IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC06-1173

v.

CHRISTIAN FLEMING,

Respondent.

PETITIONER'S REPLY BRIEF

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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? (Restated)

The State adopts the arguments contained in its initial brief and files this reply brief to correct the following factual errors and to address appellant's argument that the State failed to preserve its claims.

First, appellant incorrectly states that the State conceded error in the First District. (AB at 5). The State noted in its answer brief in case number 1D05-3411 that the outcome of the case would be controlled by this Court's decision in Galindez v. State, SC05-2047 and noted that Isaac v. State, SC05-2047 was pending in this Court as well. (AB 8). The State merely agreed that a mistake of law had occurred as to one departure reason and that the other three reasons had not been found by a jury. Any statement in the First District's decision in this case indicating that the State conceded error is thus incorrect.

Second, the controlling law in the First District is the First District's decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005). In Isaac, the First District held that the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), applied to resentencing proceedings and that Blakely v. Washington, 542

U.S. 296 (2004), applied retroactively to change the definition of statutory maximum. The State clearly placed is disagreement with the controlling case law in the First District on record in this case. (AB 8, 10). Additionally, the State notes that it was not the appellant below, but rather the appellee. The State is thus entitled to rely on any legal reason to preserve the judgment of the trial court, which was in the State's favor. To take the position to the contrary would result in the undermining of the right for the wrong reason or tipsy coachman doctrine. The State further noted that this case would be controlled by the outcome in Galindez. However, this Court in Galindez declined to reach the merits of the retroactive application argument and reached only the issue of whether harmless error would apply. As a result, the applicability of Apprendi and Blakely to this case would be at the least left to this Court's decision in Isaac.

Finally, the State notes that Fleming has failed to acknowledge that this Court's decision in Galindez had not been applied to Fleming's case. Therefore, if this Court should decline jurisdiction, despite that State's argument to the contrary, this Court should remand this case to the First District for reconsideration and application of the harmless error test in light of its decision in Galindez, and for

reconsideration, if this Court should reach the merits in Isaac or State v. McGriff, SC07-436.

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 furnished to Dave Davis, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on this 6th day of July, 2009.

Respectfully submitted and served,

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[AGO# L06-1-18334]

CERTIFICATE OF COMPLIANCE

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

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