IN THE SUPREME COURT OF FLORIDA

MELVIN B. THOMPSON,

Petitioner,

VS. CASE NO. SC07-489

STATE OF FLORIDA,

Respondent.

_____/

# INITIAL BRIEF OF APPELLANT

## PRELIMINARY STATEMENT

Petitioner, Melvin B. Thompson, was the defendant in the trial court and the appellant in the district court. He will be referred to in this brief as petitioner or by his proper name.

Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the district court. The state will be referred to herein as respondent or the state.

The record on appeal consists of six consecutively numbered volumes, one supplemental volume, and sixteen unnumbered transcripts. The record will be referred to by use of the symbol AV,@ followed by the appropriate volume and page numbers.

All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE

On September 19, 1995, appellant was charged by information with armed sexual battery by penetration, armed burglary of a dwelling, aggravated assault with a deadly weapon, and false imprisonment (V1 3-4).

He was tried by a jury and found guilty of each offense as charged (V1 53-56).

A sentencing guidelines scoresheet was prepared in anticipation of sentencing. Although the Clerk of Court certified that a copy of the scoresheet utilized in this case was not in the record (Supplemental Record 1075), discussions between the parties and the court indicate that appellant's presumptively correct sentence was 122.5 months to 204.2 months in state prison (V4 763-764). Nevertheless, the court imposed a departure sentence of life imprisonment on Count I, and five years imprisonment on Counts III and IV. The court sentenced appellant to a lifetime of probation in Count II, to run consecutively to the prison sentences (V1 63-74).

Notice of appeal was timely filed. On direct appeal appellant argued, inter alia, that his departure sentence was based in impermissible reasons, and that his trial lawyer provided ineffective assistance of counsel on the face of the record for failing to file a timely motion to recuse the trial

judge. In the alternative, petitioner asserts the requirement that a motion to recuse a judge be filed within ten days of the event giving rise to the motion to recuse was not jurisdictional so that the trial judge reversibly erred by denying the otherwise legally sufficient motion to recuse because it was filed fourteen days after the basis for the motion to recuse occurred.

Thereafter, appellant=s case was heard and affirmed by the First District Court of Appeal. In so ruling, the district court held that appellant=s motion to recuse would have been legally sufficient to require disqualification of the judge had it been timely filed, but concluded that the issue should be decided after a Rule 3.850 evidentiary hearing. The district court did not address any of the other issues raised on direct appeal. The court ordered a different judge to hear the Rule 3.850 pleading. Thompson v. State, 764 So. 2d 630 (Fla. 1st DCA 2000) (Thompson I).

Consequently, petitioner filed his Rule 3.850 petition in the trial court and argued that trial counsel had provided ineffective assistance for failing to timely file the motion to recuse, and in the alternative, that counsel was ineffective for failing to place on the record reasons for why he did not timely file the motion to recuse. Petitioner also

asserted that his being tried by a judge who had determined the sentence before hearing any evidence created a structural defect that warranted granting him a new trial. Finally, petitioner asserted that the guidelines departure sentence was an unconstitutional violation of his right to trial in that the reasons given in support of the departure sentence were neither pled in the charging document nor found beyond a reasonable doubt by the jury, citing Apprendi v. New Jersey, 530 U.S. (2000) and Blakely v. Washington, 540 U.S. 581 (2004).

Again, the trial court denied petitioner relief (unnumbered transcripts). Notice of appeal was timely filed, and that ruling was reviewed by the First District Court.

The First District Court of Appeal again affirmed petitioner:s convictions and sentences. Thompson v. State, 949 So. 2d 1169 (Fla. 1st DCA 2007) (Thompson II). In so doing, the court held that petitioner failed to prove the second prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) by showing that the result of the trial would have been different had a different judge sat on the case. Thompson II, supra. The appellate court also held that no structural defect had been shown because appellant/petitioner did not proved that Judge Smith was

actually prejudiced when he announced the sentence he intended to impose, before he heard the evidence in the case. Id.

Finally, the First District Court held that Apprendi v. New Jersey, supra, did not apply in this case because the departure sentence imposed here did not exceed the statutory maximum permitted by section 775.082, Florida Statutes. Although Blakely v. Washington, supra, later clarified what the Astatutory maximum@ meant,[1] petitioner=s case had become final by the time Blakely was decided.

This appeal follows.

[1] Blakely, held that the statutory maximum sentence was the maximum sentence a judge could impose based solely on the facts reflected in the jury verdict or admitted by the accused.

## STATEMENT OF THE FACTS

Appellant was charge by information with armed sexual battery, armed burglary of a dwelling, aggravated assault and false imprisonment (V1 3-4). The information did not include any of the facts that were later used by the trial judge as the basis for his guidelines departure sentence. In addition, the verdict form did not include any of the facts relied on by the trial judge when he imposed his guidelines departure sentence.

During a pre-trial hearing, the following was heard:

> DEFENSE COUNSEL: In [case number] 95-2874 the offenses are sexual battery with a deadly weapon, a life felony; burglary of a dwelling while armed, a first degree punishable by life; aggravated assault with a deadly weapon, a third degree felony; and false imprisonment, a third degree felony.
>
> COURT: Okay. So if convicted in that case, he will be spending the rest of his life in prison?
>
> DEFENSE COUNSEL: Perhaps if that's what the guidelines call for.
>
> COURT: With a first degree punishable by life, I don't think we need to worry about the guidelines....

(V4-683).

> PROSECUTOR: There's no question that I am going to seek the maximum.... I intend to put him away for the remainder of his natural-born life and I can tell that on the record.

(V4-688).

> COURT: .... 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 is a condition of his threat, if he's convicted, he will be in prison for the rest of his life....

(V4-689).

Fourteen days after the trial judge announced his intention to sentence petitioner to life, defense counsel filed a motion to recuse the judge (V1 26-28). In that motion petitioner alleged that the trial court had pre-judged the case by announcing his intention to impose a departure sentence of life without parole before he heard any incriminating or mitigating evidence.

The trial judge denied the motion and held it was legally insufficient because it had not been filed within ten days of the offending comments (Supplemental Record, Motion Hearing on April 3, 1996, at page 59).

Thereafter, trial commenced. Petitioner was found guilty of each offense as charged, and the trial judge sentenced petitioner to life in prison, as promised.

After petitioner's convictions and sentences were upheld on direct appeal, Thompson I, supra, he filed the instant

motion for post-conviction relief in which he alleged, inter alia, that trial counsel was ineffective for failing to file a timely motion to recuse, and in the alternative, that Judge L. Ralph ABubba@

Smith=s presiding over his trial created a structural defect which required that he be given a new trial.

Petitioner also argued that the reasons given in support of the departure sentence were neither pled in the information nor found by a jury beyond a reasonable doubt, citing Apprendi v. New Jersey, supra, and Blakely v. Washington, supra.

The First District Court rejected petitioner=s claim that trial counsel was ineffective for failing to timely file the motion to recuse and held that petitioner failed to demonstrate any prejudice from the deficient performance he alleged. Thompson II. In so doing, the First District Court certified that its opinion conflicted with opinions from the Second District Court, Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004), and the Fourth District Court in Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998)

The appellate court also held that petitioner failed to prove that Judge Smith=s presiding over his trial created a structural defect because petitioner failed to show Judge Smith was actually prejudiced. Id.

The district court also rejected petitioner=s Apprendi claim, as set out above.

Melvin B. Thompson now petitions this Court to review the decision of the First District Court of Appeal and resolve the

inter-district conflict created by the First District's decision in this case.

## SUMMARY OF ARGUMENT

First issue: Petitioner appealed the denial of his motion for post-conviction relief as it pertained to his claim that trial counsel provided ineffective assistance by failing to timely recuse the trial judge who announced before trial that he would impose a guidelines departure sentence of life in prison if petitioner was convicted for the instant offenses.

The district court erred by holding that petitioner failed to prove that the outcome of the case would have been different if a different judge had presided at trial. Other district courts, and the United States Supreme Court, have held that it is unnecessary to prove prejudice when the ineffectiveness claim involves the failure to properly recuse a trial judge. Goines v. State, infra (trial before a judge whose impartiality may reasonably be questioned would present grave due process concerns, because proceedings involving criminal charges... must both be and appear to be fundamentally fair); Kleppinger v. State, infra (a finding of prejudice required for a finding of ineffective assistance of counsel in connection with a judicial disqualification issue turns on whether disqualification would have been required, not on whether the outcome of a new trial would have been

different). See also, Pinardi v. State, infra, citing Arizona v. Fulminante, infra.

Moreover, allowing a biased judge to preside over a trial constitutes a structural defect that requires a new trial without regard for harmless error analysis or the conventional Strickland test. Pinardi v. State, infra. (The United States Supreme Court thus made it clear that when the issue is judicial bias... the Strickland test is not applicable).

Here, petitioner was required to stand trial with a judge who had pre-judged the sentence that would be imposed upon conviction because his trial lawyer failed to file a timely motion to recuse the judge. This constituted not only ineffective assistance of counsel, Goines v. State, infra, Kleppinger v. State, infra, but also constituted a structural defect which required that petitioner be given a new trial.

Public confidence in the judiciary requires that trials be conducted by a neutral and detached magistrate. In the instant case, petitioner:s trial was presided over by a judge who had publically announced what sentence would be imposed before he heard one scintilla of incriminating or mitigating evidence. Not only was petitioner deprived of his right to trial by a neutral and detached magistrate, but public confidence in the judiciary under these circumstances is understandably eroded.

Second issue: The trial and district courts erred by

denying petitioner=s Rule 3.800(a) claim that the departure sentences

imposed below violated petitioner=s Sixth Amendment right to trial by jury.

Petitioner=s offenses were committed when the sentencing guidelines set the presumptively correct sentence to be imposed. The trial judge, however, departed from the presumptively correct sentence of 204 months incarceration and sentenced petitioner to life in prison without parole. The trial judge then found by a preponderance of the evidence, reasons to support his excessive sentence. These reasons given in support of the departure sentence were neither pled in the information nor found beyond a reasonable doubt by the jury.

Under Apprendi v. New Jersey, infra, and Blakely v. Washington, infra, imposing a guidelines departure sentence under these circumstances violated petitioner=s right to trial by jury. Petitioner=s sentence had not become final until almost four months after Apprendi was decided. Blakely was merely a refinement of the holding in Apprendi and did not constitute a new rule of law. Blakely held that the relevant Astatutory maximum@ sentence for Apprendi purposes is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by the defendant. Blakely, infra. The trial court=s imposition of a

guidelines departure sentence based on reasons unilaterally found by the trial judge by a preponderance of the evidence violated petitioner:s Sixth Amendment right to trial by jury. This Court must vacate the life sentences and remand to the lower court with directions to impose a sentence within the guidelines range that was in effect at the time the instant offenses were committed.

## ARGUMENT

### FIRST ISSUE PRESENTED

THE DISTRICT COURT REVERSIBLY ERRED BY HOLDING THAT PETITIONER MUST PROVE THAT THERE WAS A REASONABLE PROBABILITY THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT IF TRIAL COUNSEL HAD TIMELY MOVED TO RECUSE THE PRESIDING JUDGE BECAUSE BEING TRIED BY A JUDGE WHO HAS PRE-JUDGED A CASE IS A STRUCTURAL DEFECT FOR WHICH ACTUAL PREJUDICE IS NOT REQUIRED TO BE SHOWN.

### Standard of Review

The issue before the Court involves a purely legal question. The standard of review for a purely legal question is de novo. See, eg., State v. Gandy, 766 So. 2d 1234 (Fla. 1st DCA 2000).

Before trial, and before either party presented any evidence, the judge announced that he intended to sentence petitioner to life in prison if the jury found him guilty as charged. Petitioner moved to disqualify that judge, but filed the motion fourteen days after the offending comments were made. The trial judge denied the motion as being legally insufficient because it was not timely filed.

After appellant was tried, convicted, and given the promised life sentence, he appealed. He argued that trial counsel=s failure to file a timely motion to recuse showed ineffective assistance of counsel on the face of the record,

and in the alternative, that the ten day rule for moving to recuse was not a jurisdictional or bright line requirement. The district court found that the motion to recuse presented a legally sufficient basis for disqualification, but denied relief holding the issue would be better settled during an evidentiary hearing. Thompson I.

Thereafter, petitioner file a Rule 3.850 motion. In it he alleged, inter alia, that trial counsel rendered ineffective assistance of counsel for not timely filing a motion to disqualify the trial judge, and in the alternative, that the trial judge=s presiding over his trial created a structural defect that was not subject to harmless error analysis.

The First District Court rejected both arguments and held that Aappellant has failed to make the required showing of >prejudice= as that term has been defined by Strickland and its progeny.@ Thompson II, supra. The district court also held that Judge Smith=s presiding over petitioner=s trial and sentencing did not create a structural defect because petitioner Adoes not present evidence showing that Judge Smith was actually biased in this case.@ Id. Petitioner respectfully disagrees with both holdings.

Petitioner asserts that when a court determines the

sentence it will impose before hearing the aggravating and mitigating evidence, or any evidence, for that matter, then the court has pre-judged the case. Pre-judging a case, by definition, evinces prejudice. See eg., Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994)(Trial judge=s announcement to defense counsel before resentencing that judge intended to impose maximum period allowable under sentencing guidelines, regardless of any evidence in mitigation, was paradigm of judicial bias and prejudice which, thus, warranted recusal). And that prejudice was allowed to permeate appellant=s trial and sentencing because trial counsel failed to file a timely motion to disqualify the judge who pre-judged the case.

The prejudice to petitioner by trial counsel=s failure to properly recuse the judge also resulted in a structural defect which necessitates that petitioner be given a new trial. But perhaps the greater prejudice is to the judicial system itself. When citizens find that a judge who has pre-judged a case is allowed to preside over that case, over a defendant=s objection, confidence in the legal system itself is greatly diminished, and the legitimacy of the judicial system is called into question.

Recently, this Court issued is decision in Carratelli v.

State, 32 Fla. L. Weekly S390 (Fla. July 5, 2007). There, this Court opined that

> AA 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 Us. 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 proceedings.@

Id.

Carratelli, supra, dealt with an ineffective assistance of counsel claim based on the failure to preserve a challenge to a potential juror. Unlike the case at bar, Carratelli, supra, did not involve a claim of structural defect. Consequently, the dicta that an ineffective assistance claim, Afor whatever reason, must be analyzed under the standard the Supreme Court enunciated in Strickland@ should be reconsidered by this Court.

In Pinardi v. State, 718 So. 2d 242 (Fla. 5th DCA 1998), the district court held that the presence on the bench of a judge who is not impartial constitutes a Astructural defect in the constitution of the trial mechanism, which defy analysis by >harmless error= standards. Citing Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Pinardi court concluded, AThe United States Supreme Court thus made it clear that when the issue is judicial bias or the denial of counsel, the Strickland test is not applicable.@ Pinardi, supra, at 248.

In Goines v. State, 708 So. 2d 656 (Fla. 4th DCA 1998), the defendant gave his trial counsel a note explaining that the trial judge, while employed at the state attorney=s office,

had previously prosecuted him on a drug charge that was to be used in the present case as the basis for a habitual felony offender designation. Trial counsel, however, failed to move to recuse the judge, and Goines was convicted for sale of cocaine. Thereafter, the court declared him to be a habitual felony offender, but imposed a 15 year sentence rather than the permissible 30 year term.

Goines ultimately filed a motion for post-conviction relief and asserted that trial counsel provided ineffective assistance by failing to move to recuse the trial judge. The trial court denied relief because Goines failed to demonstrate prejudice, i.e., that the outcome of the proceedings would have been different if the motion had been filed. Goines appealed.

The district court reversed for a new trial before a different judge. In so doing, the appellate court concluded that a defendant who is being tried by his former prosecutor who would use evidence from the prior case to formulate a sentence in the instant case, would have a reasonable fear that he might not receive a fair trial or sentencing. The court went on to note that normally, AIn order to prevail on [an ineffective assistance of counsel] claim under Strickland, defendant must show not only that counsel=s performance was

deficient, but that the deficient performance prejudiced the defense in some meaningful way.@ The Fourth District Court reasoned that Athe prejudice component of Strickland is concerned with whether counsel=s deficient performance >renders the result of the trial unreliable or the proceeding fundamentally unfair.=@ Citing Steinhorst v. State, 636 So. 2d 498 (Fla. 1994) the court found that Athe Florida Supreme Court has held that trial before a judge whose impartiality may reasonably be questioned >would present grave due process concerns,= because >proceedings involving criminal charges... must both be and appear to be fundamentally fair.= (Cite omitted.) We therefore conclude that defendant has satisfied that part of Lockhart,[2] defining prejudice as a showing that counsel=s error rendered the trial fundamentally unfair - in this case because of the appearance and risk of judicial bias.@

The court continued:

> AThe primary evil in having a judge whose impartiality might reasonably be questioned is not in the actual results of that judge=s decision making. Rather it is the intolerable appearance of unfairness that such a circumstance imposes on the system

[2] Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

> of justice. Public acceptance of judicial decision making turns on popular trust in judges as neutral magistrates. The judicial system fails to present a plausible basis for respect when a judge=s impartiality can reasonably be questioned.@

Id., at 660.

Similarly, in Kleppinger v. State, 884 So. 2d 146 (Fla. 2d DCA 2004), the defendant was charged with multiple offenses that arose from a violent confrontation with guards at the Sarasota County Jail. Kleppinger alleged his trial counsel provided ineffective assistance when he failed to move to disqualify the trial judge whose son was a jail guard. Other guards had taunted him at the jail by reminding him that the trial judge was the father of Aone of their own.@

The district court held that this would have been a legally sufficient ground for disqualification had a motion to disqualify been filed. The court concluded that a finding of prejudice required for a finding of ineffective assistance of counsel in connection with a judicial disqualification issue turns on whether disqualification would have been required, not on whether the outcome of a new trial would have been different. The court remanded the cause to the trial court for a hearing on the issue of whether counsel=s decision not to file a motion to disqualify the trial judge was strategic.

Petitioner asserts that Goines v. State, supra, and

Kleppinger v. State, supra, were correctly decided and that actual prejudice need not be shown when an appellate court reviews a claim of ineffective assistance of counsel for failing to properly recuse a trial judge. This is because having a presiding judge who has pre-judged the case creates the appearance as well as the very real risk of a citizen being denied the right to trial by a neutral and detached magistrate. Nevertheless, in the case at bar, the Judge Smith:s announced intention to impose a guidelines departure sentence of life without parole, made before Judge Smith heard any evidence from either party, evinces bias and prejudice in itself that is sufficient to grant relief here. Gonzalez v. Goldstein, supra.

Petitioner asserts that allowing a biased judge to preside over trial and sentencing hearings created a structural defect that warrants reversal.

In this case, Judge Smith pronounced the sentence that would be imposed if petitioner was found guilty before any evidence from either party was presented. That is the epitome of a biased judge. Whether the bias arose from petitioner:s in-court conduct, his race (the instant case was a black on white sexual battery), the nature of petitioner:s offenses, or an unknown source, petitioner was in fact denied his right to

due process of law and trial by a neutral and detached magistrate. U.S.C.A. amends 5 & 14.

The district court=s conclusion that AIf the trial judge had actually been biased, then he would have certainly recused himself pursuant to the dictates of the Cannon 3, Florida Code of Judicial Conduct and rule 2.160(i), Florida Rules of Judicial Administration,@ Thompson II, n. 3, supra, is unrealistic. If such a simplistic assumption is allowed to stand, then under the Strickland standard, no defendant could obtain relief in post-conviction with a claim that trial counsel was ineffective for failing to recuse the trial judge.

Bias and prejudice are most often unconscious attitudes. See, Sheri Lynn Johnson, Comment, Unconscious Racism and the Criminal Law, 73 Cornell L.Rev. 1016, 1020 n. 27 (1988). Or, as the United States Supreme Court noted in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 82 L.Ed.2d 260 (1984):

> A prosecutor=s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is Asullen@ or Adistant,@ a characterization that would not have come to his mind if a white juror had acted identically. A judge=s own conscious or unconscious racism may lead him to accept such an explanation as well supported.

Or, as this Court recognized almost one hundred years

ago, A...all experience teaches that, usually, he who is prejudiced against another is unconscious of it, or unwilling to admit it.@ Howell v. State, 81 So. 287 (Fla. 1919).

While Judge Smith=s bias went to petitioner=s sentence and not necessarily his trial, the following observations dictate that petitioner be given a new trial:

> AIf the failure to have a unbiased judge is subject to the harmless error rule so that one must be able to point to the record and show where the judges bias affected the outcome of the trial, then the denial of relief was proper. Judicial bias is not apparent in the trial record now before this court. But judicial bias can be discreet and subtle. It can affect the judge=s demeanor, or the judge=s temperament. It can appear in the judge=s glance, or in the judge=s tone of voice. It can be hidden in discretionary rulings. Indeed, judicial bias can work its evil even without the realization of the offending judge. Without a word being spoken, judicial bias can send a powerful message to the jury: ›The judge thinks he is guilty.=@

Pinardi v. State, supra, at 248.

For example, in the case at bar, Judge Smith, over objection, permitted the prosecution to ask the sexual battery victim at trial if being sexually battered was how she envisioned giving herself to a man for the first time.[3] Discretionary rulings by a biased judge could permeate the entire prosecution of a case.

In addition, the district court=s concern that defense counsel might sandbag and not move to recuse a judge in order to set up an argument for ineffective assistance of counsel is misplaced. If counsel made a strategic decision to not recuse a biased judge in order to set up an ineffective assistance of counsel claim, the fact the decision was strategic should defeat the claim. Thus, counsel would have to commit perjury and testify that it was not a strategic decision for the Asandbagging@ theory to apply. Again, it is unrealistic to believe competent counsel would set themself up that way and then commit perjury to prove their ineffectiveness.

In the instant case, Judge Smith decided to impose a

[3] The issue of whether the trial judge abused his discretion by allowing this question was raised on direct appeal, but not addressed by the district court.

departure sentence of life imprisonment, before any evidence was presented. He then denied a motion to recuse, presided over petitioner's trial and sentencing, and imposed the promised sentence of life. This created a structural defect for which neither the Strickland test nor harmless error analysis are applicable. Id. Accordingly, petitioner should be granted a new trial before an unbiased judge.

## SECOND ISSUE PRESENTED

THE DISTRICT COURT ERRED BY AFFIRMING THE DENIAL OF PETITIONER=S RULE 3.800(a) CLAIM REGARDING THE IMPOSITION OF AN UNCONSTITUTIONAL AND ILLEGAL DEPARTURE SENTENCE OF LIFE IMPRISONMENT IN COUNT I, AND A CONSECUTIVE TERM OF LIFE ON PROBATION IN COUNT II.

## Standard of Review

Generally, pursuant to Florida Rules of Appellate Procedure 9.141(b)(2)(D), if a trial court summarily denies a motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.800(a), the court=s standard of review is: AOn appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.@ See, Lopez v. state, 917 So. 2d 256 (Fla. 3d DCA 2005). However, where, as here, the trial court summarily denies the Rule 3.800(a) claim of the imposition of an unconstitutional and illegal departure life sentence based upon an issue of law, and the district court upholds that ruling, the standard of review is *de novo*. See, Ikner v. State, 756 So. 2d 1116 (Fla. 1st DCA 2000)(An order or ruling that turns on an issue of law is reviewed by the *de novo* standard of review).

Appellant asserted in the trial court that his guidelines

departure sentence of life in prison was unconstitutional pursuant to Apprendi v. New Jersey, supra, and Blakely v. Washington, supra. The trial court denied relief, and the district court affirmed that ruling stating:

> Appellant=s conviction and sentence became final on December 7, 2000, just after Apprendi had issued, but four years before Blakely was to be decided. Florida courts, including this one, have generally agreed that Blakely has no application to cases that were already final when Blakely was handed down. See Smith v. State, 899 So. 2d 475 (Fla. 1st DCA 2005); Burgal v. State, 888 So. 2d 72 (Fla. 3d DCA 2004); Burrows v. State, 890 So. 2d 286 (Fla. 2d DCA 2004); McBride v. State, 884 So. 2d 476 (Fla. 4th DCA 2004). At the time appellant=s sentence became final, the rule of Apprendi did not apply to his sentences, because sentences imposed did not exceed the statutory maximums prescribed by section 775.082, Florida Statutes. Moreover, Blakely has no application to appellant=s case, because his judgment and sentence were already final when Blakely was handed down. Therefore, to the extent appellant=s appeal is requesting relief pursuant to Blakely, it is without merit and his judgment and sentence are affirmed.

Thompson II, supra.

Petitioner asserts that Blakely supra, did not create a new rule of law, but constituted a refinement of Apprendi, so that it was applicable to petitioner=s direct appeal. See, United States v. Davis, 348 F.Supp 2d 964 (U.S.D.C. N.D. Indiana, 2004)(Athe Blakely outcome was dictated by Apprendi,

and therefore Blakely does not state a new rule@); United States v. Leahy, 438 F.3d 328 (3rd Cir. 2006)(AFour years later, the Court clarified in Blakely that the relevant ›statutory maximum= for Apprendi purposes is the maximum sentence a judge may impose based solely on facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 303-04, 124 S.Ct. 2531. In addition to refining its Apprendi holding, the Blakely Court rejected the presumption....@).

The record in this case shows conclusively that petitioner is entitled to relief and that the lower courts erred in denying him that on his Rule 3.800(a) claim of an unconstitutional and illegal departure sentence of life in prison to be followed by life on probation.

Beyond cavil, the record shows that the maximum discretionary guidelines sentence was 204.2 months in prison; that the sentencing judge made findings of additional aggravating facts required to impose a departure sentence; that those facts were not found by a jury beyond a reasonable doubt, nor did those additional facts adhere to the jury=s findings of guilt; that based upon the trial court=s findings of additional aggravating circumstances, the court imposed a departure life sentence on Count I; and that Apprendi v. New

Jersey, supra, was decided while petitioner=s direct appeal was pending before this Court on a petition for discretionary review. Petitioner=s appeal was in the pipeline and his convictions and sentences were not yet final when Apprendi was decided. This Court entered an order in Case No. SC00-1247 on December 7, 2000, declining to accept jurisdiction, which was more than five months after Apprendi was decided on June 26, 2000. Because petitioner=s sentence became final on December 7, 2000, after Apprendi was decided, there is no question that Apprendi applies in this case. Blakely v. Washington, supra, likewise applies to the case at bar because Blakely was a clarification of Apprendi, See, Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005); Morrow v. State, 331 Fla. L. Weekly D466 (Fla. 1st DCA February 13, 2006); and Moline v. State, 31 Fla. L. Weekly D701 (Fla. 1st DCA march 3, 2006). The trio of cases cited are controlling authority on this issue and demonstrate that both the lower courts= denial of relief on petitioner=s Apprendi/Blakely claim was erroneous as a matter of law. Morrow is factually indistinguishable from the case at bar; both are post-Apprendi pre-Blakely cases. As Morrow held, A...The appellant=s maximum sentence is limited to the length a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.@ (Emphasis in

original). The trial court=s imposition of a departure sentence of life without parole to be followed by life on probation for life based on the court=s findings of additional facts by a preponderance of the evidence violated the defendant=s Sixth Amendment right to jury trial as well as due process rights as explained in Apprendi and Blakely. To support the contention that the two life terms are illegal, petitioner asserts that the court was bound by the sentencing guidelines maximum discretionary sentence of 204.2 months which constitutes the maximum statutory sentence in this case pursuant to Apprendi, and the only way the court could have sentenced appellant to more time was to depart outside the guidelines, which the court did when it sentenced petitioner to terms of life in prison to be followed by life on probation. However, the departure sentences were not based on the basis of facts reflected in the jury verdicts and were thus illegal sentences.

## CONCLUSION

Based on the forgoing arguments, reasoning, and citations to authority, this Court must grant petitioner a new trial. In the alternative, this Court must vacate petitioner=s life sentences and remand this cause to the trial court with directions that appellant be sentenced in accordance with the sentencing guidelines that were in effect at the time the instant offenses were committed.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Trisha Meggs Pate**, Assistant Attorney General, Counsel for the State of Florida, The Capitol, PL-01, Tallahassee, FL 32399-1050; and to **Melvin B. Thompson**, DC #959252, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, Florida 32428-3597, on this date, May _____, 2007.

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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**IN THE SUPREME COURT OF FLORIDA**

**MELVIN B. THOMPSON**,

Petitioner,

vs. **CASE NO. SC07-489**

**STATE OF FLORIDA**,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT COURT OF FLORIDA

# INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PHIL PATTERSON
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