IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1800

WILLIE EARL LUTON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner Willie Earl Luton was the defendant in the trial court and the appellant on appeal. Respondent State of Florida was the prosecution in the trial court and the appellee on appeal. The parties will be referred to in this brief as "Mr. Luton" and "the state." The symbol "R" will constitute a reference to the record on appeal. The symbol "SR" will constitute a reference to the supplemental record on appeal. The symbol "SR2" will constitute a reference to the second supplemental record on appeal. The symbol "T" will constitute a reference to the transcript of trial proceedings.

STATEMENT OF THE CASE AND FACTS

Pursuant to a jury trial (T 1-368), Mr. Luton was convicted in the Circuit Court for the Eleventh Judicial Circuit of Florida of aggravated battery (T 364; R 85) and attempted robbery while carrying or possessing a deadly weapon (T 365; R 86).

While his appeal was pending in the Third District Court of Appeal, Mr. Luton filed a motion to correct sentencing error in the trial court (SR2 1-3). The motion asserted that his habitual violent felony offender sentence was unlawful under the dictates of *Blakely v. Washington*, 542 U.S. 296 (2004), which was decided while the appeal was pending, in that there had been no jury determination that the statutory requirements for such

sentencing had been met (SR2 2-3).[1] The state filed a response, which argued only that the sentence was not illegal, not that the issue could not properly be raised in a motion to correct sentencing error (SR2 5-6). The trial court denied the motion (SR2 7).

Mr. Luton then filed an amended initial brief[2] in the district court in which he raised, among other claims, the *Blakely* issue, asserting that the trial court erred in sentencing him and in denying his motion to correct sentencing error. Amended Initial Brief of Appellant, p. ii, 39, 42. The state filed an answer brief in which it addressed only the merits of Mr. Luton's claim. Brief of Appellee, p. 35. It specifically rephrased Mr. Luton's point in a manner that stated the issue solely as one dealing with the denial of the motion to correct sentencing error. Brief of Appellee, p. i, 35. It did not in any respect raise any claim regarding preservation, nor did it in any way argue, suggest, or even imply that Mr. Luton's

[1] Mr. Luton did not stipulate to the existence of the relevant factors, so this determination was made after a hearing at which the state presented evidence (R 145-185).

[2] The day after Mr. Luton's initial brief was filed, *Blakely* was decided. Two days later, Mr. Luton filed a motion to withdraw his brief in order to file a motion to correct sentencing error, or, alternatively, to allow relinquishment of jurisdiction. In a response to Mr. Luton's motion, the state objected solely on the ground that the motion to correct sentencing error would be without merit substantively. It in no way suggested that the procedure proposed by Mr. Luton was improper. The district court granted Mr. Luton's motion and allowed him to file an amended or supplemental brief within 30 days.

motion to correct sentencing error was improper, untimely, or in any way deficient.

Addressing the *Blakely* issue in an initial opinion, the district court stated:

> First, the defendant made no objection in the trial court that the jury, rather than the judge, must determine whether the defendant qualified as a HVFO. Since there was no timely objection to the trial court sitting as the trier of fact on the habitualization issue, the point is not properly preserved for appellate review. *See McGregor v. State*, 789 So. 2d 976, 977 (Fla. 2001).[3]

Luton v. State, 934 So. 2d 7, 9 (Fla. 3d DCA 2006).

Mr. Luton filed a motion for rehearing or clarification in which he asserted that the issue had been preserved by the motion to correct sentencing error. In a response, the state maintained that Mr. Luton's motion to correct sentencing error had been untimely, but did not argue that the issue was one which could not be raised in such a motion.

In a second opinion granting clarification and denying rehearing, the district court rejected Mr. Luton's preservation argument, stating, 934 So. 2d at 10:

> 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

[3] The district court went on to also reject Mr. Luton's argument on the merits. 934 So. 2d at 9-10.

> 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. …

934 So. 2d at 10.

The present proceeding follows.

SUMMARY OF ARGUMENT

This court has consistently and repeatedly indicated that a primary purpose of a motion to correct sentencing error is to allow a defendant to preserve a sentencing issue, and it has made clear that the rule authorizing such motions applies to *all* sentencing errors and can be used to correct *any type* of sentencing error. Thus, the decision under review, which requires defendants who wish to raise claims that they were entitled to have juries determine whether the factors necessary for habitual violent offender sentencing were shown, is inconsistent with binding precedent from this court.

Moreover, carving out an exception for one type of issue by caselaw would be terribly unfair. The bar has accepted and relied upon the system established by this court. Trial lawyers understandably approach cases with the assumption that they will not have to preserve sentencing errors and appellate attorneys accept the responsibility for asserting such claims. Indeed, this court envisioned exactly such a division of responsibility. To determine by a decision in one particular appeal that this burden should be returned to trial attorneys for one particular type of error is to leave defendants, such as Mr. Luton, whose attorneys relied on the plain wording of the rule, which includes no exceptions, and the indications by this court, which indicate that there are none, with no remedies.

It should also be realized that the approach taken by the Third District in the present case is inconsistent with that taken by the other district courts of appeal in cases involving claims similar to that raised by Mr. Luton and also inconsistent with prior Third District decisions as well. It additionally defies logic to impose a stricter preservation requirement on an issue involving the fundamental right to trial by jury than exists with regards to less significant matters.

As to the merits of Mr. Luton's claim, the decision in *Blakely v. Washington*, 542 U.S. 296 (200$), makes it clear that a habitual violent felony offender sentence may be imposed only

when a jury finds that the statutory requirements for such sentencing, other than the fact of the necessary prior conviction, exist. Here, those requirements, which consist of the lack of a pardon, the fact that the sentence has not been set aside, and the fact that the offense for which the sentence is being imposed occurred within the time frame set forth, were found to exist by the trial court, not the jury. Therefore, the trial court erred in imposing the sentence in the present case and in denying Mr. Luton's motion to correct sentencing error.

While Mr. Luton contends that this conclusion is mandated as to each of the above sentencing factors, he submits that it is particularly compelled with regard to time frame for the commission of an offense for which sentence is being imposed, here the period of five years from a defendant's last conviction or release from custody. It is a factor that hinges on the offense for which a defendant is being sentenced, not one that is already in place prior to the commission of that offense. It is therefore a factor which is within a defendant's control. Choosing to commit a crime on a certain date is no different than choosing to do so with a gun or under other circumstances which could lead to an enhanced sentence. The other factors all at least relate solely to the prior offense. Thus, while Mr. Luton asserts because they are elements over and above the mere fact of the prior conviction, he had a right under *Blakely* to

have the jury determine whether they were shown, he further submits that an even stronger rationale exists for such a conclusion with regard to the necessary timeframe.

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING, DESPITE THE FACT THAT MR. LUTON ASSERTED IN A MOTION TO CORRECT SENTENCING ERROR HIS CLAIM THAT THE DECISION IN *BLAKELY V. WASHINGTON*, 542 U.S. 296 (2004) REQUIRED A JURY TO FIND THE EXISTENCE OF THE NECESSARY FACTORS FOR HABITUAL VIOLENT FELONY OFFENDER SENTENCING, THAT THE ISSUE WAS NOT PRESERVED DUE TO THE FACT THAT MR. LUTON DID NOT RAISE IT PRIOR TO HIS SENTENCING HEARING.

In *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996) [*Amendments I*], this court created a procedural mechanism specifically designed to allow persons who have been convicted of criminal offenses to assert claims of sentencing errors.

Specifically, this court adopted a new version of Fla. R. Crim. P. 3.800(b), which authorized such defendants to file motions to correct sentencing errors within 10 days of rendition of sentence. 675 So. 2d at 1375. In doing so, this court stated, "The purpose of these amendments is to ensure that a defendant will have the opportunity to raise sentencing errors on appeal." *Id.* This court's statement was entirely consistent with the Commentary to the rule, which stated, "*Subdivision (b) was added and existing subdivision (b) was renumbered as*

subdivision (c) in order to authorize the filing of a motion to correct a sentence or order of probation, thereby providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied." Id. Shortly thereafter, the time period for filing the motion was lengthened to 30 days. *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253 (Fla. 1996) [*Amendments II*].

In *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103, 1105 (Fla. 1996) [*Amendments III*], this court reiterated the purpose behind the creation of motions to correct sentencing errors, stating, "Because many sentencing errors are not immediately apparent at sentencing, we felt that this rule would provide an avenue to preserve sentencing errors and thereby appeal them."

Subsequently, this court "significantly expand[ed]," the period in which a motion to correct a sentencing error can be filed in the trial court, *Amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600,* 761 So. 2d 1015, 1018 (Fla. 1999) [*Amendments IV*], creating Fla. R. Crim. P. 3.800(b)(2), which authorizes such motions while appeals are pending. 761 So. 2d at 1022.

In doing so, this court once again revisited the reasons why it approved the rule establishing motions to correct

sentencing errors. This court specifically noted that it did so to accomplish two purposes, allowing for the correction of sentencing errors at the earliest opportunity and "giv[ing] defendants a means to preserve these errors for appellate review." *Id.* at 1016. It went on to refer to the procedure the rule authorizes as a "procedural mechanism through which defendants may present their sentencing errors to the trial court and thereby preserve them for appellate review." *Id.* at 1017-1018. It then discussed the impact of allowing motions to be filed while appeals are pending (and of depriving trial courts of the authority under Fla. R. Crim. P. 3.800(a) to act on motions to correct illegal sentences during that time), stating:

> [T]he amended rule is intended to provide one mechanism whereby all sentencing errors may be preserved for appellate review. … The amendment to rule 3.800(a) will make it clear that a rule 3.800(b) motion can be used to correct any type of sentencing error, whether we had formerly called that error erroneous, unlawful, or illegal.

761 So. 2d at 1019.

In concluding, this court additionally noted that "these amendments will help preserve the public trust and confidence in the judicial process that might be undermined if defendants are not provided with a meaningful mechanism in which to correct and preserve for appellate review sentencing errors." *Id*. at 1020.

Also recognizing the rationale behind Rule 3.800(b) was the decision in *Davis v. State*, 868 So. 2d 647, 649 (Fla. 5th DCA 2004), *quashed on other grounds*, 887 So. 2d 1286 (Fla. 2004), in which the Fifth District Court of Appeal noted that "a principal objective of this rule is to allow a defendant to preserve an otherwise unpreserved error."

Despite this line of authority, the Third District Court of Appeal in the present case found that assertions that error occurred because juries did not make the constitutionally required findings necessary to support habitual offender sentencing, as required by *Blakely v. Washington*, 542 U.S. 296 (2004), cannot be raised in a motion to correct sentencing error. *Luton v. State*, 934 So. 2d 7, 10 (Fla. 3d DCA 2006). It did so despite the fact that the state never asserted that position, not even in its response filed after the district court's initial opinion finding the error to be unpreserved.

The district court gave no reason for its determination, instead simply stating that its belief that Mr. Luton did not timely raise the issue and that "logically" a defendant must raise the issue before sentencing. *Id.* For each of several

reasons, it should be concluded that the district court erred in reaching its conclusion.[4]

In the first place, as is obvious from the above discussion, this court has consistently and repeatedly indicated that a primary purpose of a motion to correct sentencing error is to allow a defendant to preserve a sentencing issue, and it has made clear that Rule 3.800(b) applies to *all* sentencing errors and can be used to correct *any type* of sentencing error. *Amendments IV*, 761 So. 2d at 1019. Thus, the decision under review is inconsistent with binding precedent from this court.

Second, departing from the established approach by carving out an exception for one type of issue, unless done in a rule amendment and applicable only to cases arising thereafter, would be terribly unfair. The bar has accepted and relied upon the system established by the above authorities. Trial lawyers understandably approach cases with the assumption that they will not have to preserve sentencing errors and appellate attorneys accept the responsibility for asserting such claims. Indeed, this court envisioned exactly such a division of responsibility, noting in *Amendments IV* that "trial counsel have come to rely upon appellate counsel to detect these [sentencing] errors and raise them on appeal," 761 So. 2d at 1017, and pointing out that

[4] This "issue involves the interpretation of the Court's rules and is a question of law subject to de novo review." *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006).

"an advantage of this amendment is that it will give appellate counsel, with expertise in detecting sentencing errors, the opportunity to identify any sentencing errors and a method to correct these errors and preserve them for appeal."[5] *Id*. at 1018.

Thus, to determine by a decision in one particular appeal that this burden should be returned to trial attorneys for one particular type of error is to leave defendants, such as Mr. Luton, whose attorneys relied on the plain wording of the rule, which includes no exceptions, and the indications by this court, which indicate that there are none, with no remedies.[6] Mr. Luton suggests that if there are reasons for a different approach to be taken with regard to the type of error involved here, a proposal should be made to change the rule, so that it can be fully and properly considered, and so that, if a change is made, the trial attorneys of this state will be made aware

[5] This consideration would seem to be of particular significance in the present case because the decision on which the Mr. Luton's motion to correct sentencing error was not issued until after he was sentenced and his case was already on appeal.

[6] Accentuating the unfairness of the Third District's approach is the fact that decision under review not only places the burden of raising the issue on trial attorneys, but it requires those attorneys to do so, not at sentencing, but "prior to the sentencing hearing." 794 So. 2d at 10. Thus, the district court has turned the contemporaneous objection rule into an anticipatory objection rule. Even trial attorneys who may have made *Blakely* objections are unlikely to have made them prior to the sentencing hearings, so it unlikely that any defendant sentenced before the district court decision in this case will have preserved any *Blakely* claim he or she might have.

that they are being given a new responsibility. Until and unless such a rule change is made, defendants in the situation Mr. Luton finds himself should have the right to avail themselves of the existing process.

Third, the Third District's decision in the present case is inconsistent with the approach taken by the other district courts of appeal. As noted above, the Fifth District has expressed sentiments similar to those of this court with regard to the purpose of motions to correct sentencing error. Moreover, the appellate courts have consistently considered *Blakely* issues in cases in which they were first raised after sentencing in either a motion to correct sentencing error or a motion to correct illegal sentence. *See, e.g., Morrow v. State*, ___ So. 2d ___, 31 Fla. L. Weekly D466 (Fla. 1st DCA Feb. 13, 2006); *Glennon v. State*, 937 So. 2d 1149 (Fla. 5th DCA 2006); *Langford v. State*, 929 So. 2d 528 (Fla. 5th DCA 2006); *Coggins v. State*, 921 So. 2d 758 (Fla. 1st DCA 2006); *Richardson v. State*, 915 So. 2d 766 (Fla. 2d DCA 2005); *Williams v. State*, 907 So. 2d 1224 (Fla. 5th DCA 2005). In *Sheffield v. State*, 903 So. 2d 1009 (Fla. 4th DCA 2005), the court even considered a *Blakely* claim in reviewing the denial of Rule 3.800 motion to correct illegal sentence that challenged, as here, a habitual offender sentence. *Cf. Edison v. State*, 848 So. 2d 498, 499 (Fla. 2d DCA 2003) (not dealing with a *Blakely* issue, but reviewing a challenge to a

habitual offender sentence and stating, "Although Edison did not object to his HFO sentence during sentencing, he has preserved the issue for review by filing a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).").

Fourth, the approach taken by the Third District here is also inconsistent with other decisions of that same court, which has repeatedly upheld the denial of postconviction motions raising *Blakely* challenges, concluding that *Blakely* is not retroactive. *See, e.g., Nino v. State*, 937 So. 2d 756 (Fla. 3d DCA 2006); *Fernandez v. State*, 910 So. 2d 352 (Fla. 3d DCA 2005); *Clark v. State*, 903 So. 2d 292 (Fla. 3d DCA 2005); *Jerome v. State*, 891 So. 2d 1197 (Fla. 3d DCA 2005). Inherent in the fact that the court reached the retroactivity question is the fact that the issue was preserved through the motion under review.[7]

[7] It should be noted that the cases cited in the above paragraph dealt with motions filed pursuant to Fla. R. Crim. P. 3.800(a). It would certainly seem that the Third District's conclusion that the failure to raise a *Blakely* issue before the sentencing error constitutes a failure to preserve the issue would preclude review under this rule in the same manner as the court found it to preclude review under Rule 3.800(b)(2), the vehicle employed by Mr. Luton. If that court is somehow drawing a distinction between the two, however, and saying that a *Blakely* claim not raised prior to the sentencing hearing can be considered on a Rule 3.800(a) motion, but not a Rule 3.800(b)(2) motion, the court's approach would undermine one of the purposes of motions to correct sentencing errors, one not yet discussed in depth in this brief. Such an approach would allow defendants, after

Fifth, the single case cited by the Third District in support of its determination that the issue here was not properly preserved, *McGregor v. State*, 789 So. 2d 976 (Fla. 2001), does not compel a result contrary to that urged by Mr. Luton. In that case, the defendant asserted that the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that in order to properly sentence a defendant as a prison releasee reoffender, the defendant's release must be proven to a jury beyond a reasonable doubt. This court began its analysis of the issue by stating, "First, the petitioner did not properly preserve the issue for appellate review." 789 So. 2d at 977. That statement constituted the entire discussion of

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their appeal is completed, to raise their *Blakely* claims in a Rule 3.800(a) motion and to appeal from any denial thereof. Yet, this court has made it clear that in adopting the procedure now in place, it was concerned not just with providing a mechanism to preserve errors, but also with the expeditious disposition of these issues. In *Amendments IV*, this court indicated that in initially adopting Rule 3.800(b), it "intended to provide defendants with a mechanism to correct sentencing errors in the trial court at the earliest opportunity," 761 So. 2d at 1016, and echoed its own words in discussing the amendments being adopted, stating that "the primary goal of these amendments is to ensure that sentencing errors will be corrected at the earliest possible opportunity by the trial court." *Id.* at 1020. In that same opinion, this court also noted that "[t]his early correction of these sentencing errors will further the goal of judicial efficiency as well as ensure the integrity of the judicial process." *Id.* at 1019. Certainly, considering *Blakely* errors in Rule 3.800(b)(2) motions would be a much quicker and far more efficient manner of dealing with them than delaying their consideration until an appeal is over and having the trial court's determination of them reviewed in a second appeal.

preservation. There is no indication in this court's opinion that a motion to correct sentencing error was filed or ruled on, as is the case here. It is impossible to determine from the opinion what the circumstances were in the trial court. Further, a look to the district court decision under review in *McGregor* sheds no light on the matter, as it merely affirmed the case and set forth the certified question that formed the basis for this court's exercise of jurisdiction. *McGregor v. State*, 763 So. 2d 1222 (Fla. 1st DCA 2000). Thus, the most that can be said about *McGregor* is that defendants must preserve sentencing issues relating to whether particular factors must be proven to juries. Even if that proposition is accepted, it has no bearing on the question of whether such preservation is accomplished when the issue is raised in a motion to correct sentencing error.

Sixth, given the unquestionable "fundamental nature of the right to trial by jury," *Hughes v. State*, 901 So. 2d 837, 843 n.5 (Fla. 2005), the right involved in the issue raised by Mr. Luton, it just makes no sense to impose stricter preservation requirements than are imposed for other sentencing errors. In fact, Mr. Luton would suggest that the right involved is so fundamental that its deprivation constitutes fundamental error. He recognizes that this court in *McGregor* rejected this position, 789 So. 2d at 978, n.2, but notes that *McGregor* was

decided prior to *Blakely* and asks that this court revisit the issue in light of *Blakely's* strong reaffirmation of the fundamental nature of the right involved. In that case, the Court stated:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but is a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secure[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control … in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

542 U.S. at 305-306.

Even if the error is not considered to be fundamental, however, the above sentiments should at least be recognized as an embodiment of precisely the reasons compelling the contention

noted above, that a more stringent preservation standard should not be established for this basic, fundamental right than that which applies to less significant issues.

If it is assumed, however, that the harsher requirement established by the Third District is to be employed, it should nonetheless be held that Mr. Luton's claim was preserved. When, as here, a defendant does exercise his right to a jury trial, that exercise should be deemed to encompass all determinations that fall within the jury's purview under the Constitution. Certainly no one would contend that Mr. Luton had to make separate jury demands for each of the counts he was facing. Rather, one demand covered them all. Similarly, there is no reason why an independent demand should have to be made with regard to sentencing. If such a requirement were to be said to exist, carried to its logical extreme, defendants in capital cases would have to make a second jury trial demand in order to have juries for their penalty phases. Thus, Mr. Luton submits that, if the Third District's preservation requirement is upheld, it should be upheld with the caveat that the invocation of the right to trial by jury includes the sentencing process. Such an interpretation would of course mean that Mr. Luton's

issue was preserved even before the filing of the motion to correct sentencing error.[8]

Assuming that the error here was preserved—either by the motion to correct sentencing error or by the demand for jury trial—attention must focus on the error itself. Doing so leads to the conclusion that the trial court erred in sentencing Mr. Luton and in denying his motion to correct sentencing error.[9]

The habitual offender statute required the state to show that Mr. Luton had previously been convicted of a felony or an attempt to commit or conspiracy to commit a felony and that one or more of such convictions was for one of certain enumerated offenses. § 775.084(1)(b)1., Fla. Stat. (2002). In addition, the state had to show:

> 2. 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

[8] Mr. Luton alternatively submits that should the Third District's new procedural requirement be approved, it should be held that the state's failure to argue lack of preservation should preclude the application of the preservation doctrine here. The state never—not in response to Mr. Luton's motion for leave to withdraw his brief, to his motion to correct sentencing error, to his brief, or to his motion for rehearing—asserted that this issue had to be raised at, much less before, Mr. Luton's sentencing hearing. It certainly seems that the right to assert that an issue is waived should itself be waived by the failure to assert it.

[9] A sentencing issue such as this one, which presents a pure question of law is reviewed de novo. *Damiano v. State*, 944 So. 2d 516, 517 (Fla. 4th DCA 2006).

> result of a prior conviction for an enumerated felony; or
>
> 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.

§§ 775.084(1)(b)2., 3., and 4., Fla. Stat. (2002).

The decision in *Blakely* compels the conclusion that it was improper for the trial court to have found the existence of the above factors and that the ensuing enhanced habitual violent felony offender sentence was improper because the jury did not find beyond a reasonable doubt (or at all) that the necessary showing had been made.

The Court in *Blakely* stated:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "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."

542 U.S. at 301.

> Our precedents make it clear, however, 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. See Ring* [v. Arizona, 536

> U.S. 584 (2002), *supra,* at 602. … 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment." [J.] Bishop, [Criminal Procedure (2d ed. 1872),] *supra*, § 87, at 55, and the judge exceeds his proper authority.

542 U.S. at 303-304.

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority upon the finding of some additional fact.

542 U.S. at 305.

In a footnote to the above passage, the Court added:

> Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts ***require*** a sentence enhancement or merely ***allow*** it, the verdict alone does not authorize the sentence.

542 U.S. at 305 n. 8.

It is clear from *Blakely* that a habitual violent felony offender sentence may be imposed only when the jury finds that the statutory requirements for such sentencing, other than the fact of the necessary prior conviction, exist. In the present case, those requirements, which consist of the lack of a pardon, the fact that the sentence has not been set aside, and the fact

that the offense for which the sentence is being imposed occurred within the time frame set forth, were found to exist by the trial court, not the jury. Therefore, the trial court erred in imposing the sentence in the present case and in denying Mr. Luton's motion to correct sentencing error.

While Mr. Luton contends that this conclusion is mandated as to each of the above sentencing factors, he submits that it is particularly compelled with regard to time frame for the commission of an offense for which sentence is being imposed, here the period of five years from a defendant's last conviction or release from custody. It is a factor that hinges on the offense for which a defendant is being sentenced, not one that is already in place prior to the commission of that offense. It is therefore a factor which is within a defendant's control. Choosing to commit a crime on a certain date is no different than choosing to do so with a gun or under other circumstances which could lead to an enhanced sentence. The other factors all at least relate solely to the prior offense. Thus, while Mr. Luton asserts because they are elements over and above the mere fact of the prior conviction, he had a right under *Blakely* to have the jury determine whether they were shown, he further submits that an even stronger rationale exists for such a conclusion with regard to the necessary timeframe.

Mr. Luton's habitual violent felony offender sentence in the present case is therefore invalid.[10]

CONCLUSION

Based on the foregoing argument and authorities, Mr. Luton respectfully submits that the decision of the district court in this case should be reversed with directions that Mr. Luton's sentence be vacated and the matter remanded to the trial court for resentencing.

Respectfully submitted,

BENNETT H. BRUMMER
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[10] In *Blakely*, the Court concluded, "Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." 542 U.S. at 305 (footnote omitted).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded to Linda S. Katz, Assistant Attorney General, 444 Brickell Ave., Ste. 950, Miami, FL 33131 this 7th day of February, 2007.

_____
ANTHONY C. MUSTO

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
ANTHONY C. MUSTO