IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC07-436
L.T. Case No. 1D06-1741

JULIUS McGRIFF,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

STATEMENT OF THE CASE AND FACTS

The narrow and only issue in this case is as stated in this Court's February 11, 2009 order accepting jurisdiction:

> Whether *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.

Course of Proceedings Below

Over four years ago, the Respondent filed an amended motion for post-conviction relief under Florida Rules of Criminal Procedure 3.800 and 3.850, in which he argued that his sentences, which represented a departure above the sentencing guidelines, violated *Apprendi* and *Blakely* (the "*Blakely* Motion"). (R. 13-20.) The *Blakely* Motion recited that Mr. McGriff was convicted in 1988 of second-degree murder, armed burglary, and armed robbery. (R. 11.) The trial court declared Mr. McGriff to be a habitual felony offender (an "HFO"), articulated reasons for departing above the sentencing guidelines, and sentenced Mr. McGriff to life on the murder charge, plus two ten-year sentences on the remaining two counts, which were to run concurrently with each other and consecutively with the life sentence. (R. 11.) The conviction and sentences were affirmed the following year, well before the Supreme Court decided *Apprendi* in 2000. (R. 11 (citing *McGriff v. State*, 553 So. 2d 232 (Fla. 1st DCA 1989)).)

The *Blakely* Motion further recited that Mr. McGriff had previously filed a motion to correct illegal sentence, pursuant to Florida Rule of Criminal Procedure 3.800(a), on the ground that he could not be sentenced as an HFO because his murder conviction had already been enhanced to a life felony for use of a firearm. (R. 11.) After the trial court denied the motion, the district court of appeal reversed for further consideration. (R. 11 (citing *McGriff v. State*, 775 So. 2d 371 (Fla. 1st DCA 2000)).)

The *Blakely* Motion indicated that on remand and without notice to either party, the trial court summarily entered an amended judgment that removed the HFO designation, but re-imposed the same life sentence. (R. 12.) Both parties appealed. (R. 12.) While the appeal was pending, Mr. McGriff filed a motion to correct sentencing errors pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), and the district court of appeal relinquished jurisdiction to allow the trial court to consider that motion. (R. 12.) In 2003, the trial court granted the motion, vacated Mr. McGriff's sentences, and scheduled a new sentencing hearing. (R. 12.)

According to the *Blakely* Motion, Mr. McGriff was present at the 2003 new sentencing hearing, and the trial judge re-imposed the exact same sentence (without the HFO designation) and "relied upon the same (original) scoresheet and reasons articulated in the original departure order." (R. 12.) Mr. McGriff

appealed, and the district court summarily affirmed on September 29, 2004, more than a month after *Blakely* became final. (R. 12.) *See Blakely*, 542 U.S. 961 (showing that the Supreme Court denied rehearing on August 23, 2004).

In the *Blakely* Motion, Mr. McGriff argued that his new sentence violated *Apprendi* and *Blakely* because the trial judge had imposed an "upward departure sentence by relying upon additional findings that were not proven beyond a reasonable doubt by the jury." (R. 15.) He quoted the additional findings on which the trial court relied as follows:

> 1) The defendant's unscored juvenile record. The defendant had two juvenile adjudications – breaking and entering in 1975 and battery in 1978.
>
> 2) The defendant is totally unamenable to rehabilitation. A review of his prior record demonstrates that he has been placed on probation in different forms, from the time of his first juvenile offense to the present. None of these rehabilitative efforts has [sic] been successful, including his term in prison.
>
> 3) The evidence at trial clearly demonstrated that the defendant engaged in a scheme to cover-up the crime and attempted to conceal or destroy evidence and the body of his victim.

(R. 17-18 (citations omitted).)

The State filed a response, and the only argument it raised regarding the *Blakely* issue was that those decisions are not retroactive. (R. 30 (citing *Burrows v. State*, 890 So. 2d 286 (Fla. 2d DCA 2004)).) The State did not argue that the *Blakely* claim was not preserved or that *Blakely* did not apply to the trial court's reasons for departure, if *Blakely* were otherwise applicable. In January 2005, the

trial court denied the motion without an evidentiary hearing because "neither *Apprendi* nor *Blakely* are to be applied retroactively." (R. 32 (citing *Burrows*).) The court provided no other reasoning regarding the *Blakely* claim, and it did not attach anything from the record to its order. (R. 32.)

The Respondent appealed the summary denial of his motion. (R. 33) The district court ordered the State to show cause why the summary denial should not be reversed under the authority of *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005). (Supp. R. 1.)[1] The only argument advanced by the State in support of the trial court's order was that *Blakely* and *Apprendi* should not apply because his conviction and original sentence became final before *Apprendi* was decided. (Supp. R. 2-9.) Again, it did not argue that the *Blakely* claim was not preserved or that *Blakely* does not apply to the reasons for departure.

The district court reversed based on its holding in *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005), that *Apprendi* and *Blakely* apply to cases where the defendant is resentenced after the Supreme Court issued those opinions. (First DCA Feb. 21, 2007 Opinion at 3.) It remanded the case "to the trial court for resentencing or to refute the claim with record attachments." (*Id.* at 4.) It also certified conflict with *Galindez v. State*, 910 So. 2d 284 (Fla. 3d DCA 2005),

[1] "Supp. R." refers to the supplemental record filed by the clerk of the district court on October 28, 2009. The supplemental record filed by the clerk of the district court on September 8, 2008, was stricken by this Court's order of October 13, 2009.

approved, 955 So. 2d 517 (Fla. 2007),[2] *Cutts v. State*, 940 So. 2d 1246 (Fla. 2d DCA 2006), *quashed*, 976 So. 2d 579 (Fla. 2008),[3] *Langford v. State*, 929 So. 2d 598 (Fla. 5th DCA 2006), *review denied*, 974 So. 2d 387 (Fla. 2008),[4] and *Garcia v. State*, 914 So. 2d 29 (Fla. 4th DCA 2005).

Proceedings in This Court

The State invoked this Court's conflict jurisdiction and on January 15, 2008, this Court postponed its decision on jurisdiction, appointed the undersigned counsel to represent Mr. McGriff, and directed the parties to brief the merits of the district court's ruling, as well as the issue of whether any error by the trial court in this case was harmless under *Galindez v. State*, 955 So. 2d 517 (Fla. 2007). After many months of delay while the State successfully sought (over Mr. McGriff's objection) to supplement the record with filings that were not part of the record on appeal in the district court, the Court reconsidered. On February 11, 2009, the Court formally accepted jurisdiction. In that same order, the parties were

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[2] This Court approved the Third District's decision in *Galindez* without reaching the merits of the *Apprendi*/*Blakely* issue on the ground that any error was harmless. *Galindez v. State*, 955 So. 2d 517, 524.(Fla. 2007)

[3] This Court quashed *Cutts* and directed the district court to determine whether any error by the trial court was harmless in light of this Court's holding in *Galindez*. *Cutts v. State*, 976 So. 2d 579, 579 (Fla. 2008).

[4] This Court determined that it should decline to review *Langford* by citing its decision in *Galindez*. *Langford v. State*, 974 So. 2d 387, 387 (Fla. 2008).

"specifically directed not to address" the issue of "whether any sentencing factor alleged to violate *Apprendi* and/or *Blakely* is harmless beyond a reasonable doubt."

Despite that order, the State subsequently filed an initial brief that referenced materials that were not in the record on appeal in the district court and included two separate arguments that even if *Apprendi* or *Blakely* applied to cases like Mr. McGriff's, the trial court's refusal to apply them was harmless. First, part A of the State's argument was titled "The United States Supreme Court Decisions in *Apprendi* and *Blakely* Are Inapplicable to This Case Because McGriff's Sentence was Enhanced on the Basis of His Prior Criminal Record." (Initial Br. at 13.) Second, part C was titled "McGriff Has Failed to Properly Preserve this Issue for Review by this Court." (Initial Br. at 29.)

Mr. McGriff moved to strike portions of the initial brief, specifically including parts A and C. The State filed a response arguing why it believed the arguments in parts A and C were proper. On October 13, 2009, the Court struck the State's brief in its entirety. It directed the State to file an amended initial brief and instructed the State not to "reference ... any portion of the supplemental record originally authorized by this Court's order dated March 27, 2009, because that record has now been stricken." The Court went on to direct that the State "in its amended brief shall likewise not include parts A and C of its now-stricken brief, but may otherwise retain other portions of that brief."

The State did not move for reconsideration of this order. Instead, it filed an amended initial brief in the time directed. Despite the Court's two prior orders directing the parties not to brief harmless error, the State did just that. First, part A of the State's amended initial brief argues that any error was harmless because the trial court's reasons for departure are not prohibited by *Blakely*. This part has the exact same title and largely the same substance as part A of the original initial brief. (*Compare* Am. Init. Br. at 11-13 *with* Init. Br. at 13-14.) Second, part B argues that any error in the trial court's analysis was harmless because Mr. McGriff did not preserve his *Blakely* claim. This part has the exact same title and largely the same substance as part C of the original initial brief. (*Compare* Am. Init. Br. at 13-17 *with* Init. Br. at 29-36.)

SUMMARY OF ARGUMENT

The only issue in this case is whether *Apprendi* and *Blakely* apply to cases where the conviction and original sentence became final before *Apprendi* was decided, but the sentence was vacated on other grounds and the new sentence was still pending at the time of *Blakely*. The State's arguments in part A and B – that *Blakely* and *Apprendi* do not apply to the reasons given for the departure sentence in this case and that Mr. McGriff did not preserve his claim – are irrelevant to this issue and have been presented in direct contravention of this Court's order striking

them from the original brief. Mr. McGriff will comply with the Court's order and not brief these issues.

In part C, the State argues that *Apprendi* and *Blakely* do not apply retroactively to sentences that were final when those decisions were rendered. Mr. McGriff does not dispute this argument, but it is irrelevant to this proceeding. The propriety of Mr. McGriff's original sentence is not at issue; the only question is whether *Apprendi* and *Blakely* apply to his new sentence, which was clearly not yet final when *Blakely* was decided.

The State finally gets to the issue in part D and argues that *Apprendi* and *Blakely* should not apply at post-*Blakely* resentencing hearings. The State is wrong largely for the reasons identified by Justice Cantero in his concurring opinion in *Galindez*. Florida law has long recognized that when a sentence is vacated and the case remanded, the resentencing is to be conducted entirely de novo subject to the full panoply of procedural and evidentiary rights in existence at the time of resentencing. Justice Cantero correctly concluded in *Galindez* that *Blakely* and *Apprendi* clearly should apply, at least if a new jury could be empanelled at the resentencing. While Mr. McGriff does not concede the point, nobody is arguing at this juncture that a new jury could not be empanelled.

In part E, Mr. McGriff demonstrates why *Blakely* and *Apprendi* should apply even if a new jury could not be empanelled, and he demonstrates why this would

not destroy any legitimate interest in finality the State may have. It would in no way undermined the finality of the underlying conviction and would impact only the sentence. Florida law has long recognized that a challenge to an illegal sentence may be made at any time, and the policy of correcting illegal sentences simply outweighs any interest the State may have in the finality of the sentence.

ARGUMENT

BECAUSE *BLAKELY* WAS DECIDED BEFORE MR. MCGRIFF'S SENTENCE BECAME FINAL, ITS APPLICATION TO THIS CASE IS DIRECT, NOT RETROACTIVE.

Standard of Review. Whether a particular rule of law applies to a given case is a pure question of law reviewed de novo. *E.g.*, *Smiley v. State*, 966 So. 2d 330, 333 (Fla. 2007).

The State offers five arguments as to why it contends the district court's decision should be quashed. The first three arguments are without merit and do not address the issue the Court directed the parties to brief. Indeed, the first two arguments have previously been stricken by this Court with directions that the State not retain them in their amended initial brief. Thus, parts A-C summarily dispense with these arguments. Part D addresses the only legal issue present in the case at this stage and shows why long-standing Florida sentencing law compels the result reached by the district court. Finally, Part E refutes the State's arguments

that applying this clear law would "destroy the State's interest" in the finality of convictions in the event a jury could not be empanelled for resentencing..

A. The State's Argument That Mr. McGriff's Sentence Was Enhanced on the Basis of His Prior Criminal Record Violates This Court's Clear Order Prohibiting This Argument.

In part A of its amended initial brief, the State argues that even if the trial court erred in refusing to apply *Apprendi* and *Blakely* to Mr. McGriff's resentencing, any error was harmless because two of the bases for departing from the guidelines were factors that a jury is not required to find under *Apprendi* and *Blakely*. (Am. Init. Br. at 11-13.) But this Court expressly directed the parties not to brief this issue in its February 11, 2009 order. And when the State included this argument with the exact same title as part A of its original brief, the Court struck the brief and ordered the State not to include that argument in its amended brief.

Mr. McGriff will comply with this Court's clear orders and not brief this issue. He has already demonstrated why the argument is improper at this stage in his August 3, 2009, motion to strike. If the Court were to *sua sponte* reconsider its ruling on the issue, fairness dictates that it allow Mr. McGriff to file a supplemental brief. Otherwise, this issue is best addressed in the normal course by the trial court on remand.

B. The State's Argument That Mr. McGriff Failed to Preserve His Claim Also Violates This Court's Clear Order Prohibiting This Argument.

In part B of its amended initial brief, the State argues that even if the trial court erred in refusing to apply *Apprendi* and *Blakely* to Mr. McGriff's resentencing, any error was harmless because Mr. McGriff did not preserve his *Blakely* claim. (Am. Init. Br. at 13-17.) But this Court expressly directed the parties not to brief this issue in its February 11, 2009 order. And when the State included this argument with the exact same title as part C of its original brief, the Court struck the brief and ordered the State not to include that argument in its amended brief.

Mr. McGriff will comply with this Court's clear orders and not brief this issue. He has already demonstrated why the argument is improper at this stage in his August 3, 2009, motion to strike. If the Court were to *sua sponte* reconsider its ruling on the issue, fairness dictates that it allow Mr. McGriff to file a supplemental brief. Otherwise, this issue is best addressed in the normal course by the trial court on remand.

C. Whether *Blakely* and *Apprendi* Apply Retroactively Is Not an Issue in this Case.

The State devotes the lion share of its argument to the proposition that neither *Blakely* nor *Apprendi* apply retroactively to cases in which the sentence became final after those opinions were decided. (Am. Init. Br. at 17-31.) But this

point is irrelevant in this case. Mr. McGriff is not challenging his original sentence; the district court declared that original sentence illegal and remanded the case for a new sentencing hearing. It is the sentence imposed during the resentencing that Mr. McGriff is challenging. The State does not dispute that both *Apprendi* and *Blakely* were decided before Mr. McGriff's new sentence became final. Thus, whether *Blakely* and *Apprendi* apply retroactively is simply not an issue in this case.

D. *Blakely* and *Apprendi* Apply To This Case Because They Were Both in Effect Before His Resentencing Became Final.

On page 31 of its amended initial brief, the State finally addresses the issue in this case by arguing that neither *Blakely* nor *Apprendi* apply to cases where the original conviction and sentence became final before *Apprendi*, but resentencing proceedings did not become final until after *Blakely*. The State opens with a passing acknowledgement that Justice Cantero explained in a concurring opinion in *Galindez* that Florida courts have long held that when a sentence is vacated "resentencing should proceed de novo on all issues bearing on the proper sentence." (Am. Init. Br. at 31-32 (quoting *Galindez v. State*, 955 So. 2d 517, 525 (Fla. 2007) (Cantero, J., concurring)).) But Justice Cantero's detailed reasoning merits more than this passing reference.

In *Galindez*, this Court was faced with the same question presented in this case, but ended up not answering it because it determined that the record

demonstrated that any error in failing to apply *Blakely* and *Apprendi* was harmless beyond a reasonable doubt. *Id.* at 524. Justice Cantero wrote a special concurrence to "express [his] belief that whether *Apprendi* and *Blakely* can even be applied at the resentencing of a defendant whose conviction and original sentence became final before those cases were decided depends on whether a new jury can be impaneled to decide facts relevant to sentencing." *Id.* (Cantero, J., concurring). Especially because the State does not argue that a new jury cannot be empanelled, it makes sense to begin the analysis with the assumption that a new jury could be impaneled at a resentencing. (Mr. McGriff will address the possibility that a new jury cannot be empanelled in part E.)

Justice Cantero correctly described the consistent precedents of this Court holding that a resentencing is an entirely de novo proceeding subject to the laws in effect at time of the resentencing and the evidence presented at the resentencing, without regard to the law or facts existing at the time of the original sentencing:

> We have consistently held that resentencing proceedings must be a "clean slate," *Preston v. State*, 607 So. 2d 404, 408 (Fla. 1992), meaning that the defendant's vacated sentence becomes a "nullity" and his "resentencing should proceed de novo on all issues bearing on the proper sentence." *Morton* [*v. State*], 789 So.2d [324,] 334 [(Fla. 2001)] (quoting *Teffeteller* [*v. State*], 495 So.2d [744,] 745 [(Fla. 1986)]). This means that the trial court must extend to the defendant the "full panoply" of existing procedural protections, *State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983), including any new constitutional protections that have been recognized since the defendant's original sentencing.

Galindez, 955 So. 2d at 525. This Court's precedents on which Justice Cantero relied fully support his reasoning on this point.

For example, in *Scott*, this Court addressed the scope of resentencing when an original sentence is determined to be illegal and is set aside pursuant to a Rule 3.850 motion. After noting that the defendant does not have any procedural rights to be present when the Rule 3.850 motion is considered, all of that changes once the motion is granted. 439 So. 2d at 220. The Court held, "once the court has determined that the sentence was indeed illegal and the prisoner is entitled to a modification of the original sentence or imposition of a new sentence, the full panoply of due process considerations attach." *Id.* (citing *Walker v. State*, 284 So. 2d 415 (Fla. 2d DCA 1973)).

Justice Cantero went on to note in *Galindez*, that this Court's precedents make clear that new evidence can be presented at the resentencing and, indeed, that only the evidence presented at the resentencing can be considered in imposing the new sentence:

> Before *Apprendi* and *Blakely*, the law in this state, as we stated it in *Lucas v. State*, 841 So. 2d 380 (Fla. 2003), was that "a resentencing is a completely new proceeding. It therefore necessarily follows that a resentencing court is not limited by evidence presented (or not presented) in ... the original ... sentencing phase." *Id.* at 387 (emphasis added) (citations omitted). Rather, both sides are entitled to produce additional evidence. *See Mann v. State*, 453 So. 2d 784, 786 (Fla. 1984) (explaining that at a de novo resentencing "both sides may, if they choose, present additional evidence"). In fact, because resentencing is de novo, the State was required to produce evidence

> on sentencing issues even if the State established the fact at the original sentencing. This was required whether or not the defendant disputed the issues in the prior sentencing proceeding. *See, e.g.*, *Tubwell v. State*, 922 So. 2d 378, 379 (Fla. 1st DCA 2006) (stating that because resentencing is de novo, "the state was not relieved of its burden to prove the prior offenses"); *Rich v. State*, 814 So. 2d 1207, 1208 (Fla. 4th DCA 2002) (holding that at a resentencing, the State must again prove the basis for an enhanced sentence even though such evidence was produced at the original sentencing); *Baldwin v. State*, 700 So. 2d 95, 96 (Fla. 2d DCA 1997) (stating that at resentencing, the defendant can challenge the prior convictions included on his scoresheet, even though he did not challenge them at the original sentencing).
>
> In addition to the parties' rights to present additional evidence and the State's burden to produce evidence, we also have held that the trial court is not limited to its findings from the prior proceeding, but may make new findings and may even increase the sentence. *See Morton*, 789 So. 2d at 334 (stating that a trial court has "no obligation to make the same findings as those made in a prior sentencing proceeding"); *Roberts v. State*, 644 So. 2d 81 (Fla. 1994) (permitting the resentencing court to include an additional prior conviction on the revised guidelines scoresheet).

Galindez, 955 So. 2d at 525-26.

Indeed, in *Preston*, this Court noted that Florida's statutory sentencing law requires that resentencing be entirely de novo:

> The basic premise of the sentencing procedure is that the sentencer consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine the appropriate punishment. *See* § 921.141(1), Fla. Stat. (1989). This is only accomplished by allowing a resentencing to proceed in every respect as an entirely new proceeding.

Id. at 409. [5]

Importantly, Justice Cantero's description of Florida's de novo "clean slate" rule for resentencing has recently drawn the support of the majority of the Court in *State v. Collins*, 985 So. 2d 985 (Fla. 2008). Using nearly identical reasoning and relying on the same cases, this Court held in *Collins* that a resentencing is a de novo proceeding and, therefore, the trial court must base its decision at resentencing on the law and facts presented at the resentencing hearing. *Id.* at 989-90.

Thus, Justice Cantero was correct in concluding that Florida's long-established sentencing law requires that all current law, including *Apprendi* and *Blakely*, be applied to a resentencing proceeding. The State offers two reasons why it contends Justice Cantero erred in his reasoning: (1) where a departure

[5] The issue in *Preston* was whether, when a death sentence is vacated, the trial court (with the aid of a new jury) could find an aggravating circumstance warranting the death penalty was present at a resentencing when the court (with the aid of the original jury) had found that the circumstance was not present at the original sentencing. Specifically, after Mr. Preston's original sentencing hearing, the trial court found that the murder was not committed for the purpose of avoiding arrest, but after the resentencing hearing, it found that this aggravating circumstance was present. *Preston*, 607 So. 2d at 407. The defendant argued on appeal that this violated his rights under the Double Jeopardy Clause. *Id.* Although this Court recognized that where the original sentencing court rejected the death penalty altogether, the Double Jeopardy Clause prohibited the imposition of the death penalty on resentencing, *id.* (citing *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981)), it held that this was a limited exception required by the Constitution to Florida's otherwise broad "clean slate" rule. *Id.* at 408-09 (citing *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986)).

sentence is reversed a trial court is prohibited on resentencing from identifying new grounds for a departure pursuant to *Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987), and (2) the law of the case doctrine. Neither reason should be sufficient to lead this Court to alter Florida's long-standing commitment to de novo resentencing.

1. *Shull v. Dugger* should not impact the analysis of whether *Blakely* and *Apprendi* apply.

The State contends, "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." (Am. Init. Br. at 32.) While it is true that this Court held in *Shull* that when an appellate court rejects the reasons a trial court gave for a sentence above the guidelines, the trial court is prohibited from identifying new grounds at resentencing, Justice Cantero himself explained why *Shull* does not prevent the new sentencing hearing from being de novo. In *Collins*, Justice Cantero, writing for a majority of the Court, explained that the rule in *Shull* was designed solely "to preclude the possibility of a judge providing an after-the-fact justification for a previously imposed departure sentence." *Collins*, 985 So. 2d at 990-91 (citing *Jones v. State*, 559 So. 2d 204, 206 (Fla. 1990)).

The rule in *Shull* simply has no application to this case. Mr. McGriff's original sentence was not reversed because the grounds for departure cited by the

trial court were insufficient. Rather, according to the *Blakely* petition, the sentence was reversed on the ground that he could not be sentenced as an HFO because his murder conviction had already been enhanced to a life felony for use of a firearm. (R. 11.) Thus, the trial court was required to conduct a de novo sentencing hearing at which the State had the burden of proving whatever sentencing factors it wanted to assert in support of a sentence above the guidelines.

For example, in *Rich v. State*, 814 So. 2d 1207 (Fla. 4th DCA 2002), the defendant had successfully challenged his original sentence under the violent career criminal sentencing statute. *Id.* at 1208 (citing *Rich v. State*, 765 So. 2d 750 (Fla. 4th DCA 2000)). On remand, the trial court vacated the violent career criminal sentence, but re-imposed the same sentence after declaring the defendant an HFO. *Id.* On appeal, the district court held that the trial court had the authority to impose the HFO sentence at the resentencing, but it reversed the new sentence because the trial court had erroneously relied upon the evidence presented at the original sentencing hearing. *Id.* Relying on the same principles cited by Justice Cantero in his *Galindez* concurrence, the court held the "State was required to introduce evidence that proved [the defendant] qualified for enhanced sentencing." *Id.* This holding was expressly approved by this Court in *Collins*. 985 So. 2d at 989.

2. The State's argument based on law of the case doctrine violates this Court's clear ruling that the State not make a harmless error argument.

The State next argues that the doctrine of law of the case precludes Mr. McGriff from challenging the bases for departure since they were previously affirmed by the district court. (Am. Init. Br. at 32-33.) This argument has nothing to do with the only issue this Court asked the parties to brief – whether *Apprendi* and *Blakely* apply. The State did not raise this argument in the trial court or the district court and it does not appear well taken at this point.[6]

Importantly, the State's argument is premised on its contention that Mr. McGriff's resentencing "was more akin to a ministerial action." (Am. Init. Br. at 33.) But it is simply not possible to gauge this based on the summary record in this case. The trial court certainly did not attach anything from the record to its summary order that would allow this Court to determine whether the law of the case doctrine applies. Accordingly, to the extent there is any legal or record basis to this argument, the State should raise it on remand in the trial court.

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[6] This Court has previously held that an illegal sentence is not subject to the law of the case doctrine and "may be corrected even after it has been erroneously affirmed." *Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994). *See also Mills v. State*, 724 So.2d 173, 174-74 (Fla. 4th DCA 1998) (rejecting law of the case argument and reversing the sentence imposed upon the defendant at resentencing where the trial court failed to require the State to "re-prove" the validity of the defendant's prior convictions), *and Baldwin v. State*, 700 So. 2d 95, 96 (Fla. 2d DCA 1997) (stating that at resentencing, the defendant can challenge the prior convictions included on his scoresheet, even though he did not challenge them at the original sentencing).

3. This Court appears to have authority to authorize a new jury to be empanelled, although Mr. McGriff does not concede this point.

Finally, although the State does not address it, the only potential reason not to find that *Apprendi* and *Blakely* apply pursuant to Justice Cantero's concurrence in *Galindez* would be if it were determined that a new jury could not be empanelled for resentencing. As Justice Cantero concluded: "Certainly, if a sentencing jury can now be empaneled to decide the 'sentencing fact,' then applying *Apprendi* and *Blakely* here would not implicate [the defendant's] conviction and would therefore not constitute retroactive application of those cases." *Galindez*, 955 So. 2d at 529.

The State does not offer any reason to believe that a new jury cannot be empanelled. And while Mr. McGriff does not concede that a new jury could be empanelled,[7] neither the State nor Justice Cantero have identified any reason to believe that one could not. The State does not address the legality of empanelling a new jury at all, and Justice Cantero made clear that not only did he believe that it would be appropriate for this Court to authorize a new jury to be empaneled for resentencing, but also that there do not appear to be any legal hurdles to doing so:

[7] If Mr. McGriff were forced to choose between waiving his right to challenge the authority or method by which a new jury might be empanelled and having *Apprendi* and *Blakely* applied to his resentencing, he would choose the latter.

I would gladly authorize the empanelling of new juries on resentencing so that defendants can receive the protection of *Apprendi* and *Blakely* without undermining the finality of their convictions. We already predicted in *Hughes* that new juries would be necessary to remedy *Apprendi* errors at resentencing, which was one of our reasons for barring retroactive application of that case. *See* 901 So.2d at 845 ("In every case *Apprendi* affects, a new jury would have to be empaneled to determine, at least, the issue causing the sentence enhancement."). It is true that our existing rules do not provide a mechanism for empanelling a jury at the sentencing in a noncapital case. But we do have such a mechanism in death-penalty cases, *see* § 921.141(1), Fla. Stat. (2005), so the concept is far from foreign. The lack of a corresponding procedure for noncapital cases should not prevent us from creating one, given that it represents the best remedy for the constitutional violation.

When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies. *See, e.g., In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1133 (Fla. 1990) (acknowledging "the inherent power of courts ... to afford us the remedy necessary for the protection of rights of indigent defendants," but warning that courts may not "ignore the existing statutory mechanism"). To remedy violations of *Apprendi* and *Blakely*, we would be entirely justified in adopting a procedure for the empanelling of new juries on resentencing. Nor would we be the first court to do so. *See Aragon v. Wilkinson*, 209 Ariz. 61, 97 P.3d 886, 891 (Ct. App. 2004) (stating that "although the statutory sentencing scheme does not currently provide for convening a jury trial during the sentencing phase of a non-capital case, nothing in our rules or statutes prohibits the court from doing so" and that on remand to resolve any *Apprendi* or *Blakely* problem, the trial court "may utilize its inherent authority to convene a jury trial on the existence of facts that may support imposition of an aggravated sentence"); *Smylie v. State*, 823 N.E.2d 679, 684-85 (Ind.) (holding that to meet *Blakely* requirements, a jury may be convened to consider sentencing factors), *cert. denied*, 546 U.S. 976, 126 S. Ct. 545, 163 L. Ed. 2d 459 (2005); *State v. Schofield*, 895 A.2d 927, 937 (Me. 2005) ("Although state law does not specifically provide for a jury trial on sentencing, our recognition of such a procedure is well within our inherent judicial

> power ...."); *but see State v. Hughes*, 154 Wash. 2d 118, 110 P.3d 192, 209 (2005) ("This court will not create a procedure to empanel juries on remand ... because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature."), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 222 n. 4, 126 S. Ct. 2546, 2553 n.4, 165 L. Ed. 2d 466 (2006).
>
> Nor would the Double Jeopardy Clause bar the impaneling of juries upon resentencing. In the death-penalty context, when a case is remanded for a new penalty phase we regularly allow a new jury to be empanelled. *See, e.g., Preston*, 607 So. 2d at 408; *Robinson v. State*, 574 So. 2d 108, 112 (Fla. 1991); *Rose v. State*, 461 So. 2d 84, 87 (Fla.1984). Outside of the capital context, the Double Jeopardy Clause is even less demanding with respect to sentencing. As the United States Supreme Court explained in *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980), "double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence," *id.* at 136, 101 S. Ct. 426, because "a sentence does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134, 101 S. Ct. 426. We, too, have concluded that "double jeopardy is not implicated in the context of a resentencing following an appeal of a sentencing issue." *Trotter v. State*, 825 So. 2d 362, 365 (Fla. 2002) (citing *Harris v. State*, 645 So. 2d 386, 388 (Fla. 1994)). Of course, the facts found by a new jury at resentencing cannot conflict with any facts found by the original jury in connection with the defendant's conviction. But in cases like this one, where the jury did not issue any finding concerning a sentence-enhancing fact, no double jeopardy concerns arise.

Galindez, 955 So. 2d at 526-27. Justice Cantero's comments about the double jeopardy issue have since been joined by a majority of the Court. *See Collins*, 985 So. 2d at 992-93 (holding that double jeopardy protections do not apply at sentencing to bar State from relitigating HFO status after HFO sentence was previously reversed based on insufficient evidence).

The only Florida case in which a new jury was empaneled for a *Blakely* resentencing appears to be *Ayala v. State*, 976 So. 2d 43 (Fla. 5th DCA 2008). In that case, the trial court had granted a Rule 3.800(b) motion before the direct appeal was decided and vacated a sentence based on its determination that the original sentence violated *Apprendi* and *Blakely*. *Id.* at 45. Fifth District Judge C. Alan Lawson, sitting as a circuit judge, presided over the resentencing proceeding and impanelled a new jury that found two facts that Judge Lawson concluded warranted an upward departure. *Id.* at 45-46. On appeal, the Fifth District did not reach the question of whether this procedure was proper because it concluded that the Rule 3.800(b) motion was erroneously granted because any error in imposing the enhanced sentence without the additional jury findings was harmless beyond a reasonable doubt under *Galindez*. *Id.* at 47-48.

Thus, the only two Florida jurists to address the issue – Justice Cantero and Judge Lawson – had little trouble concluding that a new jury can be impanelled for a *Blakely* resentencing. And the State has not identified any reason to believe that a new jury cannot be impanelled. Mr. McGriff declines to take a firm position because the issue is premature at this stage. As demonstrated in part E below, *Blakely* and *Apprendi* should apply to Mr. McGriff's resentencing even if a new jury could not be impanelled. Accordingly, the issue of whether a new jury may be impanelled should not be decided unless and until (1) this case is remanded to the

trial court for reconsideration on the merits of Mr. McGriff's motion (as ordered by the district court), (2) the motion is granted, and (3) the State demands that a jury be impanelled. The record and legal arguments can then be developed and decided in the normal course by the trial court and, if necessary, the district court.

E. Applying *Blakely* and *Apprendi* Will Not "Destroy the State's Interest in the Finality of McGriff's Conviction," Even If a New Jury Could Not Be Impaneled.

Even if it were determined that – for reasons that have not been identified by anybody at this stage – a new jury could not be impanelled for resentencing, *Blakely* and *Apprendi* should still apply, Justice Cantero's concurrence in *Galindez* notwithstanding.

Justice Cantero reasoned in his *Galindez* concurrence that if a new jury could not be empanelled, principles of finality would attach to defeat the application of *Blakely* and *Apprendi*. He noted that this Court has previously held that principles of finality prevent *Apprendi* from being applied retroactively, and he assumed that *Blakely* should not apply retroactively either (an assumption Mr. McGriff does not challenge). *Galindez*, 955 So. 2d at 528 (citing *Hughes v. State*, 901 So. 2d 837, 837 (Fla. 2005)). He went on to conclude that the issue becomes whether applying those cases to a resentencing that was pending before *Blakely* "amounts to the same thing" as applying them retroactively to sentences that were final before *Blakely*.

Justice Cantero went on to correctly note that both this Court and the U.S. Supreme Court have made clear that the principles of finality attach "when the defendant's *conviction* (not the *sentence*) becomes final." *Id.* at 528 & n.3 (emphases in original) (citing *Johnson v. State*, 904 So. 2d 400, 407 (Fla. 2005), *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999), *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)).

From these correct statements, he made the erroneous leap to conclude that if a new jury cannot be empanelled to determine the facts underlying the State's request for the trial court to depart from the guidelines, then the defendant's conviction would be undermined. He worried that the result would be "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." *Galindez*, 955 So. 2d at 529 (emphasis added). But Mr. McGriff is in no way challenging either his conviction or the process leading to that conviction; he is merely challenging his subsequent sentence. Mr. McGriff stands convicted of serious crimes and remains subject to a very long sentence regardless.[8]

[8] The original scoresheet is not in the record, so the guideline range cannot be determined with certainty in this proceeding. Mr. McGriff contends that the guideline maximum sentence for his offenses is 27 years. He has already served 22 years, and according to his classification officer, he has earned over 10 years in gain time. Thus, if his motion is ultimately granted, he likely will be entitled to release, but he will have already served a long sentence.

Importantly, one of the main reasons that this Court held that *Apprendi* does not apply retroactively is because the rule of law announced in *Apprendi* does *not* cast any doubt on a defendant's conviction:

> *Apprendi* does not affect the determination of guilt or innocence; it only requires that sometimes the jury, not the judge, must decide factual aspects of the sentencing decision.

Hughes v. State, 901 So. 2d 837, 842 (Fla. 2005). Instead, "*Apprendi* affects only the procedure for enhancing the *sentence*." *Id.* at 843; *see also id.* at 868 (Anstead, J., dissenting) ("[T[he underlying conviction is not at issue here"). The same is true for the holding in *Blakely*. In other words, whether *Apprendi* and *Blakely* apply in any given case will have no impact on the finality of the conviction. It is only the finality of the sentence that is implicated.

Thus, the only interest in "finality" that State might have in this case is with regard to the original sentence, which had become final before *Apprendi*. But that sentence has been determined to be illegal, and Florida has long declined to attach any overriding principle of finality to illegal sentences. *See* Fla. R. Crim. P. 3.800 (a) (providing that a court may correct an illegal sentence "at any time"); *Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1991) (en banc) ("If for any reason a defendant receives a sentence that exceeds such a maximum possible sentence for the adjudicated crime, the defendant has a fundamental right *at all times* to seek relief and obtain a sentence that fits within the confines of the law." (emphasis

added)). Indeed, Justice Anstead has explained that Rule 3.800 serves to protect a "fundamental right to request *at any time* a sentence that fits within the confines of the law" and warned that any arbitrary, technical limitation on the availability of relief from an illegal sentence under Rule 3.800 "emasculates the purpose and usefulness of Rule 3.800." *Bedford v. State*, 617 So. 2d 1134, 1135-36 (Fla. 4th DCA 1993) (Anstead, J., dissenting) (emphases in original), *quashed*, 633 So. 2d 13 (Fla. 1994).[9]

It is one thing to say that a sentence that was completely legal at the time it became final should not be upset in favor of a new sentencing hearing when the law changes, as happened with *Apprendi* and *Blakely*. The one and only reason for not applying the new law is to respect the State's legitimate interest in finality. But it is an entirely different thing to say that when an illegal sentence has to be corrected in any event, that the constitutional law applying at the time of resentencing should not apply. The very idea of conducting an otherwise de novo sentencing hearing and declining to apply currently binding constitutional holdings of the U.S. Supreme Court should offend any notion of due process.

[9] Then a district judge, he was dissenting from the district court's decision that the doctrine of law of the case precludes relief on a motion to correct an illegal sentence where the sentence had been affirmed by this Court on direct appeal. This Court granted review, quashed the district court's opinion, and unanimously and expressly approved then-Judge Anstead's dissent. *Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994).

It is certainly true that *Apprendi* and *Blakely* have by their very nature undermined the finality of sentences. While they may not apply retroactively, they surely applied to a tremendous number of criminal sentences in Florida and throughout the country that were still pending on appeal when they were decided. Our system managed to survive that transition, and it will not come crashing down now if those decisions are applied to resentencings that were not yet final when *Blakely* was decided.

CONCLUSION

For the foregoing reasons, the Court should approve the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Christine Ann Guard, Esq.**, Assistant Attorney General, Office of Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050 and **Trisha Meggs Pate, Esq.**, Tallahassee Bureau Chief, Office of Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050 by U.S. Mail, this 7th day of December, 2009.

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney