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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-4828

SAMMIE LEE SMITH IV,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Edward P. Nickinson, III, Judge.

June 11, 2019

PER CURIAM.

AFFIRMED. *Robinson v. State*, 215 So. 3d 1262 (Fla. 1st DCA 2017).

RAY, BILBREY, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Robert David Malove, Fort Lauderdale, for Appellant.

Ashley Moody, Attorney General, and Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellee.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No.: 2016-CF-003120

v.

Judge: STEPHEN A. PITRE

SAMMIE L. SMITH, IV.,
Defendant.
_____/

DEFENDANT'S MOTION TO CORRECT SENTENCING ERROR

COMES NOW the Defendant, Sammie L. Smith, IV., by and through undersigned counsel and pursuant to Rule 3.800(b)(2), *Fla. R. Crim. P.*, and moves this Court to correct a sentencing error in the above styled case. In support, Defendant submits the following:

1. Defendant was charged by amended information with Count 1: sexual battery (oral) upon a person 12 years of age or older, in violation of § 794.011(3), *Fla. Stat.* (2016); Count 2: sexual battery (vaginal) upon a person 12 years of age or older, in violation of § 794.011(3), *Fla. Stat.* (2016); Count 3: kidnapping, in violation of § 787.01(1)(a)3., *Fla. Stat.* (2016); Count 4: aggravated battery with a deadly weapon, contrary to § 784.045(1)(a)(2), *Fla. Stat.* (2016); and Count 5:

domestic battery by strangulation, in violation of § 784.041(2)(a), *Fla. Stat.* (2016). (R. 14-15).[1]

2. With regard to Count 2, the amended information alleged that:

> 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).

3. Jury trial commenced on June 5, 2017. The jury was instructed 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 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 [J.E.V.] as a result of commission of the offense.

[1] The Clerk of this Court prepared the record on appeal in *Sammie L. Smith v. State of Florida*, App. Case No. 1D17-3120. Reference to documents contained in the record on appeal will be by the symbol "R." followed by page number. Trial transcripts will be referenced by the symbol "TT." followed by page number.

> Third, whether, in the commission of the offense, Mr. Smith used or threatened to use a deadly weapon during the commission of the offense.

(TT. 296-97).

4. Likewise, the verdict form contained a special interrogatory in Count 2 which permitted the jury to find whether the State proved the elements of Dangerous Sexual Felony Offender:

> If you find SAMMIE LEE SMITH, IV guilty of SEXUAL BATTERY (DEADLY WEAPON OR FORCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY) you must then determine whether the State has further proved beyond a reasonable doubt:
>
> 1. SAMMIE LEE SMITH, IV was 18 years of age or older at the time of the commission of the offense.
>
> And
>
> 2. SAMMIE LEE SMITH, IV
>
> a) caused serious personal injury to J.E.V. as a result of the commission of the offense.
>
> b) used or threatened to use a deadly weapon during the commission of the offense.

(R. 97).

5. The jury ultimately returned a verdict finding Defendant guilty of battery, a lesser included offense, as to Count 1; guilty of sexual battery (vaginal) as to Count 2; guilty of kidnapping as to Count 3; guilty of battery, a lesser included offense, as to Count 4; and guilty of domestic battery by strangulation as to Count 5. (R. 96-98).

6. Regarding the special interrogatory for Dangerous Sexual Felony Offender contained in Count 2, the jury found that Defendant was 18 years of age or older at the time of the commission of the offense and that he caused serious personal injury to J.E.V. (R. 97).

7. A sentencing hearing was held before the Honorable Edward P. Nickinson, III, Circuit Court Judge, on October 27, 2017. (R. 211-28). The State advised the Court that the 50-year minimum mandatory sentence set-forth in § 794.0115, *Fla. Stat.* applied based on the jury's specific finding that Defendant qualified as a Dangerous Sexual Felony Offender. (R. 225).

8. Judge Nickinson acknowledged that the Court's discretion was bridled by the requirements of § 794.0115, *Fla. Stat.*; nevertheless, Judge Nickinson 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).

9. The Defendant was sentenced as to Count 1: time served; Count 2: 50 years in prison as a minimum mandatory sentence; Count 3: 5 years in prison; Count 4:

time served; and Count 5: 5 years in prison. All counts concurrent with credit for 547 days of time already served. (R. 225-26).

10. Defendant appealed the judgment and sentence to the First District Court of Appeal. *See*, *Sammie L. Smith v. State of Florida*, App. Case No. 1D17-3120. The Defendant's initial brief is due on or before July 26, 2018.

11. This Court has jurisdiction to entertain the instant Motion to Correct Sentencing Error, pending appeal, pursuant to Rule 3.800(b)(2), *Fla. R. Crim. P*.

CLAIM FOR RELIEF

THE FIFTY-YEAR MINIMUM MANDATORY SENTENCE IMPOSED IN THIS CASE IS UNCONSTITUTIONAL IN VIOLATION OF THE 5TH, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, WHERE THE CHARGING INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENTS NECESSARY TO SUPPORT ENHANCEMENT AS A DANGEROUS SEXUAL FELONY OFFENDER UNDER § 794.0115, FLORIDA STATUTES (2016).

ARGUMENT

Defendant argues that the 50-year minimum mandatory sentence imposed in this case is unconstitutional and must be vacated, where the charging document failed to allege the essential elements of the Dangerous Sexual Felony Offender enhancement, § 794.0115, *Fla. Stat.* (2016).

Factors which allow for the increase of a defendant's sentence beyond the maximum permitted by law are considered elements of a greater offense that must be set-forth in the charging document, submitted to the jury, and proved beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme 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, the 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.

The United States Supreme Court has 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), the 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. The Court 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…

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

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

[2] 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).

Count 2 of the amended information in this case charges Defendant with the offense of sexual battery, in violation of § 794.011(3), *Fla. Stat.* (2016):

> 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) (emphasis added).[3]

The allegation in Count 2 essentially traces the language found in § 794.011(3), *Fla. Stat.*, which provides that "a person who commits sexual battery upon a person 12 years of age or older, without that person's consent, *and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury* commits a life felony, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115." *Id*. (emphasis added).

While it appears that Count 2 fully and accurately sets-forth the elements of sexual battery pursuant to § 794.011(3), *Fla. Stat.*, the charge is *completely devoid*

[3] The State's reference to "794.0115(1)(a)(b)" in the amended information appears to be erroneous. This is because § 794.0115(1), *Fla. Stat.*, contains no additional subsections. Consequently, the reference to "794.0115(1)(a)(b)" was inadequate to put the Defendant on sufficient notice of the precise charge. In any event, as explained *infra*, the mere reference to a statute number does not cure the type of fundamental charging defect that is present in this case.

of any language alleging the elements of the Dangerous Sexual Felony Offender enhancement under § 794.0115, *Fla. Stat.*

As previously explained, the decisions in *Jones*, *Apprendi* and *Alleyne* make clear that the elements of § 794.011(3), *Fla. Stat.*, and the elements of § 794.0115(2), *Fla. Stat.*, combine to create a new, aggravated offense that must be precisely charged in the information. Thus, in order to properly invoke the mandatory minimum enhancement in this case, the State was required to allege: (1) that the Defendant was 18 years or older at the time of the offense; and (2) that the Defendant caused serious personal injury to the victim as a result of the commission of the offense. *See,* § 794.0115(2) and (2)(a), *Fla. Stat.*[4] Both of these crucial elements are absent from Count 2 of the amended information in this case.

The fact that the jury made special findings on the verdict form with respect to the Defendant being 18 years of age or older, and that he actually caused serious personal injury to the victim during the commission of the offense, does not cure the charging defect in this case. *See, Green v. State,* 139 So. 3d 460 (Fla. 1st DCA 2014); *Arnett v. State,* 128 So. 3d 87 (Fla. 1st DCA 2013). Neither does the fact that the State cited (albeit incorrectly) to "794.0115(1)(a)(b)" in the amended information.

[4] Defendant notes that the alternative theory that was provided to the jury on the special verdict interrogatory - *i.e.,* that the Defendant used or threatened to use a deadly weapon during the commission of the offense, *see,* § 794.0115(2)(b), *Fla. Stat.* - is also an essential element of sexual battery under § 794.011(3), *Fla. Stat.*, and was properly charged as such. (R. 14). The jury ultimately found, despite the victim's testimony to the contrary, that no deadly weapon was used by the Defendant in this case. (R. 97).

See, e.g., *Koch v. State*, 874 So. 2d 606, 608 (Fla. 5th DCA 2004) ("The state argues that because the information in this case was amended to include a reference to section 775.087(2)(a)2, that Koch was 'on notice' he faced a 20-year sentence. However, we conclude that more than a reference to the number of the statute is required to properly put a person on notice of this lengthy enhancement statute's applicability, particularly where the state must also rely on the jurors' 'express finding' of discharge on the same numerical reference"); *Rogers v. State*, 875 So. 2d 769, 771 (Fla. 2d DCA 2004) ("neither the trial court's finding that Rogers discharged the firearm nor the inclusion of the statute number in the information cures the defect in the information").

Because the State failed to allege the elements essential to the mandatory minimum enhancement in Count 2 of the amended information, the Defendant's right to notice, due process and a fair trial under Article I, Sections 9 and 16 of the Florida Constitution and the 5th, 6th and 14th Amendments to the United States Constitution were violated. *Jones*, *Apprendi* and *Alleyne*, *supra*. Consequently, the enhanced, 50-year mandatory minimum sentence imposed in this case is unlawful and must be vacated.

WHEREFORE, based on the foregoing, Defendant requests that this Court enter an order vacating the unlawful, 50-year mandatory minimum sentence imposed in this case and resentence Defendant without reference to § 794.0115, *Fla. Stat.*

Respectfully submitted,

/s/ *Robert David Malove*
Robert David Malove, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed with the Florida *e*-Filing Portal on this 19th day of July, 2018, and that a copy was electronically served upon: Office of the Attorney General at crimapptlh@myfloridalegal.com; Assistant State Attorney Diane Stefani at dstefani@osa1.org; Assistant Public Defender Frances Roberts at mo_roberts@pd1.fl.gov.

/s/ *Robert David Malove*
Robert David Malove, Esq.

APPENDIX C

IN THE CIRCUIT COURT FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

SAMMIE LEE SMITH, IV,
Defendant.

CLERK NUMBER: 1716CF003120A

DIVISION: A

STATE'S RESPONSE TO DEFENDANT'S MOTION TO CORRECT SENTENCING ERROR

COMES NOW the State by and through the undersigned Assistant State Attorney and moves this honorable Court to deny Defense's Motion to Correct Sentencing Error and in support thereof asserts the following:

1. The main crux of Defendant's motion is that the Defendant was not put on notice of enhanced sentencing related to a lack of specificity in the charging document. Specifically, that the State did not put in the charging document (1) that the Defendant was 18 years of age or older at the time of the offense and (2) that the Defendant caused seriously personal injury to the victim in the commission of the sexual battery as it relates to Count 2 of the information.

   Under existing Florida case law, this argument fails. In *Robinson v. State*, 215 So.3d 1262, 1272 (Fla. 1st DCA 2017), the Court quoting *Martinez v. State*, 2017 WL 728098 a Florida Supreme Court case, wrote that this case "declares technical-defects in state issued charging documents are no longer considered "structural" constituting per se reversible error and do not qualify as an "illegal sentence" subject to a rule 3.800(a) challenge. A defendant must raise a timely objection at the trial court level in order to preserve a technical-defect challenge, or such claim is waived. In the absence of timely objection, the defendant's claim survives only if fundamental error is established. Smith failed to raise an objection to the charging document in a timely manner.

   In *Robinson*, the Defendant asserted that the "[a]mended information is technically flawed pursuant to Apprendi, which he argues requires the phrase "great bodily harm" be precisely charged as an essential element of the enhancement provision." "Accordingly, he asserts such an omission constitutes

per se reversible error and cannot be cured by the jury verdict." Id at 1271.

The Court found Robinson's argument unpersuasive. It concluded that "[i]n wake of Galindez, Deparvine, and Martinez, the menu options for a defendant's Apprendi-error appeal have been limited. Technical-defects in a charging document are no longer "structural" constituting per se reversible error. A defendant's failure to raise a timely objection to a charging document's technical insufficiency, prior to a jury verdict, results in waiver of a pure pleading challenge. Subsequently, a defendant may only appeal by arguing constitutional error, which is subject to harmless error review. Id at 1276.

The *Robinson* Court made clear that enhanced sentencing factors do not create separate crimes when it wrote, "Florida does not view Apprendi type facts as within the essential elements pleading requirements 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 Sixth Amendment regarding notice can be satisfied without necessarily and precisely alleging Apprendi-type elements in the charging document." Id at 1272. Therefore, the State was not required to put in the charging document that the Defendant was 18 years of age or older at the time of the crime and that the defendant caused serious personal injury to the victim in the commission of the crime.

Importantly, [t]he Florida Supreme Court has clarified that, although a specific finding in an Interrogatory on a verdict form is preferable, what is ultimately required is a "clear jury finding. *Robinson* at 1274-1275. In the *Smith* case, there were specific findings on interrogatories on the verdict form related to the Defendant's age and that he caused serious personal injury to the victim during the sexual battery which made the jury findings clear.

Taking the Apprendi issue into consideration, the *Robinson* Court ultimately found for the State because, "1) the Amended Information did not omit an essential element of the charged offenses 2) the Amended Information referenced Section 775.087, Florida Statutes, in the charging document; 3) the defendant had notice the State would be seeking a reclassification of his conviction under section 775.087, Florida Statutes, based on the defendant's personal possession of a firearm during the commission of the underlying offenses; and 4) the defendant claims no surprise or prejudice in the preparation or presentation of the defense and establishes no other grounds of actual prejudice. Id.

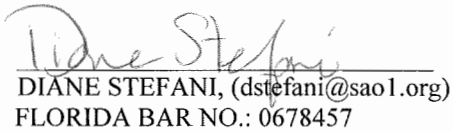
The *Smith* case is analogous with the *Robinson* case because 1) the Amended Information did not

omit an essential element of the charged offense in Count 2, 2) the Amended Information referenced Section 794.0115, Florida Statutes, in the charging document 3) the Defendant had notice that the State would be seeking enhanced sentencing under 794.0115. (see attached State's exhibit 1 – the State's Notice of Intent to Seek Dangerous Sexual Felony Offender Sentencing which was personally served on the Defendant and later filed with the Clerk of the Court) and 4) the defendant claims no surprise or prejudice in the preparation or presentation of his defense and establishes no other grounds of actual prejudice.

Lastly, the State went the extra mile in making sure the Defendant knew he was facing a 50 year Minimum mandatory sentence under Section 794.0115 when on Docket Day of May 17, 2017, it announced on the record what the defendant was facing in enhanced sentences. The Defendant was given the entire docket day to sit in court and decide whether to take a 21 year prison sentence offer or face the minimum mandatory sentencing. (See attached court smart DVD showing the defendant at docket day May 17, 2017. There are two recordings on the one disc. The defendant was addressed by the court at 10:37 a.m. and 4:24 p.m. (see attached State's exhibit 2)

WHEREFORE, the State submits that the case law and the record is conclusive proof that the defendant is not entitled to relief and requests this honorable Court to deny its motion outright or at the very least grant a hearing on the matter.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed with the Florida e-filing portal on this 20th Day of July, 2018. And that a copy was electronically served upon defense counsel Robert David Malove, Esq. 200 S. Andrews Avenue, Suite 100, Ft. Lauderdale, Fl 33301.

215 So.3d 1262
District Court of Appeal of Florida,
First District.

Ivory Lee ROBINSON, Appellant,
v.
STATE of Florida, Appellee.

CASE NO. 1D16–1988
|
Opinion filed April 4, 2017
|
Rehearing Denied May 4, 2017

Synopsis

Background: Defendant, whose convictions for attempted second-degree murder and possession of a firearm by a felon were confirmed on direct appeal, moved to correct an illegal sentence, arguing for the first time since being charged that the absence of "great bodily harm" constituted technical and substantive-defects in the amended information. The Circuit Court, Alachua County, Mark W. Moseley, J., denied the motion, and defendant appealed.

Holdings: The District Court of Appeal, M. K. Thomas, J., held that:

[1] defendant's asserted technical charging error would be deemed waived by his lack of a contemporaneous objection to any technical insufficiency of the amended information prior to the jury verdict and before his sentence was imposed;

[2] any defect in the charging document, namely failure to allege "great bodily harm" as opposed to "bodily harm" that resulted from defendant's shooting of the victim, was cured by the victim's testimony at trial and the jury verdict;

[3] *Apprendi* defects asserted by defendant did not rise to the level of fundamental error; and

[4] even if *Apprendi* defects asserted by defendant constituted a constitutional violation, any such error was harmless.

Affirmed.

West Headnotes (22)

[1] Sentencing and Punishment
⇐ Illegal sentence

A sentence that patently fails to comport with statutory or constitutional limitations is by definition "illegal."

Cases that cite this headnote

[2] Sentencing and Punishment
⇐ Illegal sentence

Sentencing and Punishment
⇐ Time

Where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy

clause, the sentence is illegal and can be declared so at any time. U.S. Const. Amend. 5; Fla. R. Crim. P. 3.800(a).

Cases that cite this headnote

[3] **Constitutional Law**
⇦ Necessity;Right to Jury Trial
Jury
⇦ Sentencing Matters

As a result of *Apprendi*, certain facts, labeled by state law as "sentencing factors," are regarded as essential elements of the offense for purposes of the Sixth Amendment's jury-trial guarantee and the due process requirement of proof beyond a reasonable doubt. U.S. Const. Amends. 6, 14.

Cases that cite this headnote

[4] **Indictment and Information**
⇦ Matter of aggravation in general

The U.S. Supreme Court's requirement that *Apprendi*-type elements be included in all federal indictments is grounded on the Grand Jury Clause of the Fifth Amendment and also serves a notice function; but *Apprendi* does not affect trial procedure except when fact-finding is necessary to raise the floor or ceiling of the authorized sentencing range. U.S. Const. Amend. 5.

Cases that cite this headnote

[5] **Criminal Law**
⇦ States

A state legislature is "vested," subject to constitutional limitations, with authority to define the elements of a crime.

Cases that cite this headnote

[6] **Criminal Law**
⇦ Elements of offense in general

Identification of the elements of a crime which must be charged in a state-issued information is, at least initially, a question of legislative intent.

Cases that cite this headnote

[7] **Criminal Law**
⇦ Right to jury determination
Indictment and Information
⇦ Mode of Making Objections in General

There exist two avenues for raising an *Apprendi* sentencing error: the first requires a timely objection to the technical-defect, and technical errors may be remedied at the trial level by dismissal or an order for particulars; secondly, if no timely objection is raised rendering the technical-defect as unpreserved, the defendant may raise, on appeal, a claim of fundamental

right violation, which is subject to harmless error analysis.

Cases that cite this headnote

[8] **Criminal Law**
In Preliminary Proceedings

A defendant must raise a timely objection at the trial court level in order to preserve a technical-defect challenge to a state-issued charging document, or such claim is waived; in the absence of timely objection, the defendant's claim survives only if fundamental error is established.

Cases that cite this headnote

[9] **Indictment and Information**
Informing accused of nature of charge

Indictment and Information
Enabling accused to prepare for trial

The purpose of an information is to inform the accused of the charge or charges against him, so that the accused will have an opportunity to prepare a defense.

Cases that cite this headnote

[10] **Criminal Law**
Indictment or information in general

Indictment and Information
Informing accused of nature of charge

Indictment and Information
Grounds

While it is the duty of the State to give clear and adequate notice through the information of the crime or crimes being charged, defects in the information are not grounds for automatic reversal or dismissal. Fla. R. Crim. P. 3.140.

Cases that cite this headnote

[11] **Indictment and Information**
Objections to Indictment or Information

Defendant's asserted technical charging error, under rule governing correction of an illegal sentence, would be deemed waived by his lack of a contemporaneous objection to any technical insufficiency of the amended information prior to the jury verdict and before his sentence was imposed. Fla. R. Crim. P. 3.800(a); Fla. Stat. Ann. §§ 924.051(1)(b), 924.051(3).

Cases that cite this headnote

[12] **Criminal Law**
Indictment or Information

Where an alleged defect in a charging document is not the omission of an essential element of the crime, the defect is fundamental only if due process was denied. U.S. Const. Amend. 14.

Cases that cite this headnote

[13] **Indictment and Information**
⇦ Matter of aggravation in general

Different levels of punishment, under state law, do not create separate offenses, and thus, the requirements of the Sixth Amendment regarding notice can be satisfied without necessarily and precisely alleging *Apprendi*-type elements in the charging documents. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] **Criminal Law**
⇦ Necessity of Objections in General

Criminal Law
⇦ Necessity of specific objection

To preserve error for appellate review, a contemporaneous, specific objection must be made during trial.

Cases that cite this headnote

[15] **Indictment and Information**
⇦ Reference to or recital of statute

A charging document that references a specific section of the criminal code sufficiently detailing all the elements of the offense may support a conviction where the pleading otherwise fails to include an essential element of the crime.

Cases that cite this headnote

[16] **Constitutional Law**
⇦ Relation between allegations and proof;variance

Criminal Law
⇦ Indictment or Information

Habeas Corpus
⇦ Indictment, information, affidavit, or complaint

Indictment and Information
⇦ Sufficiency of accusation in general

A conviction on a charge not made by the indictment or information is a denial of due process, and an indictment or information that wholly omits to allege one or more of the essential elements of the crime cannot support a conviction for that crime; this is a defect that can be raised at any time-before trial, after trial, on appeal, or by habeas corpus. U.S. Const. Amend. 14.

Cases that cite this headnote

[17] **Criminal Law**
⇦ Indictment or information in general

Any defect in the charging document, namely failure to allege "great bodily harm" as opposed to "bodily harm" that resulted from defendant's shooting of the victim,

was cured by the victim's testimony at trial and the jury verdict in prosecution for attempted second-degree murder and possession of a firearm by a felon; the jury found the defendant guilty as charged, which included the factual finding the defendant shot the victim, which was sufficient to satisfy "great bodily harm" as a required element of the sentencing enhancement. Fla. Stat. Ann. §§ 782.04, 790.23.

Cases that cite this headnote

[18] Criminal Law
Right to jury determination

Failure to subject a sentencing factor to the jury is subject to harmless error analysis, if the error is of a fundamental nature.

Cases that cite this headnote

[19] Criminal Law
Indictment or Information

Apprendi defects asserted by defendant, specifically that the charging instrument failed to allege "great bodily harm" as opposed to "bodily harm" that resulted from defendant's shooting of the victim, did not rise to the level of fundamental error in the absence of any showing by defendant that a conviction for second-degree murder and possession of a firearm by a convicted felon could subject him to a reclassification of the charged felony. Fla. Stat. Ann. § 775.087.

Cases that cite this headnote

[20] Criminal Law
Indictment or information in general

Even if *Apprendi* defects asserted by defendant, specifically that the charging instrument failed to allege "great bodily harm" as opposed to "bodily harm" that resulted from defendant's shooting of the victim, constituted a constitutional violation, any such error was harmless, because the defects were cured by the victim's testimony at trial and the jury verdict in prosecution for attempted second-degree murder and possession of a firearm by a felon. Fla. Stat. Ann. §§ 784.045, 790.23.

Cases that cite this headnote

[21] Criminal Law
Indictment or information in general

The test for granting relief based upon a substantive-defect in the charging document is actual prejudice.

Cases that cite this headnote

[22] Sentencing and Punishment

Illegal sentence

An illegal sentence subject to correction under rule governing the correction, reduction, or modification of sentences must be one that no judge under the entire body of sentencing laws could possibly impose under any set of factual circumstances; the illegality must be of a fundamental nature and clear from the face of the record. Fla. R. Crim. P. 3.800(a).

Cases that cite this headnote

***1265** An appeal from an order of the Circuit Court for Alachua County. Mark W. Moseley, Judge.

Attorneys and Law Firms

Ivory Lee Robinson, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Jennifer J. Moore, Assistant Attorney General, Tallahassee, for Appellee.

Opinion

THOMAS, M. K., J.

Ivory Lee Robinson, defendant, appeals an order denying his rule 3.800(a) motion to correct illegal sentence, in which he challenges a twenty-five year mandatory minimum sentence imposed under the "10–20–Life" law. See § 775.087, Fla. Stat. In the first claim, he asserts he was never found in actual possession of a firearm. As this claim was raised and disposed of in a prior appeal, it is barred. Now in his second claim and more than thirteen years after his conviction and sentence, he proclaims his mandatory minimum sentence is illegal pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because: 1) the Amended Information failed to expressly charge that "*great* bodily harm," as opposed to "bodily harm," resulted from his shooting of the victim in the stomach with a .357 revolver handgun (in essence, defendant is raising a technical-defect challenge, in that the Amended Information does not track *precisely* the verbiage of the sentencing enhancement statute); and 2) the "great bodily harm" factor of the enhancement statute was not *precisely* submitted to, and found by the jury beyond a reasonable doubt, resulting in grounds for a substantive-defect challenge. We disagree, and affirm his sentence.

I. Facts

In 2003, the State charged the defendant with attempted second-degree murder and possession of a firearm by a felon pursuant to sections 784.045, 782.04 and 790.23, Florida Statutes (2002). The Amended Information also charged section 775.087, Florida Statutes, the sentencing enhancement provision, also known as the "10–20–Life" law. The victim testified at trial and described being shot in the stomach by the defendant. The victim's injuries required immediate medical care and hospitalization. The jury found the defendant guilty on all

counts, as charged. In response to special interrogatories submitted, the jury found: 1) "the defendant guilty of Attempted Second[-]Degree Murder, as charged in Count I of the Information;" 2) that he "possessed and discharged a firearm, and by the discharge of said firearm caused injury to another person;" 3) he was guilty of Possession of a Firearm by a Convicted Felon, as charged in Count II of the Information; and 4) he was "in actual possession of a firearm." This Court affirmed the conviction and sentence on direct appeal. Robinson v. State, 888 So.2d 25 (Fla. 1st DCA 2004) (unpublished table decision).

Thereafter, the defendant filed a number of post-conviction pleadings including multiple rule 3.800(a) motions, which asserted no finding of the "use" of a firearm, failure to find "actual" possession of a firearm, and use of a "deadly weapon," among other claims. All were unsuccessful. In March 2016, the defendant filed this rule 3.800(a) motion, arguing for the first time since being charged that the absence of "great bodily harm" constituted technical and substantive-defects in the Amended Information.

II. "Illegal Sentence"

[1] [2] "[T]he definition of 'illegal sentence' as interpreted by case law has narrowed significantly since that term was used in the 1960s and 1970s." Carter v. State, 786 So.2d 1173, 1176 (Fla. 2001). In ***1266** Davis v. State, 661 So.2d 1193, 1196 (Fla. 1995), the Florida Supreme Court defined an "illegal sentence" as "one that exceeds the maximum period set forth by law for a particular offense without regard to the guidelines." But later, the contention Davis mandates that only those sentences that facially exceed the statutory maximums may be challenged as illegal under rule 3.800(a) was rejected. State v. Mancino, 714 So.2d 429, 433 (Fla. 1998). Instead, "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.' " Id. Further, "where it can be determined without an evidentiary hearing that a sentence has been unconstitutionally enhanced in violation of the double jeopardy clause, the sentence is illegal and can be declared so at any time under rule 3.800." Hopping v. State, 708 So.2d 263, 265 (Fla. 1998). The Florida Supreme Court thus receded from Davis in Mancino and Hopping to the extent that Davis could be read to limit challenges under rule 3.800(a) to only those sentences that exceed the "statutory maximum." Carter, 786 So.2d at 1177.

In 2014, the Florida Supreme Court addressed the question of whether a rule 3.800(a) motion is an appropriate vehicle to attack a defendant's upward-departure sentence under Apprendi, Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and Plott v. State, 148 So.3d 90 (Fla. 2014). The Court determined "that upward departure sentences that are unconstitutionally enhanced in violation of Apprendi and Blakely fail to comport with constitutional limitations, and consequently, the sentences

are illegal under rule 3.800(a)." Plott, 148 So.3d at 95. Recently, however, in Martinez v. State, No. SC15-1620, —— So.3d ——, 2017 WL 728098 (Fla. Feb. 23, 2017), the Florida Supreme Court declared that an alleged technical-defect in the charging document, which was not preserved at the trial level, does not constitute an "illegal sentence" subject to correction under Florida Rule of Criminal Procedure 3.800(a).

Accordingly, only the defendant's substantive-defect claim (that Apprendi factors were not submitted to and found by the jury) is properly raised by rule 3.800(a) motion.

III. Apprendi & State-Issued Informations

[3] [4] The defendant asserts that pursuant to Apprendi, his conviction and sentence are illegal, as the Amended Information did not "precisely" track the sentencing reclassification statute by charging "*great* bodily harm."[1] As a result of Apprendi, certain facts (though labeled by state law as "sentencing factors") are regarded as essential elements of the offense for purposes of the Sixth Amendment's jury-trial guarantee and the due process requirement of proof beyond a reasonable doubt. The U.S. Supreme Court's requirement that Apprendi-type elements be included in all federal indictments is grounded on the Grand Jury Clause of the Fifth Amendment ***1267** and also serves a notice function. Id. at 476, 120 S.Ct. 2348. But Apprendi does not affect trial procedure except when fact-finding is necessary to raise the floor or ceiling of the authorized sentencing range. See Blakely; Alleyne v. United States, —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

The Fifth Amendment's Indictment Clause states, in pertinent part: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury." U.S. CONST. Amend. V. The U.S. Supreme Court, to date, has not yet held the "Fifth Amendment's grand jury indictment requirement" as applicable to the states. Gosa v. Mayden, 413 U.S. 665, 668, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973); Byrd v. State, 995 So.2d 1008, 1011 (Fla. 1st DCA 2008). The Sixth Amendment states, in pertinent part: "[I]n 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 ... and to be informed of the nature and cause of lent the accusation." U.S. CONST. Amend. VI. The states would have a constitutional obligation to include Apprendi-type factors in their charging instruments only if the notice requirement of the Sixth Amendment, which does apply to the states via Fourteenth Amendment due process, imposed such a requirement. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (holding the Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment).

[5] [6] A state legislature is "vested," subject to constitutional limitations, "with

authority to define the elements of a crime." Chicone v. State, 684 So.2d 736, 741 (Fla. 1996). "Accordingly, identification of the elements of a crime which must be charged in a state-issued information is, at least initially, a question of legislative intent." Id. The Florida Legislature enacted the "10–20–Life" sentencing reclassification statute components as "sentencing factors" rather than elements of the underlying offense—an act within the state's established power. McMillan v. Pennsylvania, 477 U.S. 79, 83, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); Patterson v. New York, 432 U.S. 197, 211, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Speiser v. Randall, 357 U.S. 513, 523, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

A review of the evolution of Apprendi, with emphasis on precedent addressing charging-document defects and the relationship to the jury verdict, is necessary here. Following Apprendi, the United States Supreme Court issued multiple opinions defining an "Apprendi factor." See Blakely; Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Alleyne. In 2001, the Florida Supreme Court determined that sentencing errors raised under the Prison Releasee Reoffender Act must be preserved for review and rejected the assertion that such error was fundamental. McGregor v. State, 789 So.2d 976, 977 (Fla. 2001). This was likely a precursor to a similar analysis of Apprendi factors.

In 2002, the Supreme Court, in United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), addressed a defendant's appeal of a technical-pleading deficiency in a federal indictment in the absence of a challenge regarding the jury verdict submission. The defendant asserted the imposition of an illegal sentence as a result of the indictment's failure to charge the precise weight of drugs in his possession at the time of arrest (where amount of drugs was relevant to sentencing enhancement, but not to underlying offense). Id. at 628, 122 S.Ct. 1781. Of note, ***1268** the defendant did not raise an objection to the alleged technical-defect in the indictment at the trial stage. In a unanimous decision written by Justice Rehnquist, in which the sentence was upheld, the Supreme Court applied its Apprendi analysis as follows: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any factor (other than prior convictions) that increases the maximum penalty for a crime must be: 1) charged in an indictment; 2) submitted to the jury; and 3) proven beyond a reasonable doubt. Id. at 627, 122 S.Ct. 1781. However, the Court found that an overall record review, with an emphasis on the jury verdict, confirmed that the three-fold Apprendi requirements were satisfied.

The Supreme Court, in Cotton, further detailed the deficiency in the indictment did not present a jurisdictional weakness for failure to charge a crime, and also, the omission of the sentencing enhancement factor in the indictment did not justify vacating the enhanced sentence. 535 U.S. at 626, 122 S.Ct. 1781. The Court explained the real threat then to the:

> 'fairness, integrity, or public reputation of judicial proceedings' would be if

> respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial crimes because of an error that was never objected to at trial.

Id. at 634, 122 S.Ct. 1781. Accordingly, Apprendi-type element satisfaction could be accomplished despite charging deficiencies.

In 2006, in a landmark decision, the United States Supreme Court declared Apprendi violations no longer constitute per se fundamental error. See Washington v. Recuenco, 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The Court announced:

> Failure to submit a sentencing factor to the jury is not "structural" error. If a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis. E.g., Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 [(1999)]. Only in rare cases has this Court ruled an error 'structural,' thus requiring automatic reversal. In Neder, the Court held that failure to submit an element of an offense to the jury—there, the materiality of false statements as an element of the federal crimes of filing a false income tax return, mail fraud, wire fraud, and bank fraud, see id. at 20–25, 119 S.Ct. 1827—is not structural, but is subject to Chapman's harmless-error rule, 527 U.S. at 7–20, 119 S.Ct. 1827, ... Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony ... and a 'sentencing factor' was unknown...during the years surrounding our Nation's founding." 530 U.S. at 478, 120 S.Ct. 2348. Accordingly, the Court has treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Id. at 213, 126 S.Ct. 2546. Following Recuenco, even failure to submit an Apprendi factor to the jury was not considered structural error, and therefore, not a basis for a per se reversal on direct appeal.

In Galindez v. State, 955 So.2d 517 (Fla. 2007), the Florida Supreme Court applied the Recuenco harmless-error application to Apprendi and Blakely challenges. The Florida Supreme Court detailed, "...[T]o the extent some of our pre-Apprendi decisions may suggest that the failure to submit factual issues to the jury is not subject ***1269** to harmless error analysis, Recuenco has superseded them." Id. at 522–523.

[7] A year later, the Florida Supreme Court in Deparvine v. State, 995 So.2d 351 (Fla. 2008), distinguished the holding and application of its prior decision in State v. Gray, 435 So.2d 816 (Fla. 1983), and addressed preservation and waiver of alleged Apprendi error. Specifically, the court previously held, "[G]enerally, if an indictment or information fails to *completely charge a crime* under the laws of the state, the defect can be raised at any time. Gray, 435 So.2d at 818 (emphasis added). However, now "where a defendant waits until after the

State rests its case to challenge the propriety of an indictment, the defendant is required to show not that the indictment is *technically defective* but that it is so fundamentally defective that it cannot support a judgement of conviction." Deparvine, 995 So.2d at 373 (citing Ford v. State, 802 So.2d 1121, 1130 (Fla. 2001) (emphasis added)). Per Deparvine, there exist two avenues for raising an Apprendi error. The first requires a timely objection to the technical-defect. Technical errors may be remedied at the trial level by dismissal or an order for particulars. Secondly, if no timely objection is raised rendering the technical-defect as unpreserved, the defendant may raise, on appeal, a claim of fundamental right violation, which is subject to harmless error analysis. Accordingly, following Deparvine, the holding of Gray could no longer be cited as a basis for per se reversible error as technical-defects were no longer considered "structural error."

The Florida Supreme Court later held that the preservation rules of Deparvine applied to a defendant's challenge to charging documents involving mandatory minimum sentencing under the "10–20–Life" law. Bradley v. State, 3 So.3d 1168 (Fla. 2009). The court highlighted the "slightly different" rules relating to raising sentencing error challenges: 1) when preserved for review by contemporaneous objection, error may be raised on direct appeal; 2) even if not originally preserved, rule 3.800(b) provides a defendant with a mechanism to correct sentencing errors in the trial court at the earliest opportunity and gives defendants a means to preserve these errors for appellate review even while an appeal is pending (but before initial brief); 3) rule 3.850 allows a defendant to raise a sentencing error within two years after the sentence becomes final; and 4) rule 3.800(a) permits "a defendant to allege that the sentence was illegal, that insufficient credit was awarded for time served, or that the sentencing scoresheet was incorrectly calculated." Jackson v. State, 983 So.2d 562, 568 (Fla. 2008) (citing Brooks v. State, 969 So.2d 238, 241–42 (Fla. 2007)).

In Price v. State, 995 So.2d 401 (Fla. 2008), the Florida Supreme Court, in further distinguishing Gray, recognized a distinction between technical and substantive-defect challenges to state informations. Price provided a standard for distinguishing a technical-defect from a substantive-defect in declaring a substantive-defect (capable of appeal at any time as violation of fundamental right) as one that "wholly fails to allege any element of the crime .... " Id. at 405.

In 2010, the Florida Supreme Court again reviewed a conviction and sentence based on an alleged information deficiency. Miller v. State, 42 So.3d 204, 216 (Fla. 2010). The court announced "...the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial" is applicable to Apprendi challenges to state-issued informations, regardless of an enhanced sentencing component. Id.

***1270** A year later, in Carbajal v. State, 75 So.3d 258 (Fla. 2011), the Florida Supreme Court further distinguished the application of Gray. The Court advised:

> We have also explained, however, that while a charging instrument is essential to invoke the circuit court's subject matter jurisdiction, 'defects in charging documents are not always fundamental where the omitted matter is not essential, where the actual notice provided is sufficient, and where all the elements of the crime in question are proved at trial.'

Id. at 262 (quoting Gray, 435 So.2d at 818).

The Eleventh Circuit agreed with the Florida Supreme Court's holding that the Sixth Amendment did not require an indictment specify aggravating circumstances, even in a capital case. Grim v. Secy., Fla. Dep't of Corrs., 705 F.3d 1284 (11th Cir. 2013); seeu ualso Winkles v. State, 894 So.2d 842, 846 (Fla. 2005).

[8] Despite precedent provided by the United States Supreme Court and Florida Supreme Court, conflict exists among the district courts of Florida regarding treatment of Apprendi defects in state-issued informations. District courts continue to intermittently cite Whitehead v. State, 884 So.2d 139 (Fla. 2d DCA 2004), Rogers v. State, 875 So.2d 769 (Fla. 2d DCA 2004), Davis v. State, 884 So.2d 1058 (Fla. 2d DCA 2004), and Daniel v. State, 935 So.2d 1240 (Fla. 2d DCA 2006), as supporting per se reversible error for technical-defects in charging documents. See McKenzie v. State, 31 So.3d 275 (Fla. 2d DCA 2010); Green v. State, 139 So.3d 460 (Fla. 1st DCA 2014); Lewis v. State, 177 So.3d 64 (Fla. 2d DCA 2015). However, the Florida Supreme Court's recent opinion in Martinez v. State, No. SC15-1620, —— So.3d ——, 2017 WL 728098 (Fla. Feb. 23, 2017), declares technical-defects in state-issued charging documents are no longer considered "structural" constituting per se reversible error and do not qualify as an "illegal sentence" subject to a rule 3.800(a) challenge. A defendant must raise a timely objection at the trial court level in order to preserve a technical-defect challenge, or such claim is waived. In the absence of timely objection, the defendant's claim survives only if fundamental error is established.

IV. The Amended Information

The subject Amended Information charged:

> ... IVORY LEE ROBINSON, in Alachua County, Florida, on or about May 26, 2002, unlawfully and by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, but without a premediated design to effect the death of any particular person, did attempt **to kill and murder** WILLIAM FRANK MABREY, **by shooting** William Frank Mabrey, a human being, **with a firearm** and/or IVORY LEE ROBINSON did unlawfully commit a battery upon WILLIAM FRANK MABREY by actually and intentionally touching or striking said person against said person's will, or **causing bodily harm** to WILLIAM FRANK MABREY and in the commission of said battery did **use a deadly weapon**, to-wit: .357 Llama Comanche Stoger Industries Revolver Serial Number S830231, and in the course

or commission of said offenses, Ivory Lee Robinson did **discharge a firearm**; to wit; 357 Llama Comanche Stoger Industries Revolver. Serial Number S83023; and as a **result of the discharge of said firearm**, Ivory Lee Robinson did **cause an injury** to WILLIAM FRANK MABREY, **in violation of Section 775.087**, Florida Statutes, ***1271** Section 784.045(1)(a)(2), and Section 782.04(2), Florida Statutes. (L10)

COUNT II: ... IVORY LEE ROBINSON, in Alachua County, Florida, on or about May 26, 2002, having been convicted of a felony in the courts of this state or of a crime against the United States of America which is designated as a felony or convicted of an offense in another state, territory or country punishable by imprisonment for a term exceeding one year, did own or have in his care, custody, **actual possession** or control, a certain **firearm**, to-wit: . 357 Llama Comanche Stoger Industries Revolver Serial Number S830231, contrary to Section 790.23(1), Florida Statutes. (L5)

(Emphasis added.)

[9] **[10]** The purpose of an information is to inform the accused of the charge(s) against him, so that the accused will have an opportunity to prepare a defense. Florida charges the majority of crimes by information.[2] Florida Rule of Criminal Procedure 3.140 provides, "[T]he indictment or information on which the defendant is to be tried shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." In addition, Florida Rule of Criminal Procedure 3.140(d) (1) further requires the information to recite:

> ... official or customary citation of the statute, rule, regulation or other provision of law that the defendant is alleged to have violated. Error in or omission of the citation shall not be grounds for dismissing the count or reversal of a conviction based thereon if the error or omission did not mislead the defendant to the defendant's prejudice.

Rule 3.140 allows a court to order the prosecuting attorney to furnish a statement of particulars when the information fails to inform the defendant sufficiently to prepare a defense. With respect to any defect,

> no indictment or information, or any count thereof, shall be dismissed or judgement arrested, or new trial granted on account of any defect in the form of the information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the

> preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense.

Fla. R. Crim. P. 3.140(o). These sections reveal the duty of the State to give clear and adequate notice, but with the disclaimer that defects are not grounds for automatic reversal or dismissal. See Leeman v. State, 357 So.2d 703, 705 (Fla. 1978).

Technical-Defect Challenge

[11] Here, defendant asserts the Amended Information is technically flawed pursuant to Apprendi, which he argues requires the phrase "*great* bodily harm" be precisely charged as an essential element of the enhancement provision. Accordingly, he asserts such an omission constitutes per se reversible error and cannot be cured by jury verdict. The defendant claims error based on a semantic comparison arguing that the information does not sufficiently charge the required Apprendi elements. In support, the defendant cites to the Second District's opinions in Daniel and Whitehead. These cases presented challenges to minimum mandatory sentences and the ***1272** charging documents did not track the language of the enhancement statute. In both, the jury ultimately found the specific factors pursuant to special interrogatories. Daniel, 935 So.2d at 1241; Whitehead, 884 So.2d at 139. The Second District reversed both sentences, finding that the jury verdict could not cure the "defects" in the charging document and an information must *precisely* track the sentencing enhancement statute. Id. However, Daniel and Whitehead are readily distinguishable and have now been abrogated by the Florida Supreme Court in Martinez, No. SC15-1620, —— So.3d at ——, 2017 WL 728098, at *4. In Daniel, the State conceded error on a portion of the sentencing and the case involved multiple defendants- a fact pattern demanding greater specificity in pleading. Daniel, 935 So.2d at 1241.

[12] Technical-defects in a charging document are reviewed differently than the failure to assert an essential element of the crime. Gray, 435 So.2d at 818. "Great bodily harm" is not an essential element of attempted second-degree murder or possession of a firearm by a convicted felon, but rather, it allows for reclassification of the underlying crimes pursuant to section 775.087, Florida Statutes. Because the alleged defect was not the omission of an essential element of the crime, the defect is fundamental only if due process was denied. Connolly v. State, 172 So.3d 893, 904 (Fla. 3d DCA 2015); Delgado v. State, 43 So.3d 132, 133 (Fla. 3d DCA 2010) ("An information is fundamentally defective only where it totally omits an essential element of the crime or is so vague, indistinct or indefinite that the defendant is misled or exposed to double jeopardy."); State v. Wimberly, 459 So.2d 456, 458–59 (Fla. 5th DCA 1984) ("There is a difference between an information that completely fails to charge a crime and one where the charging allegations are incomplete or imprecise. The

be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error." § 924.051(3), Fla. Stat. An issue is not preserved within the meaning of the statute unless it was "timely raised before, and ruled on by, the trial court." § 924.051(1)(b) Fla. Stat., (Supp. 1996); see Latson v. State, 193 So.3d 1070 (Fla. 1st DCA 2016) (Winokur, J., concurring). Here, the defendant did not raise any objection as to the technical insufficiency of the Amended Information prior to the jury verdict. Accordingly, fundamental error must be established to maintain a viable argument on appeal.

Substantive-Defect Challenge

[15] **[16]** A charging document that "references a specific section of the criminal code" sufficiently detailing "all the elements of the offense" may support a conviction where the pleading otherwise fails to include an essential element of the crime. DuBoise v. State, 520 So.2d 260, 265 (Fla. 1988); Figueroa v. State, 84 So.3d 1158, 1161 (Fla. 2d DCA 2012). However, "a conviction on a charge not made by the indictment or information is a denial of due process[,]" and an indictment or information, that "wholly omits to allege one or more of the essential elements of the crime" cannot support a conviction for that crime. Gray, 435 So.2d at 818. This is a "defect that can be raised at any time-before trial, after trial, on appeal, or by habeas corpus." Id.

[17] Defendant also claims that his conviction and sentence are illegal, as the Apprendi factor of "great bodily harm" was not charged in the Amended Information and found by the jury beyond a reasonable doubt. Relying again on Daniel, the defendant argues that a jury verdict cannot cure any alleged deficiencies in the charging document. He also asserts that the jury did not find all sentencing factors under section 775.087, Florida Statutes, in violation of Apprendi. The trial court expressly denied defendant's argument that the Amended Information did not precisely track the enhancement statute—finding that even though the language is not precise, it is clear, and the jury found beyond a reasonable doubt that defendant discharged a firearm causing "great bodily harm."

***1274** Here, the trial court cited Gentile v. State, 87 So.3d 55 (Fla. 4th DCA 2012), in denying defendant's rule 3.800(a) motion. In Gentile, the information alleged the defendant committed the offense with a deadly weapon. Id. at 57. The Fourth District determined that by inference, the jury's verdict found the defendant guilty of using a deadly weapon because it found him guilty "as charged in the information." Id. Thus, the verdict form's reference to the information was sufficient to support Gentile's sentence reclassification.

[18] The Florida Supreme Court has consistently held a jury verdict may "cure" an Apprendi defect in a state-issued information. See Galindez v. State, 955 So.2d 517 (Fla. 2007); Miller; Price; Grim. Post–2006, failure to submit a sentencing

former is fundamentally defective. However, where the information is merely imperfect or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defect and it cannot be raised for the first time on appeal .... If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defenses.") (quoting Jones v. State, 415 So.2d 852, 853 (Fla. 5th DCA 1982)); Brewer v. State, 413 So.2d 1217, 1221 (Fla. 5th DCA 1982) (en banc) (finding no fundamental error where the deficiency of the charging document was not a total omission of an essential element of the crime); Kane v. State, 392 So.2d 1012, 1013 (Fla. 5th DCA 1981); State v. Cadieu, 353 So.2d 150, 151 (Fla. 1st DCA 1977) ("The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely.").

[13] 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. See Deparvine; Grim v. Sec'y Fla. Dep't of Corrs., 705 F.3d 1284 (11th Cir. 2013); Miller v. State, 42 So.3d 204 (Fla. 2010); DuBoise v. State, 520 So.2d 260 (Fla. 1988). Additionally, the Florida Supreme Court has noted "it will be a rare occasion that an information tracking the language of the statute defying the crime will be found inefficient to ***1273** put the accused on notice of the misconduct charged." Price, 995 So.2d at 405.

[14] Defendant's appeal of the technical-defect was initiated under rule 3.800(a), as opposed to rule 3.800(b). Accordingly, the asserted technical charging error must be deemed waived by the defendant's lack of a contemporaneous objection prior to the jury verdict and before the sentence was imposed in 2003. To preserve error for appellate review, a contemporaneous, specific objection must be made during trial. Jackson v. State, 983 So.2d 562, 568 (Fla. 2008); Gore v. State, 964 So.2d 1257, 1265 (Fla. 2007). Further, the alleged pleading insufficiency at issue here does not result in an "illegal sentence" subject to correction at any time under rule 3.800(a). The Florida Supreme Court recognizes that a defendant can waive the failure to precisely charge grounds for a mandatory minimum under the "10–20–Life" law. See Martinez; Nelson v. State, 191 So.3d 950 (Fla. 4th DCA 2016); Rolling v. State, 41 Fla. L. Weekly D1906, —— So.3d ——, 2016 WL 4723682 (Fla. 3rd DCA Aug. 17, 2016); Connolly v. State, 172 So.3d 893 (Fla. 3d DCA 2015); Bradley v. State, 3 So.3d 1168 (Fla. 2009).

The technical-defect challenge raised by the defendant is also contrary to the "Criminal Appeal Reform Act of 1996," which provides that "[a]n appeal may not

> [A]ll that is required for the application of a reclassification or enhancement statute to an offense is a clear jury finding of the facts necessary to the reclassification or enhancement 'either by (1) a specific question or special verdict form (which is the better practice), or (2) the inclusion of a reference to [the fact necessary for reclassification] in identifying the specific crime for which the defendant is found guilty.'

Gentile, 87 So.3d at 57 (Fla. 4th DCA 2012) (quoting Sanders v. State, 944 So.2d 203, 207 (Fla. 2006) (quoting Iseley, 944 So.2d at 231)).

[21] The test for granting relief based upon a substantive-defect in the charging document is "actual prejudice." Gray, 435 So.2d at 818. Because the defect did not pertain to an essential element of the crime, the defect is fundamental only if the defendant demonstrates that he was denied due process. In other words, because the defendant failed to make a contemporaneous objection, the defect was not fundamental error unless he is able to demonstrate insufficient notice that a conviction for second-degree murder and possession of a firearm by a convicted felon could subject him to a reclassification under section 775.087, Florida Statutes (2002).

[22] "An illegal sentence subject to correction under rule 3.800(a) must be one that no judge under the entire body of sentencing laws could possibly impose under any set of factual circumstances." Martinez at ——, 2017 WL 728098, at *4 (citing Wright v. State, 911 So.2d 81, 83 (Fla. 2005); seeu ualso Carter v. State, 786 So.2d 1173, 1181 (Fla. 2001). The illegality must be of a fundamental nature and clear from the face of the record. Wright, 911 So.2d at 83–84. We find no such fundamental error.

Prior decisions of this Court in Boyce v. State, 202 So.3d 456 (Fla. 1st DCA 2016), and Arnett v. State, 128 So.3d 87 (Fla. 1st DCA 2013), are factually distinguishable.[3] Furthermore, clarity has been provided by the Florida Supreme Court in Martinez at ——, 2017 WL 728098, at *4.

Conclusion

In the wake of Galindez, Deparvine, and Martinez, the menu options for a defendant's Apprendi-error appeal have been limited. Technical-defects in a charging document are no longer "structural" constituting per se reversible error. A defendant's failure to raise a timely objection to a charging document's technical insufficiency, prior to a jury verdict, results in waiver of a pure pleading challenge. Subsequently, a defendant may only appeal by arguing constitutional error, which is subject to harmless error review.

Defendant failed to properly preserve the technical-defect claim, and his "illegal sentence" challenge is not cognizable under a rule 3.800(a) motion. His substantive challenge failed to establish fundamental ***1276** error. Alternatively, even if the Apprendi defects asserted by the defendant constitute a constitutional violation, we find the error to be harmless.

factor to a jury is no longer considered structural error. Such failure is subject to harmless error analysis, if the error is of a fundamental nature. Recuenco, 548 U.S. at 221, 126 S.Ct. 2546. Here, any defect in the charging document, namely failure to allege "great bodily harm" as opposed to "bodily harm," was cured by the victim's testimony at trial and the jury verdict. The jury found the defendant guilty as charged, which included the factual finding the defendant shot the victim. We find this sufficient to satisfy "great bodily harm" as a required element of the sentencing enhancement.

If a pleading should require an identification of the particular injury, additional detail is commonly seen as flowing from the factual specificity requirement rather than the essential elements requirement. See United States v. Gayle, 967 F.2d 483 (11th Cir. 1992). Here, the record on appeal confirms Count I of the Amended Information charged that defendant "did attempt to kill ... by shooting ... with a firearm ... causing bodily harm ... did use a deadly weapon ... did possess a firearm ... did discharge a firearm ... did cause injury ... in violation of Section 775.087, Florida Statutes, Section 784.045(1)(a)(2), and Section 782.04(2), Florida Statutes." We agree with the State. The fact the defendant shot the victim, coupled with the statutory citation, was sufficient to give notice of the "great bodily harm" element of section 775.087, Florida Statutes. See Coke v. State, 955 So.2d 1216, 1217 (Fla. 4th DCA 2007) (concluding that an information, which charged the defendant with aggravated battery by "shooting [the victim] in the legs," was sufficient to advise the defendant of the "great bodily harm" element, as language was more specific than "simply alleging great bodily harm"); Nelson v. State, 191 So.3d at 952–53 (concluding the information indicating that the victim was "shot" was sufficient to provide notice of the "great bodily harm" element).

V. Fundamental Error & Harmless Error

[19] **[20]** A review of the Amended Information and the record demonstrates fundamental error was not present because: 1) the Amended Information did not omit an essential element of the charged offenses; 2) the Amended Information referenced section 775.087, Florida Statutes, in the charging document; 3) the defendant had notice the State would be seeking a reclassification of his conviction under section 775.087, Florida Statutes, based on the defendant's personal possession of a firearm during the commission of the underlying offenses; and 4) the defendant claims no surprise or prejudice in the preparation or presentation of his defense and establishes no other grounds of actual prejudice.

The Florida Supreme Court has clarified that, although a specific finding in an interrogatory on the verdict form is preferable, what is ultimately required is a "clear ***1275** jury finding." State v. Iseley, 944 So.2d 227, 231 (Fla. 2006). The Court emphasized:

For these reasons, we affirm the trial court's denial of defendant's rule 3.800(a) motion.

WOLF and BILBREY, J.J., CONCUR.

All Citations

215 So.3d 1262, 42 Fla. L. Weekly D758

Footnotes

1 It is important to distinguish between "enhancement" of penalty laws and "reclassification" of offense laws. Admittedly, in some instances such a distinction may be without a difference in its practical effect, but the legislature has chosen to make a distinction. Enhancement is commonly associated with the province of the judge in sentencing, as in the case of habitual offenders, section 775.084, and the wearing of a mask, section 775.0845. Reclassification speaks to the degree of the crime charged, and in legislative application, appears to attach at the time the indictment or information is filed and not at the time a conviction is obtained. Section 775.081 "classifies" felonies. Section 775.087(1) "reclassifies" all felonies with specified exceptions when certain conditions attend to the commission of the crimes. Cooper v. State, 455 So.2d 588, 589 (Fla. 1st DCA 1984). Subsections (2) and (3) of section 775.087, Florida Statutes, "enhance" the penalty.

2 In Florida, a capital crime must be charged by indictment; all other felonies may be charged by information. See Fla. CONST. Art. I, section 15(a). If the Indictment Clause applied to the states, Florida could not prosecute non-capital felonies by information.

3 In Arnett, the defendant was charged with possession of a firearm by a convicted felon. 128 So.3d at 87. The information did not charge "actual possession" of a firearm (key element of the underlying charge), nor did it charge the sentencing reclassification or enhancement. Id. at 88. This Court reversed on the basis that the "enhancement must be *clearly* charged in the information." Id. (emphasis added). In Boyce, this Court reversed an enhanced sentence when the information failed to charge "actual possession" of a firearm despite the underlying burglary crime involving multiple defendants. 202 So.3d at 456. The information failed to detail whether the defendant was being charged under the principal or accomplice theory and was silent with respect to the State's intent to seek the enhancement sentence; The State did not provide notice of its intent to seek sentencing enhancement against Boyce until after the jury trial. Id.

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IN THE CIRCUIT COURT
FOR ESCAMBIA, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

SAMMIE LEE SMITH, IV,
Defendant.

CLERK NO.: 1716CF003120A
DIVISION: A

NOTICE OF INTENT TO SEEK
DANGEROUS SEXUAL FELONY OFFENDER SENTENCING

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**.

I **HEREBY CERTIFY** that a copy or copies of the foregoing has been furnished to: **FRANCIS MOHAMED SAHR ROBERTS**, Attorney for Defendant, 190 Government Street , Pensacola, FL, 32502, by mail/delivery/fax/electronically on 3/22/17.

/s/ DIANE STEFANI
DIANE STEFANI (dstefani@sa01.org)
FLORIDA BAR NO: 0678457
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PO BOX 12726
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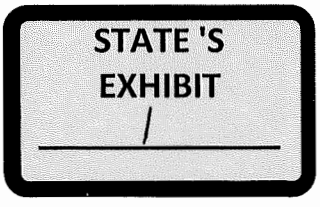

APPENDIX D

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. **CASE NO. 2016 CF 3120A**

SAMMIE L. SMITH, IV, **DIVISION A**
Defendant.
_____/

ORDER DENYING MOTION TO CORRECT SENTENCING ERROR

THIS CAUSE is before the Court upon Defendant's Fla. R. Crim. P. 3.800(b)(2) Motion to Correct Sentencing Error, filed on July 19, 2018. The Court has considered the motion, the State's Response filed July 20, 2018, and the case file. The motion can be resolved as a matter of law without a hearing pursuant to Rule 3.800(b)(1)(B).

Defendant contends that the mandatory minimum term of fifty (50) years' imprisonment imposed pursuant to the Dangerous Sexual Felony Offender ("DSFO") Act, promulgated under §794.0115 Fla. Stat., is unlawful because the information failed to recite certain matters in contravention of the U.S. and Florida Constitutions. Specifically, the motion identifies two per se flaws in the information: the citation to non-existent subparts §794.0115(1)(a)(b) instead of those subparts located in §794.0115(2)(a)(b), Fla. Stat., as well as the information's reliance upon the phrase "likely to cause serious personal injury" as

set forth in the sexual battery offense under §794.011(3), Fla. Stat., instead of "caused serious personal injury" as set forth in the DSFO Act.

In turn, the State argues that Defendant had adequate notice to satisfy due process concerns, the matters subject to DSFO are not required to be recited in the information, and that there is a lack of prejudice.

I.

To begin, the DFSO provides that any person who is convicted of sexual battery in contravention of §794.011(3), Fla. Stat., which was committed when (i) he was 18 years of age or older and (ii) caused serious personal injury to the victim as a result of the commission of the offense qualifies as a dangerous sexual felony offender who must be sentenced to a mandatory minimum term of 50 years' imprisonment. Section 794.0115(2)(a), Fla. Stat.

Pertinent to the motion, on July 7, 2016, Defendant was charged with, *inter alia*, sexual battery, as set forth below:

COUNT 2: AND YOUR INFORMANT AFORESAID, PROSECUTING AS AFORESAID, ON HIS OATH AFORESAID, FURTHER INFORMATION MAKES THAT 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. (FL-L10) (italics added; bold removed).

The information in Count 2 was amended several hours later on July 7, 2016, accurately citing §794.0115(2)(a)(b). The State again amended the information on November 9, 2016, but this time, reverted back to §794.0115(1)(a)(b).

Six months later, Defendant was informed of the mandatory minimum sentence that potentially could be imposed, to wit:

> THE DEFENDANT: Okay.
>
> MS. STEFANI: Your honor, may I put one thing on the record?
>
> THE COURT: Yes, ma'am.
>
> MS. STEFANI: I just wanted to put on the record that the State did offer what Mr. Smith scores. He scores 20.8 years. We offered him 21 years. If he's found guilty as charged, it will be a 50 year minimum mandatory on two counts of the information.
> (Transcript May 17, 2017 p. 8 ll. 11-20 filed 3/14/18)
>
> ***
>
> MR. ROBERTS: Yes, sir. And the State did state on the record what the offer was and what the minimum is if he were to be convicted as charged or – even on one of the first two counts.
> (Transcript May 17, 2017 p. 9 ll. 22-25 filed 3/14/18)

Shortly thereafter, on May 22, 2017, the State filed a Notice of Intent to seek DFSO sentencing pursuant to Sections 794.0115(1)(a) &(1)(b).[1]

[1] Again, the State's notice of intent to seek DSFO sentencing repeated the non-existent subparts cited in the second amended information.

Trial in the matter occurred on June 7, 2017. The jury found Defendant guilty of sexual battery as charged and specifically found by special interrogatory that Defendant (i) was 18 years of age or older at the time of the commission of the offense and (ii) "caused serious personal injury" to the victim. On October 27, 2017, this Court sentenced Defendant to fifty years of mandatory minimum imprisonment under Count II as a DSFO. Defendant now pursues his appeal while seeking to vacate the sentence and be resentenced without reference to the DSFO Act.

II.

Defendant posits that the failure to set forth facts that increase the minimum mandatory sentence must be recited in the information or charging documents. But Defendant's reliance upon U.S. Supreme Court precedent is not squarely on point, given that in all the cases cited, there was an overriding failure by the jury to determine certain facts beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)(jury instructions omitted a fact that would raise the maximum term); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)(any fact that increases the statutory maximum for a crime is an element that must be submitted to the jury and determined beyond a reasonable doubt); *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)(facts that increase mandatory minimum sentences must be submitted to the jury); *cf. Rogers v. State*, 963 So. 2d 328, 333-

34 (Fla. 2nd DCA 2007)(noting that *Apprendi* was not presented with a challenge to the charging instrument).

In sum, because a jury in this matter specifically determined that Defendant was 18 years of age or older at the time of the offense and caused serious personal injury to the victim, the sentence in this case does not run afoul of the constitutional guarantees regarding jury determination as specifically held in *Jones, Apprendi*, and *Alleyne*.[2]

III.

The gravamen of Defendant's motion is whether he was deprived of due process because of the State's failure to allege the DSFO qualifying factors *in the information*. Defendant's motion would squarely have this court determine whether constitutional principles demand a symmetry between jury fact finding and state charging documents. *Rogers v. State*, 963 So. 2d 328, 333-34 (Fla. 2nd DCA 2007)(furnishing notice in a state's charging document to the exclusion of any other form of notice has not been universally embraced). Stated differently,

[2] To be sure, *Alleyne* noted that defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables a defendant to predict the legally applicable penalty from the face of the federal indictment. 570 U.S. at 113-114. In *Jones*, the federal indictment therein made no reference to the carjacking statute's numbered subsection nor specified any of the pertinent enhancement facts in the federal indictment. *Id.* at 230. Consequently, it construed 18 U.S.C. §2119 (1988) as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. *Jones, supra* at 252.

Defendant submits that due process cannot be satisfied or otherwise cured unless facts raising the mandatory minimum imprisonment sentence as well as the statutory source are set forth in the charging document (as opposed to any other written or verbal notification well prior to trial).

While resolving this issue may be premature for reasons expressed below, this court is mindful that the requirements of the Sixth Amendment regarding notice can be satisfied without necessarily and precisely alleging *Apprendi*-type elements in charging documents. *Robinson v. State*, 215 So. 3d 1262, 1274 (Fla. 1st DCA 2017); *cf. Byrd v. State*, 995 So. 2d 1008 (Fla. 1st DCA 2008)(Fifth Amendment's indictment requirement is not binding upon the states).

And as applied to this matter, the factors that potentially subject a person to DSFO sentencing do not alter the substantive offense of sexual battery, which only requires as an element of the offense the use of actual physical force "likely to cause serious personal injury." Section 794.0115(2)(a)'s requirement that a defendant "caused serious personal injury" elevates the sentence floor but does not create a separate offense. If it did, it could be argued that identifying the statutory violations under §794.0115(2), Fla. Stat., e.g., 800.04(4), 794.001(3), etc., are surplusage.

To follow the logic that factors under DSFO are essential elements of an offense that must be pled in a charging document would suggest that if the state were to seek a DSFO designation, it would have to elect to forgo proving a lower

factual threshold under §794.011(3), questioning the utility of a special interrogatory and whether sexual battery by use of force likely to cause serious personal injury is somehow an unpled lesser included charge to causing serious personal injury.

Also, this matter does not involve a violation of any statutory pre-trial notice. Section 794.0115, Florida Statutes, does not expressly provide that written notice be provided to Defendant of its application. *Abrams v. State*, 971 So. 2d 1033, 1036 (Fla. 4th DCA 2008)(rejecting claim that DSFO Act was unconstitutional on its face because it provides no statutory notice, no separate hearing, and no standard of proof regarding prior offenses because publication in the Florida Statutes provides constructive notice).

Therefore, form does not prevail over function. There is no constitutional requirement compelling the *Alleyne* factors to be stated in a charging document. Nor is there any statutory provision requiring notification of seeking DSFO sentencing to be included in said charging document to the exclusion of any other form of notice.

IV.

Moreover, the purported defect does not give rise to any relief. As noted above, all elements of the offense of sexual battery were alleged. All elements of both the offense and the facts to support DSFO sentencing were properly instructed

to the jury and determined by same beyond a reasonable doubt at trial. And finally, Defendant does not and cannot complain of lack of actual notice or actual prejudice. *Cf. Miller v. State*, 42 So. 3d 204, 216 (Fla. 2010).

Quite simply, Defendant is unable to complain that he did not have actual notice to the degree "that there may be no doubt as to the judgment which should be given, if the defendant be convicted." *Alleyne*, 570 U.S. at 111, *quoting Archbold* 44 (15th ed. 1862). The State filed an express notice prior to trial that it was seeking DSFO sentencing and recited the 50-year mandatory minimum imprisonment term. While the State previously filed an amended information accurately reciting subsection (2)(a)(b), there is no credible argument that Defendant was misled by the erroneous citation to subsection (1)(a)(b), because (1)(a)(b) did not exist, and §794.0115 has no other subparts other than in subsection (2).

V.

Even assuming the information contained a defect, as opposed to a typographical error regarding the non-existent subparts relative to subsection (1), there was no objection to the charging instrument at any time prior to or at sentencing. Therefore such alleged defect should be waived, and Defendant should not be heard to complain now, especially where Defendant's counsel knew full

well, as reflected above, of the minimum mandatory penalty of fifty years for each of the two sexual battery charges.

Moreover, the alleged constitutional error is not a structural or per se error requiring automatic vacating of the sentence as a DSFO. In *Britten v. State*, 181 So. 3d 1215 (Fla. 1st DCA 2015), a jury did not make the finding that the defendant caused serious personal injury to the victim for purposes of sentencing as a DSFO. Nevertheless, the designation as a DSFO was affirmed because *Alleyne* errors are subject to a harmless error analysis. *Id.* at 1218. It would require tortured logic to conclude that omitting the DSFO sentencing factors from a charging document is structural, when failing to prove beyond a reasonable doubt a factor raising the mandatory minimum sentence under the DSFO Act is subject to harmless error analysis. *See also Martinez v. State*, 211 So. 3d 989 (Fla. 2017)(technical defects in state charging documents are no longer considered structural constituting per se reversible error).[3] Therefore, it is

[3] Defendant's reference to *Green v. State*, 139 So. 3d 460 (Fla. 1st DCA 2014) and *Rogers v. State*, 875 So. 2d 769 (Fla. 2nd DCA 2004) is not persuasive in light of abrogation in *Robinson v. State*, 215 So. 3d 1262 (Fla. 1st DCA 2017). Similarly, Defendant's reliance upon *Arnett v. State*, 128 So. 3d 87 (Fla. 1st DCA 2013) is suspect given disagreement by *Martinez v. State*, 169 So. 3d 170, 172 (Fla. 4th DCA 2015), *approving decision*, 211 So. 3d 989 (Fla. 2017)(noting defect in information not subject to correction via Rule 3.800(a)). While Defendant relies upon *Koch v. State*, 874 So. 2d 606 (Fla. 5th DCA 2004) for the proposition that mere citation to an enhancement statute in the information is insufficient, the sentence was reversed because the jury made no express finding of the discharge of the firearm.

ORDERED AND ADJUDGED that Defendant's Motion to Correct Sentencing Error is hereby **DENIED**.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida.

STEPHEN PITRE
CIRCUIT JUDGE

Copies to:

Sammie L. Smith, IV, DC# P62041, Blackwater Correctional Facility, 5914 Jeff Ates Road, Milton, FL 32583
Diane Stefani, Asst. State Attorney; dstefani@osa1.org; pcolston@osa1.org
Robert David Malove, Defense Counsel; rdm@robertmalovelaw.com
Office of the Attorney General, crimapptlh@myfloridalegal.com

APPENDIX E

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No.: 2016-CF-003120

v.

Judge: STEPHEN A. PITRE

SAMMIE L. SMITH, IV,
Defendant.
_____/

DEFENDANT'S MOTION FOR REHEARING

COMES NOW the Defendant, Sammie L. Smith, IV, by and through undersigned counsel and pursuant to Rule 3.800(b)(1)(B), *Fla. R. Crim. P.*, and moves this Honorable Court for reconsideration of its Order Denying Motion to Correct Sentencing Error, entered on July 27, 2018. In support, Defendant submits that this Court has overlooked the following:

1. This cause is before the Court on Defendant's Motion to Correct Sentencing Error filed pursuant to Rule 3.800(b)(2), *Fla. R. Crim. P.* Defendant challenges the enhanced, fifty (50) year mandatory minimum sentence imposed pursuant to the Dangerous Sexual Felony Offender (DSFO) Act, § 794.0115, *Fla. Stat.* (2016). Defendant contends that the facts necessary for enhancement as a DSFO - specifically, the fact that he was over 18-years of age when he committed the offense and the fact that he actually caused serious personal injury to the victim, *see* § 794.0115(2), (2)(a) - constitute elements of a greater offense that were mandatory to

be pleaded in the information. Because these elements were not expressly stated in the information, the 50-year mandatory minimum sentence is unlawful.

2. Defendant relies on decisions of the United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), *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), for the proposition that factors which increase the maximum sentence provided by law, including factors which increase the sentencing floor, are "elements" that combine with the core crime to create a new aggravated offense. *Apprendi*, 530 U.S. at 483 n. 10 ("facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense"); *Alleyne*, 570 U.S. at 108, 113 ("*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… [T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime").

3. Therefore, according to the United States Supreme Court, factors that trigger enhanced sentencing under Florida's DSFO statute become elements of a new, aggravated crime.

4. In its Order denying relief, this Honorable Court found that "Section 794.0115(2)(a)'s requirement that a defendant 'caused serious personal injury' elevates the sentence floor *but does not create a separate offense*." *See, Order Denying Motion to Correct Sentencing Error, p. 6* (emphasis added). Respectfully, this Honorable Court's finding appears to be in direct conflict with the aforementioned decisions of the United States Supreme Court.

5. This Honorable Court further found that there "is no constitutional requirement compelling the *Alleyne* factors to be stated in a charging document." *See, Order Denying Motion to Correct Sentencing Error, p. 7.*

6. Yet, as essential elements of a new, substantive offense, the law requires that DSFO factors be clearly and precisely set-forth in the charging instrument. "'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.*'" *Apprendi* at 480. (citations omitted) (emphasis added).

7. Not only is this result mandated by the notice requirement of 6th Amendment to the United States Constitution,[1] it is also required by Article I, Sections 9 and 16 of the Florida Constitution. In *Weatherspoon v. State*, 214 So. 3d 578 (Fla. 2017), the Florida Supreme Court explained:

> In addition to the violation of a defendant's right to be fully informed of the charges against him under article I, section 16, of the Florida Constitution, a defendant's right to due process under article I, section 9, is denied when there is a conviction on a charge not made *in the information or indictment*:
>
> > Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const.; *M.F. v. State*, 583 So. 2d 1383, 1386-87 (Fla. 1991). There is a denial of due process when there is a conviction on a charge not made *in the information or indictment*. *See [State v.] Gray*, 435 So. 2d [816,] 818 [(Fla. 1983)]; *see also Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

Id. at 583. (emphasis added).

8. Thus, while it is true that the indictment clause of the 5th Amendment to the United States Constitution has been held inapplicable to the states, *cf. Byrd v. State*, 995 So. 2d 1008 (Fla. 1st DCA 2008), Florida's Constitution requires that all

[1] *See Argersinger v. Hamlin*, 407 U.S. 25, 27-28, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (The Sixth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees all criminal defendants in state prosecutions "to be informed of the nature and cause of the accusation").

elements of a criminal offense be charged in the information or indictment. *See also* Rule 3.140(a), (b), *Fla. R. Crim. P.*

9. The fact that there was some discussion of possible exposure to a 50-year mandatory minimum sentence during plea negotiations, and that the State filed a notice prior to trial that it was seeking the DSFO enhancement, does not cure the failure to allege the *specific elements* that the State was relying on to qualify Defendant as a DSFO in the amended information.

10. As explained in the Defendant's Rule 3.800(b)(2) motion, the DSFO statute lists several different enumerated factors or "elements" that would qualify an offender as a DSFO. The offender 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…

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

11. If the State intends to invoke the DSFO Act to enhance a defendant's sentence, it must charge in the information, *with specificity*, which of the statutorily enumerated elements it will attempt to prove at trial.

12. Even assuming, as this Honorable Court suggests, that some other form of notice could suffice in lieu of actually charging the statutorily enumerated elements of DSFO enhancement in the information, the so-called "notice" provided in this case fell short of providing Defendant with the specificity required by the Constitution.

13. Merely mentioning the possibility of a mandatory minimum sentence during the plea discussions did not put the Defendant on specific notice of what particular element(s) the State was relying on to qualify Defendant as a DSFO.

14. Neither was the written notice that was filed by the State prior to trial sufficient, because it did not contain any allegations tracking the language of the statutorily enumerated elements being relied upon to qualify him as a DSFO. Although the notice did attempt to cite the DSFO statute, particular reference was made to non-existent subsections. As noted by this Honorable Court, this was the same defect suffered by second amended information.

15. Nevertheless, this Honorable Court found that the Defendant was not prejudiced by the State's erroneous citation to the non-existent subsections, because the first amended information accurately cited the relevant subsections before it was superseded just a few hours later by the filing of the second amended information containing the incorrect citation. Both the first and second amended informations were filed with the Court on July 7, 2016. The first amended information was electronically filed with the Florida e-filing portal at 9:29 a.m., and the second amended information was electronically filed approximately 7 hours later at 4:04 p.m. The Defendant was in jail and was not arraigned until the following day, on July 8, 2016, and counsel was not appointed to represent the Defendant until July 11, 2016.

16. Respectfully, this Honorable Court overlooks the fact that information that Defendant was served with at arraignment, and at all relevant stages of the criminal process thereafter, *was the second amended information containing the wrong citation*. The Defendant never had opportunity to be put on notice or otherwise become aware of the allegations contained in the first amended information.

17. Finally, this Honorable Court found that the claim should be considered waived because "[e]ven assuming the information contained a defect, as opposed to a typographical error regarding the non-existent subparts relative to subsection (1),

there was no objection to the charging instrument at any time prior to or at sentencing." *See, Order Denying Motion to Correct Sentencing Error, p. 8.*

18. Rule 3.800(b), *Fla. R. Crim. P.*, serves as a procedural mechanism through which defendants may present their sentencing errors to the trial court and thereby preserve them for appellate review. *See, Brannon v. State,* 850 So. 2d 452, 454 (Fla. 2003). The legality of the designation of a defendant as a DSFO under the statute is properly presented on a Rule 3.800(b)(2) motion. *See*, *Casica v. State*, 138 So. 3d 1093, 1094 n.1 (Fla. 4th DCA 2014).

19. Moreover, as the First District Court of Appeal explained in *State v. Burnette*, 881 So. 2d 693 (Fla. 1st DCA 2004):

> An information may withstand an untimely challenge to a technical deficiency
>
> > (1) where a statutory citation for the crime is given, but all elements are not properly charged, or
> >
> > (2) where the wrong or no statutory citation is given, but all elements of the crime are properly charged.

Id. at 695.

20. In the instant case, the second amended information fails both of the aforementioned prongs. Not only were the elements of the DSFO statute not properly charged, but the wrong statutory citation was given as well. Therefore, the charging defect in this case was a structural one in that it completely failed to charge the DSFO enhancement. This type of error is considered fundamental error that can be raised

at any time, notwithstanding defense counsel's failure to contemporaneously object. "[A] conviction on a charge not made by the indictment or information is a denial of due process[,]" and an indictment or information, that "wholly omits to allege one or more of the essential elements of the crime" cannot support a conviction for that crime. *See*, *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983). This is a "defect that can be raised at any time-before trial, after trial, on appeal, or by habeas corpus." *Id*.

WHEREFORE, in light of the foregoing, the Defendant respectfully asks that this Honorable Court reconsider its July 27, 2018, Order Denying Motion to Correct Sentencing Error.

Respectfully submitted,

/s/ *Robert David Malove*
Robert David Malove, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed with the Florida *e*-Filing Portal on this 7th day of August, 2018, and that a copy was electronically served upon: Office of the Attorney General at crimapptlh@myfloridalegal.com; Assistant State Attorney Diane Stefani at dstefani@osa1.org; Assistant Public Defender Frances Roberts at mo_roberts@pd1.fl.gov.

/s/ *Robert David Malove*
Robert David Malove, Esq.

APPENDIX F

IN THE CIRCUIT COURT FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

SAMMIE LEE SMITH, IV,
Defendant.

CLERK NUMBER: 1716CF003120A

DIVISION: A

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR REHEARING

COMES NOW the State by and through the undersigned Assistant State Attorney and moves this honorable Court to deny Defense's Motion for Rehearing on its Motion to Correct Illegal Sentencing Error and in support thereof asserts the following:

1 In Defendant's Motion for Rehearing, the defendant maintains his argument that that he is entitled to relief based on technical deficiencies in the charging Information. Specifically, (1) that all elements of the crime of sexual battery in count two were not charged in the Information and (2) that a wrong statutory citation was included in the Information related to that charge. However, as the State pointed out in its response to defense's initial motion, there is a difference between an "element" of a crime and "sentencing factors" related to the charged crime. *Robinson v. State*, 215 So.3d 1262, 1272 (Fla. 1st DCA 2017). All "elements" of the crime charged must be alleged in the Information for the Defendant to have been deemed to have received proper notice, "sentencing factors" do not have to be alleged in the Information for proper notice to have been given. Id. In the Smith Information on count 2, all elements of the charged crime were properly included in the Information.

2. Additionally, the error in the Information of citing an incorrect statutory subsection related to the DSFO Statute is related to a "sentencing factor" not the actual crime charged. The citations relating to the actual sexual battery charge are correct. Hence, there is no structural error as the defense argues.

3. More importantly, the jury found by special interrogatories that the Defendant was 18 years of age or older at the time of the offense and that the Defendant caused serious personal injury to the victim during the commission of the sexual battery. Therefore, based on *Martinez v. State*, 211 So.3d 989 (Fla. 2017) there is no fundamental error and no relief due as argued.

4. Lastly, in addition to all of the proper elements and statutory citations related to count 2 of the Smith

Information being correct, the defendant was not denied due process as he was given ample notice of the State's intent to seek DSFO sentencing through an actual written notice of the State's intent as well as having verbal notice of the same through discussion about that notice with the Court and the State at a pre-trial hearing.

WHEREFORE, the State submits based on the foregoing, the defendant is not entitled to relief and requests this Honorable Court to deny the defendant's motion for rehearing.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed with the Florida e-filing portal on this 9th day of August, 2018. And that a copy was electronically served upon defense counsel Robert David Malone, Esq. 200 S. Andrew Avenue, Suite 100, Ft. Lauderdale, FL 33301.

APPENDIX G

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

Case No.: 2016 CF 3120A
Division: A

SAMMIE LEE SMITH IV,
Defendant.

ORDER ON MOTION FOR REHEARING

This Court has considered defendant's motion for rehearing filed August 7, 2018 as well as the state's response filed August 9, 2018. The motion is **DENIED.** 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.

The defendant has a right to appeal this order denying the motion for rehearing as well as the prior order denying the motion to correct sentencing error as contemplated in Fla. R. Crim. P. 3.800(b)(2) (motion pending appeal).

DONE AND ORDERED at Pensacola, Escambia County, Florida.

eSigned by CIRCUIT COURT JUDGE STEPHEN PITRE in 2016 CF 003120 A
on 08/14/2018 16:11:37 ZkJWHUfh

STEPHEN PITRE
CIRCUIT JUDGE

Copies to:
Counsel of Record

APPENDIX H

UNITED STATES CONSTITUTION

Amendment 5 - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 - 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 14 - Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.