IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC07-436

v.

JULIUS MCGRIFF,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

STATE CASES

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Julius McGriff, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In Gadsden County case number 87-768-CFA, McGriff was convicted following a jury trial of second degree murder with a firearm, armed burglary with a firearm, and armed robbery with a firearm. See McGriff v. State, 553 So. 2d 232, 233 (Fla. 1st DCA 1989)(McGriff I); (R 11). McGriff appealed in First District case number 88-3129. McGriff raised several issues on appeal, one of which is specifically addressed by the First District's

opinion. McGriff I at 233-34. The First District affirmed McGriff's convictions. See McGriff I at 233-34.

McGriff filed several other appeals through the years. On August 5, 1993, the First District *per curiam* affirmed the trial court's order without a written opinion in case number 92-2603. See McGriff v. State, 623 So. 2d 498 (Fla. 1st DCA 1993)(McGriff II). On January 17, 1997, the First District *per curiam* affirmed the order of the trial court without a written opinion in case no. 96-2525. See McGriff v. State, 687 So. 2d 241 (Fla. 1st DCA 1997)(McGriff III).

In case number 1D00-1464, McGriff challenged the order of the trial court denying his Florida Rule of Criminal Procedure 3.800(a) motion to correct illegal sentence. See McGriff v. State, 775 So. 2d 371, 372 (Fla. 1st DCA 2000)(McGriff IV). On November 21, 2000, the First District reversed and remanded the decision in part for the trial court to consider McGriff's claim that he could not be sentenced as a habitual felony offender in case number 1D00-1464. See McGriff IV at 372.

On remand, the trial court resentenced McGriff removing the habitual offender designation without notice to the parties. (R 12). The State appealed. On April 26, 2002, the First District dismissed the appeal finding that the State's appeal fell under none of the permissible orders under Florida Rule of Appellate

Procedure 9.140(c)(1) in case number 1D01-2199. See State v. McGriff, 819 So. 2d 817 (Fla. 1st DCA 2002). McGriff sought and was granted a belated appeal by the First District in case number 1D01-2867. See McGriff v. State, 796 So. 2d 1207 (Fla. 1st DCA 2001)(McGriff V).

The case that followed was case number 1D01-4468, McGriff filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). (R 12). McGriff's motion was granted and on May 23, 2003, the trial court entered an order determining that resentencing was required. (R 12). On June 20, 2003, the trial court held the resentencing proceeding. (R 12). The trial court resentenced McGriff as to count I removing the habitual offender designation. (R 12). No changes were made to the sentences imposed in counts II and III. (R 12). McGriff appealed. (R 12). On September 29, 2004, the First District affirmed McGriff's sentence. (R 12); McGriff v. State, 883 So. 2d 804 (Fla. 1st DCA 2004)(McGriff VI).

On November 9, 2004, McGriff filed another motion to correct illegal sentence. (R 1-9). On July 5, 2005, McGriff filed an amended motion to correct illegal sentence alleging that Apprendi and Blakely applied to his sentence, and, therefore, his sentence was unconstitutional. (R 13-20). In his amended motion, McGriff stated that the trial judge relied

on the original departure reasons in sentencing McGriff to life on count I. (R 14). McGriff also set forth the basis of the trial court's departure quoting from the order. (R 17). The departure reasons included:

> "1) The defendant's unscored juvenile record. The defendant had two juvenile adjudications- breaking and entering in 1975, and battery in 1978. See, Cumming v. State, 489 So. 2d 121 (Fla. 1DCA 1986).
>
> 2) The defendant is totally unamenable to rehabilitation. A review of his prior record demonstrated 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 been successful, including his term in prison. See, Kiser v. State, 455 So. 2d 1070 (Fla. 2DCA 1984), and Allen v. State, 522 So. 2d 850 (Fla. 4DCA 1987).
>
> 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. See, State v. McCall, ___ So. 2d ___, (13 Fla. L. Weekly (S)311 (Fla. 1986), and Everage v. State, 504 So. 2d 1255 (Fla. 1DCA 1986)."

(R 17-18). On January 6, 2005, the trial court denied McGriff's motion finding that Blakely and Apprendi did not apply retroactively. (R 30, 32).

McGriff appealed. (R 33). On February 21, 2007, the First District issued its written opinion in which it reversed the order of the trial court finding based on its prior decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), both Blakely and Apprendi applied to McGriff's case. See McGriff v. State,

32 Fla. L. Weekly D 520 (Fla. 1st DCA 2007)(McGriff VII). The State filed timely filed its notice to invoke this Court's discretion.

SUMMARY OF ARGUMENT

On appeal, the First District found Apprendi and Blakely to be applicable to McGriff's resentencing. The First District's conclusion was improper for several reasons. First, McGriff's claims as set out in his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a) fails to affirmatively allege that the records demonstrate on their face that he is entitled to relief. McGriff's amended motion to correct illegal sentence firmly sets out that two of the departure reasons are recidivist based thereby making the United States Supreme Court decisions in Apprendi and Blakely are inapplicable. Second, a motion pursuant to Florida Rule of Criminal Procedure 3.800(a) is not the appropriate vehicle for the raising of a claim such as McGriff's because for a sentenct to be illegal within the meaning of Florida Rule of Criminal Procedure 3.800(a), the sentence must impose a punishment that no trial court could impose in any set of factual circumstances under the sentencing statutes. Third, neither Apprendi nor Blakely are retroactively applicable. Fourth, neither Apprendi nor Blakely is applicable to McGriff because the trial judge made no findings required to be made by a jury after the advent of Apprendi and Blakely. Fifth, Apprendi should not be applied to McGriff's resentencing because application of Apprendi to

MGriff’s case gives Apprendi retroactive affect and destroys the State’s interest in the finality of his conviction.

ARGUMENT

ISSUE I

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

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

Standard of Review

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

Preservation

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

of this brief.

Argument

In 1988, McGriff was convicted of second degree murder with a firearm, armed burglary with a firearm and armed robbery with a firearm. (McGriff I at 233); (R 11). The trial court entered a departure sentence imposing a departure sentence as to the second degree murder count sentencing McGriff to life imprisonment. (R 2). The trial court sentenced McGriff to ten years consecutive as to count II, and ten years concurrent to count II as to count III. (R 2). The trial court articulated its three reasons for departure in its order. (R 2). McGriff quoted the trial court's order in his motion to correct illegal sentence:

> "1) The defendant's unscored juvenile record. The defendant had two juvenile adjudications- breaking and entering in 1975, and battery in 1978. See, Cumming v. State, 489 So. 2d 121 (Fla. 1DCA 1986).
>
> 2) The defendant is totally unamenable to rehabilitation. A review of his prior record demonstrated 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 been successful, including his term in prison. See, Kiser v. State, 455 So. 2d 1070 (Fla. 2DCA 1984), and Allen v. State, 522 So. 2d 850 (Fla. 4DCA 1987).
>
> 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. See, State v. McCall, ___ So. 2d ___, (13 Fla. L. Weekly (S)311 (Fla.

> 1986), and Everage v. State, 504 So. 2d 1255 (Fla. 1DCA 1986)."

(R 17-18).

Following a remand, on May 18, 2001, the trial court resentenced McGriff removing the habitual offender designation. (R 12). The State appealed because neither it nor McGriff was present. See McGriff, 819 So. 2d. McGriff sought and was granted a belated appeal by the First District in case number 1D01-2867. McGriff V. McGriff filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) on December 23, 2002. (R 12). In May 2003, the trial court entered an order determining that resentencing was required. (R 12).

On June 20, 2003, the trial court held the resentencing proceeding. (R 12). After argument, the trial court resentenced McGriff as to count I removing the habitual offender designation. (R 12). McGriff appealed. (R 12). On September 29, 2004, the First District per curiam affirmed McGriff's sentence. See McGriff VI.

On November 9, 2004, McGriff filed another motion to correct illegal sentence. (R 1-9). On July 5, 2005, McGriff filed an amended motion to correct illegal sentence alleging that Apprendi and Blakely applied to his sentence, and, therefore, his sentence was unconstitutional. (R 13-20). On

January 6, 2005, the trial court denied McGriff's motion finding that Blakely and Apprendi did not apply retroactively. (R 32).

McGriff appealed. (R 33). On February 21, 2007, the First District issued its written opinion in which it reversed the order of the trial court finding based on its prior decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), both Blakely and Apprendi applied to McGriff's case. See McGriff VII.

On appeal, the First District found Apprendi and Blakely to be applicable to McGriff's resentencing. See McGriff VII at *2. The First District's conclusion was improper for several reasons. First, McGriff's claims as set out in his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a) fails to affirmatively allege that the records demonstrate on their face that he is entitled to relief. McGriff's amended motion to correct illegal sentence firmly sets out that two of the departure reasons are recidivist based thereby making the United States Supreme Court decisions in Apprendi and Blakely are inapplicable. Second, a motion pursuant to Florida Rule of Criminal Procedure 3.800(a) is not the appropriate vehicle for the raising of a claim such as McGriff's because for a sentence to be illegal within the meaning of Florida Rule of Criminal Procedure 3.800(a), the sentence must impose a punishment that no trial court could

impose in any set of factual circumstances under the sentencing statutes. Third, neither Blakely nor Apprendi apply to McGriff's sentence because applying either decision constitutes retroactive application of the decisions. Fourth, neither Apprendi nor Blakely is applicable to McGriff because the trial judge made no findings required to be made by a jury after the advent of Apprendi and Blakely. Fifth, Apprendi should not be applied to McGriff's resentencing because application of Apprendi to MGriff's case gives Apprendi retroactive affect and destroys the State's interest in the finality of his conviction.

A. 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.

The First District and the trial court erred in considering McGriff's motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). Florida Rule of Criminal Procedure 3.800(a) requires that the defendant "affirmatively allege[]" in his motion "that the court records demonstrate on their face an entitlement to relief." In the current case, McGriff's amended motion to correct illegal sentence affirmatively alleges on its face that the trial court departed for the following reasons:

> "1) The defendant's unscored juvenile record. The defendant had two juvenile adjudications- breaking and entering in 1975, and battery in 1978. See, Cumming v. State, 489 So. 2d 121 (Fla. 1DCA 1986).
>
> 2) The defendant is totally unamenable to rehabilitation. A review of his prior record demonstrated 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 been successful, including his term in prison. See, Kiser v. State, 455 So. 2d 1070 (Fla. 2DCA 1984), and Allen v. State, 522 So. 2d 850 (Fla. 4DCA 1987).
>
> 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. See, State v. McCall, ___ So. 2d ___, (13 Fla. L. Weekly (S)311 (Fla. 1986), and Everage v. State, 504 So. 2d 1255 (Fla. 1DCA 1986)."

(R 17-18).

The essential holding in Apprendi, 530 U.S. at 490, was that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This holding was disturbed in no way by the Court's subsequent decision in Blakely.

Appellant's own motion affirmatively alleges that the trial court departed for two reasons related to McGriff's prior convictions that are unequivocally legal. The third basis is the only basis potentially subject to the application of Apprendi or Blakely. Pursuant to section 921.001(6), Florida

Statutes (2008), a "departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure." See also Perry v. State, 714 So. 2d 563 (Fla. 1st DCA 1998). As a result, even if Apprendi and Blakely were applicable to McGriff's sentence, the courts were obliged to deny him relief because the departure was supported, as McGriff's motion affirmatively contended, by reasons exempt from the application of the United States Supreme Court decisions in Apprendi and Blakely. Therefore, the decision of the First District should be reversed.

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

McGriff comes before this Court as a result of a motion pursuant to Florida Rule of Criminal Procedure 3.800(a). The case law is clear that Apprendi and Blakely challenges are not properly made on collateral review. Furthermore, Florida Rule of Criminal Procedure 3.800(a) is not appropriate vehicle by which to obtain the remedy given to McGriff.

In Davis v. State, 661 So. 2d 1193, 1196-97 (Fla. 1995), this Court rejected the contention that a departure sentence that had been imposed without a contemporaneous written order providing the reasons for departure was an illegal sentence that could be corrected at any time. This Court reiterated its

holding in Gartrell v. State, 626 So. 2d 1364 (Fla. 1993), "concluding that an illegal sentence is one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." Id. at 1196. This Court further explained that "a departure sentence that is beyond the guidelines may be an erroneous sentence when written reasons are not properly filed, but it is not an illegal sentence when it is still within the maximum allowed by law." Id. at 1197.

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

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

Id.

In Hopping v. State, 708 So. 2d 263, 264 (Fla. 1998), this Court resolved the issue of whether a sentence was illegal because the sentence had been enhanced after it was imposed in violation of the double jeopardy clause. This Court determined

that a defendant could challenge such a sentence because the challenge could be determined as a matter of law. See id. at 265.

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

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

In Carter v. State, 786 So. 2d 1173, 1175 (Fla. 2001), this Court resolved the issue of whether a habitual offender sentence may be corrected as an illegal sentence pursuant to rule 3.800(a), Florida Rules of Criminal Procedure, motion when the habitual offender statute in effect at the time of the defendant's offense did not permit habitualization for life felonies. In its opinion, this Court also clarified the role of rule 3.800(a), Florida Rules of Criminal Procedure, and the definition of an illegal sentence within the meaning of the rule. This Court explained:

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

> requirements of law.

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

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

In finding that Carter could challenge his sentence by means a motion pursuant to Florida Rule of Criminal Procedure 3.800(a), this Court emphasized "that this is not a case, as in Davis, where the error was in a failure to comport with statutory procedural safeguards employed in the imposition of the sentence." Carter, 786 So. 2d at 1180-81.

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

> The difference between [the situations in Hopping and Calloway] is significant, and not just because no evidentiary hearing is necessary to ascertain the illegality. Separate sentences for each of multiple crimes committed during a criminal episode may not amount to unconstitutional enhancements as such if the statute prescribing

> the crime and penalty expressly provide for and allow this kind of multiple punishment. No judge, however, can increase a sentence once it has been imposed and the prisoner has begun to serve it.

Additionally, the Fourth District stated:

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

Id. at 1185-86.

In McGriff's case, he essentially argues that he is entitled to relief by his motion pursuant to Florida Rule of Criminal Procedure 3.800(a) **because the trial court failed to comply with the procedural safeguards** set forth in Apprendi and Blakely. As this Court discussed in Carter, 786 So. 2d at 1180-81, this is not an appropriate basis for relief under the rule. Further, McGriff's request does not meet the criteria of the "short-list" identified in Blakely, 746 So. 2d. Because McGriff's sentence does not "impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances," rule 3.800(a), Florida Rules of Criminal Procedure does not provide him a vehicle by which to obtain relief.

C. Neither Blakely Nor Apprendi Apply Retroactively.

In Apprendi, 530 U.S. at 490, the defendant fired bullets

into the home of an African-American family. Apprendi entered into a plea agreement in which he agreed to plead guilty to three of the twenty-three counts charged. See id. at 469-70. Under the terms of the agreement, the sentences for two counts would run consecutively and the sentence for the third count would run concurrently with the other two. See id. at 470. Apprendi faced a maximum sentence of twenty years on the two counts without the imposition of a hate-crime enhancement. See id. However, if the hate-crime enhancement was applied, the statute authorized a twenty-year maximum sentence on one count alone. See id. The judge, utilizing a preponderance of the evidence standard, found that the hate-crime enhancement applied. See id. at 471. As a result, Apprendi was sentenced to a twelve-year term on that count and to shorter concurrent sentences on the other two counts. See id.

Before the Supreme Court, the question was whether a jury had to find there had been a hate crime beyond a reasonable doubt. See id. at 468-69. In response to that question, the Court held that any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

In Blakely, the Court applied the Apprendi decision to

Washington's presumptive sentencing system. Blakely pled guilty to kidnaping his wife. See Blakely, 542 U.S. at 298. Pursuant to Washington's sentencing statute, Blakely faced a sentence of forty-nine to fifty-three months. See id. at 299. However, the statute allowed for the imposition of a greater sentence if the judge found substantial and compelling reasons that justified a "exceptional sentence." See id. The judge imposed the greater sentence of ninety months based upon a finding that Blakely acted with "deliberate cruelty." See id. at 300. On review, the Supreme Court concluded that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Id. at 303 (emphasis in original). The Court continued:

> In other words the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

As a result, the Court found that because Blakely's sentence exceeded the presumptive sentence and there was no jury finding of the enhancing factor under the reasonable doubt standard, the sentence violated the Sixth Amendment right to a jury trial. See id. at 305.

In Hughes v. State, 901 So. 2d 837 (Fla. 2005), this Court considered whether or not Apprendi should be given retroactive

application. After analyzing the Apprendi decision under the test set forth in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980), this Court concluded that Apprendi should not be applied retroactively. See Hughes 901 So. 2d at 848.

This Court has not yet ruled whether the decision in Blakely should be given retroactive effect. The State respectfully suggests that Blakely should not be applied retroactively.

In Witt v. State, 387 So. 2d at 931, this Court set forth its test for determining whether or not a change of law requires retroactive application. This Court stated that an alleged change of law will not be considered for retroactive application unless the change: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Id. at 931. Florida based its test for retroactivity on the considerations set forth in Stovall v. Denno, 388 U.S. 293 (1967), and Linkletter v. Walker, 381 U.S. 618 (1967), in which the United States Supreme Court looked to the purpose to be served by the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule. Stovall, 388 U.S. at 297. Blakely does emanate for the United States Supreme Court

and involves the right to a jury trial; however, Blakely does not constitute a development of fundamental significance. In Witt, 387 So. 2d at 929-930, this Court stated:

> A change of law that constitutes a development of fundamental significance will ordinarily fall into one of two categories: (a) a change of law which removes from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) a change of law which is of sufficient magnitude to require retroactive application. 387 So. 2d at 929.

The ruling in Blakely does not divest the state of the right to prohibit any conduct or the right to establish punishments for proscribed conduct. Hence, the question is whether it is a change of law which is of sufficient magnitude to require retroactive application. The decision in Gideon v. Wainwright, 372 U.S. 335 (Fla. 1963), is an example of a law change which was of sufficient magnitude to require retroactive application. Witt, 387 So. 2d at 929. However, this Court also said:

> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgement of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state,

> fiscally and intellectually, beyond any tolerable limit.

Witt, 387 So. 2d at 929-930. For example, in Linkletter v. Walker, 381 U.S. 618 (1965), "the Supreme Court refused to give retroactive application to the newly-announced exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)." Witt, 387 So. 2d at 929 n.26.

Because the Witt test is only applied if there is a new rule, this Court must first determine whether Blakely announced a new rule of law. In Teague v. Lane, 489 U.S. 288, 301 (1989), Justice O'Connor, stated that "in general . . . a case announces a new rule when it breaks new ground," or stated differently, "if the result was not dictated by precedent existing at the time the defendant's conviction became final." In Beard v. Banks, 542 U.S. 406, 413 (2004), the Court stated with respect to the definition of what constitutes a new rule:

> We must . . . ask "whether the rule later announced . . . was dictated by then-existing precedent -- whether, that is, **the unlawfulness of [the] conviction was apparent to all reasonable jurists."**

(*quoting* Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997))(emphasis added).

Although Blakely relied on Apprendi, the Blakely decision fundamentally changed understanding of "maximum sentence" in the courts. Blakely redefined the "maximum sentence," not as the

maximum allowed by state statute, but as the maximum allowed by the jury's verdict. Before Blakely, the courts consistently held that Apprendi did not apply to sentences within the statutory maximum. See Simpson v. United States, 376 F.3d 679, 681 (7th Cir. 2004) (stating that "before Blakely was decided, every federal court of appeals had held that Apprendi did not apply to guideline calculations made within the statutory maximum" (*citing* United States v. Hughes, 369 F.3d 941, 947 (6th Cir. 2004))); United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir. 2004); United States v. Alvarez, 358 F.3d 1194, 1211-12 (9th Cir. 2004); United States v. Phillips, 349 F.3d 138, 143 (3d Cir. 2003); United States v. Patterson, 348 F.3d 218, 228-29 (7th Cir. 2003); United States v. Randle, 304 F.3d 373, 378 (5th Cir. 2002); United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001); United States v. Webb, 347 U.S. App. D.C. 162, 255 F.3d 890, 898 (D.C. Cir. 2001); United States v. Angle, 254 F.3d 514, 518 (4th Cir. 2001); United States v. Caba, 241 F.3d 98, 100 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 183-84 (2d Cir. 2001). Therefore, the rule in *Blakely* was clearly not apparent to all courts, was not dictated by precedent and was subject to debate among reasonable jurists. See Schardt v. Payne, 414 F.3d 1025, 1035 (9th Cir. 2005) (holding that Blakely

is new rule and pointing out that "[e]very circuit court of appeals that addressed the question presented in Blakely reached the opposite conclusion from the rule subsequently announced by the Supreme Court"). Because Blakely announced a new rule of law, this Court must apply the Witt test to determine whether Blakely applies to McGriff's sentence.

To determine if a change of law is of significant magnitude, this court applies Stovall/Linkletter test which "requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice." State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995). Crucial to the court's analysis is the purpose to be served by the new rule. Blakely, as the decision in Apprendi, served the purpose of ensuring that once a defendant is found guilty, that defendant does not receive a sentence higher than the statutory maximum, as redefined by Blakely, unless those factors which are used to impose the above-the-maximum sentence are proven to the jury beyond a reasonable doubt. However, while the Blakely ruling may implicate due process and equal protection concerns, it does not specifically operate to prevent any grievous injustices or disparities in sentencing between equally situated defendants. Rather, Blakely

merely changes the procedure employed for determining the appropriate sentence. For example "the plight of a defendant who is serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that of an equally-situated defendant whose sentence was enhanced based on jury-determined factors. In fact, it is conceivable that, if given the opportunity, a jury might find even more enhancing factors than would have been found by the judge." See Hughes v. State, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002). Thus, the due process and equal protection concerns involved in Blakely are so insignificant that it does not require retroactive application.

Indeed, in looking to the significance of Blakely in contrast to decisions which required retroactive application, this Court should consider the fact that had the issue been properly presented and preserved in the trial court, there is very little expectation that the outcome of the sentence would be any different. For example, if a criminal defendant requested a special verdict regarding the victim's injury, it is unlikely that a jury's findings regarding the severity of a victim's injury would be any different that of a judge. In contrast, there is a strong likelihood of a criminal defendant unfamiliar with the rules of evidence and unaware that crucial evidence against him is subject to suppression, will be

convicted when unrepresented and acquitted if represented by competent counsel. Therefore, Gideon v. Wainwright, required retroactive application; however, Blakely, like Apprendi, is not of sufficient magnitude because a Blakely violation causes no harm to the defendant.

In fact, the United States Supreme Court held that a Blakely claim is not plain or fundamental error. See Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, (2006)(explaining that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"). The Court found that the error presented was subject to harmless-error analysis

> because "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Id., at 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35. See also Schriro v. Summerlin, 542 U.S. 348, 355-356, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (rejecting the claim that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which applied Apprendi to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a "'"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding,'" in part because we could not "confidently say that judicial factfinding seriously diminishes accuracy").

Recuenco, 126 S. Ct. at 2551-2552. This Court has likewise concluded that Apprendi and Blakely errors are subject to

harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007). Therefore, if an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. See United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir. 2002)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi, is not retroactive).

In fact, the United States Supreme Court has even held that the right to a jury trial is not retroactive. See DeStefano v. Woods, 392 U.S. 631 (1968)(refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury); cf. Brown v. Louisiana, 447 U.S. 323, 328 (1980)(holding that because the conviction by non unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts, the decision should be applied retroactively).

Every other federal circuit which has addressed the issue has found that Blakely is not retroactive. The United States Supreme Court has narrowed the test for retroactivity in Teague v. Lane, 489 U.S., holding that a new rule will not be applied

in a collateral review unless it falls under one of two exceptions. The Court stated that "[f]irst, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[,]'" and "[s]econd, a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.'" Teague, 489 U.S. at 307. "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, 121 S. Ct. 2478, 2484 (2001). "A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461 (1993), citing, Teague, 489 U.S., at 301.

Although the federal test is now slightly different for this Court's test for retroactivity, it is significant to this Court's analysis that the federal circuits addressing this issue have held that Blakely is not retroactive. See Sciulli v. U.S.,

142 Fed. Appx. 64 (3d Cir. 2005); U.S. v. Stoltz, 149 Fed. Appx. 567 (8th Cir. 2005); Schardt v. Payne, 414 F. 3d 1025, 1034 (9th Cir. 2005); U.S. v. Price, 400 F.3d 844, 849 (10th Cir. 2005); Michael v. Crosby, 430 F.3d 1310, 1312 (11th Cir. 2005). Additionally, state supreme courts that have held Blakely is not retroactive. See State v. Smart, 202 P.3d 1130 (Alaska 2009)(determining that Blakely should not be applied retroactively on collateral review under the state test in Judd v. State, 482 P.2d 273 (Alaska 1971), which employs the Linkletter, 381 U.S., analysis); People v. Johnson, 142 P.3d 722 (Colo. 2006); Carmichael v. State, 927 A.2d 1172 (Me. 2007); Gutermuth v. State, 868 N.E.2d 427, 433 (Ind. 2007); State v. Houston, 702 N.W.2d 268 (Minn. 2005); State v. Evans, 114 P.3d 627 (Wash. 2005).

In agreement with the other courts in this nation, Blakely is a change of procedure that is not of such significance to require retroactive application. As the First District stated stated in Hughes, 826 So. 2d at 1074: "If an Apprendi violation can be harmless, it is difficult to logically conclude that the purpose behind the change of law in Apprendi is fundamentally significant. Thus, analysis of the Apprendi ruling under the first prong of the Stovall/Linkletter test does not weigh in favor of retroactivity." Since the same is true of Blakely, the

test does not weigh in favor of Blakely being applied retroactively either.

The second prong of the Stovall/Linkletter test is the extent of reliance on the old rule. Trial judges have historically had the ability to determine sentence-enhancing factors. This Court found in Hughes, 901 So. 2d at 845,

> Trial courts have long exercised discretion in sentencing. Moreover, since 1994 our trial courts have been permitted to impose sentences exceeding the statutory maximums based on the judge's factual findings made under the sentencing guidelines and the Criminal Punishment Code. See: § 921.001(5), Fla. Stat. (Supp. 1994); § 921.0024(2), Fla. Stat. (Supp. 1998). Therefore, when Apprendi was decided there had been a considerable period of reliance on this principle in sentencing under both the guidelines and the Code.

The same should be stated of Blakely, as there has been considerable reliance on the ability of judges to impose departure sentences under both the sentencing guidelines and Criminal Punishment Code.

The third prong of the Stovall/Linkletter test is the effect that retroactive application of the rule will have on the administration of justice. The findings of this Court in Hughes, 901 So. 2d at 845-46, are no less applicable to the situation created by the retroactive application of Blakely. To that effect, this Court stated in Hughes:

> Two district courts of appeal have stated that

retroactive application of Apprendi would have a far-reaching adverse impact on the administration of justice. As the Fifth District noted,

> virtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score. Justice O'Connor's observation that the effect of Apprendi to guidelines sentencing would be "colossal" barely describes the cataclysm in Florida if such sentences are invalidated because the jury did not make the "victim injury" finding.

McCloud v. State, 803 So. 2d 821, 827 (Fla. 5th DCA 2001) (*en banc*), *review denied*, 821 So. 2d 298 (Fla.), *cert. denied*, 537 U.S. 1036, 154 L. Ed. 2d 455 (2002). In this case, the First District concluded that the impact on the administration of justice "would be monumental." Hughes, 826 So. 2d at 1074. As the court noted, "each and every enhancement factor that was determined by a judge and which resulted in a sentence above the statutory maximum will either have to be stricken completely and the sentences recalculated without the factor (which in itself is a laborious process), or a jury will have to be empaneled to decide those factors." Id.

* * *

To apply Apprendi retroactively would require review of the record and sentencing proceedings in many cases simply to identify cases where Apprendi may apply. In every case Apprendi affects, a new jury would have to be empaneled to determine, at least, the issue causing the sentence enhancement. In most cases, issues such as whether the defendant possessed a firearm during the commission of a crime, the extent of victim injury or sexual contact, and whether a child was present (to support use of the domestic violence multiplier) cannot be considered in isolation. Many, if not all, of the surrounding facts would have to be presented. In others, a jury would

> have to determine factors unrelated to the case (e.g., whether legal status points may be assessed).

Because none of the Witt test factors weighs in favor of Blakely being found to be a change of law that constitutes a development of fundamental significance, this Court should find Blakely, just as it has Apprendi, to not be retroactively applicable. Additionally, this Court should decline to apply the Apprendi and Blakely decision to McGriff's case as set forth in the following sections of this brief.

D. Neither Apprendi Nor Blakely Are Applicable to McGriff's Case Because No Findings Were Made by a Judge Rather Than a Jury After the Advent of the United States Supreme Court Decisions in Either Appprendi or Blakely.

The de novo resentencing proceedings employed by Florida are unique and cause unique problems to arise as demonstrated by the present case. As Justice Cantero noted his concurrence in Galindez, 955 So. 2d at 525, this Court has "traditionally held that 'resentencing should proceed *de novo* on all issues bearing on the proper sentence.'" (*citing* Morton v. State, 789 So. 2d 324, 334 (Fla. 2001)(*quoting* Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986)). Justice Cantero failed to recognize that resentencings are not completely *de novo* proceedings, especially when it comes to the imposition of departure sentences like the sentence at issue in this case. This Court has expressly limited the ability of the State and the trial court to impose a

departure sentence on remand. In Shull v. Dugger, 515 So. 2d 748, 749-50 (1987), this Court held explicitly that when a departure sentenced is reversed because the departure reasons are invalid, the trial court may not again depart based upon new reasons. In essence, the trial court gets only one chance to depart and that is at the time of the defendant's original sentencing. Since the trial court may only mitigate a defendant's sentence and not enhance it thereafter, Florida's resentencings are not completely *de novo* proceedings.

This argument is further supported by the law of the case doctrine. In this case, McGriff had the opportunity to challenge the departure reasons following his original conviction and sentencing in his original direct appeal which became final in 1989. McGriff also had the opportunity and did in fact challenge the grounds stated in his departure sentence. As a result, prior to the decisions in Blakely and Apprendi, the trial court's reasons for departure were approved by the appellate court and are, therefore, law of the case. As a result, the later decision in Blakely is of no consequence because the trial judge did not make new departure findings in violation of Blakely's holding. Further, Apprendi itself is of no consequence because Apprendi merely held that the sentence could not exceed the statutory maximum for the crime without

separate jury findings. In Florida, the applicable statutory maximum is found in section 775.082, Florida Statutes, and McGriff's sentence did not exceed the maximum for any of the counts for which he was sentenced. Therefore, neither Apprendi nor Blakely are offended by the sentence reimposed based upon a the ministerial act of removing the habitual offender designation from his sentence in this case. To hold otherwise, would be to permit a collateral attack on the long ago approved departure reasons which is contrary to the concept that neither Blakely nor Apprendi are retroactive based upon a simple technical correction.

Finally, while McGriff was resentenced, the act was more akin to a ministerial action. A departure sentence was imposed that was substantially in excess of the guidelines. Based upon the facts of the case as demonstrated by the reasons for departure, it was unlikely that the trial court would not have imposed the same or substantially the same departure sentence on remand. McGriff is not entitled to receive a second windfall because he simply waited long enough to challenge his sentence such that Apprendi and Blakely came to pass.

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

Finally, neither Apprendi nor Blakely should be given what

amounts to retroactive application in cases such as McGriff's. Once a case is final on its original direct appeal, the State has an interest in the finality of the conviction. Applying the rules of Apprendi and Blakely to cases such as McGriff's eviscerates that interest by allowing the defendant to challenge the methodology of his sentencing long after he was originally sentenced and his challenges, if any, to the departure sentence are affirmed during his original direct appeal. The State is further disadvantaged by the passage of time in that its witnesses may no longer be available to testify live, exhibits may no longer exist a decade or more after the conviction became final on direct appeal, witnesses memories will have faded, etc. As a result, even if this Court creates a process permitting the State to empanel a new jury for purposes of finding the departure reasons beyond a result, the State's interest in finality is undermined.

Justice Cantero's logic in his concurrence in Galindez, is compelling, if this Court interprets Blakely and Apprendi in such a manner as to restrict the findings to the original jury findings at the time the defendant was originally convicted, then the application in fact is retroactive. Justice Cantero stated:

> **Under such an interpretation, Apprendi and Blakely no longer affect only the sentencing; they affect**

> **the conviction as well because the facts found at that time dictate the sentence.** If that is the case, then applying Apprendi and Blakely to a resentencing *would* "alter the effect of a jury verdict and conviction." Galindez v. State, 910 So. 2d 284, 285 (Fla. 3d DCA 2005). **Stated another way, if Apprendi and Blakely reverberate backward to the defendant's conviction, applying those cases to defendants whose convictions already were final constitutes a retroactive application, contrary to our decision in Hughes.** Such an approach also would be misguided as a matter of policy (retroactivity, after all, is more a policy question than anything else) **because it penalizes the State for pursuing the conviction in accordance with then prevailing law without allowing it a remedy, and because it allows the defendant to benefit from a conviction he has shown no right to reopen.**

Galindez, 955 So. 2d at 525 (J. Cantero concurring)(bold emphasis added). Applying the new law set forth in Blakely and Apprendi to McGriff's case, "would 'destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state . . . beyond any tolerable limit.'" Id. at 527-28 (*quoting* Witt, 387 So. 2d at 929-30. As Justice Cantero further pointed out, application of the finality principle

> avoids those dire consequences by allowing retroactive application only when new rulings "so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of postconviction relief is necessary to avoid individual instances of obvious injustice." Id. at 925. We have already evaluated Apprendi under the Witt standard and held that it does not apply retroactively. See Hughes, 901 So. 2d at 837. It is safe to assume that Blakely,

> which "appl[ied] the rule . . . in Apprendi," 542 U.S. at 301, will not apply retroactively, either. Thus, the defendant clearly has no right to retroactive relief under Apprendi or Blakely.

Id. at 528 (*quoting* Witt, 387 So. 2d at 925).

These statements lead to the discussion of when finality attaches in a criminal case. This Court has stated that finality attaches when the defendant's conviction rather than the sentence becomes final. For instance in Johnson v. State, 904 So. 2d 400, 407 (Fla. 2005), this Court stated "that once a conviction has been upheld on appeal, the State acquires a strong interest in finality." See also Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999)(providing that "once a conviction has been affirmed on direct appeal 'a presumption of finality and legality attaches to the conviction and sentence.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 633 (1993)).

Additionally, in this Court's opinion in Hughes, 901 So. 2d at 83-40, this Court "emphasized the affirmance of the *conviction* as the critical moment for retroactivity purposes." Galindez, 955 So. 2d at 528 (J. Cantero concurring). It should also be noted, as Justice Cantero did in Galindez, 955 So. 2d at 528 n.3, that the United States Supreme Court placed emphasis on the conviction in its plurality opinion in Teague v. Lane, 489 U.S. at 309, when it stated that the "[a]pplication of constitutional rules not in existence at the time a conviction

becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

If this Court intends to apply Apprendi and Blakely to cases such as McGriff's, then at the least, this Court should create a methodology for permitting the State to empanel a jury for purposes of finding the sentencing enhancements beyond a reasonable doubt. Otherwise, the decision of this Court will grant the defendant a windfall to which he is not entitled for simply delaying his proceedings until the rules of the game became more favorable to him. Finally, as Justice Cantero noted in his concurrence in Galindez, 955 So. 2d at 529,

> In fact, applying Apprendi and Blakely without a new jury is even more disruptive than most retroactive applications. It creates a bizarre paradox: **the State is faulted for failing to prove sentence-enhancing facts to the jury at a time when it was not required to do so, yet is barred from proving those facts to a jury once such a requirement has been created.** The result is that defendants will obtain relief (i.e., lighter sentences than their behavior warrants) because of defects in the process leading to their convictions, despite the continued finality of those convictions. **That is the very essence of retroactive application. It violates the principle of finality that we so adamantly defended in Hughes and contradicts its express language.**

(emphasis added).

Conclusion

Based on the foregoing, the State respectfully submits that this Court should reverse the ruling of the First District and find that neither Apprendi nor Blakely apply to resentencings such as the resentencing of the Respondent. Even if this Court rules that Respondent can challenge his sentence and/or Apprendi and Blakely is applicable, this case is not fully resolved. The case must be remanded for the completion of a harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007)(concluding that harmless error analysis applied to Apprendi/Blakely error and determining that the failure to submit the issue of victim injury points to the jury was harmless); see also Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006)(explaining that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error"). Under a harmless error analysis, the lower court must determine if the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factors. Alternatively, this Court should permit the State the opportunity to empanel a jury for purposes of finding the sentencing enhancements beyond as reasonable doubt, should the lower court be unable to determine from the record that the error, if any, was harmless.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to John Stewart Mills, Esq., Mills & Creed, P.A., 865 May Street, Jacksonville, Florida 32204, by MAIL on 12th day of November, 2009.

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CERTIFICATE OF COMPLIANCE

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

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