior Conviction Documents

Ex. F Record on Appeal in Case No. 1D01-2734

Ex. G Order of the First District Directing the State to Respond in Case No. 1D01-2734

Ex. H State's Response to Order to Show Cause in Case No. 1D01-2734