IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO: SC09-1570

v.

SIRRON JOHNSON,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT SIRRON JOHNSON

On Discretionary Review from a Decision of the District Court of Appeal, First District

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT vii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 5

STANDARD OF REVIEW 6

ARGUMENT

I. THIS COURT SHOULD LIMIT ITS APPELLATE REVIEW TO THE DISCRETE ISSUE OF WHETHER BLAKELY CAN BE GIVEN LIMITED RETROACTIVE APPLICATION 7

II. THE FIRST DISTRICT'S APPLICATION OF BLAKELY TO JOHNSON'S CASE IS CONSISTENT WITH THE PRINCIPLES OF RETROACTIVE APPLICATION OF A NEW CRIMINAL LAW AS EXPRESSED IN WITT V. STATE, 387 So. 2d 922 (Fla. 1980) 12

A. Retroactive Analysis Under Witt 13

B. The State Relies On Federal Court Precedent Following a Teague Standard, Which Is Not the Standard In Florida for Determining The Retroactive Application of a Law 27

III. IF BLAKELY IS GIVEN LIMITED RETROACTIVE APPLICATION, JOHNSON IS ENTITLED TO RELIEF 30

A. Johnson's Sentence Was Enhanced Due to Judge's Factual Findings 30

B. Johnson Preserved His Apprendi/Blakely Claim 32

C. Johnson Was Resentenced On All Counts 33

CONCLUSION 35

CERTIFICATE OF SERVICE 36

CERTIFICATE OF TYPE SIZE AND STYLE 36

TABLE OF AUTHORITIES

Page

CASES

Albritton v. State,
476 So. 2d 158 (Fla. 1985) 31

Apprendi v. New Jersey,
530 U.S. 466 (2000).....passim

Behl v. State,
898 So. 2d 217 (Fla. 2d DCA 2005) 3

Blakely v. Washington,
542 U.S. 296 (2004).....passim

Caraballo v. State,
805 So. 2d 882 (Fla. 2d DCA 2001).....19

Dufour v. State,
69 So. 3d 235 (Fla. 2011) 6

Galindez v. State,
955 So. 2d 517 (Fla. 2007) 3-4

Gilson v. State,
795 So. 2d 105 (Fla. 4th DCA 2001).....19

Hughes v. State,
901 So. 2d 837 (Fla. 2005) .....passim

Isaac v. State,
911 So. 2d 813 (Fla. 1st DCA 2005) 21-28

Jackson v. State,
983 So. 2d 562 (Fla. 2008) 33

Johnson v. State,
717 So. 2d 1057 (Fla. 1st DCA 1998) 30-31

Johnson v. State,
18 So. 3d 623 (Fla. 1st DCA 2009).....passim

Kijewski v. State,
773 So. 2d 124 (Fla. 4th DCA 2000).....19

Linkletter v. Walker,
381 U.S. 618 (1967).....13-14, 17-18, 20, 25

Mackey v. United States,
401 U.S. 667 (1971).....28

McCloud v. State,
803 So. 2d 821 (Fla. 5th DCA 2001).....19

McGregor v. State,
789 So. 2d 976 (Fla. 2001).....19

Monnar v. State,
984 So. 2d 619 (Fla. 1st DCA 2008) 3

Salser v. State,
613 So. 2d 471 (Fla. 1993) 8

State v. Callaway,
658 So. 2d 983 (Fla. 1995).....20

State v. Fleming,
61 So. 3d 399 (Fla. 2011) 8, 32

Stovall v. Denno,
388 U.S. 293 (1967).....13-14, 17-18, 20, 25

Teague v. Lane,
489 U.S. 288 (1989)..... 27-30

Toler v. State,
493 So. 2d 489 (Fla. 1st DCA 1986).....10

Witt v. State,
387 So. 2d 922 (Fla. 1980) .....passim

STATUTES

§775.082, Fla. Stat. 18-19, 22-23, 33

RULES

Florida Rule of Appellate Procedure 9.141(b)(2)(C) 1, 9-10

PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, is referred to as "the State." Respondent, SIRRON JOHNSON, is referred to as "Respondent" or "Johnson."

The record is contained in one volume and four supplemental volumes, which will be referenced as "R y-z" or "SRx y-z", followed by any appropriate volume and page numbers. Petitioner has also attached to his brief an Appendix of the motions and orders filed in the First District during the underlying appeal. References to the appendix are indicated as "App. x," where "x" represents the exhibit number.

All emphasis in quotations in this brief has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Statement of Case and Facts presented in the State's Initial Brief adequately sets forth most of the underlying facts. However, there are some additional procedural aspects of this case that should be clarified.

On November 21, 2007, Johnson filed a motion to correct illegal sentence. (SRI 1). In addition to Florida Rule of Criminal Procedure 3.800(a), Johnson also cited to Florida Rule of Criminal Procedure 3.850(a) as the basis for his motion. (SRI 1). Among other issues, Johnson asserted that his June 2002 resentencing was illegal because the judge entered a departure sentence without complying with the principles of Apprendi v. v. Jersey, 530 So. 2d 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). (SRI 3). The trial court summarily denied the motion, finding that Blakely did not apply retroactively to Johnson's case. (SRI 6). Johnson timely appealed the summary denial and filed an initial brief in the First District Court of Appeal.

On December 3, 2008, the State filed a notice of filing no answer brief, which stated that the State would not file an answer brief "unless directed by this Court pursuant to Rule 9.141(b)(2)(C)." (App. 2). On January 30, 2009, the First District issued an Order to Show Cause directing that the State provide a response within 20 days for why the First District should not reverse the summary denial of Johnson's motion, as it appeared that Johnson's resentencing may have violated

the dictates of Apprendi v. v. Jersey, 530 So. 2d 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). (App. 3). Rather than file a response, the State filed a motion to supplement the record. The First District granted the motion and gave the State an additional 20 days to file a response. (App. 4).

The State again failed to file a response as ordered and instead filed a motion to correct the record. The First District granted this second motion regarding the record and extended the deadline for the State to file a response to May 18, 2009. (App. 5). The State, however, did not file a response as ordered and instead filed a Motion to Stay the proceedings, arguing that the First District's decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), was on review in this Court, and that the ruling in Isaac should resolve the issues on appeal. (App. 6). Importantly, the only issue the State raised in its motion was the question of whether Blakely applied to resentences that occurred post-Apprendi, but that were final pre-Blakely. Id.

The First District denied the State's Motion to Stay, treated the motion as the State's response in compliance with the First District's order to show cause, and proceeded to address the merits of the appeal. (App. 7). The First District issued an opinion finding:

> In Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), this Court held that although Apprendi does not apply retroactively, Apprendi and Blakely apply to a defendant who is resentenced after Apprendi became final but before Blakely was decided. This holding

was recently affirmed in Monnar v. State, 984 So. 2d 619 (Fla. 1st DCA 2008). In that case, this Court noted that the supreme court held in Galindez v. State, 955 So. 2d 517 (Fla. 2007), that a harmless error analysis applies to any Apprendi/Blakely error. This Court went on to hold:

> The supreme court's decision [in Galindez] did not, however, supersede or disapprove of our decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), which held that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), although decided after Isaac's conviction and original sentence were final, apply to any resentencing that took place after Apprendi came down, even resentencings taking place before Blakely was decided. On this point, Isaac still controls, not as law of the case, but as governing precedent within the First District.

Monnar, 984 So. 2d at 619.

Here, the appellant was resentenced after Apprendi was decided but before Blakely came down. Thus, pursuant to Isaac, the dictates of Apprendi and Blakely apply to appellant's sentences.

The trial court held that even if Apprendi applies, the sentences imposed did not violate Apprendi because they were not above the statutory maximums for the offenses. However, the appellant was sentenced pursuant to the sentencing guidelines, not the Criminal Punishment Code. Thus, as Blakely makes clear, the statutory maximum would be the maximum guidelines sentence appellant could receive without the court imposing an upward departure. See Behl v. State, 898 So. 2d 217 (Fla. 2d DCA 2005) (holding that pursuant to Blakely, "under a guidelines sentencing scheme which restricts judicial discretion in imposing sentences, the factors used to calculate the maximum guidelines sentence to which a defendant is exposed must be based either on (1) findings made by the jury, (2) facts admitted by the defendant, or (3) the defendant's prior convictions").

> Accordingly, we reverse and remand for the trial court to either attach portions of the record conclusively refuting appellant's claim or to conduct further proceedings pursuant to Galindez v. State, 955 So. 2d 517 (Fla. 2007) (holding that harmless error analysis applies to Apprendi/Blakely errors).

Johnson v. State, 18 So. 3d 623, 625 (Fla. 1st DCA 2009); (App. 1).

After the First District issued its opinion, the State did not file a motion for rehearing raising any of the issues it now raises before this Court. Rather, the State filed a motion to withhold issuance of the mandate, which again only raised the legal issue as to whether Blakely could be given retroactive application. (App. 8).

SUMMARY OF ARGUMENT

This review proceeding comes before the Court on an express and direct conflict with the decision of Johnson v. State, 18 So. 3d 623 (Fla. 1st DCA 2009). In Johnson, the First District Court of Appeal held that, when an incarcerated prisoner was resentenced and the resentence became final after the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), but before the issuance of Blakely v. Washington, 542 U.S. 296 (2004), the holding in Blakely should be applied retroactively to the sentence, such that all factual findings that enhanced the prisoner's sentence, other than findings regarding prior convictions, must be determined by a jury and proven beyond a reasonable doubt.

The First District's holding is consistent with this Court's decision in Witt v. State, 387 So. 2d 922 (Fla. 1980), regarding retroactive application of a change of law. Indeed, the Supreme Court's decision in Blakely was intended to clarify and give full effect to its decision in Apprendi. Since the First District's limited retroactive application of Blakely applies only to cases falling within the short four-year period between the issuance of Apprendi and the issuance of Blakely, the retroactive application of Blakely will not cause a substantial disruption to the administration of justice. This Court should not be persuaded by federal cases to the contrary, as those cases rely on a standard that is not applicable in Florida.

Lastly, while the only issue the State preserved in this appeal is the discrete issue of whether Blakely can be given limited retroactive application, if this Court were to examine the other issues the State raises, Respondent would still be entitled to relief under Blakely. The record reflects that Respondent's sentences were enhanced based on at least one fact found by the trial judge, and not the jury. Moreover, Respondent properly preserved his Apprendi/Blakely challenge by filing a rule 3.800 motion. Furthermore, Respondent was resentenced on all counts post-Apprendi or alternatively, his sentence did not become final until after Apprendi was decided. For these reasons, Respondent properly preserved this issue and his sentence falls within the period of time for which Blakely should be given retroactive application, and thus, he is entitled to relief under Blakely.

This Court should adopt the holding of the First District and grant Blakely limited retroactive application.

STANDARD OF REVIEW

The issue in this case is whether Blakely can be given limited retroactive application to resentences that were final after Apprendi was decided, but before Blakely was issued. This is a question of law subject to *de novo* review. Dufour v. State, 69 So. 3d 235, 246 (Fla. 2011).

ARGUMENT

I. THIS COURT SHOULD LIMIT ITS APPELLATE REVIEW TO THE DISCRETE ISSUE OF WHETHER BLAKELY CAN BE GIVEN LIMITED RETROACTIVE APPLICATION

This Court should limit its review of the First District's decision in Johnson v. State, 18 So. 3d 623 (Fla. 1st DCA 2009), to the discrete issue of whether Blakely can be given limited retroactive application to resentences that became final post-Apprendi, but before Blakely was issued. This is the only issue addressed by the First District in its Johnson decision. The First District did not discuss whether Johnson was entitled to resentencing under Blakely, except as to its determination that Blakely would apply to Johnson's sentence if his other allegations proved to be true.

Rather than limit its brief to the discrete issue addressed by the First District, the State has raised several additional procedural issues and asserts that, even if Blakely applied retroactively, Johnson would not be entitled to relief. The State contends that: (1) Johnson's sentence was enhanced solely due to prior convictions and thus, Apprendi does not apply; (2) Johnson was not resentenced as to one of his counts and thus, his sentence was final as to that count prior to the issuance of Apprendi; and (3) Johnson failed to properly preserve the Apprendi/Blakely issue. While Johnson disagrees with the State's position on these issues and is fully confident that he is entitled to relief under Blakely, the

more important fact is that the State failed to preserve any of these issues for appellate review.

This Court has held that the State has the obligation to first raise issues in the district court before those issues can be heard on appeal to this Court. See State v. Fleming, 61 So. 3d 399, 401 (Fla. 2011) (noting that State failed to preserve argument that Fleming's rule 3.800(b) motion could not preserve the Apprendi/Blakely issue for review where State did not raise the issue before the district court); see also Salser v. State, 613 So. 2d 471, 472 n.2 (Fla. 1993) (Kogan, J., dissenting) ("Moreover, I find no indication that the state attempted to raise this issue before the district court. Accordingly, even if the state's assertions are correct, the state has waived the issue for purposes of appeal."). Indeed, a fundamental principle of appellate practice is that, other than fundamental errors, issues must be preserved in order to be reviewed on appeal.

In this case, the State filed a notice that it would not file an answer brief unless it was directed to do so by the First District. (App. 2). The First District, however, did direct the State to file a response as to why the summary denial of Johnson's claim should not be reversed and the cause remanded for further proceedings to determine if Johnson was entitled to resentencing. (App. 3). Contrary to the assertion it made in its notice, the State failed to file an answer brief. Instead, the State filed a Motion to Supplement the Record and later a

Motion to Correct the Record, which were both granted by the First District. After granting the motions, the First District again directed the State to file a response.

Rather than file an answer brief, the State filed a Motion to Stay, which only raised the issue as to whether Blakely could be given retroactive application. The First District denied the motion to stay, treated the motion as the State's response, and proceeded with the appeal.

After the First District issued its opinion, the State did not file a motion for rehearing raising any of the issues it now raises before this Court. Rather, the State filed a motion to withhold issuance of the mandate, which again only raised the legal issue as to whether Blakely could be given retroactive application.

In failing to raise in the district court the additional issues it now presents to this Court, the State has waived those issues. Indeed, in apparent recognition of this fact, the State begins its arguments in its Initial Brief with a section titled "Preservation," in which it asserts that Florida Rule of Appellate Procedure 9.141(b)(2)(C), provides that "[n]o briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal." Essentially, the State argues that it can file a notice stating that it will submit an answer brief if directed to do so, wholly ignore a district court's order to show cause directing the State to file a brief, fail to raise any issue before the district court, and then once an adverse opinion is issued, it can seek to invoke this

Court's discretionary jurisdiction and raise any issue it chooses in an effort to have the district court's decision reversed. Johnson does not believe this is the procedure authorized in Florida, nor should it be.

Rule 9.141(b)(2)(C), which was proceeded by the former rule 9.140(g), "provides a streamlined procedure for the handling of appeals from orders denying 3.850 motions without hearing. Among other things, it provides that 'no briefs or oral argument shall be required.'" See Toler v. State, 493 So. 2d 489 (Fla. 1st DCA 1986). The Rule's assumption is that most appeals from summary denial orders can be disposed of without briefs and without participation by the State. However, the rule also provides that the appellate court "may request a response from the State before ruling."

In this case, the First District issued an Order to Show Cause directing the State to file a response. Despite the fact that the State filed a notice stating it would submit an answer brief in response to such an order, the State here ignored the order. While there may be some policy justification for not requiring the State to file a brief in every post-conviction summary denial case, it seems incredible that the State can ignore an Order to Show Cause issued by a district court—an order that clearly indicates that the district court intends to reverse a summary denial—and after an adverse opinion is issued by the district court, seek to have this Court accept jurisdiction and raise issues in its brief the State could not be

bothered to raise before the district court. At the very least, the State should have filed a motion for rehearing bringing to the attention of the district court issues the court may have overlooked. The State did not do even that much here.

While the State is likely to complain that it has limited resources, it seems highly disingenuous for the State to assert that it lacked the resources to respond to the First District's order to show cause, but it nonetheless has the resources to challenge the First District's decision and submit a comprehensive appellate brief in this appeal. If this were a case in which the State were correct that the defendant was not entitled to relief, which is not the case here, the First District could have affirmed the summary denial based on the additional arguments raised by the State. This would have saved judicial resources, and the State could have avoided the extra work of preparing and filing jurisdictional briefs in this Court. There simply is no basis for justifying the State's failure to file a responsive brief here, especially considering that the State indicated it would file an answer brief if asked to do so and the State managed to file a Motion to Stay raising apparently the only issue the State wanted heard.

This Court should follow its own precedent and determine that the State here has failed to preserve any issue other than the discrete legal issue of whether Blakely can be given limited retroactive application, which is the only issue addressed by the First District. Johnson would also suggest that this Court adopt a

policy that, if the State wishes to raise an issue before this Court regarding the reversal of a summary denial of a post-conviction motion and the district court has issued an order to show cause indicating that it is inclined to reverse the summary denial, the State must raise the issue in the district court by filing a responsive brief if the State wishes to have the issue heard on review in this Court.

II. THE FIRST DISTRICT'S APPLICATION OF BLAKELY TO JOHNSON'S CASE IS CONSISTENT WITH THE PRINCIPLES OF RETROACTIVE APPLICATION OF A NEW CRIMINAL LAW AS EXPRESSED IN WITT V. STATE, 387 So. 2d 922 (Fla. 1980).

Johnson assumes that this Court will agree that the only issue preserved in this appeal is whether the Supreme Court of the United State's decision in Blakely should be given limited retroactive application, and thus, Johnson will address that issue first. Of importance, it should initially be clarified that **the issue is not, as the State seems to contend, whether Blakely should be applied retroactively to all past criminal convictions in Florida**. The First District only afforded **limited** retroactive application to Blakely to those few defendants whose resentencing was not final post-Apprendi but which became final pre-Blakely. Apprendi was decided on June 25, 2000. Blakely was decided on June 24, 2004. Thus, there is only a four-year period in which circuit courts might have misconstrued the Apprendi reference to "statutory maximum" as meaning the maximum sentence allowed by statute as opposed to the maximum sentence a judge can impose based on the facts found by a jury. The limited retroactive application of Blakely

adopted by the First District comports with this Court's seminal case in Witt v. State, 387 So. 2d 922 (Fla. 1980).

A. Retroactive Analysis Under Witt

In Witt, this Court held that a change of law would be applied retroactively if 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. The State concedes that Blakely satisfies the first two prongs of this test. (Initial Brief, p. 25-26). The State, however, asserts that Blakely does not constitute a development of "fundamental significance." (Initial Brief, p. 26). The State is mistaken.

In determining whether a law constitutes a "development of fundamental significance," this Court has stated laws that are fundamentally significant generally fall within one of two categories: (1) changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties;" and (2) changes which are 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 v. Walker, 381 U.S. 618 (1965). See Witt, 387 So. 2d at 929-931. Johnson concedes that the holding in Blakely does not fall within the first category, but Blakely does fit within the second category.

The three-fold test of Stovall and Linkletter requires a consideration of: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect of retroactive application of the rule on the administration of justice. Witt, 387 So. 2d at 926. If one examines these three factors as to the Blakely decision, such analysis would weigh in favor of approving the limited retroactive application of Blakely adopted by the First District.

1. The Purpose To Be Served By The New Rule

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the defendant was charged with numerous offenses stemming from his act of firing a gun into the home of an African-American. 530 U.S. at 469. Apprendi entered into a plea agreement in which he agreed to plead guilty to three of the twenty-three counts charged. See id. at 469-70. Each of the counts carried a sentence of between 5 and 10 years in prison. As part of the plea bargain, the prosecution reserved the right to seek an enhanced sentence on the basis that the crime was committed with a biased purpose. Such an enhancement would have doubled the sentence otherwise imposed for each of the crimes. Apprendi, in turn, reserved the right to challenge the bias crime enhancement, claiming it violated the federal Constitution. Id. at 470.

The trial judge accepted Apprendi's plea. The trial judge found "by a preponderance of the evidence" that Apprendi's crime was motivated by the race of

the victims. Id. at 471. He sentenced Apprendi to 12 years in prison—2 years above the maximum sentence authorized for the weapons charge apart from the hate-crime enhancement. Id.

The Supreme Court addressed whether the Sixth Amendment of the United States Constitution required that a jury make the determination that Apprendi's actions had been a hate crime. The Supreme Court ruled that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The Court stated, "The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." Id. at 497.

Four years after its Apprendi decision, the Supreme Court heard Blakely v. Washington, 542 U.S. 296 (2004). In Blakely, the defendant pled guilty to second-degree kidnapping. Id. at 298. At the plea hearing, Blakely admitted the facts necessary to support the charges but no others. Under Washington law, second-degree kidnapping was a class B felony, punishable by a maximum sentence of 10 years in prison. Id. at 299. However, under Washington's mandatory sentencing guidelines, the judge was required to sentence Blakely to no less than 49 and no more than 53 months in prison, unless he had "substantial and compelling" reasons to impose a sentence outside that range. Id. at 299-300.

The trial judge sentenced Blakely to 90 months, finding that Blakely had acted with "deliberate cruelty." Blakely appealed, arguing that this unexpected additional fact-finding on the judge's part violated his Sixth Amendment right under Apprendi to have the jury determine beyond a reasonable doubt all the facts legally necessary to his sentence. Id. at 301. The Washington Court of Appeals rejected his claim, and the Washington Supreme Court declined to review it. Blakely then asked the U.S. Supreme Court to review the case, and it agreed to do so.

The Supreme Court concluded that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. Since Blakely's sentence exceeded the presumptive sentence and there was no jury finding supporting the enhancement factor, the Supreme Court ruled that Blakely's sentence violated his Sixth Amendment right to a jury trial. Id. at 303-04.

An examination of Blakely reflects that the decision was intended to clarify and effectuate the Supreme Court's holding in Apprendi. Indeed, the Supreme Court stated, "Our precedents make clear, however, 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." Blakely v. Washington, 542 U.S. 296, 303 (U.S. 2004) (emphasis added).

Of equal importance, the Supreme Court viewed its decision in Blakely as being of fundamental significance. The Court stated:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. *That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure*. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305-06 (emphasis added).

Given the fact that Blakely was intended to clarify and give full effect to the Supreme Court's decision in Apprendi, the First District reasonably concluded that, in order to remain consistent with the constitutional protections intended to be granted through the Apprendi decision, Blakely must be given limited retroactive application to sentences to which Apprendi applies. For this reason, the First District granted Blakely ***limited*** retroactive application to resentences that became final post-Apprendi, but pre-Blakely.

As stated above, the first factor of the Stovall/Linkletter test is to examine the purpose to be served by the new rule. The purpose of Blakely is to correct a misinterpretation of the application of Apprendi and to ensure that criminal defendants are not subjected to increased sentences due to judicially-based factual findings. The limited retroactive application of Blakely, as adopted by the First

District, is entirely consistent with this purpose and, in fact, is required if Blakely is to be given its full effect, i.e. ensuring that criminal defendants, to which Apprendi applies, are sentenced in accordance with Apprendi principles. For this reason, the first factor of the Stovall/Linkletter test weighs in favor of the limited retroactive application of Blakely to all sentences that are subject to the requirements of Apprendi.

2. The Extent of Reliance on the Old Rule

In its brief, the State asserts that "[t]rial judges have historically had the ability to determine sentence-enhancing factors," and thus, "there has been considerable reliance on the ability of judges to impose departure sentences under both the sentencing guidelines and Criminal Punishment Code." (Initial Brief, p. 34). However, this is not the correct analysis. Rather, given the First District's **limited** retroactive application of Blakely, the question here is the extent courts have relied on the view that Apprendi does not apply to sentences within the statutory maximum.

When Apprendi was first decided in 2000, there was much debate in Florida as to whether the term "statutory maximum" meant the maximum penalties outlined in section 775.082, Florida Statutes, or the maximum sentence imposed under the sentencing guidelines before including any additional grounds for increasing the guidelines score based on the judge's factual-findings. See

McCloud v. State, 803 So. 2d 821, 824 (Fla. 5th DCA 2001) (en banc). Florida courts recognized that the latter interpretation of Apprendi, which is the interpretation expressed in Blakely, comported with logic and the language used in the Apprendi decision. Id. at 824. As the Fifth District stated, it is illogical to make a "constitutional imperative of a jury finding beyond a reasonable doubt for any sentencing fact that increases punishment even one day beyond the "statutory maximum" but make[] no such requirement if the same fact is used to increase punishment for any amount of time below the statutory maximum." Id. at 824. Thus, Florida courts should have interpreted Apprendi as applying to any fact that increases a criminal defendant's sentence above the one that a judge could impose solely on the basis of the facts found by the jury or admitted by the defendant. Florida courts, however, reached the contrary conclusion.

Indeed, in late 2000, Florida courts began to determine that Apprendi only applied to sentences that exceeded the statutory maximum sentence set forth in section 775.082. See, e.g., McGregor v. State, 789 So. 2d 976 (Fla. 2001), approving Kijewski v. State, 773 So. 2d 124 (Fla. 4th DCA 2000); see also Gilson v. State, 795 So. 2d 105 (Fla. 4th DCA 2001) (penetration "is merely a 'sentencing factor' that the judge considered in his broad discretion to sentence, 'within the range prescribed by statute'"); Caraballo v. State, 805 So. 2d 882 (Fla. 2d DCA 2001) (holding that because sentence was less than the statutory maximum,

Apprendi did not apply); McCloud, 803 So. 2d at 827 (same). While Johnson does not dispute that most Florida courts ultimately interpreted Apprendi as not applying to sentences below the statutory maximum, the courts relying on that interpretation could have done so only during the brief four-year period between the issuance of Apprendi in 2000, and the Blakely decision in 2004. In fact, since there was some dispute as to the proper application of Apprendi in Florida until late-2000/early-2001, the reliance on this interpretation of Apprendi was less than four years.

Given the short amount of time under which Florida courts may have relied on the prior interpretation Apprendi, Jonson would assert that the second factor in the Stovall/Linkletter test weighs in favor of the limited retroactive application of Blakely adopted by the First District. See State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995) (holding second factor of the Stovall/Linkletter test weighed in favor of retroactive application of change in law because "reliance on the belief that habitual offender sentences could be imposed consecutively for multiple offenses committed during a single criminal episode could only have existed during the six-year period between the 1988 amendment of section 775.084 and this Court's 1994 decision in Hale.").

3. The Effect of Retroactive Application of the Rule on the Administration Of Justice

In its brief, the State relies on this Court's holding in Hughes v. State, 901 So. 2d 837 (Fla. 2005), asserting that the retroactive application of Blakely would have a substantial negative impact on the administration of justice. In Hughes, during this Court's examination of whether Apprendi should be applied retroactively, this Court stated:

> Two district courts of appeal have stated that retroactive application of Apprendi would have a far-reaching adverse impact on the administration of justice. As the Fifth District noted,
>
> > virtually every sentence involving a crime of violence that has been handed down in Florida for almost two decades has included a judicially-determined victim injury component to the guidelines score. Justice O'Connor's observation that the effect of Apprendi to guidelines sentencing would be "colossal" barely describes the cataclysm in Florida if such sentences are invalidated because the jury did not make the "victim injury" finding.
>
> McCloud v. State, 803 So. 2d 821, 827 (Fla. 5th DCA 2001) (en banc), review denied, 821 So. 2d 298 (Fla.), cert. denied, 537 U.S. 1036, 154 L. Ed. 2d 455 (2002). In this case, the First District concluded that the impact on the administration of justice "would be monumental." Hughes, 826 So. 2d at 1074. As the court noted, "each and every enhancement factor that was determined by a judge and which resulted in a sentence above the statutory maximum will either have to be stricken completely and the sentences recalculated without the factor (which in itself is a laborious process), or a jury will have to be empaneled to decide those factors." Id.

Id. at 845-46.

While in Hughes this Court determined that retroactive application of Apprendi would have a substantial negative impact on the administration of

justice, it must be remembered that Florida's sentencing guidelines were initially developed as a result of legislation passed in 1982. See McCloud v. State, 803 So. 2d 821, 825 (Fla. 5th DCA 2001). Thus, in Hughes, this Court was considering the effect of the application of Apprendi for criminal convictions covering nearly a twenty-year span of time. That is not the issue here.

Apprendi was already in effect in 2000, and thus, that decision was being applied in Florida courts. During the less than four-year period between the end of 2000 and mid-2004, Florida courts held that Apprendi did not apply to sentences that did not exceed the statutory maximum sentence. Thus, the limited retroactive application of Blakely would only apply to cases occurring within that short window of time, as opposed to the twenty-year window at issue in Hughes.

Moreover, the applicable version of section 775.082 during 2000 through 2004 provides the following statutory maximums:

> (3) A person who has been convicted of any other designated felony may be punished as follows:
>
> (a) 1. For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30.
>
> 2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.
>
> 3. For a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

(b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

(c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

See § 775.082, Fla. Stat.

Since Apprendi would have been applied to sentences imposed that exceeded the statutory maximums set forth in section 755.082, the limited retroactive application of Blakely would only apply to those sentences issued between 2000 and 2004 that were enhanced, but which did not exceed the statutory maximum. As a practical matter, given that it is now 2012, many of these criminal defendants, who otherwise would be able to take advantage of a retroactive application of Blakely, have already been released from state custody due to the expiration of their sentences.

Accordingly, the limited retroactive application of Blakely would only impact those defendants who were sentenced to **significant** prison sentences based

on facts found by the trial judge. Johnson would assert that this small class of prisoners, who are being incarcerated for substantial lengths of time based on judge-made factual findings, have suffered the greatest harm due to their sentences being imposed without observing their constitutional right to a jury determination of all facts that led to the sentence. This fact weighs in favor of the limited retroactive application of Blakely.

Moreover, as Justice Pariente observed in her dissent in Hughes, before any post-conviction claimant would be entitled to collateral relief, there would have to be a determination that victim injury sentencing points or other factual sentencing point enhancements, other than those associated with prior convictions, were assigned based solely on a judge's findings, and that the error was not harmless beyond a reasonable doubt. See Hughes, 901 So. 2d at 868 (Pariente, J., dissenting). Most collateral claims would not be able to overcome these hurdles.

Furthermore, consistent with Justice Pariente's dissent, in most cases in which a Blakely violation is "harmful, the defendant could be resentenced within the range allowed by the jury's verdict. Only in the extraordinary case would an additional jury trial be necessary to establish the facts necessary to impose the enhanced sentence." Id. at 869.

In short, given the fact that the limited retroactive application of Blakely adopted by the First District only applies to resentences occurring between 2000

and 2004 and given that many sentences that were issued below the statutory maximum would have expired by now and given that a criminal defendant could easily be resentenced within the range allowed by the jury's verdict and only in the most extraordinary cases would a jury trial be needed, the limited retroactive application of Blakely adopted by the First District will not cause a great disruption to the administration of justice. For this reason, the third factor in the Stovall/Linkletter test weighs in favor of a limited retroactive application of Blakely.

4. Blakely Was A Fundamentally Significant Decision

As discussed above, the limited retroactive application of Blakely, as adopted by the First district, satisfies the requirements of Witt. Johnson would also note, as Justice Anstead stated in his dissent in Hughes, the Apprendi and Blakely decisions were "two of the most important United States Supreme Court decisions rendered in modern times impacting our criminal law and our death penalty jurisprudence." See Hughes, 901 So. 2d at 855 (Anstead, J., dissenting). Moreover, as Justice Pariente eloquently stated:

> We must remember that the key question under Witt is whether Apprendi constitutes a decision of "fundamental significance." Despite the United States Supreme Court's characterization of its decision in Apprendi as one requiring "constitutional protections of surpassing importance," and its recent reaffirmation of Apprendi's importance in Blakely, the majority has found the decision not one of fundamental significance. In its fixation on finality, the majority has written off the Apprendi decision as one of minor procedural error.

> The United States Supreme Court's own characterization of the significance of Apprendi directly refutes this conclusion.
>
> Ultimately, however, the overriding interests of fairness and uniformity make it impossible to justify a decision that deprives individuals of their life or liberty based on a fact-finding process that has been determined to be violative of fundamental constitutional rights. Our admonition in Witt bears repeating here:
>
> > The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Hughes, 901 So. 2d at 869-870 (Pariente, J., dissenting) (citations omitted).

While this Court's decision not to apply Apprendi to all past criminal convictions may have been warranted given the twenty-year period at issue in Hughes, this Court should not reach the same conclusion as to the limited retroactive application of Blakely. Blakely would only be retroactively applied to cases spanning a short four-year period. Such limited retroactive application ensures that the constitutional protections the Supreme Court recognized in Apprendi are applied uniformly to all cases to which Apprendi applies.

B. The State Relies On Federal Court Precedent Following a Teague Standard, Which Is Not the Standard In Florida for Determining The Retroactive Application of a Law

In its brief, the State heavily relies on federal court decisions holding that Blakely does not apply retroactively. Ignoring the fact that those decisions do not address the narrower issue of whether Blakely should be given limited retroactive application, the federal decisions cited by the State all relied on the standard expressed in Teague v. Lane, 489 U.S. 288 (1989). This Court has never adopted the Teague standard, nor should it do so now.

In Teague, the Supreme Court of the United States, in examining when habeas review of state court convictions would be allowed when based on changes in the law, adopted a standard under which a change of law would not be deemed retroactive unless it: (1) places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority," or (2) "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty'" and "implicates the fundamental fairness of the trial." Id. at 307, 311-312 (quoting Mackey v. United States, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). Florida has never adopted the Teague standard, and instead, has continued to follow the Witt standard for determining the retroactive application of changes of law.

The undersigned counsel cannot state the reasoning for why Teague should not apply in Florida any better than the statements made by Justice Pariente in Hughes, in which she stated:

> Of course, as noted above, Florida has never adopted the federal Teague standard, which was fashioned upon considerations wholly inapplicable to state law systems. Instead, Florida has adopted its own standard for evaluating the critical issue of whether an important judicial decision should be applied retroactively based upon considerations of fairness and justice and has found retroactivity appropriate in numerous cases, many of obviously less significance than Apprendi. As noted above, the majority has essentially chosen to ignore those cases decided under Witt, and to rely upon federal decisions controlled by Teague.
>
> There are, of course, good reasons why this Court and other state courts have chosen not to embrace Teague. As the Missouri Supreme Court accurately and pointedly noted in a recent opinion rejecting the adoption of the Teague standard, "it has been suggested that 'the Teague test essentially prevents state courts from achieving their goal [of correcting injustice], for through its focus on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case.'"
>
> In the article cited approvingly by the Missouri high court, Hutton joins a host of other legal commentators in urging states to exercise their prerogative to develop alternative methods of determining retroactivity because many of the policy reasons behind Teague are not applicable to state post-conviction procedures. In fact, the plurality opinion in Teague has been universally criticized by legal commentators "as being fundamentally unfair, internally inconsistent, and unreasonably harsh."
>
> . . . .
>
> Virtually all of these commentators focus on the important differences between habeas corpus proceedings in state courts compared to the very different role played by the additional and limited habeas review of state court convictions conducted in federal

> proceedings. Importantly, any examination of the Teague standard should begin with the obvious: that the Teague plurality's main focus and concern in adopting a more restrictive view of retroactivity was to limit the scope of federal habeas review of state convictions, an issue supportive of our adoption of a distinct retroactivity analysis in Witt. While there is ongoing debate about the wisdom and fairness of this limitation, the major focus of this concern with the proper scope of federal habeas is associated with an understandable reluctance of the federal courts to interfere with a state's own review of its cases, and the proper scope of rules of collateral attack in federal courts on claims by state prisoners who have already litigated their claims in state courts.
>
> . . . .
>
> In short, issues of the availability of cumulative federal review of issues already resolved in state proceedings should not determine this Court's substantive standard for retroactivity to be applied in state post-conviction proceedings. It would make little sense for state courts to adopt the Teague analysis when a substantial part of Teague's rationale is deference to a state's substantive law and review. If anything, the more restrictive standards of federal review place increased and heightened importance upon the quality and reliability of the state proceedings. In other words, if the state proceedings become the only real venue for relief, as they in fact have become, it is critically important that the state courts provide that venue and "get it right" since those proceedings will usually be the final and only opportunity to litigate collateral claims. In fact, it is the presumed heightened quality of state proceedings that allows the federal courts to defer to the state proceedings as adequate safeguards to the rights of state prisoners. To then further restrict the state proceedings would undermine the entire rationale for restricting federal proceedings because of the reliability of state proceedings.

Hughes, 901 So. 2d at 861-863 (Pariente, J., dissenting) (citations omitted).

For the above reasons, this Court has not and should not adopt a Teague standard for determining whether a change in law should be given retroactive application. Rather, this Court should continue to follow the standard it expressed

in Witt. As discussed in the prior section, the First District's limited retroactive application of Blakely satisfies the Witt standard. The federal decisions the State cites, which rely on a Teague analysis, should not sway this Court's decision here.

III. IF BLAKELY IS GIVEN LIMITED RETROACTIVE APPLICATION, JOHNSON IS ENTITLED TO RELIEF

While this Court should limit its review to the discrete issue of whether Blakely should be given limited retroactive application, in the event this Court does consider the other issues raised by the State, Johnson addresses those issues below:

A. Johnson's Sentence Was Enhanced Due to Judge's Factual Findings

The State argues that Johnson's departure sentence, at both his original sentencing and his resentencing, was based on an "escalating pattern of criminal conduct and unscored juvenile convictions." (Initial Brief, p. 14). The State is incorrect.

In Johnson v. State, 717 So. 2d 1057, 1065 (Fla. 1st DCA 1998), the First District summarized the basis of Johnson's departure sentence as follows:

> Under the sentencing guidelines, adopted by our Legislature in its wisdom, Sirron Johnson, having been convicted of armed kidnapping, armed sexual battery, and armed robbery, scored in a guideline range of 9.6 to 16 years prison. On the motion of the State, the court imposed a 45-year sentence on each count to run concurrently. The judge announced that he was departing from the guidelines and would enter a written order setting forth his reasons within seven days. In moving for a departure, the State had noted

> appellant's unscored juvenile offenses, escalating pattern of criminal conduct, and *premeditation and calculation in the present offenses*. Six days after sentencing, the court entered its written departure order noting the factors that had been argued by the State at sentencing.

Id. at 1065 (emphasis added). Thus, Johnson's departure sentence was based in part on the judge's factual finding that Johnson's crimes were premeditated and calculated. However, facts such as "premediation" and "calculation" are not elements of the crimes for which Johnson was convicted.

The State's reliance on this Court's decision in Albritton v. State, 476 So. 2d 158 (Fla. 1985), is misplaced. In Albritton, this Court held that "when a departure sentence is grounded on both valid and invalid reasons that the sentence should be reversed and the case remanded for resentencing unless the state is able to show beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence." Id. at 160. However, since the State failed to file a responsive brief in the district court, it certainly did not establish beyond a reasonable doubt that the non-recidivist reasons did not affect the departure sentence. Moreover, it seems evident that the trial court's departure sentence was influenced by the alleged premediation and calculation of Johnson's crimes. It certainly cannot be said beyond a reasonable doubt that non-recidivist reasons did not affect the departure sentence.

For this reason, Johnson is entitled to resentencing under Apprendi and Blakely.

B. Johnson Preserved His Apprendi/Blakely Claim

The State contends that "Johnson's claims were not properly presented to the First District for review because they were not preserved at the time of his original trial in 1998, nor were they preserved at his 2002 resentencing." The State further contends that a rule 3.800(a) motion is not the proper mechanism for raising an Apprendi/Blakely error. The State is mistaken.

Johnson filed a motion to correct illegal sentence under both 3.800(a) and 3.850(a). In Fleming, this Court directly addressed the issue the State raises here as to whether an Apprendi/Blakely error could be raised through a 3.800 motion. This Court stated:

> In its initial brief, the State sought review of the conflict issue but also argued that the Court need not address it. The State contended that Fleming's rule 3.800(b) motion could not preserve the Apprendi/Blakely issue for review in the district court. The State, however, did not preserve this argument in the district court, and as Fleming points out, the district courts have held that such claims are properly preserved by such a motion and no cases hold to the contrary. See Arrowood v. State, 843 So. 2d 940, 941 (Fla. 1st DCA 2003) ("[The defendant] properly filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) to raise his Apprendi claim."). To the extent the State argues that our decision in Jackson v. State, 983 So. 2d 562 (Fla. 2008), controls this issue, we note that Jackson does not directly address or even mention Apprendi error.

Fleming, 61 So. 3d at 401 n.3. As in Fleming, the State failed to preserve this issue for appellate review in failing to raise it in the district court. Moreover, as

this Court concluded, the State is incorrect in its assertion that rule 3.800 cannot be used as a mechanism for raising an Apprendi/Blakely error.

Of importance, this case is not about what current criminal defendants need to do to preserve Apprendi/Blakely errors at sentencing. Rather, this case involves the application of Blakely to the narrow class of prisoners whose sentences fell below the statutory maximum set forth in section 775.082 and whose sentences became final after Apprendi, but before Blakely was issued. As to those prisoners, they would not have been aware that their sentences were illegal under Apprendi, because Florida courts interpreted Apprendi as applying only to sentences that exceeded the statutory maximum set forth in section 775.082. It was only after Blakely was issued that the prisoners had notice of the error. Thus, if this Court approves the limited retroactive application of Blakely, the only mechanism these prisoners would have to raise the issue is through a rule 3.800 motion. The State's argument to the contrary is without merit.

C. Johnson Was Resentenced On All Counts

As its Issue II, the State asserts that the First District erred "when it determined that Johnson had been resentenced on count eight at the time of his resentencing on counts six and seven." (Initial Brief, p. 43). While the State again failed to preserve this issue for appellate review, even if it had, the State is mistaken.

In its opinion, the First District stated:

> On August 24, 1996, following a jury trial, the appellant was convicted of one count of armed kidnapping, one count of armed sexual battery, and one count of armed robbery. He alleges that the permitted sentencing range on his guidelines scoresheet was 9.6 to 16 years' imprisonment. Appellant alleges that the trial court sentenced appellant to concurrent upward departure sentences of 48 years' imprisonment on each count. The Florida Supreme Court affirmed the appellant's judgment and sentence on June 22, 2000. On June 19, 2002, in response to a motion to correct illegal sentence, the appellant was resentenced to concurrent terms of 40 years' imprisonment on the charges of armed kidnapping and armed sexual battery. *The trial court reimposed the same 48 year sentence on the charge of armed robbery*.

Johnson, 18 So. 3d at 624 (emphasis added). The First District properly determined that the trial court did resentence Johnson to the same 48 year sentence on Count 8.

This is supported by the record since, during the 2002 resentencing, the trial court issued a new sentencing order as to all counts for which Johnson was convicted. (SRIV 8-12). The trial court, as the First District stated, reimposed the same 48 year sentence on Count 8, which was Johnson's conviction for armed robbery.

Of more importance, Johnson's original sentence did not become final until October 2, 2000, when the Supreme Court of the United States denied Johnson's petition for writ of certiorari. Thus, Johnson's original sentence was not final until after Apprendi was decided. If this Court approves the limited retroactive

application of Blakely, as adopted by the First District, then Johnson would be entitled to relief under Apprendi and Blakely, even if he was not resentenced on Count 8 in 2002 as the State contends.

CONCLUSION

For the foregoing reasons, this Court should approve the limited retroactive application of Blakely adopted by the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been provided via U.S. Mail to: **Christine Ann Guard, Esq. and Trisha Meggs Pate, Esq.**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399-1050, on this 13th day of July, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

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