IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC09-1570

v.

SIRRON JOHNSON,

Respondent.

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Sirron Johnson, the appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name. The record on appeal consists of one volume and four supplemental volumes, which will be referenced as "R" or "SR", followed by any appropriate page number in parentheses. All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Johnson was convicted in Duval County Circuit Court on September 3, 1996 following a jury trial of armed sexual battery, armed kidnapping and armed robbery. (SRIV 8). Johnson took a direct appeal from his conviction and on August 13, 1998, the First District affirmed the conviction and sentence. Johnson v. State, 717 So. 2d 1057 (Fla. 1st DCA 1998). The facts of Johnson's case are set forth in the First District's opinion on his direct appeal, which provides:

> A man identified at the trial of this case as Sirron Johnson accosted and raped three Jacksonville women between December 30, 1994, and January 31, 1995. Although Johnson was charged with crimes involving each of the three victims, the counts involving one victim, C.R., were severed and tried separately. The

> present appeal arises out of Johnson's conviction for the January 31, 1995, armed kidnaping, armed sexual battery, and armed robbery of C.R.. Over a defense objection, the trial court allowed the jury to hear collateral crime evidence from Mr. Johnson's other two rape victims, P.W. and N.B..

Johnson, 717 So. 2d at 1059. The opinion described the crimes as follows:

> Around noon on December 30, 1994, P.W. parked her car at the Independent Life Insurance office on Atlantic Boulevard in Jacksonville. The office is near Art Museum Drive. After conducting some business for her employer in the insurance office, she returned to her car. When she opened her car door, a man, whom she identified at trial as Sirron Johnson, came up behind her with a gun. P.W. identified the gun as a small black automatic pistol. Johnson pushed the gun into P.W.'s back and asked for her purse. He then asked for her jewelry. He next instructed her to unlock the passenger door so he could enter the car. He opened the door after pulling his jacket over his hand. Johnson then ordered her to drive out of the Independent Life driveway and proceed to the Atlantic Gardens Apartments. After she parked the car, Johnson took her out of the car and walked her to the back of the apartment complex where there was a tall wooded fenced-in area that apparently housed certain mechanical equipment for the apartment complex. While holding the gun on her, Johnson forced her to remove her clothes and stand facing a wall. At that point, and for the first time, Johnson instructed P.W. that she should no longer look at him. He then forcibly penetrated her.
>
> On January 13, 1995, at around 11:30 a.m., N.B. was waiting at a bus stop on Art Museum Drive. The bus stop is directly across the street from the Atlantic Gardens Apartments. After a few minutes, a man identified by N.B. at trial as Sirron Johnson, approached her and questioned her about when the next bus would be arriving. When, after a few minutes, she sat down on the bench, Johnson stood over her and placed a gun to her side. N.B. described the gun as a very dark semi-automatic pistol. Johnson then demanded that N.B. hand over any belongings she had. N.B. told

> Johnson that he could take her purse and asked him just not to hurt her. He told her that he could not take the purse at the bus stop because people might see. He then walked her across the street by threatening to kill her if she did not go with him. After crossing the street, Johnson took N.B. to an empty apartment at the Atlantic Gardens Apartments. Once in the apartment, Johnson instructed N.B. to take off all her clothing. Johnson then rifled through N.B.'s belongings. N.B. testified that while Johnson was doing this, he pulled his shirt sleeves over his hands. Johnson then ordered N.B. to lie down on the floor and, for the first time, Johnson covered N.B.'s face so that she could no longer see. After probing her vagina with his pistol, Johnson raped N.B..
>
> On January 31, 1995, at around 8:30 a.m., C.R. arrived at Commonwealth Land and Title Insurance Company, her place of employment, and parked her car near the office door she normally used. After she entered the doorway, she noticed a man, identified by her at trial as Sirron Johnson, in the stairwell. Johnson grabbed her shoulder and ordered her to turn over her money. Johnson had a gun in his hand, described by C.R. as a black semi-automatic pistol. C.R. gave Johnson $40.00, and Johnson then told her "we're going to go get in your car, and we're going to drive to a stoplight, and you are going to let me out of your car. If you scream or try to run, I'm going to kill you." Once in the car, Johnson directed C.R. to a nearby apartment complex, the Atlantic Garden Apartments. During the time Johnson was in C.R.'s car, he did not touch anything, and made a point to pull his sleeves down over his hands before he got out of the car. At the apartment complex, Johnson led C.R. to the back of the apartments to a fenced-in area which housed mechanical equipment. After going through her purse and wallet, Johnson ordered C.R. to take off all her clothes. She complied after he threatened to kill her if she did not remove her clothing. Then, for the first time, Johnson told C.R. to close her eyes, and warned her that if she opened her eyes he would kill her. After forcing her to lie down on top of her clothes, Johnson raped C.R.

Id. at 1059-60. P.W. and N.B. identified a man, not Johnson, from a photographic lineup. See id. at 1060. C.R. identified

Johnson from an actual in person lineup. See id. at 1060-61. The DNA evidence obtained as to the crimes against all three women identified Johnson as their attacker. See id. at 1061-62. P.W. and N.B. were both told that they had incorrectly identified their attacker. See id. at 1061. P.W. and N.B. correctly identified a picture of Johnson as being their attacker when shown a photograph before trial. See id.

With respect to the departure sentence imposed following trial, the First District found:

> 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 [sic] 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. Counsel for appellant did not, at that time, file a motion under rule 3.800(b), Florida Rules of Criminal Procedure, concerning the departure.
>
> On appeal appellant argues that although a trial judge may delay shortly in issuing a written departure order, the judge must orally articulate departure reasons at sentencing under Rule 3.702(d)(18)(A), Florida Rules of Criminal Procedure. Here, the trial judge did not state his reasons, orally or otherwise, at sentencing. Accordingly, argues appellant, the judge's written order does not save the departure sentence, and appellant is entitled to a guideline sentence for his crimes. We hold that the sentencing issue is not preserved for appeal because appellant

> made no objection at the time of sentencing concerning the trial court's failure to strictly abide by the rules of criminal procedure, nor did he file a Rule 3.800(b) motion within thirty days. Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800, 675 So. 2d 1374 (Fla.1996); Johnson v. State, 697 So. 2d 1245 (Fla. 1st DCA), review denied, 703 So. 2d 476 (Fla. 1997); and Williams v. State, 697 So. 2d 164 (Fla. 1st DCA), review denied, 700 So. 2d 689 (Fla. 1997). Indeed, it is not unlikely that defense counsel recognized that by orally announcing his intent to depart, the trial judge simply adopted the reasons articulated by the State.

Id. at 1065-66.

Johnson then invoked the jurisdiction of this Court, and this Court accepted jurisdiction. See Johnson v. State, 727 So. 2d 906 (Fla. 1998). On June 22, 2000, this Court issued its opinion in Johnson's appeal. See Johnson v. State, 761 So. 2d 318 (2000). This Court approved of the First District's decision based upon this Court's decision in Maddox v. State, 760 So. 2d 89 (Fla. 2000). See id. This Court declined to address any other issues. See id.

Johnson next filed a petition for writ of certiorari in the United States Supreme Court. The United States Supreme Court denied the request on October 2, 2000. See Johnson v. Florida, 531 U.S. 889 (2000).

On December 4, 2000, Johnson filed a motion to correct illegal sentence in the trial court. (SRI 2). In his motion, Johnson contended that the trial court had sentenced him to a departure sentence in excess of the statutory maximum. (SRI 2).

The trial court found that two of Johnson's sentences did in fact exceed the statutory maximum sentence for the crimes as to counts six and seven. (SRI 2). The trial court resentenced Johnson on June 19, 2002 as to counts six and seven. (SRI 2). The new sentencing order required that Johnson be imprisoned for a term of forty years as to count six and forty years on count seven. (SRIV 8-9). The trial court denied Johnson's request as to count eight and left Johnson's sentence as to count eight in place at forty eight years. (SRIV 7). The resentencing documents reflect a new sentence was imposed only as to counts six and seven. (SRIV 8-9). Johnson was not resentenced as to count eight, the remaining 48 year original sentence. (SRIV 10, 12). These facts are confirmed by the record in Johnson's appeal related to his resentencing. (Appendix A). Johnson's appeal was dismissed. (SRI 2).

On November 21, 2007, Johnson filed a second motion to correct illegal sentence. (SRI 1). Johnson asserted for the first time that his sentence was illegal under the decisions in Blakely and Apprendi. (SRI 3). Johnson claimed that the State did not produce a basis for an enhanced sentence at his resentencing hearing and that the trial judge did not make any independent findings for the imposition of an enhanced sentence at his resentencing hearing. (SRI 3). The trial court denied the motion finding that Blakely and Apprendi did not

retroactively apply to Johnson's case. (SRI 6). The trial court concluded that, even if Apprendi applied to Johnson's sentence, Johnson's sentence did not exceed the statutory maximum for the offenses for which he was convicted. (SRI 7).

Johnson appealed. The First District found the following applicable facts:

> 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 v. State, 18 So. 3d 623, 624 (Fla 1st DCA 2009). The First District held:

> 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 reaffirmed 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").

The State invoked jurisdiction in this Court. This Court accepted jurisdiction, and this brief follows that order. See State v. Johnson, 2012 WL 1435713 (Fla. March 14, 2012).

SUMMARY OF ARGUMENT

Issue I

Johnson's sentence constitutes a legal sentence under Apprendi. Blakely is not applicable to Johnson's challenged sentence. **First**, Johnson's departure sentence was imposed based upon his prior convictions and recidivism. Under Apprendi and Blakely, no jury finding is required to depart on those grounds. **Second**, Johnson failed to preserve his challenge by objecting at his original trial, sentencing or by motion during his direct appeal as to count eight and failed to preserve his challenge at his subsequent resentencing as to counts six and seven. **Third**, other state and federal courts have held that Apprendi and Blakely do not apply retroactively on collateral challenges. This Court's precedents dictate the same outcome, as Blakely should be applied to convictions and sentences that became final prior to their advent. This Court held in Hughes v. State, 901 So. 2d 837 (Fla. 2005), that Apprendi does not apply retroactively. Likewise, under this Court's decision in Witt v. State, 387 So. 2d 922 (Fla. 1980), Blakely is not subject to retroactive imposition. **Fourth**, Blakely is not applicable because the judge made no further findings rather than the jury after the Court ruled in Apprendi and Blakely. **Fifth**, applying Blakely to Johnson's case essentially gives Blakely retroactive application thereby destroying the State's interest in the

finality of the conviction. **Finally**, assuming Apprendi applies, since Blakely does not apply, Johnson's sentence does not violate Apprendi because it does not exceed the statutory maximum specified in section 775.082, Florida Statutes.

Issue II

The First District's decision finding that Johnson was resentenced on count eight in 2002 is not supported by competent substantial evidence.

ARGUMENT

ISSUE I

WHETHER BLAKELY V. WASHINGTON, 542 U.S. 296 (2004), APPLIES TO JOHNSON'S CASE?

The First District erroneously concluded that Blakely applied to Johnson's case relying on its precedent set forth in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005).

Standard of Review

The issue of the applicability of the decisions of the United States Supreme Court in Apprendi, 530 U.S., and Blakely, 542 U.S., is a question of law to be determined under the *de novo* standard of review.

Preservation

Because the State was the appellee below and this case comes to this Court on a summary denial of a motion seeking collateral relief, the State has not previously been required by the rules of appellate procedure to file a brief in this matter and no further preservation was required for the matters presented by it here. 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. The court may request a response from the appellee before ruling." The State filed no brief below, and therefore, no further preservation is required to present the matters the State presents in this

appeal.

With respect to the State's position as to Johnson's proper preservation and presentation, the State's arguments with respect to those matters are presented in the argument section of this brief.

Argument

A. This Court's Decision in Fleming and Its Dismissal Order in Isaac Are Not Dispositive of This Case.

With respect to the history of recent Blakely and Apprendi related cases before this Court, the State notes the following at the outset. Recently, in State v. Fleming, 61 So. 3d 399, 399 (Fla. 2009), this Court concluded that Apprendi and Blakely apply to a *de novo* resentencing that becomes final after Apprendi and Blakely were decided. Fleming was a Blakely pipeline case because Fleming's resentencing was not final at the time Blakely issued. See id. at 408. Fleming raised his claims via a Florida Rule of Criminal Procedure 3.800(b)(2) motion during the course of his direct appeal from resentencing. See id. at 401.

Following Fleming, this Court issued an order dismissing review in State v. Isaac, 66 So. 3d 912 (Fla. 2011). In its order, this Court stated:

> We previously granted review of Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), to resolve a certified conflict in the district courts regarding the applicability of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296

> (2004), to resentencing proceedings which became final after Apprendi and Blakely issued where the conviction and the original sentence were final before they issued. See art. V, § 3(b)(4), Fla. Const; State v. Isaac, 4 So. 3d 677 (Fla.2009) (granting review). We resolved this conflict, however, in State v. Fleming, 36 Fla. L. Weekly S50 (Fla. Feb. 3, 2011), revised, 36 Fla. L. Weekly S198 (Fla. Apr. 28, 2011) (granting motion for clarification in part and remanding for harmless error analysis). Accordingly, we have determined to discharge jurisdiction in Isaac and dismiss this review proceeding.

In the present case, Johnson's resentencing was final long before the United States Supreme Court issued its Blakely decision on June 24, 2004. Johnson's conviction and sentence as to count eight became final on October 2, 2000 when the United States Supreme Court denied his petition for writ of certiorari. See Johnson, 531 U.S. Johnson's resentencing as to counts six and seven became final on November 6, 2002, when his appeal was dismissed. (SRIII 2). As a result, it is clear that Johnson's case does not fall within the purview of the Fleming decision. Further, because this Court discharged jurisdiction and dismissed the Isaac case, there is no precedential decision affecting the outcome of this case to be derived from this Court's order in Isaac. The applicability of Apprendi to Johnson's convictions is discussed *infra*.

B. The United States Supreme Court Decisions in Apprendi and Blakely Are Inapplicable to This Case Because Johnson's Sentence was Enhanced on the Basis of His Prior Criminal Record.

The essential holding in Apprendi, 530 U.S. at 490, was that any fact, other than a prior conviction, "that increases

the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This holding was disturbed in no way by the Court's subsequent decision in Blakely. See Blakely, 542 U.S. at 301.

The trial court in the original sentencing and resentencing proceedings departed based upon an escalating pattern of criminal conduct and unscored juvenile convictions. See Johnson, 717 So. 2d at 1065-66. The First District affirmed the departure reasons in Johnson's direct appeal. See id.

Recidivist grounds for enhancing a defendant's sentence are specifically excluded from the application of Apprendi and Blakely. The First District simply relied on its decision in Isaac v. State, 911 So. 2d 813 (Fla. 1st DCA 2005), to determine that Johnson's sentence was illegal because his sentences became final after Apprendi was decided, but before Blakely was decided. Johnson, 717 So. 2d at 624.

The First District has repeatedly failed to distinguish between the included and excluded departure reasons before it indiscriminately applies its precedent and the decisions in Apprendi and Blakely. Here, the two major departure reasons were excluded from the application of Apprendi and Blakely. As a result, the First District was obliged to uphold or at least evaluate the departure sentence based upon this Court's precedent in Albritton v. State, 476 So. 2d 158, 160 (Fla.

1985). This Court held in Albritton, 476 So. 2d at 160, "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." Here, it is clear, that the two valid recidivist reasons demonstrate that the two non-recidivist reasons did not affect the imposition of the departure sentence. Therefore, the decision of the First District should be reversed.

C. Johnson Has Failed to Properly Preserve This Issue for Review by This Court.

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. In Hughes v. State, 901 So. 2d 837, 844 (Fla. 2005), this Court noted that "a claim of Apprendi error must be preserved for review" and "expressly rejected the assertion that such error is fundamental." (citing McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001)). In United States v. Cotton, 535 U.S. 625, 631 (2002), the Court applied the plain-error test of Federal Rule of Criminal Procedure 52(b) in a case involving a claim that an Apprendi error had occurred because the defendant's claim had been forfeited when he failed to make timely assertion of the right before the trial court. See

Cotton, 535 U.S. at 631 (citing United States v. Olano, 507 U.S. 725, 731 (1993); see also Curtis v. United States, 294 F.3d 841 (7th Cir. 2002)(holding that Apprendi is not retroactive because it is not a substantial change in the law; rather, it "is about nothing but procedure" and it is not so fundamental because it is not even applied in direct appeal without preservation relying on Cotton, 535 U.S.).

Because an Apprendi or Blakely error requires a jury to find certain facts that may enhance a sentence beyond a reasonable doubt, Apprendi and Blakely errors are necessarily errors that occur at the time of the jury trial, but which manifest at the time of sentencing. As a result, the proper time to object to the lack of inclusion of matters which will eventually be scored, or in this case, departure reasons, was prior to the verdict form being provided to the jury in 1998, such that the jury could make the desired findings.

While dealing with a different matter than the reasons for departure in Johnson's case, in Rosen v. State, 940 So. 2d 1155, 1163 (Fla. 5th DCA 2006), the trial court concluded that the Apprendi objection should be made at trial, rather than at sentencing. The Fifth District's approach in Rosen is based upon sound logic. The Fifth District explained that an untimely objection at sentencing illustrates precisely why the contemporaneous objection rule should apply. The policy behind

the contemporaneous objection rule is to eliminate legal trickery and procedural gamesmanship by crafty litigants who intentionally cause error so they can complain about it on appeal, and "equally important, the rule provides the trial court with a timely opportunity to correct the error and avoid mistrial or reversal on appeal." Rosen, 940 So.2d at 1163 (citing Caldwell v. State, 920 So. 2d 727, 730 (Fla. 5th DCA 2006). Implicitly, the Rosen Court correctly reasons that a judge can correct an Apprendi error at trial when the jury is present, but not at sentencing when the jury is not.

Additionally, in the instant case, Johnson made no objection based upon Apprendi at his resentencing hearing. Even if this Court found that sentencing was an appropriate time, rather than at trial, to make such an objection, Johnson failed to lodge a timely objection such that the trial court could have reviewed the departure reasons under the harmless error test enunciated by the Court in Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006), and later adopted by this Court in Galindez v. State, 955 So. 2d 517 (Fla. 2007).

Johnson did not raised these claims in a direct appeal, but rather, he has raised them through a collateral challenge to his judgment and sentence. In Fleming, 61 So. 3d at 401 fn.3, this Court found that the State had not preserved its assertion that

Apprendi and Blakely claims are not properly preserved by the filing of a Florida Rule of Criminal Procedure 3.800(b)(2) motion. Here, Johnson never raised his claim in a direct appeal proceeding, but rather was permitted to collaterally attack his sentencing proceeding after both his sentences were final. The First District has not distinguished between the types of claims and on the face of the Isaac opinion did in fact permit a defendant to raise his claims collaterally.

Johnson comes before this Court as a result of a motion pursuant to Florida Rule of Criminal Procedure 3.800(a). The case law is clear that Apprendi and Blakely challenges are not properly made on collateral review. As discussed *infra*, neither Apprendi nor Blakely should be applied retroactively. As a result, Johnson's rule 3.800(a) motion is of no assistance to him in this matter.

Furthermore, Florida Rule of Criminal Procedure 3.800(a) is not the appropriate vehicle by which to obtain such a remedy. In Davis v. State, 661 So. 2d 1193, 1196-97 (Fla. 1995), this Court rejected the contention that a departure sentence that had been imposed without a contemporaneous written order providing the reasons for departure was an illegal sentence that could be corrected at any time. This Court reiterated its holding in Gartrell v. State, 626 So. 2d 1364 (Fla. 1993), "concluding that an illegal sentence is one that exceeds the maximum period set

forth by law for a particular offense without regard to the guidelines." Id. at 1196. This Court further explained that "a departure sentence that is beyond the guidelines may be an erroneous sentence when written reasons are not properly filed, but it is not an illegal sentence when it is still within the maximum allowed by law." Id. at 1197.

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

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

Id.

In Hopping v. State, 708 So. 2d 263, 264 (Fla. 1998), this Court resolved the issue of whether a sentence was illegal because the sentence had been enhanced after it was imposed in violation of the double jeopardy clause. This Court determined that a defendant could challenge such a sentence because the challenge could be determined as a matter of law. See id. at 265.

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

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

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

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

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

1186-87, Judge Farmer wrote:

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

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

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

> The difference between [the situations in Hopping and Calloway] is significant, and not just because no evidentiary hearing is necessary to ascertain the illegality. Separate sentences for each of multiple crimes committed during a criminal episode may not amount to unconstitutional enhancements as such if the statute prescribing the crime and penalty expressly provide for and allow this kind of multiple punishment. No judge, however, can increase a sentence once it has been imposed and the prisoner has begun to serve it.

Additionally, the Fourth District stated:

> From Davis, Calloway, Hopping and Mancino, we discern that the short list still has only three members: (1) those sentences in excess of the

> statutory maximum; (2) those sentences that fail to give credit for record jail time; and (3) those sentences that violate double jeopardy by a post sentencing enhancement clear from the record.

Id. at 1185-86.

In Johnson's case, he essentially argues that he is entitled to relief by his motion pursuant to Florida Rule of Criminal Procedure 3.800(a) because the trial court failed to comply with the procedural safeguards set forth in Apprendi and Blakely. As this Court discussed in Carter, 786 So. 2d at 1180-81, this is not an appropriate basis for relief under the rule. Further, Johnson's request does not meet the criteria of the "short-list" identified in Blakely, 746 So. 2d. Because Johnson's sentence does not "impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances," rule 3.800(a), Florida Rules of Criminal Procedure does not provide him a vehicle by which to obtain relief. This point is also illustrated by this Court's decision in Hughes, wherein this Court found that Apprendi error was not fundamental in nature. This Court should conclude that freestanding Apprendi and Blakely challenges may not properly be made through the postconviction process. This issue has been properly raised by the State in this proceeding under the applicable appellate rules further differentiating the posture of this case from the posture of the Fleming case.

D. Neither Blakely Nor Apprendi Should Be Applied Retroactively.

In Apprendi, 530 U.S. at 490, the defendant fired bullets into the home of an African-American family. Apprendi entered into a plea agreement in which he agreed to plead guilty to three of the twenty-three counts charged. See id. at 469-70. Under the terms of the agreement, the sentences for two counts would run consecutively and the sentence for the third count would run concurrently with the other two. See id. at 470. Apprendi faced a maximum sentence of twenty years on the two counts without the imposition of a hate-crime enhancement. See id. However, if the hate-crime enhancement was applied, the statute authorized a twenty-year maximum sentence on one count alone. See id. The judge, utilizing a preponderance of the evidence standard, found that the hate-crime enhancement applied. See id. at 471. As a result, Apprendi was sentenced to a twelve-year term on that count and to shorter concurrent sentences on the other two counts. See id.

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

Id. at 490.

In Blakely, the Court applied the Apprendi decision to Washington's presumptive sentencing system. Blakely pled guilty to kidnapping his wife. See Blakely, 542 U.S. at 298. Pursuant to Washington's sentencing statute, Blakely faced a sentence of forty-nine to fifty-three months. See id. at 299. However, the statute allowed for the imposition of a greater sentence if the judge found substantial and compelling reasons that justified a "exceptional sentence." See id. The judge imposed the greater sentence of ninety months based upon a finding that Blakely acted with "deliberate cruelty." See id. at 300.

On review, the Supreme Court concluded that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Id. at 303 (emphasis in original). The Court continued:

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

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

In Hughes v. State, 901 So. 2d 837 (Fla. 2005), this Court

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

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

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

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

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

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

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

Witt, 387 So. 2d at 929-930. For example, in Linkletter v.

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

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

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

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

Although Blakely relied on Apprendi, the Blakely decision fundamentally changed understanding of "maximum sentence" in the courts. Blakely redefined the "maximum sentence," not as the maximum allowed by state statute, but as the maximum allowed by the jury's verdict. Before Blakely, the courts consistently held that Apprendi did not apply to sentences within the statutory maximum. See Simpson v. United States, 376 F.3d 679,

681 (7th Cir. 2004) (stating that "before Blakely was decided, every federal court of appeals had held that Apprendi did not apply to guideline calculations made within the statutory maximum" (*citing* United States v. Hughes, 369 F.3d 941, 947 (6th Cir. 2004))).[1] Therefore, the rule in Blakely was clearly not apparent to all courts, was not dictated by precedent and was subject to debate among reasonable jurists. See Schardt v. Payne, 414 F.3d 1025, 1035 (9th Cir. 2005) (holding that Blakely is new rule and pointing out that "[e]very circuit court of appeals that addressed the question presented in Blakely reached the opposite conclusion from the rule subsequently announced by the Supreme Court"). Because Blakely announced a new rule of law, this Court must apply the Witt test to determine whether Blakely applies to Johnson's sentence.

To determine if a change of law is of significant magnitude, this Court applies Stovall/Linkletter test which "requires an analysis of (i) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the

[1] See also United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir. 2004); United States v. Alvarez, 358 F.3d 1194, 1211-12 (9th Cir. 2004); United States v. Phillips, 349 F.3d 138, 143 (3d Cir. 2003); United States v. Patterson, 348 F.3d 218, 228-29 (7th Cir. 2003); United States v. Randle, 304 F.3d 373, 378 (5th Cir. 2002); United States v. Sanchez, 269 F.3d 1250, 1268 (11th Cir. 2001); United States v. Webb, 347 U.S. App. D.C. 162, 255 F.3d 890, 898 (D.C. Cir. 2001); United States v. Angle, 254 F.3d 514, 518 (4th Cir. 2001); United States v. Caba, 241 F.3d 98, 100 (1st Cir. 2001); United States v. Garcia, 240 F.3d 180, 183-84 (2d Cir. 2001).

effect that retroactive application of the rule will have on the administration of justice." State v. Callaway, 658 So. 2d 983, 987 (Fla. 1995). Crucial to the court's analysis is the purpose to be served by the new rule. Blakely, as the decision in Apprendi, served the purpose of ensuring that once a defendant is found guilty, that defendant does not receive a sentence higher than the statutory maximum, as redefined by Blakely, unless those factors that are used to impose the above-the-maximum sentence are proven to the jury beyond a reasonable doubt. However, while the Blakely ruling may implicate due process and equal protection concerns, it does not specifically operate to prevent any grievous injustices or disparities in sentencing between equally situated defendants. Rather, Blakely merely changes the procedure employed for determining the appropriate sentence. For example "the plight of a defendant who is serving a sentence that was enhanced because of judge-decided factors is not necessarily any more severe than that of an equally-situated defendant whose sentence was enhanced based on jury-determined factors. In fact, it is conceivable that, if given the opportunity, a jury might find even more enhancing factors than would have been found by the judge." See Hughes v. State, 826 So. 2d 1070, 1074 (Fla. 1st DCA 2002). Thus, the due process and equal protection concerns involved in Blakely are so insignificant that it does not require retroactive application.

Indeed, in looking to the significance of Blakely in contrast to decisions which required retroactive application, this Court should consider the fact that had the issue been properly presented and preserved in the trial court, there is very little expectation that the outcome of the sentence would be any different. For example, if a criminal defendant requested a special verdict regarding the victim's injury, it is unlikely that a jury's findings regarding the severity of a victim's injury would be any different than that of a judge. In contrast, there is a strong likelihood of a criminal defendant unfamiliar with the rules of evidence and unaware that crucial evidence against him is subject to suppression, will be convicted when unrepresented and acquitted if represented by competent counsel. Therefore, Gideon v. Wainwright, required retroactive application; however, Blakely, like Apprendi, is not of sufficient magnitude because a Blakely violation causes no harm to the defendant.

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

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

Recuenco, 126 S. Ct. at 2551-2552. This Court has likewise concluded that Apprendi and Blakely errors are subject to harmless error analysis. See Galindez v. State, 955 So.2d 517 (Fla. 2007). Therefore, if an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. See United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir. 2002)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi, is not retroactive).

In fact, the United States Supreme Court has even held that the right to a jury trial is not retroactive. See DeStefano v. Woods, 392 U.S. 631 (1968)(refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being

done by the judge rather than the jury); cf. Brown v. Louisiana, 447 U.S. 323, 328 (1980)(holding that because the conviction by non unanimous six-member jury raised serious questions about the accuracy of the guilty verdicts, its holding would apply retroactively).

Every other federal circuit which has addressed the issue has found that Blakely is not retroactive. The United States Supreme Court has narrowed the test for retroactivity in Teague, 489 U.S. at 307, holding that a new rule will not be applied in a collateral review unless it falls under one of two exceptions. The Court stated that "[f]irst, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[,]'" and "[s]econd, a new rule should be applied retroactively if it requires the observance of 'those procedures that ... are 'implicit in the concept of ordered liberty.'" Teague, 489 U.S. at 307. "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," and the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Tyler v. Cain, 121 S. Ct. 2478, 2484 (2001). "A holding constitutes a 'new rule' within the meaning of Teague if it 'breaks new ground,' 'imposes a new

obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" Graham v. Collins, 506 U.S. 461 (1993), citing, Teague, 489 U.S., at 301.

Although the federal test is now slightly different from this Court's test for retroactivity, it is significant to this Court's analysis that the federal circuits addressing this issue have held that Blakely is not retroactive.[2] Additionally, state supreme courts that have held Blakely is not retroactive. See State v. Smart, 202 P.3d 1130 (Alaska 2009)(determining that Blakely should not be applied retroactively on collateral review under the state test in Judd v. State, 482 P.2d 273 (Alaska 1971), which employs the Linkletter, 381 U.S., analysis); People v. Johnson, 142 P.3d 722 (Colo. 2006); Carmichael v. State, 927 A.2d 1172 (Me. 2007); Gutermuth v. State, 868 N.E.2d 427, 433 (Ind. 2007); State v. Houston, 702 N.W.2d 268 (Minn. 2005); State v. Evans, 114 P.3d 627 (Wash. 2005).

In agreement with the other courts in this nation, Blakely is a change of procedure that is not of such significance to require retroactive application. As the First District stated stated in Hughes, 826 So. 2d at 1074: "If an Apprendi violation

[2] See Sciulli v. U.S., 142 Fed. Appx. 64 (3d Cir. 2005); U.S. v. Stoltz, 149 Fed. Appx. 567 (8th Cir. 2005); Schardt v. Payne, 414 F. 3d 1025, 1034 (9th Cir. 2005); U.S. v. Price, 400 F.3d 844, 849 (10th Cir. 2005); Michael v. Crosby, 430 F.3d 1310, 1312 (11th Cir. 2005).

can be harmless, it is difficult to logically conclude that the purpose behind the change of law in Apprendi is fundamentally significant. Thus, analysis of the Apprendi ruling under the first prong of the Stovall/Linkletter test does not weigh in favor of retroactivity." Since the same is true of Blakely, the test does not weigh in favor of Blakely being applied retroactively either.

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

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

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

The third prong of the Stovall/Linkletter test is the effect that retroactive application of the rule will have on the administration of justice. The findings of this Court in

Hughes, 901 So. 2d at 845-46, are no less applicable to the situation created by the retroactive application of Blakely. To that effect, this Court stated in Hughes:

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

> cannot be considered in isolation. Many, if not all, of the surrounding facts would have to be presented. In others, a jury would have to determine factors unrelated to the case (e.g., whether legal status points may be assessed).

Because none of the Witt test factors weighs in favor of Blakely being found to be a change of law that constitutes a development of fundamental significance, this Court should find Blakely, just as it has Apprendi, to not retroactively apply. Thus, the State asserts that the decision in Blakely, 542 U.S., should not be applied retroactively to a resentencing hearing held after the Court's decision in Apprendi, 530 U.S., but which was final before the Court's decision in Blakely. To hold otherwise would result in the retroactive application of the Blakely decision.

This Court never reached the question presented in this case in its Fleming decision. In Fleming, 61 So. 3d at 408, this Court specifically noted that "the basis for granting postconviction relief to vacate original final sentences was not the violation of Apprendi and Blakely. That would be retroactive application of those cases to provide postconviction relief." However, this is precisely what has occurred in this case and in other First District precedent such as Isaac. See Isaac, 911 So. 2d at 814. On the face of the Isaac opinion, it is clear that Isaac's resentencing was final in 2002, before Blakely issued. See id. Isaac challenged his sentence by a

successive Florida Rule of Criminal Procedure 3.800(a) motion, not in a direct appellate proceeding. See id. Isaac received relief only as a result of the Blakely decision as his sentence was within the statutory maximum as understood after Apprendi. As a result, the First District's precedent gives retroactively applies the Blakely decision. The First District retroactively applied Blakely to Johnson's case as defined by this Court in Fleming. As a result, the decision of the First District should be reversed.

F. Blakely Should Not Be Applied to Johnson's Original or Resentencing Proceedings Because Applying Blakely to such a Proceedings Essentially Applies Blakely Retroactively to Johnson's Convictions and Sentences which Became Final in 200 and 2002 Prior to the Decision in Blakely.

Blakely should not be given what amounts to retroactive application in cases such as Johnson's. Once a case is final on its original direct appeal or direct appeal from resentencing, the State has an interest in the finality of the conviction. Applying the rule of Blakely to cases such as Johnson's eviscerates that interest by allowing the defendant to challenge the methodology of his sentencing long after he was originally sentenced and his challenges, if any, to the departure sentence are affirmed during his direct appeal. The State is further disadvantaged by the passage of time in that its witnesses may no longer be available to testify live, exhibits may no longer exist a decade or more after the conviction became final on

direct appeal, witnesses memories will have faded, etc. As a result, even if this Court creates a process permitting the State to empanel a new jury for purposes of finding the departure reasons beyond a result, the State's interest in finality is severely undermined.

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

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

Galindez, 955 So. 2d at 525 (J. Cantero concurring)(bold emphasis added). Applying the new law set forth in Blakely to Johnson's case, "would 'destroy the stability of the law, render

punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state . . . beyond any tolerable limit.'" Id. at 527-28 (*quoting* Witt, 387 So. 2d at 929-30. As Justice Cantero further pointed out, application of the finality principle

> avoids those dire consequences by allowing retroactive application only when new rulings "so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of postconviction relief is necessary to avoid individual instances of obvious injustice." Id. at 925. We have already evaluated Apprendi under the Witt standard and held that it does not apply retroactively. See Hughes, 901 So. 2d at 837. It is safe to assume that Blakely, which "appl[ied] the rule . . . in Apprendi," 542 U.S. at 301, will not apply retroactively, either. Thus, the defendant clearly has no right to retroactive relief under Apprendi or Blakely.

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

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

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

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

> In fact, applying Apprendi and Blakely without a new jury is even more disruptive than most retroactive applications. It creates a bizarre paradox: **the State is faulted for failing to prove sentence-enhancing facts to the jury at a time when it was not required to do so, yet is barred from proving those facts to a jury once such a requirement has been created.** The result is that defendants will obtain relief (i.e.,

> lighter sentences than their behavior warrants) because of defects in the process leading to their convictions, despite the continued finality of those convictions. **That is the very essence of retroactive application. It violates the principle of finality that we so adamantly defended in Hughes and contradicts its express language.**

(emphasis added). As a result, the State requests this Court end the collateral challenges to such sentences that are still permitted despite the *dicta* contained in this Court's Fleming opinion.

G. Even if Apprendi Applies to Johnson's Sentence, Blakely Does Not, and Johnson's Sentence Did Not Exceed the Statutory Maximums Expressed in Section 775.082, Florida Statutes.

As discussed in previous sections, until the decision in Blakely, the understanding of the courts was that Apprendi applied only in cases where the trial court imposed a sentence in excess of the statutory maximum as set forth in state law. In Florida, section 775.082, Florida Statutes, sets forth the applicable maximums. Johnson's conviction for armed kidnapping as charged in count six was a life felony punishable by either forty years or life imprisonment. (SRIV 4). Johnson was sentenced to forty years imprisonment which is less than or equal to the statutory maximum sentence of forty-years or life imprisonment. Johnson's conviction for sexual battery as charged in count seven was a life felony punishable by forty years or life imprisonment. (SRIV 4). Johnson was sentenced to forty years imprisonment which is less than or equal to the

statutory maximum sentence of forty-years or life imprisonment. Johnson's conviction for armed robbery as charged in count eight was a first degree felony punishable by life imprisonment. Johnson was sentenced to forty-eight years imprisonment which is less than the maximum sentence of life imprisonment. As a result, no violation of Apprendi occurred in this case.

Conclusion

Based on the foregoing, the State respectfully submits that neither Apprendi or Blakely are applicable to Johnson's sentencing. Therefore, the decision of the First District in Johnson, 18 So. 3d, should be reversed. Finally, even if this Court rules that Respondent can challenge his sentence and/or Blakely is applicable, this case must be remanded for harmless error analysis pursuant to Galindez.

ISSUE II

DID THE FIRST DISTRICT ERR WHEN IT FOUND JOHNSON HAD BEEN RESENTENCED ON COUNT EIGHT BECAUSE SUCH A FINDING IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD?

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. The First District's conclusion is not supported by competent substantial evidence and is contrary to the evidence contained in the record.

Standard of Review

The applicable standard of review is whether competent substantial evidence supports the court's factual determination.

Preservation

As discussed in Issue I of this brief, this matter is properly presented for review as briefing on the issues before the trial court was not required. The First District first reached this conclusion in its opinion in this case. Thus, the State properly challenges the First District's conclusion in this appeal.

Argument

In its opinion, the First District found:

> 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.

However, the record before the First District does not support this conclusion. The record before the First District reflects that on December 4, 2000, Johnson filed a motion to correct illegal sentence in the trial court. (SRI 2). In his motion, Johnson contended that the trial court had sentenced him to a departure sentence in excess of the statutory maximum. (SRI 2). The trial court found that two of Johnson's sentences did in fact exceed the statutory maximum sentence for the crimes as to counts six and seven. (SRI 2). The trial court resentenced Johnson on June 19, 2002 as to counts six and seven. (SRI 2). The new sentencing order required that Johnson be imprisoned for a term of forty years as to count six and forty years on count seven. (SRIV 8-9). The trial court denied Johnson's request as to count eight and left Johnson's sentence as to count eight in place at forty eight years. (SRIV 7). The resentencing documents reflect a new sentence was imposed only as to counts six and seven. (SRIV 8-9). Johnson was not

resentenced as to count eight, leaving in place the 48 year original sentence. (SRIV 10, 12). These facts are confirmed by the record in Johnson's appeal related to his resentencing. (Appendix A).

As such, this Court should find that the First District erred in concluding that Johnson's sentence as to count eight was in any legal manner reimposed as a result of Johnson's resentencing as to counts six and seven.

CONCLUSION

Based upon the foregoing, the State respectfully submits that the opinion of the First District should be reversed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Henry G. Gyden of Haas, Lewis, DiFiore, P.A. 4921 Memorial Highway, Suite 200, Tampa, Florida 33634, by MAIL on this 14th day of May, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

_____
Christine Ann Guard
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

Case No. SC09-1570

v.

SIRRON JOHNSON,

Respondent.

APPENDIX

Ex. A Record on Appeal in First District Case No. 1D02-3354