IN THE SUPREME COURT OF FLORIDA

MELVIN B. THOMPSON,

Petitioner,

Case No. SC07-489

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S AMENDED ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Melvin B. Thompson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of six consecutively numbered volumes, one supplemental volume, and sixteen unnumbered volumes of transcripts. The records marked as “3.850” will be referenced according to the respective number designated in the Index to the Record on Appeal. The sentencing transcript will be referenced as “ST”, the transcript of the hearing on the motion to withdraw will be referenced as “MTW” and the trial transcript will be referenced as “TT”, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

Petitioner’s direct appeal case, Thompson v. State, 764 So. 2d 630 (Fla. 1st DCA 2000), will be referred to as Thompson I. The State will reference Petitioner’s postconviction appeal, Thompson v . State, 949 So. 2d 1169 (Fla. 1st DCA 2007), as Thompson II.

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

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record subject to the following additions:

(1) The trial court sentenced the Petitioner upon conviction as follows: Count I, sexual battery with a deadly weapon, life imprisonment; Count II, burglary of a dwelling while armed, life probation consecutive to the life imprisonment imposed in Count I; Count III, aggravated assault with a deadly weapon, five years imprisonment concurrent with the life term imposed in Count I; Count IV, false imprisonment, five years imprisonment concurrent with the life term imposed in Count I. (RI 63-71).

(2) The full context of the exchange at the hearing on the motion to withdraw is as follows:

> JUDGE SMITH: Okay. So if convicted in that case, he will be spending the rest of his life in prison?
>
> MR. GREENBURG: Perhaps if that's what the guidelines call for.
>
> JUDGE SMITH: With a first degree punishable by life, I don't think we need to be worrying about

> the guidelines. So his threat is that when he gets out of prison, he's going to make you pay for it and kill you and kill me and Mr. Poitinger and Mr. Murrell and the families and everybody?
>
> MR. GREENBURG: Yes, Your Honor, that's correct…. I understand I guess the point the Court is making that if he's convicted, he may get life in prison….
>
> * * *
>
> MR. POITINGER: There's no question that I am going to seek the maximum. There's no doubt about that…. I intend to put him away for the remainder of his natural-born life….
>
> * * *
>
> JUDGE SMITH: As far as the motion to withdraw, the Court is going to deny the motion to withdraw. If there has been a threat made, the court concludes that it was a threat that could never be carried out. If he's convicted, which was the condition of his threat, he will be in prison for the rest of his natural life and he couldn't do physical harm to you or Mr. Poitinger or Mr. Murrell or me or anyone else."

(MTW 6-13).

(3) During his postconviction proceedings, Petitioner had the DNA evidence in this case tested. The testing resulted in the generation of a laboratory report reflecting that the Petitioner's semen was found on the victim's black sweatpants. (RIII 400-401, 415-16). The frequencies reflected are one in 110 trillion African Americans, one in 2.8 quadrillion Caucasians, and one in 180 quadrillion Hispanics. (RIII 412-13).

SUMMARY OF ARGUMENT

Issue I

The District Court properly applied the prejudice standard presented in Strickland v. Washington, 466 U.S. 668 (1984), to the Petitioner's postconviction claim of ineffectiveness by his trial counsel as a result of his failure to timely file a motion to disqualify the trial judge. The Petitioner failed to demonstrate that the trial judge was actually biased, and instead on claims that he had a reasonable fear that the trial judge might be biased.

The Fourth and Second Districts in Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998), and Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004), incorrectly supplanted the Strickland prejudice standard with the statements of the United States Supreme Court in Lockhart v. Fretwell, 506 U.S. 364 (1993). Since Lockhart, the United States Supreme Court has made it clear in cases such as Williams v. Taylor, 529 U.S. 362 (2000), that Lockhart has not supplanted Strickland as the applicable standard. Likewise, this Court made clear in Caratelli v. State, 961 So. 2d 312 (Fla. 2007), that the Strickland standard should be the standard applied and an actual showing of bias is required to establish the prejudice prong. As a result, Goines

and Kleppinger have been wrongly decided, and the decision of the District Court in this case should be affirmed.

ISSUE II

The Petitioner failed to preserve this issue for review as required by United States v. Cotton, 535 U.S. 625 (2002). Further, the trial court's imposition of a departure sentence in this case does not violate the holding of Apprendi v. New Jersey, 530 U.S. 466 (2000). The trial court sentenced the Petitioner to life imprisonment followed by life probation on counts that were a life felony and a first degree felony punishable by life, respectively. The sentences imposed did not exceed the statutory maximums.

The Petitioner's judgment and sentence became final some four years before the decision in Blakely v. Washington, 542 U.S. 296 (2004). Several federal courts have found that Blakely does not apply retroactively under a Teague v. Lane, 489 U.S. 288 (1989), analysis. This court, agreeing with the United States Supreme Court, has already decided that Ring v. Arizona, 536 U.S. 584 (2002), an extension of Apprendi, does not apply retroactively under this Court's Witt v. State, 387 So. 2d 922 (Fla. 1980), analysis. An application of the Witt factors weighs heavily against applying Blakely retroactively.

Finally, as this Court decided recently in Galindez v. State, 955 So. 2d 517 (Fla. 2007), Apprendi and Blakely errors are subject to harmless error analysis. In this case, the evidence presented to the jury establishes that any error in not submitting the departure factors to a jury was harmless beyond a reasonable doubt. Consequently, this Court should affirm the sentences imposed in this case.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT CORRECTLY APPLY THE STANDARD ANNOUNCED IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), WHEN IT FOUND THAT PETITIONER HAD NOT DEMONSTRATED PREJUDICE SUFFICIENT TO GRANT POSTCONVICTION RELIEF? (Restated)

Petitioner contends that the District Court incorrectly applied the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), rather than the standard enunciated in Lockhart v. Fretwell, 506 U.S. 364 (1993), which was followed by the courts in Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998), and Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004). The State respectfully disagrees.

Standard of Review

The issue of whether the District Court applied the correct law to this case is a pure legal question entitled to *de novo* review.

Preservation

Petitioner preserved this issue by arguing it to the trial court in his amended motion for postconviction relief and on appeal. (RIII 4-11); Thompson II, 949 So. 2d at 1173-74.

Argument

The District Court correctly applied the ruling in Strickland to this case. Prior to trial, Petitioner threatened the life of his trial counsel, Richard Greenburg, and all of the other participants in the case, along with their families. As a result, Mr. Greenburg filed a motion to withdraw on February 23, 1996, only forty seven days after he had been appointed. At the hearing on the motion to withdraw, the following exchange occurred

> JUDGE SMITH: Okay. So if convicted in that case, he will be spending the rest of his life in prison?
>
> MR. GREENBURG: Perhaps if that's what the guidelines call for.
>
> JUDGE SMITH: With a first degree punishable by life, I don't think we need to be worrying about the guidelines. So his threat is that when he gets out of prison, he's going to make you pay for it and kill you and kill me and Mr. Poitinger and Mr. Murrell and the families and everybody?
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> MR. GREENBURG: Yes, Your Honor, that's correct…. I understand I guess the point the Court is making that if he's convicted, he may get life in prison….
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> MR. POITINGER: There's no question that I am going to seek the maximum. There's no doubt about that…. I intend to put him away for the remainder of his natural-born life….

* * *

> JUDGE SMITH: As far as the motion to withdraw, the Court is going to deny the motion to withdraw. If there has been a threat made, the court concludes that it was a threat that could never be carried out. If he's convicted, which was the condition of his threat, he will be in prison for the rest of his natural life and he couldn't do physical harm to you or Mr. Poitinger or Mr. Murrell or me or anyone else."

(MTW 6-13). Thereafter on March 20, 1996, Mr. Greenburg, filed a motion to disqualify the trial judge based partially upon the comments recited above. On April 3, 1996, the trial judge denied the motion, finding the motion was untimely under Rule 2.160(e), Florida Rules of Judicial Administration. (RIII 543, RIV 706). Thereafter, the Petitioner obtained new counsel. (RIII 543).

The trial court found that Mr. Greenburg's performance based upon a totality of the circumstances was not deficient. (RIII 545-552). The District Court did not specifically address the deficiency prong finding that it was unnecessary to reach this issue because Petitioner did not demonstrate prejudice. Thompson II, 949 So. 2d at 1174. The District Court found that

> In attempting to establish the prejudice prong of Strickland, appellant notes that the trial court did, in fact, sentence appellant to life imprisonment and life probation - just as the court's statement indicated it would. However, appellant has not alleged any circumstances or presented any evidence, which suggest that the aggravating factors relied upon by the court to

> impose this heightened sentence did not exist. Nor does appellant allege that, assuming the existence of these aggravating factors, the sentence actually imposed was not within the trial court's discretion. As noted above, under the law at the time appellant was sentenced, these were legal sentences, which any trial judge could have legally, justifiably, and reasonably imposed under the facts of this case. Accordingly, the mere fact that the trial court imposed such a sentence is not evidence of prejudice resulting from his attorney's failure to timely file the motion to disqualify.

Id.

The District Court noted that Petitioner presented an alternative argument stating that Petitioner alleged he did not need to demonstrate prejudice in this case because the failure to file the motion to disqualify created a structural error in the proceedings. See id. The District Court stated:

> Appellant fails to establish a structural defect in this case. He argues that a structural defect was created when Judge Smith - who would have been impelled, by a timely filed motion to disqualify, to recuse himself - was permitted to preside over appellant's trial and sentencing. However, as was the case in Pinardi [v. State, 718 So. 2d 242 (Fla. 5th DCA 1998)], appellant merely alleges that Judge Smith could have been disqualified by a timely filed motion to disqualify, and does not present evidence showing that Judge Smith was actually biased in this case. Establishing the existence of facts and circumstances which could reasonably cause a litigant to fear that a judge might be biased, is not the same as establishing that the judge was actually biased.

> In this case, appellant has not alleged that Judge Smith was biased because of his relationship to the parties, nor has he identified any pecuniary interest in the outcome of the proceeding. See e.g., Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927); see also Goines v. State, 708 So. 2d 656, 661 (Fla. 4th DCA 1998). It is true that the statements made by Judge Smith may have been sufficient to require him to recuse himself, had the motion been timely filed. However, the existence of these statements standing alone is insufficient to establish that Judge Smith was actually biased in this case. Appellant has not pointed to any action or inaction by Judge Smith, which was not entirely permissible in light of the applicable law and attendant circumstances present in this case. Had appellant been able to point to behavior by Judge Smith showing that he was actually biased (thus violating Canon 3, Florida Code of Judicial Conduct, by remaining on the case), then this Court would be required to grant appellant the relief he requests.
>
> A "biased" judge presiding over a criminal defendant's trial only creates a structural defect when that judge is actually biased. It cannot be said that an unbiased judge, who would have been required to recuse himself by a timely filed motion to disqualify, presents the type of concerns with which the structural error rule is concerned. In light of the fact that appellant has failed to show actual bias, he has failed to demonstrate the existence of a structural defect, and is, consequently, not exempt from the requirement that he show prejudice.

Id. at 1174-75.

The District Court finally continued that it disagreed with decisions in Goines and Kleppinger wherein the courts determined that the finding of prejudice in cases where the defendant

alleges ineffective assistance of counsel turns on whether disqualification would have been required. See id. at 1175. The District Court found that the courts had misinterpreted the decision of the United States Supreme Court in Lockhart, 506 U.S.

In Strickland v. Washington, 466 U.S. 668, 686 (1984), the United States Supreme Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In order to evaluate ineffectiveness claims, the Supreme Court set forth a two-prong test:

> **First, the defendant must show that counsel's performance was deficient**. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Second, the defendant must show that the deficient performance prejudiced the defense.** This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687 (emphasis added). Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that rendered the result unreliable. See id.

To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694. The court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Id. at 693. The court stated that "[i]t is not enough for a defendant to show that the deficiency of counsel had some conceivable effect on the outcome of the proceeding." Id. at 693. Not every error of counsel that conceivably could have influenced the outcome of the trial undermines the reliability of the result of the proceeding. See Rutherford v. State, 727 So. 2d 216, 220-21 (Fla. 1998). A defendant, then, bears the burden of establishing both prongs of the Strickland test before a criminal conviction will be vacated. See Schofield v. State, 681 So. 2d 736, 738 (Fla. 2d DCA 1996).

Recently, in Carratelli v. State, 961 So. 2d 312 (Fla. 2007), this Court addressed the prejudice prong with respect to postconviction claims regarding juror selection and peremptory challenges. The court agreed with the Fourth District's conclusion in Carratelli v. State, 915 So. 2d 1256 (Fla. 4th DCA 2005)(en banc), requiring that prejudice be established by proving that a biased juror served on the jury rather that whether reasonable doubt existed as to the juror's impartiality. At trial, defense counsel failed to preserve a claim as to three

jurors suitability to serve on the jury. See id. In his postconviction motion, the defendant alleged that his trial counsel was ineffective for failing to preserve the denial of the for cause challenges to the jurors. See id. The court noted that three of the four jurors did not serve on the jury. See id.

This Court stated: "[T]he test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of ineffective assistance." Sanders v. State, 847 So. 2d 504, 506 (Fla. 1st DCA 2003) (en banc) (quoting Hill v. State, 788 So. 2d 315, 318 (Fla. 1st DCA 2001)), *approved*, 946 So. 2d 953 (Fla. 2006). On direct appeal, to obtain a new trial a defendant alleging the erroneous denial of a cause challenge must show only that preserved error occurred. See Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999). To obtain postconviction relief, however, the standard is much more strict. See id. The court quoted its holding in Sanders in which it stated that the test for prejudice in a collateral claim is different from that on direct appeal. See Caratelli. This Court continued

> A defendant's claim that his counsel offered ineffective assistance at trial, for whatever reason, must be analyzed under the standard the Supreme Court enunciated in Strickland. The purpose of the right to the effective assistance of counsel is to "ensure a fair trial,"

> Strickland, 466 U.S. at 686, defined as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. at 685. The Supreme Court established the following standard for determining when counsel has provided ineffective assistance warranting postconviction relief:
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687.
>
> Specifically, the Court stressed that **"[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."** Id. at 694. Therefore, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (quoting United States v. Addonizio, 442 U.S. 178, 184, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979)).

Id. (emphasis added).

In the context of Carratelli's case, this Court required that prejudice can only be shown where an actually biased juror

served in the defendant's case, and the defendant must demonstrate that the juror was actually biased. See id. This Court noted that applying a lesser standard would "disregard[] the fundamental difference, which we have discussed, between review on appeal and the much higher standard applicable to postconviction relief." Id.

In accordance with this Court's decision in Caratelli, the District Court in the case at bar required the Petitioner demonstrate that the trial judge, like the juror in Caratelli, was actually biased. In this case, Petitioner has established no actual bias. Petitioner has only alleged that he had reason to believe that the trial judge was biased. Thompson II, 949 So. 2d at 1175 n.3. Petitioner has not shown that the trial judge acted unethically, had any relationship to the parties, or had any pecuniary interest in the outcome of the case. In fact, Petitioner has not even shown that the rulings of or sentence imposed by the trial judge in this case are any different than those that would have resulted from another trial judge. In light of the nature of the actions of the Petitioner during the crime, including the particular cruelty of those actions, and his escalating pattern of criminality, Petitioner cannot establish that any other trial judge would not have departed and

sentenced him to the same sentence of life imprisonment if he had been convicted.

Even if Petitioner received a new trial in front of another trial judge, there is no likelihood of a different outcome. In fact the evidence against Petitioner would be stronger on retrial because during his postconviction proceedings, Petitioner had the DNA evidence in this case tested. The testing resulted in the generation of a laboratory report reflecting that the Petitioner's semen was found on the victim's black sweatpants. (RIII 400-401, 415-16). The frequencies reflected are one in 110 trillion African Americans, one in 2.8 quadrillion Caucasians, and one in 180 quadrillion Hispanics. (RIII 412-13).

While the District Court correctly applied the Strickland prejudice prong, the courts in Goines and Kleppinger wrongly interpreted the decision in Lockhart. First, it should be noted that the courts in Goines and Kleppinger did not have the benefit of this Court's decision in Caratelli. In Lockhart, the Supreme Court focused not on whether the ultimate outcome of the case would have changed, but rather said that courts in federal habeas proceedings should focus on whether the errors of trial counsel rendered the trial unreliable or the proceedings unfair. The Court stated

> Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart, 506 U.S. at 369-70.

Recently, the United States Supreme Court made it clear that the Strickland test, which is outcome determinative, generally determines whether trial counsel's performance prejudiced the defendant. In Williams v. Taylor, 529 U.S. 362, 390-91 (2000), the Court states the "[c]ases such as… Lockhart… do not justify a departure from the straightforward application of Strickland when the ineffectiveness of counsel does not deprive the defendant of a substantive or procedural right to which the law entitles him." Additionally, in Glover v. United States, 531 U.S. 198, 203 (2001), the Court reinforced its holding in Williams stating that "[t]he Court explained last Term that our holding in Lockhart did not supplant the Strickland analysis."

The District Court found that the courts in Goines and Kleppinger, relied on the language from Lockhart "to conclude that a defendant's failure to demonstrate how the outcome of the trial, or the sentence imposed, would have been different, does not preclude the defendant from obtaining relief" based upon a

claim of ineffective assistance of counsel. Thompson II, 949 So. 2d at 1177.

In Goines, trial counsel failed to move to disqualify the trial judge on the basis that the trial judge had previously prosecuted the defendant. Goines, 708 So. 2d at 657. The Fourth District indicated that "[t]his circumstance led defendant to fear that the former prosecutor, now his trial judge, would be biased against him in the current criminal trial." Id. During the postconviction hearing, Goines admitted that he qualified for habitual felony offender sanctions, that he had not received the thirty year maximum habitual offender sentence requested by the State and the his co-defendant had been sentenced to the thirty year maximum. See id. at 658. The Goines court noted that disqualification was not required. However, the court noted that upon motion, the trial judge should have disqualified himself, and that the court had granted a writ of prohibition on identical grounds. See id. at 659.

The Fourth District stated that "Lockhart states that the prejudice component of Strickland is concerned with whether counsel's deficient performance 'renders the result of the trial unreliable or the proceeding fundamentally unfair.'" Id. at 660 (quoting Lockart, 506 U.S. at 372). The court concluded that the performance of counsel rendered the proceedings

"fundamentally unfair" "because of the appearance and risk of judicial bias." Id. at 661.

In Kleppinger, the Second District followed the Fourth District's decision in Goines stating that "[t]he finding of prejudice turns on whether disqualification would have been required, not on whether the outcome of a new trial would have been different." Kleppinger, 884 So.2d at 149. The trial judge in Kleppinger was the father of a corrections officer, and the case involved the beating of a corrections officer in the same county. See id. Further, the judge's son was a friend of the beaten corrections officer. See id. As a result, the Second District found that the defendant's motion for disqualification would have been legally sufficient. Therefore, the court found that Kleppinger established a prima facie case of ineffective assistance. See id. It is of note, however, that the case involved a summary denial of the motion for postconviction relief, and the court's ruling did not dispose of the claim.

The Goines and Kleppinger courts utilized the improper standard in determining whether trial counsel was ineffective. The United States Supreme Court has made it clear that Lockhart did not supplant Strickland. This Court made it clear in Caratelli that the Strickland prejudice standard is the standard to be applied. As a result, the District Court in this case

correctly applied the Strickland test and found that the Petitioner had failed to establish that he had been prejudiced as a result of trial counsel's failure to timely file the motion for disqualification in this case. Applying the standard advocated by the Petitioner promote sandbagging as discussed by the District Court and warned of by this Court in Caratelli. The standards on post conviction require that the Petitioner demonstrate that the trial judge was actually biased, not merely that Petitioner feared that the trial judge was biased. As a result, this Court should affirm the ruling of the District Court in this case and disapprove to the decisions in Goines and Kleppinger to the extent that they impose a showing of prejudice less than that required by Strickland.

ISSUE II

WHETHER THE DISTRICT COURT PROPERLY AFFIRMED THE DENIAL OF PETITIONER'S RULE 3.800(a), FLORIDA RULES OF CRIMINAL PROCEDURE, CLAIM THAT THE DEPARTURE SENTENCE IMPOSED WAS ILLEGAL AND UNCONSTITUTION UNDER THE UNITED STATES SUPREME COURT RULINGS IN APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) AND BLAKELY V. WASHINGTON, 542 U.S. 296 (2004)? (Restated)

Petitioner contends that the First District erred when it affirmed the denial of Petitioner's Rule 3.800(a), Florida Rules of Criminal Procedure, claim that the trial court imposed an illegal departure sentence based upon the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). The State respectfully disagrees

Standard of Review

The issue of whether the trial court properly denied the relief requested by Petitioner presents an issue of law and is, therefore, properly reviewed *de novo*.

Preservation

Petitioner has not preserved this issue for review. An Apprendi issue must be preserved for review. See United States v. Cotton, 535 U.S. 625 (2002); see also McGregor v. State, 789 So. 2d 976 (Fla. 2001); and Hughes v. State, 901 So. 2d 837 (Fla. 2005). Although Petitioner argued that his conduct did

not warrant a departure sentence and that the guideline sentence was adequate, he never objected to the imposition of the departure sentence on the grounds that the departure factors were found by the trial judge, rather than a jury. (ST 16-18, 21-23).

Argument

Petitioner contends that the District Court erred when it affirmed the trial court's denial of his motion for postconviction relief on the grounds that the trial court imposed the departure sentence in this case based upon facts other than a prior conviction without a jury finding regarding those facts. (IB at 28). The District Court correctly determined that Blakely did not apply because Petitioner's case became final some four years before Blakely was decided. Thompson II, 949 So. 2d at 1172-73. Further, because sexual battery with a deadly weapon was classified as a life felony and burglary of a dwelling while armed was classified as a first degree felony punishable by life, Petitioner's sentence for those crimes, life imprisonment followed by life probation, does not exceed the statutory maximum for the crimes. Additionally, even if Blakely applied, the failure of the trial court to submit the facts that formed the basis of the departure sentence is harmless beyond a reasonable doubt.

Petitioner's judgment and sentence became final on December 7, 2000, the date this Court denied his petition for review. Thompson v. State, 779 So. 2d 275 (Fla. 2000). The United States Supreme Court reached its decision in Apprendi on June 26, 2000. See Apprendi, 530 U.S. at 466. As a consequence, Apprendi is applicable to Petitioner's case.

In Apprendi, the Court held that "any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In the case at bar, the two counts for which Petitioner challenges the sentence imposed, Counts I and II, the maximum sentence contained in the statute is life imprisonment. Petitioner's sentence on neither count exceeds the statutory maximum of life imprisonment. As a result, the Petitioner's sentence complies with the demands on Apprendi.

Blakely does not apply to Petitioner's case. Petitioner's judgment and sentence became final some four years prior to the Court's decision in Blakely. Neither this Court nor the United States Supreme Court has applied Blakely retroactively.[1]

In Blakely, Blakely was convicted of second-degree kidnapping which is a class B felony. Blakely, 542 U.S. at 299.

[1] In fact, the United States Supreme Court declined to answer the question of whether Blakely applied retroactively in Burton v. Stewart, 127 S. Ct. 793 (2007).

Washington state law provided that a sentence for a class B felony could not exceed ten years. See id. However, other provisions of state law further limited the sentencing range for the specific offense of second-degree kidnapping with a firearm to a "'standard range' of 49 to 53 months." Id. at 300. To impose a sentence above the standard range, the sentencing judge had to find substantial and compelling reasons supported by findings of fact and conclusions of law. See id. The United States Supreme Court stated 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 303-04 (emphasis in original). Therefore, the Court concluded that "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." Id. Because the Washington statutes further limited the sentencing range from the 10 year maximum to the standard range of 49 to 53 months, the Washington trial court's "departure" sentence violated the principles set forth in Apprendi. See id. at 305.

In numerous federal cases, the courts have held that Blakely does not apply retroactively. For instance, in In re: Anderson, 396 F.3d 1336 (11th Cir. 2005), the United States

Court of Appeals for the Eleventh Circuit discussed the fact that the Supreme Court "'has strongly implied that Blakely is not to be applied retroactively." See also Emuchay v. Vasquez, 213 Fed. Appx. 899 (11th Cir. 2007); Wesson v. U.S. Penitentiary Beaumont, TX, 305 F.3d 343 (5th Cir. 2002); U.S. v. Price, 400 F.3d 844 (10th Cir. 2005). The Eleventh Circuit noted that the Supreme Court issued its opinion in Schriro v. Summerlin, 542 U.S. 348 (2004) the same day as its decision in Blakely. In Schriro, the Court held that Ring v. Arizona, 536 U.S. 584 (2002), which extended the application of Apprendi to the facts that increased a sentence from life imprisonment to death, was not to be applied retroactively to cases on collateral review. See Schriro, 542 U.S. at 358. This Court has reached the same conclusion as the Schriro Court in Johnson v. State, 904 So. 2d 400 (Fla. 2005) and recently in Kearse v. State, 2007 Fla. LEXIS 1534 (Fla. August 30, 2007).

In analyzing whether Blakely should be given retroactive application, the federal courts have applied the rule in Teague v. Lane, 489 U.S. 288, 310 (1989). As a general rule, new rules of criminal procedure are not given retroactive effect and are unavailable for use in a collateral attack to a criminal conviction. See Teague, 489 U.S. at 316. However, the Supreme Court has set forth an exception to this general rule when the

new rule represents a "watershed rule" of criminal procedure. See id. Since the Court decided Teague, it has only cited its decision regarding the right of counsel in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), as being such a watershed rule. See Fulcher v. Motley, 444 F.3d 791, 816-817 (6th Cir. 2006).[2]

In Teague, the Court found that the procedural rule must be "central to an accurate determination of innocence or guilt." Teague, 489 U.S. at 313. In Saffle v. Parks, 494 U.S. 484, 495 (1990), the Court explained that a "watershed rule" is a rule which goes to the "fundamental fairness and accuracy of the criminal proceeding." In Schriro, 542 U.S. at 352, the Court explained that the fact that the procedural rule "is

[2] The Supreme Court has even declined to apply new rules in capital sentencing proceedings. See Graham v. Collins, 506 U.S. 461, 478 (1993) (reasoning that the denial of special jury instructions on mitigation factors during the capital sentencing phase did not "'seriously diminish[] the likelihood of obtaining an accurate determination' in [the defendant's] sentencing proceeding."); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (refusing to grant retroactive application of a new rule requiring trial courts to allow capital defendants to rebut prosecutions' assertions of continued dangerousness as a factor in death sentence consideration, when defendants would be ineligible for parole under a life sentence); Beard v. Banks, 542 U.S. 406 (2004) (refusing to give retroactive effect to the Court's new rule that invalidated a state practice of requiring juries to disregard mitigating factors not found unanimously in capital sentencing cases); and Schriro, 542 U.S. (finding that its newly announced rule requiring juries, and not judges, to find aggravating circumstances necessary for imposition of the death penalty was not a watershed rule).

'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" (quoting Teague, 489 U.S. at 313) (emphasis in original). Additionally, Teague provided that a watershed rule must "alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Teague, 489 U.S. at 311.

This Court discussed in Johnson, 904 So. 2d at 409, that it was not bound by the holding in Teague in determining the retroactivity of a decision. This Court stated

> We incorporated Linkletter [v. Walker, 381 U.S. 618 (1965)] into our own retroactivity analysis in Witt v. State, 387 So. 2d [922 (Fla. 1980)] at 925. Witt held that a change in the law does not apply retroactively in Florida "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. We explained that a "development of fundamental significance" is one that "places beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall [v. Denno, 388 U.S. 293 (1967)] and Linkletter." Id. at 929. By permitting the retroactive application of new rules only in these limited circumstances, we "declared our adherence to the limited role for postconviction relief proceedings, even in death penalty cases." Id. at 927.

Id. at 408. Thus, this Court employed a three part test to determine whether the decision required retroactive application, that being

> (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice.

Id. at 409. Under that standard, this Court determined that Ring was not retroactive. See id. at 412. This Court found that the rule changed in Ring was procedural and did not change the conduct or class of persons to be punished. See id. at 410. This Court further found that the old rule had been relied on "immeasurably." See id. Finally, this Court determined that hundreds of cases could require a new penalty phase, and the task of reviewing the cases to make the determination of whether such reconsideration was necessary would be a burdensome task. See id. at 411.

Likewise in this case, the class of persons and conduct sought to be punished is unchanged by the decision in Blakely. Additionally, the courts had prior to the change in Florida's sentencing structure long relied on the methodology utilized in this case. The trial judge has long determined the factors for departure. Finally, the application of Blakely retroactively would result in the review of not just hundreds of cases as discussed in Johnson, but rather thousands of cases. As a

result, this Court should find Blakely, like Ring, does not warrant retroactive application.

Harmless Error Analysis

In Galindez v. State, 955 So. 2d 517 (Fla. 2007), this Court declined to address the merits of the claim presented, i.e., whether the holdings of Apprendi and Blakely apply in resentencings, and instead affirmed finding that any failure to apply Apprendi and Blakely was harmless error. This Court, assuming that Apprendi applied, considered the question of whether the failure to have the jury make the victim injury finding contributed to the conviction or sentence; i.e., whether the record demonstrated beyond a reasonable doubt that a rational jury would have found penetration.

This Court concluded:

> At trial the young victim, then pregnant by Galindez, testified that she and Galindez engaged in sexual intercourse on multiple occasions over a period of several months. Galindez's confession confirming these facts, including his admission that they repeatedly had sexual intercourse, was admitted at trial. Finally, Galindez's defense at trial was that the twelve-year-old victim consented. Thus, Galindez did not dispute the facts of the sexual relationship at trial, and he did not contest them at resentencing, either.
>
> In light of the clear and uncontested record evidence of penetration regarding Count I, we hold that no reasonable jury would have returned a verdict finding there was no penetration. See Neder [v. United States], 527 U.S. [1, 19 (1999)] ("[W]here a defendant did not, and apparently

> could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee."). Accordingly, we find the error in this case harmless beyond a reasonable doubt.

Galindez, 955 So. 2d at 524.

In this case, the trial court departed based upon Section 921.0016(3)(l), Fla. Stat. (1995), which provides in pertinent part:

> (3) Aggravating circumstances under which a departure from the sentencing guidelines is reasonably justified include, but are not limited to:
>
> (b) The offense was one of violence and was committed in a manner that was **especially heinous, atrocious, or cruel**.
>
> (l) The victim **suffered extraordinary physical or emotional trauma** or permanent physical injury, or was treated with particular cruelty.
>
> (p) The defendant is not amenable to rehabilitation or supervision, as evidenced by an **escalating pattern of criminal conduct** as described in s. 921.001(8).

In this case, the trial court departed from the guidelines because it found that, (1) the Defendant's criminal conduct demonstrated an increasing pattern of violence (agreeing with the State's argument);[3] (2) Ms. Harvey suffered extraordinary emotional trauma; (3) the crime was especially heinous,

[3] Appellant admitted his prior history as set forth in the pre-sentence investigation was substantially correct. (ST 5).

atrocious and cruel; (4) Ms. Harvey was free from any fault and a virgin; (5) Ms. Harvey had been placed in great fear for her life; (6) Ms. Harvey was led to believe that Ms. Clark had been killed; and (7) Ms. Harvey suffered extreme mental anguish in addition to physical trauma. (ST 21-24).

The twenty-one (21) year old victim, Ms. Stephanie Harvey ("Ms. Harvey"), testified in 1995, she was attending Florida State University and pursuing a Bachelor of Arts major in the School of Theater. Ms. Harvey was also working to put herself through school. (TTIV 449, 452). Ms. Harvey had been awarded several scholarships, a theater and university scholarship, as well as an academic scholarship. (TTIV 452). After the rape, Ms. Harvey left the University and went to Atlanta. (TTIV 449). Ms. Harvey never obtained her degree. (TTIV 449).

While in school, Ms. Harvey shared an apartment with Allison Clark ("Ms. Clark") and Jessica Pillmore ("Ms. Pillmore"). Both Ms. Clark and Ms. Pillmore were friends. (R. V, pg. 450-451). Ms. Harvey had been living in Tallahassee for approximately four months before the attack. (TTIV 451).

When Ms. Harvey left the house to go to work on the day of the attack, she saw both her roommates sleeping. (TTIV 453). Ms. Harvey was familiar with her roommates' schedules and she

knew that they would be at home more or less during the entire day. (TTIV 453-454).

After Ms. Harvey returned from work, the Defendant attacked her. Throughout the time that the Defendant pushed and dragged Ms. Harvey from room-to-room in her apartment, the Defendant threatened to kill Ms. Harvey. Ms. Harvey believed the Defendant and was in fear for her life. (TTIV 474-475). The Defendant's knife pressing down "very hard" on the side of Ms. Harvey's neck the entire time that the Defendant was dragging and raping her. (TTIV 504). The Defendant raped Ms. Harvey from behind. The Defendant forced Ms. Harvey to kneel in front of the sofa after pulling down both her shorts and underwear. Next, when unable to rape her, the Defendant pushed Ms. Harvey down onto the floor, with her face pressing against the carpet, and began raping her again. (TTIV 476-477). After raping Ms. Harvey, the Defendant dragged her through the apartment, placed her in a closet, closed the door and again threatened to kill her. Ms. Harvey was nude from the waist down. Ms. Harvey remained in the closet because she wanted to live. (TTIV 481).

While in the closet, Ms. Harvey was concerned about her roommate Ms. Clark. (TTIV 482). The Defendant had told her that he "[had] already got her [Ms. Clark], don't think about her." (TTIV 482). Throughout the entire ordeal, Ms. Harvey was under

the impression that the Defendant had harmed Ms. Clark. (TTIV 482). Ms. Harvey believed that if the Defendant had harmed Ms. Clark, he would harm her as well. (TTIV 482). While Ms. Harvey was in the closet, she could hear the Defendant walking around the apartment and talking. (TTIV 482). At some point, the Defendant left, but Ms. Harvey remained in the closet because she was scared. Ms. Harvey remained in the closet until she heard Ms. Clark's voice. (TTIV 483).

Ms. Harvey testified that she no longer feels secure in her own home. (TTIV 486). Ms. Harvey testified that many things ended for her on the day of the attack and rape. Ms. Harvey move out of her apartment. Ms. Harvey terminated her education and was forced to leave Tallahassee. Ms. Harvey no longer was a virgin. (TTIV 491). Ms. Harvey continued having panic attacks for a year and a half after the attack. (TTIV 492). At trial, almost two (2) years after the attack, Ms. Harvey still had scars from the rug burns on her hands. (TTIV 507). The victim testified that as a result of the attack her vaginal area bled. The Defendant told her she was bleeding and Ms. Harvey assumed that the Defendant wiped Ms. Harvey's blood with the towel. (TTIV 510).

Ms. Harvey testified at the sentencing hearing that the Defendant's criminal acts against her have "changed [her] life

forever." Ms. Harvey also testified that the last two (2) years had been very "long" and "hard" not just for her but for everyone that knows her and is involved in her life. (ST 19).

Based upon the testimony heard by the jury at trial, there is no reasonable doubt that the jury would have found that the victim suffered extraordinary physical and emotional trauma and that the Petitioner committed the crimes in this case in a manner that was especially heinous, atrocious or cruel. As a result, any error in this case is harmless beyond and to the exclusion of any reasonable doubt.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 949 So. 2d 1169 should be approved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Phil Patterson, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on September 19, 2007.

Respectfully submitted and served,

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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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