No. 18-8527

IN THE

Supreme Court of the United States

RENE RIVERA, *Petitioner,*

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Mark Inch, and
ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
Respondent(s).

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida apply an incorrect standard of review as established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000), by denying Petitioner's application for certificate of appealability based upon a finding that Petitioner "has failed to make a substantial showing of the denial of a constitutional right"?

II. As a matter of first impression, where a defendant in a state criminal proceeding is handicapped by a language barrier as a foreign-born national, has intellectual deficiencies, and whose competency to proceed to trial was questioned on three separate occasions before and during trial, are the State of Florida's provision of law libraries alone adequate to ensure that indigent prisoners are able to file meaningful legal papers for post-conviction litigation; or do the Sixth and/or Fourteenth Amendment protections to a fair trial and due process require the provision of post-conviction counsel?

LIST OF PARTIES

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versus
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Mark Inch, and
ATTORNEY GENERAL OF FLORIDA, Ashley Moody, *Respondent(s)*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix H to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix F to the petition and is reported at *Rivera v. Jones*, No. 17-cv-80101, 2018 U.S. Dist. LEXIS 84065 (S.D. Fla., May 16, 2018).

JURISDICTION

The date on which the United States Court of Appeals decided this case was September 13, 2018. Appendix H.

A timely petition for reconsideration was denied by the United States Court of Appeals on December 11, 2018, and a copy of the order denying rehearing appears at Appendix K.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI, United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV, Section 1, United States Constitution, "No State shall make or enforce any law which [...] shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On September 20, 2002, Rivera was charged by Information in the Florida Fifteenth Judicial Circuit Court case 502002CF0110201 with Burglary of a Dwelling and Grand Theft at the Bowers-Williams residence. On December 16, 2002, Rivera was charged by Information in cases 502002CF014603 with Burglary of a Dwelling and Grand Theft at the Chitty residence; and 502002CF014604 with Burglary while Armed and Grand Theft at the Ladd residence.

None of the property purportedly taken from the residences was ever recovered. The method of entry was different in each residence. Crime Scene Investigators were unable to locate a single foreign fingerprint in any residence. The only evidence tying Rivera to any of the burglaries was purported drops of human blood found at each of the residences (some inside, some outside) containing DNA that matched to Rivera.

On May 9, 2003, the State of Florida moved to consolidate the three cases for trial. Over defense objection, the trial court granted the motion and consolidated the three cases. The consolidate cases proceeded to a single trial before a single jury, who heard the State's aggregated evidence regarding all three cases.

On August 26, 2004, the jury found Rivera guilty as charged on all counts. On October 14, 2004, the trial court adjudicated Rivera guilty on all three cases and sentenced him as a Prison Releasee Reoffender to life imprisonment for the Burglary while Armed count on case 502002CF14604, and to 15 years imprisonment for each of the other two burglaries. The court imposed five-years sentences in

prison for each of the three Grand Theft counts. All sentences were to run concurrently to each other.

On May 23, 2007, the Florida Fourth District Court of Appeal affirmed Rivera's convictions and sentences in direct appeal case number 4D04-4307. See *Acosta v. State*,[1] 956 So.2d 1235 (Fla. 4th DCA 2007). The mandate issued on June 8, 2007. On March 19, 2009, the Florida Supreme Court, in its case number SC07-1030, quashed this Court's decision with directions to remand to the trial court for further proceedings. See, *Acosta v. State*, 7 So.3d 525 (Fla. 2009). On June 10, 2009, the Fourth District Court withdrew its original opinion and again affirmed Rivera's sentences in case 4D04-4307. See, *Acosta v. State,* 10 So.3d 1181 (Fla. 4th DCA 2009). The mandate issued on August 7, 2009.

In the intervening years, Rivera subsequently filed various collateral challenges to his convictions and/or sentences in state courts.

On January 24, 2017, having exhausted his conventional remedies for collateral relief in the state courts, pursuant to 28 U.S.C. § 2254, Rivera petitioned the United States District Court for the Southern District of Florida, for habeas corpus relief. Appendix A. The District Court ordered the State of Florida to respond to the petition and, on March 6, 2017, the State complied. Appendix B.

On March 29, 2017, Rivera filed a reply brief to the State's response. Appendix C. On May 17, 2018, the Magistrate Judge issued his report and recommendation. Appendix D. On May 30, 2018, Rivera filed his objections to the

[1] Rivera was originally prosecuted under several aliases, including Erick R. Acosta, Ruiz E. Acosta, and Jose Rodriguez.

Magistrate's report. Appendix E. On June 18, 2018, the District Court entered an order adopting the Magistrate's report and summarily denying Rivera's petition. Appendix F. In the same order, the District Court denied Rivera a certificate of appealability ("COA").

On July 29, 2018, Rivera applied to the United States Court of Appeals for the Eleventh Circuit for a COA. Appendix G. On September 13, 2018, the Eleventh Circuit Court summarily denied the COA. Appendix H. On October 3, 2018, Rivera timely moved the Circuit Court for reconsideration, Appendix I; and, in an effort to clarify his points for review, submitted an amended application for COA. Appendix J. On December 11, 2018, the Circuit Court summarily denied reconsideration. Appendix K.

This petition follows within 90 days of the Eleventh Circuit Court's denial of reconsideration if filed on or before March 11, 2019. 28 U.S.C. §1254 (1).

REASONS FOR GRANTING THE WRIT

Scope of Certiorari Review

The United States Supreme Court has authority to reverse a circuit court of appeals decision to affirm the district court's order denying a petition for writ of habeas corpus attacking a state conviction on federal grounds where it misconstrued, misapplied, or misconceived an applicable United States Supreme Court opinion. See *McAndless v. Furland*, 296 U.S. 140 (1935); *Upshaw v. United States*, 365 U.S. 399 (1961).

Federal law prescribes the authority of both the federal district courts and circuit courts to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). Under this standard, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The petitioner, however, is not required to show he will ultimately succeed on appeal, *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), because when a court considers an application for a COA, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate," *Id.* at 342. Accordingly, a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337.

Petitioner's Impediments to Presenting His Claims for Habeas Relief

Rivera is a Puerto Rican national whose native tongue is Spanish. He comprehends very little English and, in fact, relied on a court-appointed interpreter

to converse with his monolingual attorneys and to follow the trial proceedings conducted entirely in English. Moreover, Rivera is of below-average intelligence. He is neither highly educated nor especially literate; neither trained nor skilled in the law, nor is he otherwise gifted in the art of litigation. Consequently, in his collateral challenges to his convictions and sentences, he has been entirely dependent upon the assistance of "jailhouse lawyers" to help him prepare and file his legal papers. See *Johnson v. Avery,* 393 U.S. 483, 488 (1969).[2]

On two occasions prior to trial, November 7, 2003, and January 6, 2004, defense counsel was so troubled by Rivera's inability to assist him with the preparation of his defense that he sought the appointment of a mental health expert or psychologist to evaluate Rivera's competency to proceed to trial. The trial court granted both motions. Independent evaluations were conducted; however, the two experts ultimately concluded that Rivera was mentally competent.

Again, in the midst of trial, the judge *sua sponte* colloquied Rivera, inquiring whether he was having any trouble communicating with his counsel through an interpreter. But when Rivera explained that the Prozac he was prescribed made it difficult for him to understand or think clearly because "What happens is that I'm taking medicine and I don't understand a lot of things," "I don't feel well thinking," and "I feel like my mind is very slow," the judge abruptly ended the colloquy, finding "no evidence" that Rivera was not competent to continue with trial.

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[2] ("In the case of all except those who are able to help themselves — usually a few old hands or exceptionally gifted prisoners — the prisoner" who cannot obtain the assistance of a "jailhouse lawyer" "is, in effect, denied access to the courts.").

In his original application for COA, Rivera briefly summarized three of the five issues that had been litigated in the lower tribunal: **(i)** that the improper consolidation of three separate and unrelated burglary cases tried together before a single jury violated Rivera's right to a fair trial under the Sixth and Fourteenth Amendments; **(ii)** that Rivera's conviction for burglary of the Ladd residence while becoming armed and its attendant life sentence based upon insufficient evidence violates his right to fundamental due process under the Fourteenth Amendment; and **(iii)** that the post-verdict judicial fact-finding to impose an enhanced sentence under Florida's Prison Releasee Reoffender Act ("PRRA") violated *Apprendi v. New Jersey*.[3] Appendix G.

Between July 29, 2018, the date Rivera filed his application for COA, Appendix G, and the Eleventh Circuit's denial thereof on September 13, 2018, Appendix H, the jailhouse lawyer who had been helping Rivera was transferred to another institution. Per prison rule, Rivera and the other prisoner are forbidden to communicate, leaving Rivera to fend for himself. He ultimately enlisted the aid of a certified prisoner law clerk to continue where the jailhouse lawyer left off. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977).[4]

When the Eleventh Circuit summarily denied COA, Appendix H, the prisoner law clerk drafted a motion for reconsideration and an amended application for COA. Appendix I and J, respectively. In his request for reconsideration, Rivera posited

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[3] 530 U.S. 466 (2000).

[4] ("fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.")

that "[f]rom the minimal assertions made in Rivera's original application for COA, coupled with his somewhat inartfully-pled grounds for habeas relief presented below, as well as his predicate state court pleadings," the Eleventh Circuit "ha[d] not been presented with adequate notice of his claims of Constitutional violations." Appendix I.

Here, in denying Rivera a COA "because he has failed to make a substantial showing of the denial of a constitutional right," Appendix H, the Eleventh Circuit has applied an unreasonably-stringent standard in place of the relatively liberal standard for granting COA established in *Slack* and *Miller-El* requiring a habeas petitioner to show only "the ***debatability*** of the underlying constitutional claim." *Miller-El* at 342 (emphasis added). See also, *Slack*, 529 U.S. at 484 (under § 2253 standard, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims ***debatable*** or wrong") (emphasis added).

Some of the Circuit Court's inability may owe to Rivera's personal language and intellectual deficits and his reliance on fellow prisoners to help him draft and file his legal papers at every collateral stage of litigation. Accordingly, Rivera beseeches this Court to review the daunting challenges Rivera has faced at each stage of collateral attack juxtaposed with the severe impediments he has faced in presenting his claims in those judicial venues and, finally, the danger of manifest injustice posed by the Eleventh Circuit Court's refusal to grant permission to even present his case on appeal.

Substantial Showing of the Denial of Constitutional Rights

Issue 1: Improper Consolidation of Cases — Among many more specific rights, the Sixth Amendment provides that one accused by the Government of a criminal offense is guaranteed a fair trial. Inherent in this concept is that neither the accused's guilt of a charged criminal act, nor his propensity to commit crimes may be proven by evidence of unrelated crimes or accusations. See *United States v. Lane*, 474 U.S. 438 (1986).

Improper joinder does not itself violate the federal Constitution. *Lane*, 474 U.S. at 446 n.8. To rise to the level of a constitutional violation, joinder must result in prejudice so great as to deny a defendant his constitutional right to a fair trial. *Id.* When a case is consolidated, the due process concern is whether the jury was able properly to compartmentalize and consider separately the evidence relating to each incident. *United States v. Sherlock*, 962 F.2d 1349, 1360 (9th Cir. 1989). There is a "high risk of undue prejudice whenever ... joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible," implicating due process. *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986). The failure of the jury to convict on all counts is "the best evidence of the jury's ability to compartmentalize the evidence." *Park v. California*, 202 F.3d 1146, 1150 (9th Cir. 2000).

Florida courts take a much more cautious view when consolidating cases. The Florida Supreme Court held in *Paul v. State*, 385 So.2d 1371 (Fla. 1980) that consolidation is improper when "based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's

alleged guilt in both or all instances." *Id.* at 1372, *adopting Paul v. State*, 365 So.2d 1063, 1065–66 (Fla. 1st DCA 1979) (Smith, J., dissenting). The purpose of requiring separate trials under these circumstances is "to assure that evidence adduced on one charge will not be misused to dispel doubts on the other...." 365 So.2d at 1066, *adopted*, 385 So.2d at 1372. In *State v. Williams*, 453 So.2d 824 (Fla. 1984) the Florida Supreme Court said:

> [E]ven if consolidation is the "most practical and efficient method of processing" a case, practicality and efficiency should not outweigh a defendant's right to a fair trial. "The objective of fairly determining a defendant's innocence or guilt should have priority over the relevant considerations such as expense, efficiency, and convenience." *Crum v. State*, 398 So.2d 810, 811 (Fla. 1981).... We emphasize that prejudice to the defendant will outweigh judicial economy. *State v. Vazquez*, 419 So.2d 1088, 1091 (Fla. 1982) (footnotes omitted).

Williams, 453 So.2d at 825.

Here, the State charged Rivera in three separate cases with as many separate burglaries, then sought permission of the trial court to consolidate the cases so that they could be tried together by a single jury. While the State argued that the three burglaries were all committed in a single "spree" and alleged that Rivera's blood was found at all three properties, the burglaries were each committed with distinct methods of entry; and were in distinct parts of the city, each separated by several miles. At least one of the burglaries may have occurred on a different date. Despite Rivera's vehement opposition, the trial court granted the State's motion.

As a result, the State was allowed to expose the jury to the evidence of all three distinct and unrelated burglaries, and imply that if the jury found that Rivera

was guilty of one burglary, it could presume he was guilty of the other two, either directly or because Rivera had a propensity to commit burglaries. Rivera argues that this cross-contamination of evidence caused the jury to find him guilty of each separate and distinct burglary on the cumulative evidence of the other two, rather than the strength of the evidence of each separate burglary.

Had the cases not been consolidated, and Rivera been tried separately for each burglary, the State would have been precluded from presenting in any one trial the evidence of the other two unrelated charges. Thus, with the consolidation of the three separate, distinct cases, the State gained an unfair windfall advantage that sharply increased its likelihood of conviction in each case and, thus, violated Rivera's Sixth Amendment right to a fair trial. *Lane*; *Sherlock*; *Lewis*; *Park*; *Williams*; *Paul*.

The only reasoned opinion on the subject of consolidation is the trial court's pre-trial order granting the State's motion. Although Rivera raised the issue in his direct appeal and the state appellate court affirmed, it did so silently, which cannot be considered a decision on the merits. The State argued below that the issue was a matter of state law, without addressing the Sixth Amendment claim. This position is contrary to the decision of this Court in *Lane*. To the extent the Court would find that Rivera failed to advance the claim as a federal issue in the state courts, he

would counter that *Martinez v. Ryan*[5] establishes cause and prejudice to excuse Rivera's oversight.

Issue 2: Conviction Upon Insufficient Evidence — The Fourteenth Amendment expressly forbids a State's deprivation of its citizens' life, liberty, or property without due process of law. Inherent in the concept of due process is that no person can be found guilty of a criminal offense upon legally insufficient evidence. See *Coleman v. Johnson*, 566 U.S. 650, 132 S.Ct. 2060 (2012); *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970). "Under *Jackson*, federal courts must look to state law for 'the substantive elements of the criminal offense' 443 U.S. at 324 n.16, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman*, 566 U.S. 650, 132 S.Ct. at 2064 (quoting *Jackson*).

In the case of the Ladd burglary, Rivera has consistently argued that he is innocent of the charged offense of *armed* burglary, an offense punishable in Florida by life imprisonment. See §810.02(2)(b), Fla. Stat. (2002). The State does not dispute that its case against Rivera is *entirely circumstantial* and that there is no *direct* evidence linking him to any of the consolidated cases. While he concedes that there is some circumstantial evidence that he entered the Ladd residence without consent, Rivera has repeatedly argued that there is no evidence — not even circumstantial — that he took a firearm from the residence and, thus, "became armed" as required to support a conviction on the charge. Ibid.

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[5] 566 U.S. 1, 17 (2012) (a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective).

The only evidence the State presented that the firearms even existed was the testimony of Lawrence Ladd, its only witness attesting to the matter. The State never introduced independent evidence showing that Ladd actually owned or had possession of the firearms in question, never identified a serial number for either weapon, and neither pistol was ever recovered.

Ladd admitted that he had last seen his service pistol two days before the alleged burglary and that he had last seen the rusty revolver several months before. Ladd acknowledged that several other people, including his teenaged son and his son's friends, had access to, and could have taken, the two firearms. Hence, even circumstantially, Ladd could not be sure that either firearm was in his home during the burglary, and could not eliminate the possibility that the firearms had been taken before the burglary. Accordingly, no reasonable trier of fact could have eliminated reasonable doubt that Rivera took either firearm, and that doubt would demand a verdict of not guilty or guilty only of the lesser included offense of simple burglary.

Simple burglary carries a maximum punishment of fifteen (15) years imprisonment. Rivera has already served over 16 years in prison. But for this violation of fundamental due process, Rivera already would have been at liberty.

Moreover, the lower tribunal cited to *Coleman* and *Jackson*, supra for the proper controlling authority, but then inexplicably found that "§2254 requires th[e] court to presume that the state court's factual findings are correct" unless Rivera can "rebu[t] that presumption by clear and convincing evidence" so as to prove that

the state court's findings were unreasonable. Appendix D at 30. This is the wrong legal standard to apply to a sufficiency-of-the-evidence claim.

Whether the evidence is legally sufficient to support a conviction is a question of pure law, *Coleman*; *Jackson*, and the state court resolution deserves no deference but is reviewed *de novo*. In fact, a summary denial of post-conviction relief is tantamount to a question of pure law, and any factual findings made without an evidentiary hearing would be *per se* unreasonable. *Earp v. Ornoski*, 431 F.3d 1158, 1168–70 (9th Cir. 2005) (state court's rejection of petitioner's habeas claim was unreasonable under 2254(d)(2) where the court made credibility determinations on the basis of a paper record, without an evidentiary hearing).

Rivera shows above that, as a question solely of federal law, the State's circumstantial evidence that he burglarized the Ladd residence could not support the finding beyond a reasonable doubt that he took either firearm, a question the lower tribunal completely failed to address. Accordingly, "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack*.

Issue 3: *Apprendi* Violation — In *Apprendi v. New Jersey*, the Supreme Court held that any fact that would permit the enhancement of the penalty for a crime beyond the prescribed statutory maximum becomes, in essence, an element of a greater crime formed by the essential elements of the base crime plus the fact permitting the enhanced penalty. *Id.*, 530 U.S. at 483 n.10. Since that decision, the Court has continued to explain, refine, and expand *Apprendi*'s reach. See, e.g.,

Blakely v. Washington, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Washington v. Recuenco*, 548 U.S. 212 (2006); *Cunningham v. California*, 549 U.S. 270 (2007); *Alleyne v. United States*, 570 U.S. 99 (2013).

The significance of *Apprendi* to the sentencing process is that the outer limits of a judge's authority to impose sentence are constrained by the facts inhering in the jury's verdict or admitted by the defendant. *Id.*; *Blakely*, 542 U.S. at 303–04.[6] And, except for the singular fact that the defendant has a prior conviction, every fact necessary to impose punishment must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt or admitted by the defendant. *Id.* at 490 (quoting *Jones v United States*, 526 U.S. 227, 243 n.6 (1999)).

The Court explained that the "historical foundation" of *Apprendi*'s principles "extends down centuries into the common law" *id.* at 477, and are not mere procedural formalities but a fundamental reservation of power in our constitutional structure. *Blakely*, 530 U.S. at 477. Accordingly, any sentence that exceeds the limits provided by law for the crime informed by the jury's verdict or admitted by the defendant based upon a judge's post-verdict fact-finding, except for the fact of a prior conviction,[7] or upon a fact not proven beyond a reasonable doubt, violates the

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[6] ("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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority") (quoting *Apprendi*).

[7] But see, *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) ("Moreover, it has long been clear that a majority of this Court now rejects that exception. See *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part and concurring in judgment); see also *Almendarez-Torres v. United States*, 523 U.S. 224, 248–249 (1998) (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi* at 520–521 (Thomas, J., concurring).").

defendant's right to a jury trial under the Sixth and Fourteenth Amendments or his Fourteenth Amendment right to due process. *Apprendi.*

Florida's PRRA provides that defendants who are convicted of certain enumerated crimes that were committed less than three years after the date of their release from prison must be sentenced to the maximum punishment provided by law and are not eligible for early release, even by award of gain-time. See §775.082(9)(a,b), Fla. Stat. (2002). Florida law grants the award of basic gain-time to prisoners as a matter of course, reducing the prisoners' actual time served to 85% of the imposed term. See §944.275, Fla. Stat. (2002). Hence, a PRRA sentence clearly is designed to increase the punishment beyond the statutory maximum, which is the imposed sentence term less 15%.

Moreover, the PRRA grants sole discretion whether to impose an enhanced sentence or not to the prosecutor, who has the exclusive and final control over enhanced sentencing under the Act. §775.082(9)(a)3. Rivera maintains that the authority granted to the State by the Act violates the Separation of Powers doctrine by usurping the courts' inherent power to tailor the sentence to fit the crime and by unconstitutionally conveying that power to the prosecution.

The lower tribunal found that the authority to impose an enhanced sentence under the PRRA "does not increase the penalty beyond the statutory maximum" and that "neither the Constitution nor any statute is violated when a prior offense ... is used to increase a sentence ... based upon judicial findings of prior convictions that were never proved to a jury beyond a reasonable doubt." Appendix D at 28

(citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *United States v. McCain*, 358 Fed.Appx. 51 (11th Cir. 2009) (unpublished)).

This is a misstatement of both the PRRA and *Apprendi*. While the Supreme Court, consistent with its prior decision in *Almendarez-Torres*, excluded the bare fact that a defendant has a prior conviction, sentence enhancement under the PRRA requires more than just the fact of a prior conviction: The PRRA requires the determination that (i) the defendant has a prior conviction; (ii) for an offense for which the sentence is punishable by more than 1 year in Florida; (iii) that he was imprisoned for that crime, (iv) that he is to be sentenced for an enumerated crime; and (v) that the crime for which he is to be sentenced was committed within three years of the date he was previously released from prison. §775.082(9)(a)1.

The Court's rationale for the *Apprendi* prior-conviction exclusion was that this fact was already proven beyond a reasonable doubt, and established as a matter of record in a previous trial or plea agreement. In contrast, the four additional facts necessary for a PRRA sentence identified above, which may relate to a prior conviction in another jurisdiction, are not established and, indeed, require the State to call witnesses and introduce evidence proving the facts to the satisfaction of the sentencing court. *Apprendi*.

Apprendi does not exclude every procedure "whe[re] a prior offense ... is used to increase a sentence" (Magistrate's Report & Recommendation), only those resting solely and entirely on the mere fact of a prior conviction. The PRRA requires more facts than this; and "judicial findings ... never proved ... beyond a reasonable

doubt," ibid., violate the *Apprendi* rule. *Id.* at 490 (quoting *Jones*, 526 U.S. at 252–253. Accordingly, "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack.*

Provision of Post-Conviction Counsel

Finally, Rivera asks the Court to consider, as a matter of first impression, whether, under the totality of the circumstances, Rivera has been denied his rights to a fair trial and due process, where his combined handicaps of language barrier, intellectual deficiencies, and questionable competency to stand trial created a "perfect storm" of circumstances that has made it practiacally impossible to mount a meaningful collateral challenge to his convictions and sentences without the assistance of a tained profession legal adviser, especially in light of the State of Florida's decision to comply with this Court's decision in *Bounds v. Smith*, supra, by providing law libraries in its prisons as opposed to "adequate assistance from persons trained in the law." *Id.*, 430 U.S. at 828.

Although Florida staffs its law libraries with prisoner "law clerks," the training provided to law clerks only covers the basic ability to locate statutory and constitutional law, case law in the various case reporters, and rules of court. The training program explicitly avoids any effort to train law clerks in the recognition of constitutional violations or the art of litigation, explaining that law clerks are expected to develop such skills on their own.

And, although this Court has held that indigent prisoners are not constitutionally entitled to the appointment of post-conviction or collateral counsel,[8] the Court also has held that ineffective assistance of post-conviction counsel, or the denial of post-conviction counsel altogether, may implicate due process concerns identical to the denial of counsel for direct appeal. *Martinez v. Ryan*, supra.

Consequently, in a case such as Rivera's, unable to understand English, under prescribed medication that had made it impossible to follow the trial proceedings, and without a professional legal assistant to help him navigate prison law library materials published entirely in English, the criminal justice system has failed to afford him a fair trial and due process, in the form of an initial-review collateral proceeding and all subsequent proceedings that have flowed therefrom.

Unless this Court intervenes, Rivera will spend the rest of his life in prison fighting a "justice" system that operates in a language he cannot understand and possesses a complexity he cannot comprehend. Left uncorrected, Rivera will continue to suffer a miscarriage of justice until the day he dies. A court's only *raison d'être* is to dispense justice. Hence, when faced with a manifest injustice, a court is compelled to take such necessary actions as will remedy such and do justice. Rivera implore this Court to see his injustice and grant him certiorari relief.

CONCLUSION

In view of the foregoing facts, arguments, and authorities, Petitioner respectfully submits that a writ of certiorari should be granted.

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[8] See, e.g., *Pennsylvania v. Finley,* 481 U.S. 551 (1987).

Respectfully submitted,

/s/
RENE RIVERA, Petitioner

Date: March 5, 2019