IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1800

WILLIE EARL LUTON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATE STATUTES

STATEMENT OF THE CASE AND FACTS

On October 17, 2002, Defendant was charged by amended information with two counts of aggravated battery with a deadly weapon, attempted robbery with a deadly weapon and possession of a firearm by a convicted felon. Defendant was ultimately tried only on counts two and three of the amended information, in connection with the aggravated battery of Daniel Hernandez, by stabbing him three times with a knife, and the attempted robbery of Daniel Hernandez with a deadly weapon. (R. 6-11, T. 3). Defendant was found guilty as charged in counts two and three. (R. 130 - 132). On October 23, 2003, a sentencing hearing was conducted, at which time Defendant was sentenced as an habitual violent felony offender to thirty years state prison with a ten year minimum mandatory on each count. (R. 130 - 135).

On June 23, 2004, Defendant filed his Initial Brief Of Appellant in the Third District Court of Appeal, case no. 3D03-2956, which was a direct appeal of his conviction. The following day, the United States Supreme Court issued its opinion in Blakely v. Washington, 124 S. Ct. 2531 (2004).

On June 26, 2004, Defendant filed a Motion To Correct Sentencing Error in the trial court, alleging that pursuant to Blakely his habitual violent felony offender sentence presents an issue that should have been presented to a jury. For the

purpose of presenting the sentencing issue to the trial court, Defendant filed a Motion in the appellate court To Withdraw Brief Or Relinquish Jurisdiction in the Third District Court of Appeal. The Third District ultimately allowed the relinquishment and the trial court denied the motion. Defendant was then permitted to file an amended brief which included an issue on the appeal of the trial court's denial of the Blakely issue.

On February 15, 2006, the Third District issued an opinion affirming the convictions and sentences. As to the sentencing issue, the appellate court rejected Defendant's argument that for the purpose of habitual violent offender sentencing, Blakely requires that the jury - not the court - must determine that the defendant committed the current offense during or within five years after completion of incarceration on the qualifying offense and must also determine that the defendant has not received a pardon on the ground of innocence on the qualifying offense, and that a conviction on the qualifying offense has not been set aside in any postconviction proceeding.

As a threshold matter, the court noted that Defendant did not pose any objection in the trial court when the above mentioned determinations were made by the judge, as opposed to the jury. Because there was no timely objection, the court held that the issue was not preserved for appellate review, and cited to McGregor v. State, 789 So.2d 976, 977 (Fla. 2001). The

opinion went on hold that even if the issue had been preserved, it would be without merit. Luton v. State, 934 So.2d (Fla. 3rd DCA 2006). Defendant subsequently filed a Motion For Rehearing Or Clarification Or, In The Alternative, Certification Of Conflict, And For Certification Of Question Of Great Public Importance. The motion suggested that the Court failed to consider that the issue raised on direct appeal was raised in a 3.800 motion. Defendant argued that such motion preserved the issue for appellate review. The Court ordered the State to address Defendant's claim that his Blakely argument was properly preserved.

The State filed a Response to the Motion For Rehearing Or Clarification Or, In The Alternative, Certification Of Conflict, And For Certification Of Question Of Great Public Importance and argued that Defendant's alleged sentencing error was not preserved by the Fla. R. Crim. P. 3.800(b)(2) motion for post conviction relief because the motion was not filed prior to the filing of Defendant's first brief. Furthermore, the State argued that the fact that the opinion in Blakely was not issued until the day after Defendant filed his initial brief has no bearing on the untimely filing of the motion for purposes of preservation. Lastly, although Blakely was not yet issued at the time of Defendant's sentencing, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) was available for Defendant to cite as the

basis for the same objection which he raised under Blakely. However, no such objection was posed, nor was a timely 3.800 motion filed on that basis. Thus, the State argued that the issue was not preserved for appellate review.

On August 9, 2006, the Third District Court Of Appeal denied rehearing, but issued a clarifying opinion, in which it stated:

> By motion for rehearing or clarification or certification, defendant-appellant Luton takes issue with that part of the opinion which indicates that the defendant's argument under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), was not properly preserved for appellate review. The defendant explains that after the appeal had been initiated, he filed a motion to correct sentencing error pending appeal under Florida Rule of Criminal Procedure 3.800(b)(2). In that motion he argued that he was entitled to a jury determination whether he qualified as a habitual violent felony offender ("HVFO"). The trial court denied the Rule 3.800(b)(2) motion and the defendant included the issue in his brief as one of the points on appeal.
>
> We adhere to the view that the defendant did not timely raise this issue below. If a defendant believes that he is entitled to a jury trial on the question whether he qualifies for habitualization, logically he must raise that issue before, not after, the sentencing proceeding. The defendant neither requested a jury nor objected to the trial judge sitting as the trier of fact for purposes of habitual offender sentencing.
>
> The defendant may be arguing that he could not have made a Blakely argument at the time of his sentencing because Blakely had not been decided at that time. The Blakely decision was announced

> after this appeal had commenced. That fact makes no difference. To raise the issue timely, and thus preserve the point for appellate review, the defendant needed to request a jury trial on sentencing, or object to the trial judge sitting as the trier of fact, prior to the sentencing hearing. As stated in an analogous case, "To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (citation omitted).
>
> Since the point was not timely raised in the trial court, it is not properly preserved for appellate review. See § 924.051(1)(b), (3), Fla. Stat. Accordingly, we grant clarification to the extent of this opinion, but deny rehearing and certification.

Luton v. State, 2006 Fla. App. LEXIS 13291, 1-3 (Fla. 3rd DCA 2006).

Petitioner then sought this Court’s discretionary review.

SUMMARY OF ARGUMENT

A. Defendant has failed to properly preserve the claim that, pursuant to Blakely, the determinations for his habitual violent felony offender sentence should have been decided by the jury, instead of the trial judge. In order to raise the claim on direct appeal, Defendant was required to request a jury trial on sentencing or pose a proper objection to the trial judge sitting as the trier of fact on sentencing. Either notification would be required to be made before the sentencing proceeding. Defendant acknowledges that he failed to do so. To effectively preserve the issue, the Defendant had to notify the trial court while the guilt phase jury was still empanelled. Defendant failed to do so. Instead, he claims that his rule 3.800(b)(2) motion preserved the issue. Because Defendant's claim implicates the guilt phase jury, the matter is no longer within the realm of a sentencing error. Thus, a rule 3.800(b)(2) motion would not adequately preserve the issue.

B. Even if Defendant's claim was a sentencing issue which could be preserved by way of a rule 3.800(b)(2) motion, Defendant's motion still would not have effectively preserved the issue, because it was not timely filed. Defendant acknowledges that he did not request a jury trial on sentencing or object prior to sentencing to the trial judge sitting as the

trier of fact on habitual sentencing factors. Instead, Defendant filed a 3.800(b)(2) motion, but it was untimely. The governing rule expressly states that such motion must be filed prior to Defendant serving his initial brief. Defendant's motion was not filed until days after the service of his brief. Thus, Defendant's claim could not be preserved based on Defendant's argument.

C. Defendant's Blakely claim does not constitute fundamental error. Thus, it must be preserved for appellate review.

D. Aside from the procedural bar to this issue, this claim has no merit. The trial court's determination of whether Defendant committed the current offense within five years after incarceration on the qualifying offense, whether Defendant received a pardon on the qualifying offense, or whether a conviction on the qualifying offense was set aside in a postconviction proceeding was proper. Such determinations are not in violation of Blakely because they are all derivative of the prior conviction. Thus, they fall under Apprendi's prior conviction exception.

E. Lastly, any claimed error would be harmless beyond a reasonable doubt, as the validity of the HVFO sentencing factors which were determined by the trial court was undisputed.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN DENYING DEFENDANT'S BLAKELY ISSUE REGARDING JURY FINDINGS FOR SENTENCING AS A HABITUAL VIOLENT FELONY OFFFENDER WHERE IT WAS NOT PRESERVED BY REQUESTING A JURY TRIAL ON SENTENCING OR BY OBJECTING TO THE TRIAL COURT SITTING AS THE TRIER OF FACT FOR HABITUAL OFFENDER SENTENCING DETERMINATIONS AND WAS WITHOUT MERIT.

A: CLAIMED ERROR IS NOT A SENTENCING ERROR

Defendant argues that the Third District Court of Appeal erred in finding that his Blakely[1] claim, as asserted in his 3.800(b)(2) motion to correct sentencing error, was not preserved for appellate review due to his failure to raise an objection prior to sentencing. Defendant characterizes the appellate court's opinion below as creating a more restrictive procedure for appealing Habitual Violent Felony Offender ("HVFO") sentencing errors based on a lack of jury findings because it precludes preservation for direct review by way of 3.800(b)(2) motion, and only allows for review where a request for a jury trial on sentencing or an objection to the trial court sitting as the trier of fact for habitualization determinations was made *prior* to the sentencing proceeding. Defendant's argument is without merit.

[1] Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Although Apprendi and Blakely are related to sentencing questions, the request for a jury determination needs to be made prior to sentencing for multiple reasons. First, once the jury determining guilt is discharged, any assertion of the right to a jury determination of sentencing facts would then necessitate the empanelling of a second jury, after prolonged jury selection, for a brief presentation and determination regarding facts related to prior convictions, release dates, the absence of any pardon and the absence of any overturning of those convictions. While the guilt phase jury most likely should not hear such matters during deliberations as to guilt or innocence, as such matters could prejudice the defendant at that stage, such matters could, if necessary, be heard through a bifurcated proceeding, immediately following jury selection, and prior to the discharge of the jury. Any contrary procedure places a tremendous additional burden and tremendous additional cost on the judicial system, as it necessitates a second jury selection process and the empanelling of a second jury for a very limited purpose.

Accordingly, this is not a mere sentencing issue under Rule 3.800(b)(2); it is an issue which implicates the jury which determined guilt and the issue is therefore one which requires preservation by a timely objection or request for a jury

determination.[2] Rule 3.800(b)(2) should not be utilized in a manner that circumvents such preservation requirements.

Thus, the Third District's opinion correctly holds that such request for a jury trial on sentencing or objection to the judge determining the pertinent HVFO sentencing facts had to be raised prior to the sentencing proceedings in order to preserve the error for direct appeal. As Defendant does not dispute that this was not done, the issue was not preserved for direct appeal.

B: DEFENDANT'S 3.800(b)(2) MOTION WAS UNTIMELY

Although the State maintains that the claim raised by Defendant is not a sentencing error, even if it was a sentencing error it would not be properly preserved by Defendant's rule 3.800(b)(2) motion. Defendant stated that the purpose of the amended version of Fla. R. Crim. P. 3.800(b) was to provide defendants with the opportunity to raise sentencing errors on appeal. Amendments to Fla. Rule of Appellate Procedure 9.090(g) and Fla. Rule of Crim. Procedure 3.800, 675 So.2d 1374 (Fla. 1996); Amendments to Fla. Rule of Crim.Procedure 3.800, 685 So.2d 1253 (Fla. 1996); Amendments to Fla. Rules of Crim. Procedure 3.111(e) and 3.800 and Fla. Rules of Appellate

[2] As noted in section D of this brief, a jury determination at all and the preservation issue is purely academic.

Procedure 9.020(h), 9.140, and 9.600, 761 So.2d 1015 (Fla. 1999); Amendments to Fla. Rules of Crim. Procedure 3.111(e) & 3.800 & Fla. Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1017-18 (Fla. 2000) (hereinafter Amendments II). The objective of Fla. R. Crim. P. 3.800(b) was to allow a defendant to preserve an otherwise unpreserved sentencing error. Davis v. State, 868 So.2d 647 (Fla. 5th DCA 2004) quashed on other grounds, 887 So.2d 1286 (Fla. 2004).

As of January 2000, appellate counsel have had the procedures set forth in rule 3.800(b)(2) available to ensure that sentencing issues are properly preserved before they are presented to the appellate court. Rydberg v. State, 891 So.2d 572 (Fla. 2nd DCA 2004). Defendant cites to several cases for the proposition that, in the absence of an objection at sentencing, a 3.800(b)(2) motion will suffice to preserve an otherwise un-preserved error. However, throughout his entire brief, Defendant failed to acknowledge that his 3.800(b)(2) motion was not properly filed, as it was not served *before* Defendant served his first brief. Instead, Defendant's recitation of the facts vaguely represents that he filed a motion to correct sentencing error "[w]hile his appeal was pending." (Page 1 of Defendant's Brief On The Merits). The fact that the opinion in Blakely was not issued until the day after

he filed his initial brief has no bearing on the untimely filing of the motion for purposes of preservation.[3]

Defendant appears to overlook the fact that 3.800(b) is a rule of *procedure*. Accordingly, the rule expressly mandates how and when the motion is to be filed. Florida Rule of Criminal Procedure 3.800(b)(2) provides as follows:

> (2) Motion Pending Appeal. --If an appeal is pending, a defendant or the State may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellate counsel and **must be served before the party's first brief is served**. A notice of pending motion to correct sentencing error shall be filed in the appellate court, which notice automatically shall extend the time for the filing of the brief until 10 days after the clerk of circuit court transmits the supplemental record under Florida Rule of Appellate Procedure 9.140(f)(6).

Fla. R. Crim. P. 3.800. (Emphasis added).

In its opinion in Maddox v. State, 760 So.2d 89 (Fla. 2000), the Court reaffirmed that in cases in which the initial

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[3] Mitchell v. Moore, 786 So. 2d 521, 530 n.8 (Fla. 2001) (recognizing that the "pipeline" theory allows a defendant to seek application of a new rule of law if the case is pending on direct review or not yet final and the defendant timely objected in the trial court if an objection was necessary to preserve the issue for appellate review); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). In Evans v. State, 946 So. 2d 1, 15-16 (Fla. 2006), rehearing denied, 2006 Fla. LEXIS 3043 (Fla. 2006), Evans argued that Florida's death penalty statute, as applied to him, was unconstitutional pursuant to Apprendi and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Although Evans' direct appeal was in the "pipeline" when Ring was decided in 2002, the Court held that the claim was procedurally barred because Evans did not preserve the claim by challenging the constitutionality of Florida's sentencing scheme both at trial and on direct appeal.

brief is filed after the effective date of Amendments II, a defendant is required to have objected at sentencing or utilize rule 3.800(b) to preserve all sentencing errors, including fundamental sentencing errors, for appeal. The only case law which has permitted an exception to the rule 3.800(b)(2) requirement that the motion be filed **before** the initial brief has occurred in cases where appellate counsel's initial brief was filed pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967)) and the appellate court subsequently issues an order allowing a defendant to file a pro se initial brief. In Anders cases in which the defendant has been given the opportunity to file a pro se brief, it is the pro se brief, and not the Anders brief, which is considered the "party's first brief" for purposes of rule 3.800(b)(2). Proctor v. State, 901 So.2d 994 (Fla. 1st DCA 2005), Lopez v. State, 905 So.2d 1045, 1047 (Fla. 2d DCA 2005).

In addition to the above district court cases, the only time that this Court permitted review of an issue where the 3.800(b)(2) motion was filed after the initial brief was in Harvey v. State, 848 So.2d 1060 (Fla. 2003) which involved a Heggs[4] challenge. The Court held that the defendant's filing of a rule 3.800(b)(2) motion prior to the filing of the initial brief would have been futile because at that time the trial court

[4] Heggs v. State, 759 So. 2d 620 (Fla. 2000).

would have been required to deny the motion pursuant to the then controlling First District precedent which upheld the sentencing law. The law was subsequently declared invalid by Heggs for being in violation of the single-subject requirement.

However, rule 9.140(e) provides that "[a] sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to [rule] 3.800(b). Thus, subsequent to Harvey, the Court held in Brannon v. State, 850 So.2d 452, 456 (Fla. 2003), that the failure to preserve a fundamental sentencing error by a rule 3.800(b) motion or by objection during the sentencing hearing forecloses a defendant from raising the error on direct appeal. Thus, the Court deemed Harvey to be an exception which applied only to a facial challenge to the constitutionality of a sentencing statute that, at the time the initial appellate brief was filed, had not been declared unconstitutional in any appellate decision binding on the trial court. Id. at 458. Clearly, no such exception applies to the case at bar.

Defendant has not acknowledged that his 3.800(b)(2) was untimely and thus could not have preserved the issue for direct appeal. Instead, in furtherance of his preservation argument, Defendant also argues that the opinion unduly burdens trial counsel with the responsibility of having to pose such

objections at trial. Clearly, the Third District is well aware of, and respectful of, the purpose of rule 3.800(b)(2). The Third District's opinion in James v. State, 932 So.2d 431, 433 (Fla. 3rd DCA 2006), which was issued subsequent to Luton, quoted this Court's opinion in Brannon as authority for the principle that rule 3.800(b)(2) provides a reliable mechanism to preserve sentencing errors for appellate review. The Third District specifically quoted the Court by stating that the rule gives "appellate counsel, with expertise in detecting sentencing error, the opportunity to identify any sentencing errors and a method to correct these errors and preserve them for appeal." Brannon, 850 So.2d at 455. However, as argued in section "A" of this brief, because the claim is outside the realm of a true sentencing error the only way it can effectively be preserved is by the appropriate jury request or objection by trial counsel prior to sentencing.

Nevertheless, even if this was a sentencing error, due to Defendant's conceded lack of any objection whatsoever at trial, and the established untimeliness of his motion, the issue was not preserved for direct review.

C: THE ISSUE DOES NOT CONSTITUTE FUNDAMENTAL ERROR

In the alternative, Defendant argues that even if the issue was not preserved, it should be considered as fundamental error.

Defendant acknowledges that in holding that an Apprendi claim must be preserved for appellate review, this Court in McGregor rejected the argument that such a claim constitutes fundamental error. However, Defendant goes on to argue that because McGregor was decided prior to Blakely, this Court should reconsider the issue in light of Blakely. There is no need to do so. Blakely merely clarified Apprendi. The only difference between Apprendi and Blakely is that Apprendi was construed as applying only to sentences that exceed the statutory maximum and Blakely applies to sentences that exceed the guideline caps. Accordingly, there is no reason for McGregor to be reinterpreted in light of Blakely.

Moreover, in United States v. Dowling, 403 F.3d 1242, 1246 (11th Cir.), cert denied, 126 S. Ct. 462, 163 L. Ed. 2d 351 (2005) the Eleventh Circuit held that in order to preserve error under Apprendi/Blakely/Booker, a defendant must object with reference to the Sixth Amendment or the Apprendi line of cases or must challenge "the role of the judge as fact-finder with respect to sentencing facts. Clearly, Apprendi and it progeny are all considered similarly for the purpose of requiring preservation.

As pointed out by this Court in Hughes, the First District stated, "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." Hughes, 826 So. 2d at 1074. Hughes v. State, 901 So. 2d 837, 844 (Fla. 2005); Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Therefore, the Blakely claim does not constitute a fundamental error. Clearly, it is not enough for the subject case to have been pending on appeal when Blakely was decided in order for it to be in the pipeline and have Blakely apply to its appeal. Instead, the issue had to be properly raised at trial, as delineated herein, and on direct appeal. As Defendant has failed to preserve the issue at trial due to his failure to timely request a jury trial on sentencing, raise an objection to the trial court determining HVFO sentencing facts or timely file a motion (if the issue is deemed to be a sentencing issue), the issue cannot be raised on direct appeal.

D: LACK OF MERIT

Moreover, the issue of preservation is academic and futile to Defendant's case, as it is without merit. As was reiterated by the Court in Hughes v. State, 901 So. 2d 837 (Fla. 2005):

> the holding in Apprendi is that "**other than the fact of a prior conviction**, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The decision in Apprendi was intended to guard against erosion of the Sixth Amendment's guarantee of the right to jury trial, by requiring that a jury decide the facts supporting a sentence that exceeds the statutory maximum

Id at 840-841 (emphasis added). The Defendant loses sight of the fact that Apprendi does not apply to the fact of a prior conviction.

Sentence enhancements under the various provisions of the habitual offender statute meet the requirements of Apprendi and Blakely because the enhancements are based solely on prior convictions. Tillman v. State, 900 So. 2d 633 (Fla. 2d DCA 2005); Grant v. State, 815 So. 2d 667, 668 n.3 (Fla. 2d DCA 2002); Matthews v. State, 891 So. 2d 596 (Fla. 3d DCA 2004); Frumenti v. State, 885 So. 2d 924 (Fla. 5th DCA 2004); McBride v. State, 884 So. 2d 476 (Fla. 4th DCA 2004); Fyler v. State, 852 So. 2d 442 (Fla. 5th DCA 2003); Jones v. State, 791 So. 2d 580 (Fla. 1st DCA 2001); Saldo v. State, 789 So. 2d 1150 (Fla. 3d DCA 2001); Dennis v. State, 784 So. 2d 551 (Fla. 4th DCA 2001); Gordon v. State, 787 So. 2d 892 (Fla. 4th DCA 2001).

Apprendi exempted prior convictions from facts that must be submitted to a jury because they increase the penalty for a crime. 530 U.S. at 490. Thereafter, this Court held that the sentencing enhancement scheme found in the Prison Releasee Reoffender Act (PRR), which is similar to HVFO sentencing, is unaffected by Apprendi. Robinson v. State, 793 So. 2d 891, 893 (Fla. 2001) (holding that Florida's PRR statute is not invalidated by Apprendi: proof to the jury of a defendant's

release which subjects a defendant to a sentence under the Act is not required.); Parker v. State, 790 So. 2d 1033, 1035-36 (Fla. 2001); McGregor v. State, 789 So. 2d 976, 977-78 (Fla. 2001); Sheffield v. State, 794 So. 2d 592, 594 (Fla. 2001); Barnes v. State, 794 So. 2d 590, 592 (Fla. 2001); Smith v. State, 793 So. 2d 889, 891 (Fla. 2001); Marshall v. State, 789 So. 2d 969, 970-71 (Fla. 2001); McDowell v. State, 789 So. 2d 956, 957 (Fla. 2001); Sheffield v. State, 789 So. 2d 340, 342 (Fla. 2001); Balkcom v. State, 789 So. 2d 949, 950-51 (Fla. 2000). Thus, the Court in Gudinas v. State, 879 So. 2d 616, 618-619 (Fla. 2004), found that HVFO sentencing does not violate Apprendi. Likewise, in Sheffield v. State, 903 So.2d 1009 (Fla. 2005), the Court held that the defendant's Apprendi/Blakely claim was not applicable to HVFO sentencing.

Despite the already clear authority that Defendant was properly sentenced, Defendant argues that the jury, and not the judge, should have determined whether he qualified as an habitual violent felony offender, pursuant to § 775.084(1)(b)2,[5].

[5] § 775.084(1)(b)2, provides:

The felony for which the defendant is to be sentenced was committed:

a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for an enumerated felony; or

As in this Court's opinion in McGregor v. State, 789 So.2d 976 (Fla. 2001), Defendant's claim is clearly without merit. Based on Apprendi, McGregor argued that because sentencing under the Prison Releasee Reoffender Act,[6] requires that a defendant "commit[], or attempt[] to commit" any of an enumerated list of crimes "within 3 years of being released from a state correctional facility, the reasoning in Apprendi requires that a defendant's release be proved to a jury beyond a reasonable doubt. The Court held that an Apprendi claim must be preserved for review and expressly rejected the assertion that such error is fundamental. In addition to the finding on lack of preservation, the Court expressly disagreed with McGregor's argument and held that Apprendi does not require that the date of release be proved to a jury. As there is no appreciable

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b. Within 5 years of the date of the conviction of the last prior enumerated felony, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole, or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for an enumerated felony, whichever is later.

3. The defendant has not received a pardon on the ground of innocence for any crime that is necessary for the operation of this paragraph.

4. A conviction of a crime necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

[6] Fla. Stat. ch. 775.082(9) (1998).

difference between Apprendi and Blakely, this finding should extend to Defendant's Blakely claim as well.[7]

Subsequent to McGregor, district courts of appeal throughout the State have upheld various portions of the habitual offender provisions, despite the allegation of claims similar to that raised by Defendant herein. In Tillman v. State, 900 So.2d 633 (Fla. 2d DCA 2005), the defendant was sentenced under the habitual offender statute and argued that Blakely and Apprendi required the jury to determine, among other things, that the charged offense either occurred within five years of his prior felony conviction or his release from his imprisonment for that conviction. The appellate court held that Blakely does not require the jury to make such a factual determination. Id. at 634. In Gurley v. State, 906 So.2d 1264, 1265 (Fla. 4th DCA 2005), the Fourth District held that for the purpose of applying Apprendi and Blakely, the date of a defendant's release from prison under the prison releasee reoffender statute is analogous to the fact of a prior conviction under the habitual felony offender statute.").

[7] The only difference between Apprendi and Blakely is that Apprendi was construed as applying only to sentences that exceed the statutory maximum and Blakely applies to sentences that exceed the guideline caps. Accordingly, there is no reason for McGregor to be reinterpreted in light of Blakely.

Likewise, in Calloway v. State, 914 So.2d 12 (Fla. 2d DCA 2005), cert. denied, 126 S. Ct. 1794 (2006); the Second District applied the rationale of Tillman, and concluded that Calloway's date of release from prison is a part of his prior record. Accordingly, it does not need to be presented to a jury and proved beyond a reasonable doubt. In so holding, the court recognized that the fact of Calloway's date of release from his prior prison sentence is not identical to the bare fact of a prior conviction, but it concluded that it is "directly derivative of a prior conviction and therefore does not implicate Sixth Amendment protections." Id. at 14.

In support of its conclusion, the Calloway opinion cited to United States v. Pineda-Rodriquez, 133 F. App'x 455, 458 (10th Cir. 2005), which held that the fact of the date of defendant's release from custody and the fact that defendant was on supervision during commission of the instant offense fall under the prior conviction exception because they are "subsidiary findings" that are "merely aspects of the defendant's recidivist potential, . . . easily verified, and . . . require[] nothing more than official records, a calendar, and the most self-evident mathematical computation"). The court also cited to United States v. Garcia-Rodriquez, 127 F. App'x 440, 451 (10th Cir. 2005), which held that the prior conviction exception of Apprendi permits a court to find facts "intimately related" to

the underlying prior conviction, such as whether the defendant is the same person who committed the prior crimes.

Additionally, the Eleventh Circuit held that Blakely, like Apprendi, does not require a jury to find beyond a reasonable doubt that a defendant had prior convictions for the purpose of sentence enhancement. United States v. Marseille, 377 F.3d 1249, 1258 n.14 (11th Cir. 2004)(although the district court found that defendant had prior convictions, Blakely does not take such fact-finding out of the hands of the courts).

Thus, there is no authority to support Defendant's claim that the jury should have determined that he committed the current offense within five years after completion of incarceration on the qualifying offense, that he has not received a pardon on the ground of innocence on the qualifying offense, and that a conviction on the qualifying offense has not been set aside in any postconviction proceeding. Instead, the various decisions throughout the State, as well as controlling federal authority, support the Third District's opinion on the merits, as set forth in the initial opinion, which stated:

> The determination that a prior conviction exists necessarily includes the question whether that conviction has been pardoned or set aside. The determination that a prior conviction exists also includes the relevant historical facts about the conviction: the date of the prior conviction, the sentence punishment imposed, and the date of the defendant's end of sentence or release from

> supervision. The Blakely decision does not require that such findings be made by the jury.

Luton v. State, 934 So.2d 7, 10 (Fla. 3rd DCA 2006).

E: HARMLESS ERROR

Even if, for the sake of argument, Apprendi and Blakely did apply to Defendant's sentence, and the determinations as to the time frame of the prior convictions and whether Defendant received a pardon or postconviction relief as to any of the prior convictions were to be made by a jury, Defendant has never claimed that the result would be different. Defendant's Motion To Correct Sentencing Error did not allege that Defendant did not commit the current offense during or within five years after completion of incarceration on the qualifying offense or that he received a pardon on the ground of innocence on the qualifying offense, or that a conviction on the qualifying offense has been set aside in any postconviction proceeding.

Instead, the motion merely alleges that his HVFO sentence was improper because the determinations for HVFO sentencing were made by the trial court, as opposed to being made by a jury beyond a reasonable doubt. (S.R. 1 – 3). The court's determinations were made based on documentation which was clearly verifiable and without dispute. In United States v. Cotton, 535 U.S. 625, 152 L. Ed. 2d 860, 122 S. Ct. 1781 (2002),

the United States Supreme Court held that Apprendi error may be deemed harmless where there is "'no basis for concluding that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.''" Id. at 869. Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); Galindez v. State, 2007 Fla. LEXIS 288 (Fla. 2007); Hughes at 844; State v. Delva, 575 So.2d 643, 645 (Fla. 1991) (stating that the failure "to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error" and is subject to the contemporaneous objection rule); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Even if Defendant's argument was correct, any error would be harmless as there was no challenge to the validity of the underlying factors. Accordingly, the failure to have the sentencing facts technically acknowledged by the jury as opposed to the trial court, would be harmless beyond a reasonable doubt in this case.

CONCLUSION

Based on the foregoing, the Third District's opinion should be affirmed, as Defendant failed to preserve his issue for appeal and the issue is clearly without merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent On The Merits was mailed this 5th day of April, 2007 to ANTHONY C. MUSTO, P.O. Box 2956, Hallendale Beach, Florida, 33008-2956.

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LINDA S. KATZ

CERTIFICATE REGARDING FONT SIZE AND TYPE

I hereby certify that the foregoing Brief has been typed in Courier New, 12-point type, in compliance with the Florida Rules of Appellate Procedure.

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LINDA S. KATZ