No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Sammie Lee Smith, *Petitioner*,

v.

State of Florida, *Respondent*.

_____

On Petition for a Writ of Certiorari to the
First District Court of Appeal for
the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the facts triggering a mandatory minimum sentence under Florida's Dangerous Sexual Felony Offender Act, § 794.0115, *Fla. Stat.* (2016), together with the underlying substantive offense, constitute a new aggravated crime, the elements of which must be charged in the information, submitted to a jury, and proved beyond a reasonable doubt?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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

OPINION AND ORDER BELOW

The opinion of the First District Court of Appeal (Case No. 1D17-4828) appears at Appendix A to this petition. The court's opinion is reported at Sammie Lee Smith v. State of Florida, 2019 WL 2437931 (Fla. 1st DCA 2019).

JURISDICTION

The First District Court of Appeal (Case No. 1D17-4828) issued its opinion on June 11, 2019. A copy is attached at Appendix A. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (Appendix H).

STATEMENT OF THE CASE

Petitioner was charged by second amended information with Counts I and II: sexual battery, in violation of §§ 794.011(3) and 794.0115(1)(a)&(b)[1], *Fla. Stat.* (2016); Count III: kidnapping with intent to inflict bodily harm or to terrorize, in violation of §§ 787.01(1)(a)3. and 787.01(2), *Fla. Stat.* (2016); Count IV: aggravated battery while actually possessing a firearm, in violation of §§ 784.045 (1)(a)(2) and 775.087(2), *Fla. Stat.* (2016); Count V: and domestic battery by strangulation, in violation of § 784.041(2)(a) and (3), *Fla. Stat.* (2016). With respect to Count II, the charge alleged:

> SAMMIE LEE SMITH, IV, on or about June 9, 2016, at and in Escambia County, Florida, did unlawfully commit a sexual battery upon a person twelve (12) years of age or older, J.E.V., 19 years of age, by penetrating the vagina of J.E.V. with the penis of Sammie Lee Smith, IV, without the consent of J.E.V., and in the commission of the offense used or threatened to use a deadly weapon, a firearm, or used actual physical force likely to cause serious personal injury, in violation of Sections 794.011(3) and 794.0115(1)(a)(b), Florida Statutes.

(R. 14-15).[2]

On May 22, 2017, the State filed a separate document titled "Notice of Intent to Seek Dangerous Sexual Felony Offender Sentencing" which alleged:

> COMES NOW William Eddins, State Attorney of the First Judicial Circuit of Florida, by and through the undersigned Assistant State Attorney, pursuant to Chapter 794.0115 1(a) &(1)(b), Florida Statutes, and files this NOTICE OF INTENT to have the Defendant, SAMMIE LEE SMITH, IV, sentenced as a DANGEROUS SEXUAL FELONY OFFENDER.

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[1] The State's reference to "794.0115(1)(a)&(b)" was erroneous because § 794.0115(1) contains no additional subsections.

[2] The record on appeal in *Sammie Lee Smith v. State of Florida*, No. 1D17-4828, consists of a record ("R."), a supplemental record ("SR."), a second supplemental record ("SSR."), and trial transcripts ("T.")

(R. 45).[3]

Jury trial commenced on June 7, 2017. The victim ("J.E.V.") testified that on the morning of June 9, 2016, she went to work a scheduled shift at the Alorica call center located in Pensacola, Florida. (T. 101-102). J.E.V. knew the Petitioner from high school[4] and they had been communicating with each other throughout the day. (T. 102-05). J.E.V. believed Petitioner was in Fort Pierce, Florida, working at his own job. (T. 106). Sometime after 2 p.m., J.E.V. went out to the parking lot and took her second break of the day. (T. 107). Makayla Sellers ("Sellers"), a co-worker, went outside with J.E.V. because she needed to use J.E.V.'s cellphone. (T. 107). While Sellers was using the phone, J.E.V. noticed the Petitioner standing in the parking lot and he approached asking for J.E.V.'s phone. (T. 108-09).

After Sellers finished using the cellphone, she ended her break and went back inside. (T. 109). At that point, Petitioner grabbed the cellphone from J.E.V.'s hand and proceeded to his car. J.E.V. followed (T. 110). After they entered Petitioner's car, Petitioner was demanding that J.E.V. give him the password to unlock the phone (T. 110). Petitioner struck J.E.V. on the left side of her head and would not allow her to exit the vehicle. Petitioner drove to a nearby, dead-end road and parked. (T. 110-11).

[3] As in the second amended information, the State cited to "Chapter 794.0115 1(a) & (1)(b), Florida Statutes" in the notice of intent. However, the cited subsections are non-existent.

[4] In 2014, the Petitioner and J.E.V. began a romantic relationship. (T. 215). During the relationship, they conceived a child, who was one and a half years old on the date of trial. (T. 216.).

J.E.V. did not want to give Petitioner access to her phone because she was concerned about what he might see. Eventually, she gave Petitioner the code to unlock the phone. (T. 113).

J.E.V. testified that Petitioner threatened her with a silver handgun and forced her to have sex with him. (T. 115). Petitioner penetrated J.E.V. orally, but did not ejaculate in her mouth. Petitioner also vaginally penetrated J.E.V. (T. 116).

After the assault, J.E.V. was able to convince Petitioner to call his father in an attempt to calm him down. (117-18). J.E.V. retrieved her phone, exited the vehicle and walked back to work. (T. 118). When J.E.V. arrived back at Alorica, she informed her boss that she needed to go home. Tierra Caracter ("Caracter"), a co-worker, called the police and took J.E.V. to the hospital where her injuries were treated and a rape kit examination was completed. (T. 119).

On cross-examination, J.E.V. testified that Petitioner had been in town just a few days before the assault took place. During this time, J.E.V. and Petitioner stayed together in hotels in Pensacola and Alabama. They were intimate and had consensual sex on several occasions, without protection. (T. 123-24).

J.E.V. testified that, even though Petitioner lived in Fort Pierce, he would come to visit her and their child at least once every two weeks. (T. 125). J.E.V. acknowledged she was cheating on Petitioner. (T. 127).

Tierra Caracter testified that when J.E.V. arrived back at Alorica, her clothes looked disheveled and bloody. (T. 147). Caracter drove J.E.V. to the hospital. (T. 148). At some point earlier in the day, Caracter received a text message from J.E.V. asking

to clock her out. (T. 149). Caracter repeatedly called J.E.V. to confirm whether or not she should clock her out and, on one occasion, the Petitioner answered J.E.V.'s phone. (T. 149). Petitioner asked Caracter about an individual named Lucson and informed her that J.E.V. would be returning to work. (T. 150).

Deputy Grant McMullen of the Escambia County Sheriff's Office testified that he first made contact with J.E.V. at the hospital. (T. 156-57). He observed injuries to her head and neck. (T. 157). Deputy McMullen wrote a report. (T. 158). J.E.V. did not inform Deputy McMullen that the sexual interaction with Petitioner was oral in nature. (T. 159).

Emergency room nurse Brid Wade testified that she assisted with the rape exam and that swabs were collected to identify DNA. (T. 169).

Crime laboratory analyst Jennifer Wilkerson of the Florida Department of Law Enforcement testified that the swabs collected from J.E.V. contained a foreign DNA profile that matched the profile of Petitioner. (T. 200-01). Wilkerson further testified that DNA could typically stay inside the vaginal area for a period of three to five days. (T. 206).

Prior to resting its case-in-chief, the State apprised the trial court of a stipulation reached with the Defense on an essential element of the Dangerous Sexual Felony Offender Enhancement, as follows:

> [THE STATE]: Your Honor, I do have one other thing. I'm sorry. It's not a witness.
>
> THE COURT: Yes, ma'am.

> [THE STATE]: There was a stipulation that the Defense and I entered into, and basically the stipulation is that the defendant was 20 years old -- 20 years of age at the time of this incident.
>
> THE COURT: That's an agreed fact between the State and the Defense --
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: -- that doesn't require proof that Mr. Smith was 20 years old on the date of the alleged offense. So that's a fact that you can take as proven even though no one has testified to it.

(T. 207).

Petitioner testified for the defense. Petitioner testified that he was with J.E.V. about a week prior to the incident and that they were intimate during that time. (T. 216). Petitioner admitted he suspected J.E.V. was being unfaithful and that he came back to Pensacola to check on her. (T. 217). Petitioner admitted he got upset when saw certain information on J.E.V.'s phone confirming his suspicions. (T. 219). Petitioner admitted to putting his hands on J.E.V. and choking her. (T. 219). Petitioner denied having a handgun, denied having sex with J.E.V. that day, and denied preventing J.E.V. from leaving the car. (T. 219-20). Petitioner denied threatening J.E.V. with, or otherwise possessing, a gun. (T. 223). Petitioner denied forcing J.E.V. to have sex or oral sex with him, and denied kidnapping J.E.V. (T. 228).

During the jury charge, the trial court instructed the jury as to the elements of Dangerous Sexual Felony Offender as follows:

> Here is an instruction that applies to both Counts 1 and 2. You find it only in the written instructions one time at the end of Count 2: If you find Mr. Smith guilty of sexual battery in either Count 1, or Count 2, or both, you must then determine whether the State has further proved beyond a reasonable doubt-- and these all are in separate questions for

> each of those Counts-- these facts: Yes or no. And this is after you make a determination if he is guilty. If you don't find him guilty of one of those charges, you don't answer these questions.
>
> First, whether Mr. Smith was 18 years of age or older at the time of the commission of the crime.
>
> Second, whether Mr. Smith caused serious personal injury to Ms. J.E.V. as a result of the commission of the offense.
>
> Third, whether, in the commission of the offense, Mr. Smith used or threatened to use a deadly weapon during the commission of the offense.

(T. 296-97, R. 82-85).

The jury returned a verdict finding Petitioner guilty as charged as to Counts II, III, and V. As to Counts I and IV, the jury found the Petitioner guilty of the lesser included offenses of battery. With regard to the special interrogatory for Dangerous Sexual Felony Offender, the jury found that Petitioner was 18 years or older at the time of the offense and that Petitioner caused serious personal injury to J.E.V. However, the jury found that Petitioner did not use or threaten to use a deadly weapon during the commission of the offense. (T. 319-21, R. 96-98). Sentencing was deferred pending preparation of a presentence investigation report.

A sentencing hearing was held on October 27, 2017. (R. 211-28). The State advised the trial court that the 50-year mandatory minimum sentence set-forth in § 794.0115, *Fla. Stat.* applied based on the jury's specific finding that Petitioner qualified as a Dangerous Sexual Felony Offender. (R. 225). The trial court acknowledged its discretion was bridled by the requirements of § 794.0115, *Fla. Stat.*; nevertheless, the court openly expressed that a 50-year sentence was inappropriate under the facts of this case:

> I mean, if you want -- I'll be real candid. I wouldn't -- probably wouldn't do a 50 year sentence if it weren't required -- under the facts of this case, but --
>
> * * *
>
> -- I wouldn't do a 50 year sentence if it weren't required. I don't know what it would be. It would be substantial, but I probably wouldn't do 50 years if it weren't required.

(R. 212, 215).

The Petitioner was sentenced as to Count I: time served; Count II: 50 years in prison as a mandatory minimum sentence; Count III: 5 years in prison; Count IV: time served; and Count V: 5 years in prison. All counts concurrent with credit for 547 days of time already served. (R. 225-26).

Petitioner appealed the judgment to the First District Court of Appeal. While the appeal was pending, Petitioner filed a motion to correct sentencing error in the trial court pursuant to Rule 3.800(b)(2), *Fla. R. Crim. P.*[5] In that motion, Petitioner alleged that the 50-year mandatory minimum sentence imposed in this case was unlawful, where the charging information failed to allege the essential elements necessary to support enhancement as a Dangerous Sexual Felony Offender under § 794.0115, *Fla. Stat.* (2016). Petitioner argued that United States Supreme Court precedent in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), made clear that factors which increase a punishment greater than that otherwise legally prescribed, including facts that increase the sentencing floor, were

[5] Rule 3.800(b)(2) permits a party to file a motion to correct a sentencing error in the trial court while an appeal is pending. The purpose of the rule is to allow the preservation of unpreserved sentencing errors. Once the trial court disposes of the motion, jurisdiction then returns to the appellate court and the alleged sentencing errors are ripe for review.

by definition "elements" of a separate legal offense that must be charged in the indictment, submitted to the jury and proved beyond a reasonable doubt. Petitioner argued that the factors which trigger the 50-year mandatory minimum enhancement under the Dangerous Sexual Felony Offender statute combine with the core crime to create a separate offense under the reasoning of *Apprendi* and *Alleyne*. Petitioner argued that the State was thus required to allege in the information, with specificity, which of the enumerated elements set-forth in § 794.0115(2)(a-e) the State was relying on to designate him a Dangerous Sexual Felony Offender. (SR. 239-50). (Appendix B).

The State responded that Petitioner's argument was foreclosed by the First DCA's decision in *Robinson v. State*, 215 So. 3d 1262 (Fla. 1st DCA 2017), wherein the court stated, "Florida does not view *Apprendi* type facts as within the essential elements pleading requirement because *Apprendi*-elements do not alter the offense itself (as opposed to the punishment that can be imposed). The different levels of punishment, under state law, do not create separate offenses. Florida now adopts the position that the requirements of the Sixth Amendment regarding notice can be satisfied without necessarily and precisely alleging *Apprendi*-type elements in the charging documents." *Id.* at 1272. The State urged that Petitioner was put on sufficient notice by virtue of the fact that he was served with a "Notice of Intent to Seek Dangerous Sexual Felony Offender Sentencing" prior to trial, and further that there was an on-the-record discussion during a preliminary hearing where Petitioner heard the State would be seeking the enhancement. (SR. 251-73). (Appendix C).

The trial court denied the Rule 3.800(b)(2) motion. The trial court reasoned that, although the factors set-forth in § 794.0115(2)(a-e) do elevate the sentence floor, they do not create a separate offense. The trial court found that Petitioner received sufficient notice and was not misled by the State's erroneous citation to § 794.0115(1)(a)(b) "because (1)(a)(b) did not exist, and § 794.0115 has no other subparts other than in subsection (2)." The court concluded that, even assuming the information was defective, "there was no objection to the charging instrument at any time prior to or at sentencing" and therefore the alleged defect should be considered waived. (SR. 274-83). (Appendix D).

Petitioner moved for rehearing, arguing that the trial court's legal conclusion that the enumerated factors in § 794.0115(2)(a-e) do not combine with the elements of the core offense to create a separate legal offense is contrary to United States Supreme Court precedent in *Apprendi* and *Alleyne*. (SSR. 288-97). (Appendix E).

The State responded that "there is a difference between an 'element' of a crime and a 'sentencing factor' related to the charged crime." Relying again on the First DCA's decision in *Robinson*, the State argued that "All 'elements' of the crime charged must be alleged in the information for the defendant to be deemed to have received proper notice. 'Sentencing factors' do not have to be alleged in the information for proper notice to have been given." (SSR. 298-99). (Appendix F).

The trial court denied the motion for rehearing, in relevant part, as follows:

> Defining facts that increase the mandatory statutory minimum to be part of the substantive offense is a separate principle than the one advocated by the defendant which is the creation of a new offense altogether. But at its core, it is the ability of a defendant to receive due

> process and know what is being alleged and what mandatory statutory minimums that the State is seeking prior to trial that is paramount. In this matter, it still need not be decided whether the *Alleyne* requirements upon federal charging documents now also apply to state charging documents. The defendant had actual notice of the DSFO penalties being sought by the State prior to trial.

(SSR. 300-01). (Appendix G).

After subsequent briefing of the issue on appeal, the First District Court of Appeal affirmed the decision of the trial court with a single citation to its decision in *Robinson*. (Appendix A).

The instant petition timely follows.

REASON FOR GRANTING THE PETITION

I. The First District Court of Appeal for the State of Florida has decided an important question of federal law in a way that conflicts with relevant decisions of this Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

ARGUMENT

In *Robinson v. State*, 215 So. 3d 1262 (Fla. 1st DCA 2017), the First District Court of Appeal proclaimed:

> Florida does not view *Apprendi* type facts as within the essential elements pleading requirement because *Apprendi* elements do not alter the offense itself (as opposed to the punishment that can be imposed). The different levels of punishment, under state law, do not create separate offenses. Florida now adopts the position that the requirements of the Sixth Amendment regarding notice can be satisfied without necessarily and precisely alleging *Apprendi*-type elements in the charging documents.

Id. at 1272.

The First District Court of Appeal's reasoning in *Robinson* runs directly contrary to this Court's precedent.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this Court explained that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478. "Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment. 'Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, *an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.*'" *Id.* at 480. (citations omitted) (emphasis added). In holding to these long-established principles, this Court noted "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." *Id.* at 483 n.10.

This Court further extended the rationale of *Apprendi* to those factors which increase a sentencing floor. In *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), this Court held that "*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that

increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Alleyne*, 570 U.S. at 108. This Court further explained that "*the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime*, each element of which must be submitted to the jury. Defining facts that increase a mandatory statutory minimum to be part of the substantive offense *enables the defendant to predict the legally applicable penalty from the face of the indictment.*" *Id.* at 113-14. (emphasis added).

Florida's Dangerous Sexual Felony Offender Act, § 794.0115, *Fla. Stat.* (2016), provides for the imposition of a mandatory minimum sentence for defendants who have been convicted of certain enumerated sexual offenses, and who otherwise meet the criteria for enhanced sentencing under the Act. In order to qualify as a Dangerous Sexual Felony Offender, the person must have been 18 years of age or older when the offense was committed, *and*

> (a) Caused serious personal injury to the victim as a result of the commission of the offense;
>
> (b) Used or threatened to use a deadly weapon during the commission of the offense;
>
> (c) Victimized more than one person during the course of the criminal episode applicable to the offense;
>
> (d) Committed the offense while under the jurisdiction of a court for a felony offense under the laws of this state, for an offense that is a felony in another jurisdiction, or for an offense that would be a felony if that offense were committed in this state; or
>
> (e) Has previously been convicted of a violation of s. 787.025(2)(c); s. 794.011(2), (3), (4), (5), or (8); s. 800.04(4) or (5); s. 825.1025(2) or (3); s.

> 827.071(2), (3), or (4); s. 847.0145; of any offense under a former statutory designation which is similar in elements to an offense described in this paragraph; or of any offense that is a felony in another jurisdiction, or would be a felony if that offense were committed in this state, and which is similar in elements to an offense described in this paragraph…

s. 794.0115(2)(a-e), *Fla. Stat.* (2016).

Because the Act provides for the imposition of a mandatory minimum sentence, this Court's decision in *Alleyne* controls. Accordingly, both the defendant's age and any of the factors contained in § 794.0115(2)(a-d)[6] constitute "elements" of a new, aggravated crime, and those elements must be charged in the information with certainty and precision.

That rule was not followed in this case. The second amended information failed to apprise Petitioner of which elements the State was relying on to enhance Petitioner's sentence as a Dangerous Sexual Felony Offender under § 794.0115(2)(a-d). When the Petitioner complained of the error, the State and the trial court relied on the First District Court of Appeal's decision in *Robinson* to conclude that the factors which invoke the mandatory minimum sentence need not be charged in the information as elements of a new, aggravated offense. The First District Court of Appeal gave its stamp of approval by its single citation to *Robinson* in its opinion affirming Petitioner's direct appeal.

[6] The fact of a prior conviction in § 794.0115(2)(e) is the sole exception to the rule that factors which increase the maximum penalty must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. *See*, *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998).

CONCLUSION

The State of Florida is not exempt from this Court's precedent in *Apprendi* and *Alleyne*. By proclaiming that, in Florida, *Apprendi*-type facts are no longer subject to the essential elements pleading requirement because "different levels of punishment, under state law, do not create separate offenses," *Robinson*, 215 So. 3d at 1272, the First District Court of Appeal ignores the very foundation upon which *Apprendi* and its progeny are premised.

"'[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' The Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi*, 530 U.S. at 476 (citations omitted).

The erosion of these core, constitutional principals in Florida must be stopped. For these reasons, Petitioner respectfully asks this Honorable Court exercise its certiorari jurisdiction.

Respectfully submitted,

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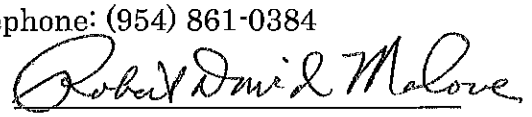
By: 
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