

19-7298

LEGAL MAIL PROVIDED TO  
NEW RIVER C.I.

No. \_\_\_\_\_

JAN 02 2020 PH

FOR MAILING JLBS  
INMATES INITIALS

IN THE  
SUPREME COURT OF THE UNITED STATES

JAMES LEE BELL - PETITIONER

vs.

STATE OF FLORIDA - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI

Supreme Court, U.S.

FILED

JAN - 2 2020

OFFICE OF THE CLERK

FLORIDA FIRST DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

James Lee Bell  
New River Correctional Institution  
P.O. Box 900  
Raiford, Fl 32083

## **QUESTIONS PRESENTED**

*Q 1: Was the limitation of Almendarez-Torres and the dictates of Apprendi and Blakely violated? Florida in deciding whether Petitioner qualified for recidivist treatment and whether a statutory enhanced sentence be imposed, let the judge not only determine whether necessary predicates were present (priors, etc) but also permitted him (not jury) to make a factual determination unrelated to priors that made an enhanced sentence mandatory and removed all Judicial Discretion.*

*Q2: Whether Florida's action in ignoring binding precedent at time that required resentencing under the guidelines rather than allowing a *denovo* resentencing violate Due Process (5<sup>th</sup> and 14<sup>th</sup> Amendment).*

## TABLE OF CONTENTS

	<u>PAGE</u>
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION.....	18

## INDEX TO APPENDICES

<b>APPENDIX A</b>	Florida First District Court of Appeal decision affirming denial of Rule 3.800(a) motion.
<b>APPENDIX B</b>	Florida Circuit Court order denying Rule 3.800(a) motion.
<b>APPENDIX C</b>	Florida First District Court of Appeal denying Motion of Rehearing.

## TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE(S)</u>
<i>Almendaraz-Torres v. U.S.</i> , 523 U.S. 224, 247 (1991).....	6,7,8,10,11
<i>Anderson v. Wilkinson</i> , 396 Fed. Appx. 262, 268-269 (9 <sup>th</sup> Cir. 2010).....	11
<i>Apprendi v. N.J.</i> , 530 U.S. 466, 490 (2000).....	6,7,8,9
<i>Blakely v. Washington</i> , 542 U.S. 296 (2000).....	6,7,8,9,11
<i>Cunningham v. California</i> , 549 U.S. 270 (2007).....	10
<i>Dobbert v. Florida</i> , 432 U.S. 282 (1977).....	14
<i>Monge v. California</i> , 524 U.S. 721 (1998).....	14
<i>People v. Rivera</i> , 5 N.Y. 3D 61, 71 (2009).....	13
<i>Quinn v. Ohio Dept. of Rehab</i> , 2012 U.S. App. Lexis 27102 (6 <sup>th</sup> Cir. January 18, 2012).....	11
<i>Shull v. Dugger</i> , 515 So. 2d 748, 750 (Fla. 1987).....	14
<i>State v. Foster</i> , 109 Ohio St. 3d 1 (2006).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	13
<i>U.S v. Ugo</i> , 406 F. 3d 839, 842 (7 <sup>th</sup> Cir. 2003).....	11
<i>U.S. v. Smith</i> , 474 F. 3d 888, 892 (6 <sup>th</sup> Cir. 2007).....	12
<u>STATUTES AND RULES</u>	
3.800(a) Fla. R. Crim. P.....	passim
3.850 Fla. R. Crim. P.....	4
Fifth Amendment- United States Constitution.....	passim
Sixth Amendment- United States Constitution.....	passim
Fourteenth Amendment- United States Constitution.....	passim
28 U.S.C 1257 U.S.C.....	2
775.084 Florida Statutes.....	passim
812.13(2)(a) Florida Statutes.....	passim
2929.14 Ohio Revised Code.....	11

**LIST OF PARTIES**

[ ] All parties appear in the caption on the cover page

[ X ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

James Lee Bell- Petitioner  
Florida Attorney General- Respondent

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Florida Circuit court appears at Appendix "B" to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. 19 A 418.

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

For cases from **state courts**:

The date on which the highest state court decided my case was JUNE 12, 2019. A copy of that decision appears at Appendix "A".

A timely petition for rehearing was thereafter denied on the following date: August 5, 2019, and a copy of the order denying rehearing appears at Appendix "C".

An extension of time to file the petition for a writ of certiorari was granted to and including January 2, 2020 (date) on October 17, 2019 (date) in Application No. 19 A 418.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Fifth Amendment- United States Constitution

Sixth Amendment- United States Constitution

Fourteenth Amendment- United States Constitution

## **STATEMENT OF CASE AND FACTS**

Petitioner Bell is serving a life sentence for Robbery with a Firearm (F.S. 812.13(2)(a)) under Florida recidivist statute (F.S. 775.084) (Habitual Violent Felony Offender) which was imposed at a resentencing following a successful challenge to the legality of his initial sentence. (Motion to Correct Illegal Sentence 2003)

The conviction was the result of a jury verdict where Petitioner Bell was specifically found guilty of Robbery with a Firearm, a First Degree felony punishable by Life. At his initial 1997 sentencing, the state successively sought classification and treatment (enhanced) as a violent career criminal (V.C.C) (F.S. 775.084). The Court made the statutory required findings for V.C.C qualification and treatment introducing priors and current level of dangerousness. The V.C.C enhanced life sentence was not parole eligible. This is Florida's most egregious recidivist statute.

Petitioner Bell's first challenge to his conviction or sentence was a successful Florida Rule Criminal Procedure 3.800(a) Motion to Correct Illegal Sentence filed in 2003. Bell argued and state agreed that he did not qualify for V.C.C. Sanctions. The V.C.C designation was stricken.

At the resulting 2004 resentencing the state requested that Bell be resentenced under another recidivist statute- Habitual Violent Felony Offender. The Court determined that Petitioner Bell had the qualifying prior offenses, his current offense was qualifying and that he posed a present danger to the community on that basis, the Court found he qualified as a violent felony offender (F.S. 775.084) and sentenced him to Life in prison without parole.

Over the years Petitioner Bell challenged his conviction/sentence multiple times. In 2005

he filed a Fla. R. Crim. P. 3.850 Post Conviction Motion claiming amongst other issues that his lawyer was constitutionally defective for failing to object to his habitual felony violent felony offender sentence on the basis it was an improper upward departure sentence. This motions was summarily denied.

In 2007, Petitioner Bell filed another Fla. R. Crim. P. 3.800(a) Motion to Correct Illegal Sentence alleging that the trial court failed to specify which convictions it relied upon to qualify him as a Habitual Felony Violent Offender. This motion was also summarily denied as was the subsequent Fla. R. Crim. P. 3.800(a) motion filed in 2012 challenging a double jeopardy violation.

In 2017, Bell filed one last Fla. R. Crim. P. 3.800(a) motion challenging the legality of the violent habitual sentence, the summary denial is addressed in this petition (Appendix "B").

## ***QUESTIONS PRESENTED***

*Q1: Was the limitation of Almendarez-Torres v. U.S., and the dictates of Apprendi and Blakely violated? Florida in deciding whether Petitioner qualified for recidivist treatment and whether a statutory enhanced sentence should be imposed, let the judge not only determine whether necessary predicates were present (Prior, etc.) but also permitted him (not jury) to make a factual determination unrelated to priors that made an enhanced sentence mandatory and removed all judicial discretion. (6<sup>th</sup> Amendment).*

*Q2: Whether Florida's action in ignoring binding precedent at time that required resentencing under the guidelines rather than allowing as the Court did of a denovo resentencing, violate due process (5<sup>th</sup> and 14<sup>th</sup> Amendment).*

## **REASONS FOR GRANTING PETITION**

Petitioner James Bell was convicted of Armed Robbery (F.S. 812.13(2)(a)) which is a first degree felony potentially punishable by Life in prison under the non-enhanced statutory maximum (F.S. 775.082). The state sought and the Court sentenced him as a recidivist violent career criminal (F.S. 775.084) to Life in prison.

The Petitioner successfully collaterally challenged the violent career criminal (V.C.C) recidivist sentence on the basis that he did not meet the statutory requirements. The Court agreed and violated the V.C.C Life sentence. At the subsequent resentencing, the state sought a different recidivist enhancement- violent Habitual Felony Offender (H.V.F.O). The Court permitted the state to pursue this different recidivist enhancement. Petitioner was subsequently sentenced to Life as a V.H.F.O.

Review is now sought because during this process, Florida Constitutionally erred two ways.

First the dictates of *Almendarez-Torres v. U.S.*<sup>1</sup>, *Apprendi*<sup>2</sup> and *Blakely*<sup>3</sup> were violated by the Court's action in making a factual determination that increased the statutory maximum rather than having a jury make this determination.<sup>4</sup>

This case calls into question Florida's recidivist statutory scheme that requires judges, not jury to make mandatory factual findings as to dangerousness. The finding is mandatory and determines whether any enhanced sentence would be imposed (mandatory) imposed or whether

---

1 523 U.S. 224, 247 (1998)

2 *Apprendi v. N.J* 530 U.S. 466, 490 (2000)

3 *Blakely v. Washington*, 542 U.S. 296 (2004)

4 Even though Petitioner's felony was potentially punishable by Life he could only receive such a sentence rather than guidelines if the Court had a legal basis for departure. Here the Court relied on habitualization for that justification so the judge's factual finding is why the sentence was imposed outside the guidelines.

such a sentence was barred (mandatory)- no discretion.

Second, Florida Constitutionally erred by not following their own binding precedent that would have prevented the state from seeking enhancement under a different statutory recidivist qualifier after the first enhancement was quashed. Well established state decisional law at the time did not permit this and instead required a guideline sentence at resentencing. Florida's refusal to abide by their (then) controlling law is more than a matter of state law which this Court does not enforce. Rather it violates due process guarantee (5<sup>th</sup> and 14<sup>th</sup> Amendment) in the same manner that a disadvantageous statutory revision would be an ex post facto violation.

### **QUESTION ONE**

*Was the limitation of Almendarez-Torres and the dictates of Apprendi and Blakely violated? Florida in deciding whether Petitioner qualified for recidivist treatment and whether a statutory enhanced sentence should be imposed, let the judge not only determine whether necessary predicates were present (priors etc.) but also permitted him (not jury) to make a factual determination unrelated to priors that made an enhanced sentence mandatory and removed all judicial discretion.*

Petitioner was found to have met the statutory requirements for Florida's violent Habitual Felony Offender (V.H.F.O) recidivist enhanced penalty by a judge following vacation of his original recidivist enhanced penalty-violent career criminal (V.C.C). This earlier sentence was vacated through a collateral challenge where Petitioner demonstrated that he did not qualify.

*Almendarez-Torres* provides that a judge, not necessarily a jury, make factual findings necessary to qualification for a recidivist enhancement as it relates to priors such as number, type, date, etc. The Court does not violate *Almendarez-Torres* by determining whether the current offense before the court qualifies such as whether an enumerated felony. Florida's decision in this regard were constitutionally proper.

It was the judge's actions in next making a so-called "discretionary" decision that violated the dictates of both *Apprendi* and *Blakely* which prohibit judicial fact finding that increases the statutory maximum or sentence range (Guidelines).

## **Impermissible Finding**

Petitioner's judge made a factual finding that enhanced habitual sentence was necessary for protection of the public. This mirrors the mandatory finding required under F.S. 775.084(3)(a)(6):

“.... it meets criteria under subjection (1) [Prior Record, etc.] court must sentence defendant to Habitual Violent Felony unless finding such sentence is not necessary for protection of public.”

It matters not whether this finding is expressed as a positive or negative. This finding is mandatory and once made, the court has no discretion. A statutory enhanced sentence is required (mandatory) if the court determines it is necessary for the protection of the public through a specific finding as occurred in Petitioner's case.

If expressed as a negative (not necessary for protection of the public), then the court is required (mandatory) to sentence to a non-enhanced sentence. In either scenario, the court is without discretion and the sentence range is determined by the finding of the judge. This can hardly be a fairly described as discretionary and yet it is.

## **Cunningham v. California<sup>5</sup> provides guidance but does not directly answer the question.**

*Cunningham* court struck down a very specific type of judicial fact finding because it exceeded the limitations established in *Almendarez-Torres*, the fact finding here is somewhat different than *Cunningham* but like *Cunningham* exceeds *Almendarez-Torres* limitation.

Under the Fla. Staute 775.084, a finding as to dangerousness is mandatory. Such a finding as occurred in Petitioner's case could not have been made strictly on the basis of Petitioner's priors. The Court had to consider and did consider other factors, issues that required factual findings and which were made by the judge thereby exceeding *Almendarez-Torres* limitations.

---

<sup>5</sup> 542 U.S. 270 (2007)

Petitioner's sentencing judge considered and factored in facts of his current offense an improper consideration as it did not directly relate to priors.

**The Sixth Circuit Court has held that a recidivist sentencing scheme similar to Florida violates *Almendarez-Torres*.**

In *Quinn v. Ohio Department of Rehabilitation and Corrections*, 2012 U.S. App. Lexis 27102 (6<sup>th</sup> Cir. January 18, 2012), the Sixth Circuit Court of Appeal in examining an Ohio statute similar to Florida's found it an unconstitutional application and a violation of *Almendarez-Torres*.

In *Quinn*, an Ohio jury found him guilty of kidnapping and six counts of rape. In sentencing *Quinn* to 70 years the judge relied on his finding that *Quinn* had

“committed the worst form of the offense” and “posed the greatest likelihood of recidivism, having been lost out of prison and having committed these offenses within 4 days of his release.”

In disallowing the practice, the *Quinn* court held that the trial court's factual finding “likelihood of recidivism” did not fit within the prior conviction permitted under *Almendarez-Torres*. The Court explained that the narrow exception of *Almendarez-Torres* concerning prior only incorporates subsidiary findings such as whether two crimes are part of a common scheme or the nature of the prior offense.

In addition *Quinn* requires the prior offense, or any of these findings must be directly reflected in documents of conviction rather than being derived or inferred from the conviction-citing to *Anderson v. Wilkinson*, 396 Fed. Appx. 262, 268-69 (9<sup>th</sup> Cir. 2010), *CF/U.S. v. Ugo*, 406 F. 3d 839, 842 (7<sup>th</sup> Cir. 2003)

The trial court had been guided by Ohio revised code 2929.14 which the Ohio Supreme Court subsequently invalidated as violative of *Blakely*.<sup>6</sup>

Specifically the *Quinn* court held that the trial court constitutionally erred by:

---

<sup>6</sup> The Ohio Supreme Court severed sections of the statute that violated *Blakely*. See *State v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio

“Instead, the trial court inferred from the convictions that *Quinn* was likely to become a recidivist, a conclusion that was not directly reflected in the documents of conviction. Further the trial court relied on the timing of the offense- four days after *Quinn*'s release from prison- to determine *Quinn* was likely to re-offend. This infected the recidivism analysis with a fact that pertains to the commission of the offense for which the defendant [was] presently charged.” *United States v. Smith*, 424 F. 3d 888, 892 (6<sup>th</sup> Cir. 2007)

Looking to the actions of the court in Petitioner's case it can be fairly seen how Florida's finding “necessary for protection of public” is not much or not different than Ohio's finding of likelihood or recidivism”

#### **Error not Harmless**

Finally the *Quinn* court rejected any attempt to find the error harmless on the basis that even with a correct sentencing formula, the court could impose the same sentence he had previously received. The court reasoned it could not be determined what the judge would have done so it could not be harmless.

In Petitioner's case, the error was anything but harmless where the judge could not have legally imposed the same sentence without a further jury determination. As pointed out above, although Petitioner offense which is a first degree punishable by Life is subject to a life sentence, such sentence can only be constitutionally imposed under Florida statutes under narrow circumstances.

The first is with a proper recidivist sentence but without it, the court does not have a basis to “deviate from the sentencing guidelines and hence is barred under *Blakely* from making a factual finding to expand the guidelines (depart)

**Regardless of the order of operations-Florida's recidivism statute and application are unconstitutional.**

The state of New York courts are permitting judges to make certain factual findings so long as they are part of their discretionary authority. In *Singh v. Bennett*, 2011 U.S. Dist. Lexis 132085 (E.D. NY Nov. 14, 2011), the court placed great emphasis on the order of operations. The reasoning is that if the court first determines whether a defendant qualifies for recidivist treatment (priors, etc.), then the subsequent decision on whether to impose an enhanced sentence is not the factors that expands the sentencing range, statutory maximum, ect., and is instead the court exercising its' historical discretionary function.

The *Singh* court and other New York Courts therefore placed great importance that the procedures take place in that order.<sup>7</sup>

This reasoning even if applied to Petitioner's circumstances would not justify the court's actions. In Florida, the court is first required to determine whether priors, exist, etc., and then make a determination as to the question as to whether it is necessary for the protection of the public.

As detailed, above this is not a discretionary decision but rather mandatory and the court's decision determines whether an enhancement must be imposed or an enhanced sentence can not be imposed – no middle ground. With this mandatory finding required “protection of the public” this question should be treated no differently than the other qualifies priors, ect., for it does not matter in any sense which determination is done first where both determinations must be made.

The *Strickland v. Washington*, 466 U.S. 668 (1984) is a good example of this principle. Both prongs of *Strickland* must be demonstrated so it matters not the order they are approached. With truly discretionary issues that do not mandatorily qualify or disqualify, then order has importance.

---

<sup>7</sup> *People v. Rivera*, 5 N.Y. 3D 61, 71 (2009)

## QUESTION TWO

*Whether Florida's action in ignoring binding precedent at time that required resentencing under the guidelines rather than allowing as the courts did of a de novo resentencing, violate Due Process (5<sup>th</sup> and 14<sup>th</sup> Amendment).*

Petitioner successfully challenged the recidivist statute employed violent career criminal (V.C.C) to give him a life sentence. At that point, the trial court should not have allowed!, the state to again try for a recidivist enhanced sentence especially a different one than was previously imposed.

Under binding precedent at the time under Florida law, when a sentence was reversed for invalid reasons for departure, a guideline sentence was required on remand. See *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). Here, the court at the initial sentencing stated on record that the reason the court was sentencing Petitioner to an upward departure sentence (Life) was because Petitioner had qualified for enhanced sentencing as habitual violent felony offender (HVFO) (F.S. 775.084)

On remand, rather than impose this mandatorily required guideline sentence the court instead sentenced him as a HVFO to Life in prison.

The state court justified its action on the basis that a resentencing is de novo and the court is free to reimpose any sentence it could have originally had. While this is true, it ignores the existence of binding state court authority (*Shull v. Dugger*) which requires a guideline sentence on remand.

When decisional law is well established was as *Shull* at time of sentencing, it acts the same way a statutory change would violate due process if applied to a defendant who commits his offense prior to the change, if the change is disadvantageous to him as is the case here. (5<sup>th</sup> and 14<sup>th</sup> Amendment) See *Dobbert v. Florida*, 432 U.S. 282 (1977)

*Monge v. California*, 524 U.S. 721 (1998) permits the courts to try to again establish the requisite priors, etc. For a recidivist enhancement *Morge* should not however change the entitlement Petitioner has to relief under the Due Process guarantee and the holding of *Shull*.

This Court is now being asked to address these issues:

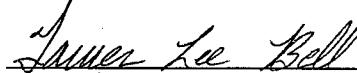
Whether Florida violated Due Process by failing to honor and apply binding state precedent at the time or whether such a violation is only a matter of state law.

Whether the *Monge* decision freed Florida from what otherwise would have been a mandatory obligation to apply binding established precedent favorable to defendant when later law holds otherwise.

### CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

  
\_\_\_\_\_  
Date: January 2, 2028  
James Bell, D.C. #323863  
New River Correctional Institution  
P. O. Box 900  
Raiford, Fl 32083