*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-113

SEPTEMBER TERM, 2006

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 2, Chittenden Circuit |
| Minh Nguyen | } | |
| | } | DOCKET NO. 6777/78-11-99 Cncr |

Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals the district court=s decision denying his motion for reconsideration of his sentence. We affirm.

In January of 2000, defendant was convicted by a jury on two counts of attempted second degree murder. In December of 2000, the district court sentenced defendant to serve two concurrent terms of 45 years to life. In arriving at defendant=s sentence, the district court found certain aggravating factors which

prompted the court to set defendant=s minimum sentence above the statutory minimum of 20 years. See 13 V.S.A. ' 2303(b) (setting minimum sentence for second degree murder at 20 years)*; 13 V.S.A. ' 9(a) (stating that sentence for attempted murder will be the same as that for murder). Defendant appealed his conviction, but not his sentence; we affirmed his conviction in State v. Nguyen, 173 Vt. 598 (2002).

During the time following defendant=s conviction but prior to his sentencing and filing of a notice of appeal, the United States Supreme Court handed down its decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). That case held that A[o]ther than the fact of a prior conviction, any fact 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. Despite the fact that Apprendi was available to defendant both for his sentencing hearing and in his direct appeal, he did not make any argument based on Apprendi in either venue. See State v. Styles, 166 Vt. 615, 616 (1997) (change in law that occurs while case is on direct appeal will be given effect). Rather, in a pro se motion filed several years after our decision on his direct appeal, defendant argued that Apprendi=s requirement that a jury decide fact issues related to sentencing should have applied to prevent the sentencing court from raising his minimum sentence from the statutory period of 20 years to 45 years.

The district court determined that defendant had waived any argument based on Apprendi, as the decision had already been issued at the time of his sentencing and direct appeal, but defendant did not raise an Apprendi argument at that time. The district court relied on our decision in State v. Gibney, where we held that a defendant who failed to raise an Apprendi argument in his direct appeal had waived the issue. 2005 VT 3, & 4-5, 177 Vt. 633.

Defendant argues that Vermont Rule of Criminal Procedure 35(a) permitted him to challenge a sentence that was illegally imposed Aat any time.@ While Rule 35(a) states that an illegally imposed sentence may be challenged Aat any time,@ the barrier here is not a matter of timing, but of preservation. See State v. Grega, 170 Vt. 573, 575 & n.2 (1999) (mem.) (defendant may not use Rule 35 as means of reviving arguments that were waived on direct appeal). Stated another way, it is not that defendant has raised the issue too late, but that he did not raise it when given the opportunity in either his sentencing hearing or his direct appeal. Barring

litigation of the issue at this stage protects the State=s interest in the finality of judicial decisions. See State v. Provencher, 128 Vt. 586, 591 (1970) (Holden, C.J., concurring with all members of the Court in accord) (recognizing State=s interest in the finality of criminal judgments).

Defendant also seeks to distinguish the instant case from Gibney by arguing that in Gibney, the defendant raised sentencing issues in his direct appeal, but did not raise an Apprendi argument, despite the fact that it was available. Accordingly, the defendant in Gibney was barred from arguing Apprendi on remand. Here, defendant argues, he did not challenge his sentence in his direct appeal and so waiver should not operate in the same way that it did in Gibney. In fact, in both Gibney and the instant case, the defendants had the same opportunity to raise an Apprendi challenge in their direct appeal but failed to do so. The argument is waived.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice

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[*] Section 2303 was amended effective May 1, 2006 in response to our examination of Apprendi in State v. Provost, 2005 VT 134, && 15B19. See 2006, No. 119, ' 2. At the time of the amendment, subsection (b)

was renumbered as 2303(c).