

IN THE SUPREME COURT OF FLORIDA

GARY DIRK,)	
)	
Petitioner,)	DCA CASE NO. 5D06-3770
)	
versus)	
)	
STATE OF FLORIDA,)	S.CT. CASE NO. SC08-6
)	
Respondent.)	
_____)	

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER'S BRIEF ON JURISDICTION

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JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Eighteenth Judicial Circuit, in and for Brevard County, Florida. In this brief, the symbol “V” followed by a number is used to denote the numbered volume from the record -on- appeal for cites to the record-on-appeal.

STATEMENT OF THE CASE AND FACTS

On February 11, 1985, in case number 1984-120, Petitioner, was convicted of count one, burglary, count two, robbery, and count three, sexual battery. (V1 60) The court sentenced Petitioner on count two to fifteen years prison followed by a consecutive sentence of thirty years prison on count three followed by a life sentence on count one.(V1 104-107) The life sentence was an upward departure. (V1 p. 90)

Petitioner appealed to the Fifth District Court of Appeal. (V1 119) On December 5, 1985, the Fifth District Court of Appeal affirmed the conviction but reversed the sentences based upon the trial court's invalid reasons for the upward departure. (V1 122-123) On March 10, 1986, Petitioner was re-sentenced and the court again sentenced him to an upward departure sentence of life in prison. (V1 141) Petitioner appealed and the Fifth District Court of Appeal Per Curiam *affirmed* the sentence on November 25, 1986. (V1 164)

In case number 1984-191, Petitioner was convicted of count one, burglary of a dwelling with an assault, count two, sexual battery with physical force and violence not likely to cause serious personal injury, and count three, sexual battery with physical force and violence not likely to cause serious personal injury. (V1 71, 87-89) Petitioner was sentenced on count one to an upward departure sentence

of life in prison followed by 20 years probation,¹ on count two, to 15 years prison, and on count three, to 15 years prison. (V1 109-110, 113-115) The sentences were ordered to run consecutive to the sentences imposed in case number 1984-120. (V1 116)

In case number 05-1984-CF-1001, Petitioner was charged with burglary of a dwelling and aggravated battery, convicted by a jury of burglary, and acquitted on the aggravated battery charge. (V1 77, 81, 82) Petitioner was sentenced February 11, 1985, to serve five years in prison. (V1 100) Petitioner appealed to the Fifth District Court of Appeal. (V1 119) On December 5, 1985, the Fifth District Court of Appeal affirmed the conviction, but reversed the sentences. (V1 122-123) On March 10, 1986, the court re-sentenced Petitioner to five years prison.-- the same sentence as the originally imposed sentence (V1 161)

On December 13, 2004, Petitioner filed a Motion to Correct Illegal Sentence pursuant to Rule 3.800 (a), Florida Rules of Criminal Procedure. (V2 200) For purposes of this appeal, the relevant portions of that motion were Petitioner's position that he should be re-sentenced in case numbers 05-1984-CF-120, 05-1984-CF-01001 and 1984-191. (V1 315) Regarding case numbers 05-1984-CF-120, 05-1984-CF-01001, Petitioner maintained that he was never given

¹Petitioner appealed the conviction and sentence. (V1 122) The conviction was affirmed and the sentence was affirmed as modified striking the provision

the opportunity to elect to be sentenced under the sentencing guidelines because both the original sentencing and the re-sentencing in those cases occurred prior to July 1, 1984, when, pursuant to the holding in *Smith v. State*, the 1983 guidelines were unconstitutional. *Smith v. State*, 537 So. 2d 982 (Fla. 1989) (V2 210)

On March 21, 2005, the trial court granted Petitioner's motion for re-sentencing regarding 1984-CF-1001 and 05-1984-CF-120 and denied the motion for re-sentencing regarding 1984-CF-191-A. (V2 203)

On November 16, 2005, Petitioner's trial counsel filed a motion for reconsideration for the portion of the March 21, 2005 order denying re-sentencing for case number 1984-CF-191-A. (V2 310-312) On January 6, 2006, the court denied Petitioner's Motion for Reconsideration² finding that the motion was untimely filed. (V2 349-350)

On December 29, 2005, the court re-sentenced Petitioner in case numbers 1984-CF-1001 and 1984-CF-120 (V1 40-46) At that time, Petitioner elected to be sentenced under the sentencing guidelines. (V1 23) Petitioner objected to the addition of forty points on the sentencing guideline scoresheet for moderate injury or penetration and to the imposition of an upward departure sentence pursuant to

imposing probation to follow the life imprisonment. (V1 122, 130)

² The court treated the Motion for Reconsideration as a Motion for Rehearing pursuant to Rule 3.800 (b)(1)(B) Florida Rules of Criminal Procedure.

Blakely v. Washington, 542 U.S. 296 (2004). (V2 321)³ Petitioner asserted that because the facts supporting the trial court’s upward departure sentence (V1 352-359) and the imposition of the victim injury points were neither admitted by Petitioner nor found by the jury, the trial court’s decision to impose an upward departure sentence violated Petitioner’s Sixth Amendment right to jury trial as defined and explained in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) and *Blakely v. Washington*, 542 U.S. 296, 303 (2004) The court concluded that *Blakely* had no impact on the reasons originally cited for the departure sentence and that *Blakely* would not apply retroactively. (V1 38-39)

In case number 84-CF-120, the court sentenced Petitioner to 15 years prison on count two followed by thirty years prison on count three followed by a life sentence on count one. (V1 23, 40-41). It adopted all of the reasons justifying the upward departure sentence imposed at the March 10, 1986, sentencing. (V1 40-42, 352-359) Additionally, the court considered an escape charge as an additional reason for an upward departure, citing an escalation of criminal activity. (V1 45) The court stated that if any of the individual reasons for the departure sentence were found invalid, the court would still impose the same departure sentence if only one reason was found to be valid on appeal. (V1 43)

³ The Prosecutor and Petitioner litigated the issue of these 40 points based upon “penetration or slight injury” when the scoresheet indicted the points were added

In case number 05-1984-CF-1001, the court imposed a five year prison term.

(V1 40)

Petitioner filed a Petition for Belated Appeal in the Fifth District Court of Appeal which was granted on October 18, 2006, thus allowing belated appellate review for the sentences imposed on the December, 2005, re-sentencing hearing.

(V1 360). Petitioner's convictions and sentences were affirmed by the Fifth District Court of Appeal Notice on November 30, 2007. *Dirk v. State*, ___ So.2d ___ (Fla. 5th DCA 2007), 32 Fla. L. Weekly D2853 (Fla. 5th DCA November 30, 2007). (APPENDIX). The Fifth District Court of Appeal certified conflict with *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005) A notice to invoke this Honorable Court's jurisdiction was filed in the Fifth District Court of Appeal on December 31, 2007.

for "moderate injury or penetration." (V1 20-22, V2 321)

SUMMARY OF ARGUMENT

The Supreme Court has jurisdiction to review the Fifth District Court of Appeal's decision in this cause. Rule 9.030(a)(2)(iv), Fla.R.App.P.; Art. V §3(b)(3), Fla. Const. The Fifth District Court of Appeal's ruling in this case, that 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) do not apply in cases where the convictions became final prior to the *Apprendi* decision, even though re-sentencing occurred post-*Apprendi*_ directly and expressly conflicts with the First District Court of Appeal's decision in *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005)

ARGUMENT

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *ISAAC v.* *STATE*, 911 So. 2d 813 (Fla. 1st DCA 2005)

The issue addressing the conflict between Petitioner's case and *Isaac v. State*, 911 So. 2d 813 (Fla. 1st DCA 2005) is now squarely before this Court in the case of *State of Florida v. Lemuel Isaac* SC 05-2047. In that case, this Court acknowledged the exact issue in Petitioner's case and on January 9, 2009, ordered Petitioner (Isaac) to file an initial brief on the merits addressing whether *Apprendi* and *Blakely* apply to resentencings held after either or both decisions issued in cases in which the convictions were final before *Apprendi* issued; and whether *Blakely* applies retrospectively to sentencing proceedings held after *Apprendi* issued, but which were final before *Blakely* issued.

The decision herein and in *Isaac*, supra, are in express and direct conflict. In *Galindez v. State*, 955 So. 2d 517 (Fla. 2007), this Court recently addressed the conflict between the First District's decision in *Isaac* and the other district courts on whether *Apprendi* and *Blakely* are applicable to re-sentencings in cases in which the convictions became final before *Apprendi* and *Blakely* were decided. However, the Court did not resolve the conflict and decided the case on other grounds. This issue will continue repeatedly and should be resolved by this Honorable Court.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point “Times New Roman.”

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Gary Dirk, DC#697529, Hardee Correctional Institution, 6901 State Rd. #62, Bowling Green, FL 33834, this 10th day of January, 2008.

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