APPENDICES

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES W. BURNEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2994

Opinion filed March 25, 2020.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hillsborough County; Mark R. Wolfe, Judge.

James W. Burney, pro se.

PER CURIAM.

Affirmed.

SILBERMAN, VILLANTI, and SLEET, JJ., Concur.

THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

JAMES W. BURNEY
Appellant

v. Case No.: 2D19-2994

STATE OF FLORIDA
Appellee
_____/

AMENDED INITIAL BRIEF

On appeal from the Thirteenth Judicial Circuit Court, Hillsborough County, Florida to review the summary final order of the Honorable Mark Wolfe, Circuit Judge, denying Appellant's Motion to Correct Illegal Sentence, Fla.R.Crim.P. 3.800(a).

James W. Burney #034208
Sumter Correctional Institution
9544 CR 476-B
Bushnell, FL 33513

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Statement of the Case and Facts

This is an appeal of Appellant James Burney's motion for resentencing under Fla.R.Crim.P. 3.800(a). The record on appeal is referred to in this brief as (P. #).

Mr. James W. Burney was convicted after a jury trial on April 12, 1972 for an unarmed robbery less than $100.00 committed August, 10, 1971[1] in violation of s. 813.011 Fla. Stat. (1970). Burney was 17-years old at the time his offense was committed. The court sentenced him to life in prison at the conclusion of trial.[2]

This Court affirmed Burney's judgment and sentence in *Burney v. State*, 276 So.2d 520 (Fla. 2d DCA 1973). He filed a Rule 3.800 motion raising issues unrelated to the arguments in this motion. The trial court denied the motion and this Court affirmed in *Burney v. State*, 561 So.2d 1153 (Fla. 2d DCA 1990).[3]

III. The Appellant's Motion for Resentencing

In the case *sub judice* the Appellant filed a motion for resentencing under the current robbery statute in s. 812.13(2)(c) Fla. Stat. (2018), in light of the change to the Savings Clause in Art. X, §9 of the Florida Constitution.[4] The change at issue here is the electorates' decision to remove the prohibition on retroactive application of sentencing laws. The Appellant alleged the current unarmed robbery statute immediately became applicable to the facts of his case when the amended constitutional provision became effective.[5]

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[1] P. 1, 9
[2] P. 1
[3] P. 2
[4] *id.*
[5] P. 3

IV. The Summary Denial

The trial court summarily denied the motion [6] based on three legal principles: the court does not construe the amendment as self executing,[7] enactment legislation is required to for the amendment to apply to the Appellant's case,[8] and controlling sentencing law applies versus current law.

V. The Rehearing

The Appellant filed a motion for rehearing stating that the trial court was incorrect that enactment legislation is required because that requirement is not found in the constitutional, statutory or decisional law, and because of that, the amendment is self executing. [9]

The rehearing also argued that the court's citation to *State v. Battle*,[10] is misplaced [11] because its legal principle that Art. X, §9 prohibits retroactive application of sentencing laws is based on the former version of that provision.

VI. The Final Order

The trial court denied rehearing stating that its previous order rendered on 6/27/2019 adequately addressed the Appellant's claims.[12]

The Appellant filed a timely notice of appeal and Suggestion for Certification and this appeal follows.

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[6] P. 13 - 17
[7] *id.*
[8] *id.*
[9] P. 35
[10] 661 So.2d 38 (Fla. 2d DCA 1995)
[11] P. 36
[12] P. 40

Summary of the Argument

The lower court's reasoning in the Orders denying Appellant's claim was that there is nothing in the language of the constitutional change that states the amended provision should be construed as self executing or whether the change in law requires implementation to become effective. The court also used a narrow construction of the language of the constitutional analysis for the amendment which stated that it will allow the legislature to apply lesser sentencing to prisoners currently in prison.

The constitution's enactment clause in Art. XI, § 5(e), Fla. Const. clearly refutes the court's first position that the amendment to Art. X, §9 must sit dormant until the legislature passes a new law making it effective: 'it shall be effective as an amendment to or revision of the constitution....' The court's interpretation of the constitutional analysis that the legislature may apply new sentencing guidelines to those currently incarcerated does in no way mean that the constitution still prohibits retroactive application of mollified sentencing laws they have already passed.

The trial court also cited to *State v. Battle* for its position that the Appellant's sentences are limited to the statutes in effect at the time their crimes were committed. The court's use of *Battle* as its authority to deny the Appellant's claim is inapplicable to their arguments. This case, when one drills down into the cases and authorities they cite to, all rely on the previous version of Art. X, §9 as their

top level authority to deny those defendant's claim for relief based on a new sentencing provision. The *Battle* case is now abrogated by the electors' decision to modify the Savings Clause.

Appellant's claim was that the voter's specific intent when they passed Amendment 11 to amend Art. X, §9 Fla. Const. was to "remove[] a prohibition on the retroactive application of *changes in criminal laws* to the punishment of previously committed crimes." This narrative was contained in the Amendment's ballot summary, and is what the voters signed up for. This is the reason Appellant moved for resentencing under the current robbery statute.

The trial court's denial stating that the constitutional amendment does not provide for retroactive application of sentencing laws misses the entire point of the amendment. It is an amendment *for the retroactive application sentencing laws* already on the books and future legislation. The trial court's position is in opposition to intent of the people who enacted it. Once the electors voted for this provision it became self-executing on January 8, 2019 based on Art. XI, §5(e), Fla. Const. and cannot be abrogated by a decision or subsequent legislation. The decision of the lower court should be reversed with instructions to resentence Appellant based on the current robbery statute.

Standard of Review

A denial of a postconviction claim without an evidentiary hearing must be conclusively refuted by the record.[13] The review of a decision construing a provision of the state or federal constitution concerns a pure question of law [largely parallel those of statutory interpretation] that is subject to de novo review.[14] In construing constitutional provisions, courts must first examine the actual language used in the Constitution.[15] "If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written."[16] The words of the Constitution "are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense."[17]

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[13] See *Anderson v. State*, 627 So.2d 1170 (Fla. 1993)
[14] See *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So.2d 134, 139 (Fla. 2008).
[15] *Id.* at 140.
[16] See *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n*, 489 So.2d 1118, 1119 (Fla. 1986)
[17] See *Henry v. State*, 175 So.3d 675, 677 (Fla. 2015)

Argument

Whether the trial court erred in denying Appellant's claim that the current robbery statute applies to his case based on the amended version of Art. X, § 9 of the state constitution.

I. Introduction

The Appellant avers that there are three reasons this Court can find the trial court's decision is contrary to clearly established law as determined by the supreme court: (a) the amendment is self-executing requiring no implementation legislation, (b) the postconviction court was bound to follow the intent of the voters, (c) the amendment created a substantive right to be sentenced within the parameters of current legislative intent.

Appellant's arguments below rely heavily on a substantially similar case in *Florida Hospital Waterman, Inc v. Buster*[18], which decided that the 2004 passage of Article X, §25, Fla. Const. was self executing and retroactive, and that several subsections of section 381.028, Florida Statutes (2005), conflict with [the] amendment ... and are therefore unconstitutional" [19] because the statute modified the intent of provision. This Court will find the same legal principles in *Buster* apply to Appellant's case.

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[18] 984 So.2d 478 (Fla. 2008)
[19] *Id.* at 481.

II. Governing Law and Analysis

There are several sources from which a constitutional amendment may originate. See *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) ("Proposed amendments to the Florida Constitution may originate in any of several sources, including the Legislature, revision commission, citizen initiative, or constitutional convention.") (footnotes omitted). Proposed Amendment 11 was placed on the ballot through by the revision commission of the Florida legislature pursuant to the provisions of Article XI, §2 of the state constitution. The amendment therefore represents the intent of the people and the legislature.

a. The Amendment is Self Executing

The Appellant avers that Art. X, §9 became effective on January 8, 2019 by virtue of Art. XI, §5(e), Fla. Const., which states:

> Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, *it shall be effective as an amendment* to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

The phrase above "it shall be effective as an amendment" tells this Court that the amendment is self-executing. All constitutional amendments are presumed to be so if they meet "[the] appropriate standard for determining whether

constitutional provisions are self-executing in *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960):"[20]

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. *State ex rel. City of Fulton v. Smith*, 1946, 355 Mo. 27, 194 S.W.2d 302. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. *City of Shawnee v. Williamson*, Okl. 1959, 1959 OK 64, 338 P.2d 355. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing. *People v. Carroll*, 1958, 3 N.Y.2d 686, 171 N.Y.S.2d 812, 148 N.E.2d 875. *Id.* at 851. In *Gray*, the Court found self-executing a constitutional provision providing a formula to determine the number of judges in the judicial circuits, noting the provision laid down "a sufficient rule by which the number of circuit judges which the people have dictated shall be furnished to them may be readily determined without enabling action of the legislature. *Id.*

b. The Amendment

The crux of this case comes down to what defines "it ... as an amendment" in Art. XI, §5(e). Defining the '*it*' here is the intent of the electorate that even precedes the passage of the amendment. This intent is found in the ballot summary the voters considered at the booth and, the text of the amendment:

> Amendment 11 Ballot Summary (2018)
>
> Repeal Prohibition on Aliens Property Ownership, Delete Obsolete Provision on High Speed Rail and Repeal of Criminal Statutes Effect on Prosecution

[20] See *Buster*, 984 So.2d at 485 - 486.

> The amendment would remove discriminatory language that states: "...ownership, in heritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." It also removed obsolete language repealed by voters regarding high-speed rail and removes a prohibition on the retroactive application of changes in criminal law to the punishment of previously committed crimes.
>
> Article X, § 9, Fla. Const. (2019) Repeal of Criminal Statutes.
>
> Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime previously committed before such repeal.

The language of the Amendment 11 provisions and ballot summaries were upheld by the supreme court in *Detzner v. Anstead*[21] as providing sufficient notice to "what it is that voters are being asked to approve or reject, and Florida law does not require that it do more than that."[22] A literal reading of the summary and the stated purpose of the amendment would give any fair minded person the impression that, upon passing, there will be "retroactive application of changes in criminal law to the punishment of previously committed crimes." The term "previously committed" encompasses cases that

[21] 256 So.3d 820, 825 (Fla. 2018)

[22] *Id.*, at 828, fn. 3 (Amendment 11 bundles a proposal to eliminate language authorizing the regulation of real property ... by aliens ineligible for citizenship with a proposal deleting a provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment (while retaining a provision allowing prosecution of a crime committed before the repeal of a criminal statute) and with a proposal that deletes language regarding the development of high speed ground transportation.)

are final and those that are not. Nothing in this summary or in the amendment itself gave the voters the impression that the amended Savings Clause would sit dormant until the legislature decided to pass implementation legislation. The intent of the voters is why this Court can decide this case in favor of Appellant, as the supreme court explained:

> The **will of the people is paramount** in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. *Id.* The importance of ascertaining and abiding by the intent of the framers was emphasized, so that "a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied." *Id.* at 852.[23]

The language of "the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment - it speaks for the entire people and is self-executing."[24]

Decisional and statutory law is subordinate to the constitution. Requiring enactment legislation in the instant case to give the constitution its force and effect impermissibly gives decisions and statutes equal weight in law. "[W]hat the people provide in their constitution, the Legislature and the courts may not take away

[23] *Buster*, 984 So.2d at 486.
[24] *Id.*, at 486.

through subsequent legislation or decision."[25] The peril of allowing a court, as in this case, or the legislature to create law that attenuates a constitutional enactment is found in the following example:

The Florida constitution has a 'Religious Freedom' clause in Art. 1, §3, which mirrors the First Amendment of the federal constitution. Given the lower court's position in the instant case, religious freedom, could have remained in stasis indefinitely until the legislature enacted a statute providing for religious freedom, or a court could decide who they believe those freedoms were meant for. Same with free speech, access to the courts, slavery and any other constitutional protections.

The trial court was obliged to interpret and apply Art. X, §9 in accord with the intention of the people of this state who enacted it.

> It is not for a court to judge the wisdom of the constitutional amendments enacted or the change in public policy pronounced through those amendments, even in instances where the change involves abrogation of long-standing legislation that establishes and promotes an equally or arguably more compelling public policy. Hence, what the Legislature has given through its enactments and the courts have enforced through their decisions, the people can take away through the amendment process to our state constitution.[26]

But, what the court has done in its decision is to add an enactment legislation requirement that does not exist and the court cites to no authority for its decision.

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[25] *Id.*, at 494
[26] *Id.*

V. Conclusion

The Appellant submits that the amendment is unambiguous - where it used to prohibit retroactive application of changes in criminal law to the punishment of previously committed crimes, now it does not. It is just that simple. The words of the Constitution "are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense."[27]

This Court's interpretation of Art. X, §9 will bring about a significant change in Florida law. This will have an impact statewide on litigation filed by persons who are incarcerated and where subsequent legislation mollified their sentencing statutes. This Court should certify the following questions to the Florida Supreme Court as matters of great public importance having an effect on the administration of justice:

> 1) DOES ART. X, §9 GIVE DEFENDANTS THE RIGHT TO BE RESENTENCED UNDER CURRENT LAW?
>
> 2) IS ART. X, §9 SELF-EXECUTING?

Respectfully submitted,

James William Burney
James W. Burney

[27] See *Henry* 175 So.3d at 677.

VII. Certificate of Service and Font Compliance

I certify that this brief complies with the font requirements in Fla.R.App.P. 9.210, and it was served via US mail from Sumter Correctional Institution mailroom staff to this Court and the Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, on this 30th day of August, 2019.

James William Burney

James W. Burney #034208
Sumter Correctional Institution
9544 CR 476-B
Bushnell, FL 33513

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

September 12, 2019

CASE NO.: 2D19-2994
L.T. No.: 71-CF-581

JAMES BURNEY	v.	STATE OF FLORIDA
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's suggestion that the circuit court order under judicial review should be certified by this court as requiring immediate resolution by the Florida Supreme Court is denied. Pursuant to Florida Rule of Appellate Procedure 9.125(f), no rehearing is permitted.

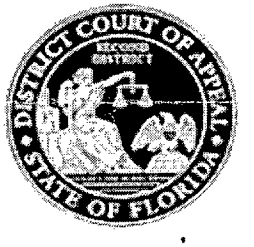
I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Attorney General, Tampa C. Todd Chapman, A.A.G. James Burney
Pat Frank, Clerk

lb

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk



IN THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

JAMES W. BURNEY
Appellant

v.

Case No.: 2D19-2994
L.T. Case No.: 71-CF-581

STATE OF FLORIDA
Appellee
_____/

Appellant's Suggestion for Certification

Appellant James W. Burney respectfully suggests that the final judgment under review by this Court should be certified for immediate review by the supreme court and states the following:

1. The Appellant's notice of appeal was filed via US mail on 8/1/2019 to the Thirteenth Judicial Circuit Court, Hillsborough County, thus this suggestion is timely filed within 10-days.

2. Florida Rules of Appellate Procedure 9.125(a), authorizes this Court to certify that a judgment requires immediate resolution by the supreme court because the issue has a great effect on the administration of justice throughout the state. This is the procedure required to invoke the Florida Supreme Courts' constitutional authority to review such decisions pursuant to article V, section 3(b)(5) of the Florida Constitution.

3. The summary of this case is Mr. Burney received a life sentence for an unarmed robbery in 1971. In 1975, the legislature segmented robbery into different felony degrees. Burney's alleged that the facts of his case are now a second degree

felony with a maximum 15-year sentence. He filed a Rule 3.800(a)[1] motion for resentencing under the current robbery statute based on the amended savings clause in art. X, §9, Fla. Const. which removed the restrictions on retroactive application of sentencing laws. The trial court denied the motion with the following reasoning:

> Enactment legislation is required for the amendment to art. X sec. 9 to permit defendants to seek resentencing under current law citing SB 704 (2019), and the Constitutional Revision Commission Judicial Committee Proposal Analysis dated December 11, 2017; and the controlling robbery statute at the time of Burney's offense is still controlling citing *State v. Battle*, 661 So .2d 38, 39 (Fla. 2d DCA 1995). [2]

4. Burney submits that the decision by the lower court should be certified as one of great public importance based on a substantially similar case in *Florida Hospital Waterman, Inc v. Buster,*[3] which decided that the 2004 passage of Article X, §25, Fla. Const. was self executing and retroactive, and that several subsections of section 381.028, Florida Statutes (2005), conflict with [the] amendment ... and are therefore unconstitutional." *Buster* is instructive in this case.

5. Burney submits no decision or subsequent legislation can subvert the intent of the voters. "[W]hat the people provide in their constitution, the Legislature and the courts may not take away through subsequent legislation or decision."[4] But this is precisely what that trial court did in their decision.

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[1] See Appendix – Exhibit A, Motion for Resentencing and Motion for Rehearing
[2] See Appendix – Exhibit B, Order Denying Motion for Resentencing and Order Denying Motion for Rehearing
[3] 984 So.2d 478 (Fla. 2008)
[4] *Id.* 984 So.2d at 494

The crux of this case comes down to what defines "it ... as an amendment" in Art. XI, §5(e). Defining the *it* here is the intent of the electorate and highest authority that even precedes the passage of the amendment. This intent is found in the ballot summary the voters considered and, the text of the amendment:

> Amendment 11 Ballot Summary
> Repeal Prohibition on Aliens Property Ownership, Delete Obsolete Provision on High Speed Rail and Repeal of Criminal Statutes Effect on Prosecution
> The amendment would remove discriminatory language that states: "...ownership, in heritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." It also removed obsolete language repealed by voters regarding high-speed rail and removes a prohibition on the retroactive application of changes in criminal law to the punishment of previously committed crimes.
>
> Article X, § 9, Fla. Const. (2019) Repeal of Criminal Statutes.
> Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime previously committed <u>before such repeal</u>.

The language of the Amendment 11 provisions and ballot summaries were upheld by the supreme court in *Detzner v. Anstead*[5] as providing sufficient notice to "what it is that voters are being asked to approve or reject, and Florida law does not require that it do more than that."[6] A literal reading of the summary and the

[5] 256 So.3d 820, 825 (Fla. 2018)

[6] See also 256 So.3d 828, fn. 3 (Amendment 11 bundles a proposal to eliminate language authorizing the regulation of real property ... by aliens ineligible for citizenship with a proposal deleting a provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment (while retaining a provision allowing prosecution of a crime committed before the repeal of a criminal statute) and with a proposal that deletes language regarding the development of high speed ground transportation.)

stated purpose of the amendment would give any fair minded person the impression that, upon passing, there will be "retroactive application of changes in criminal law to the punishment of previously committed crimes." Nothing in this summary or in the amendment itself gave the voters the impression that the amended Savings Clause would sit dormant until the legislature decided to pass implementation legislation. The term "previously committed" encompasses cases that are final and those that are not. This conflicts with the trial court reliance on *State v. Battle.*

The intent of the voters is why this Court can decide this case in favor of Burney as the supreme court explained:

> The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. *Id.* The importance of ascertaining and abiding by the intent of the framers was emphasized, so that "a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied." *Id.* at 852.[7]

6. If amended and mollified sentencing provisions are not subject to the current version of the Savings Clause, it is beyond dispute that some offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not

[7] *Buster*, 984 So.2d at 486

final when the Art. X, §9 (2019) became effective. Because the supreme court's interpretation of this provision will bring about a significant change in Florida law that will have impact statewide on litigation filed by persons who are incarcerated and where subsequent legislation mollified their sentencing statutes, this Court should certify the following questions to the Florida Supreme Court as matters of great public importance requiring immediate resolution:

1) DOES ART. X, §9 GIVE DEFENDANTS THE RIGHT TO BE RESENTENCED UNDER CURRENT LAW?

2) DOES ART. X, §9 REQUIRE ENACTMENT LEGISLATION?

Respectfully submitted,

James William Burney
James W. Burney

Certificate of Service

I certify that a copy of the foregoing was served via US mail to this Court and the Office of the Attorney General, 3507 E. Frontage Road, Ste. 200, Tampa, FL 33607on this 7th day of August, 2019.

Respectfully submitted,

James William Burney
James W. Burney #034208
Sumter Correctional Institution
9544 CR 476 B
Bushnell, FL 33513

IN THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA
Appellee / Plaintiff

v.

Case No.: 2D19-2994
L.T. Case No.: 71-CF-581

JAMES W. BURNEY
Appellant / Defendant.
_____/

Appendix in Support of Appellant's Suggestion for Certification

James Burney submits this appendix, pursuant to Fla.R.App.P. 9.125(4), to provide the documents required by the rule.

Certificate of Service

I certify that a copy of this Appendix was served via US mail to this Court and the Office of the Attorney General, 3507 E. Frontage Road, Ste. 200, Tampa, FL 33607on this 7th day of August, 2019.

James William Burney

James W. Burney #034208
Sumter Correctional Institution
9544 CR 476 B
Bushnell, FL 33513

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION**

STATE OF FLORIDA **CASE NO.: 71-CF-000581-A**

v.

DIVISION: B

JAMES W. BURNEY,
Defendant.
_____/

FILED
JUL -1 2019
CLERK OF CIRCUIT COURT

ORDER DENYING DEFENDANT'S MOTION FOR RESENTENCING

THIS MATTER is before the Court on "Defendant's Motion for Resentencing," filed January 28, 2019, which the Court construes as a motion to correct an illegal sentence, filed pursuant to Florida Rule of Criminal Procedure 3.800(a).[1] After reviewing the motion, the court file, and the record, the Court finds as follows:

On April 12, 1972, Defendant was found guilty of Robbery under section 813.011, Florida Statutes (1973). *See* Judgment and Sentence, attached. The date that the offense was alleged to have been committed was August 30, 1971. *See* Information, attached. On April 12, 1972, the Court sentenced Defendant to life imprisonment. *See* Judgment and Sentence, attached.

In the instant motion, Defendant alleges that he "is entitled under the amended Article X, Section 9 of the Florida Constitution to be resentenced to a second degree felony for unarmed robbery under section 812.13(2)(c)(2018)." *See* Defendant's Amended Motion, attached. Defendant alleges that, he was convicted for an "unarmed robbery in 1971 as alleged in his information," under section 813.011, and received a life sentence, because the "statute, in effect at the time, provided for a life sentence regardless if a weapon was used or not." *Id.* Defendant

[1] The Court notes that the instant motion requesting a lesser sentence would be untimely if construed as a "Motion to Reduce or Modify Sentence" filed pursuant to rule 3.800(c). Additionally, the Court finds that Defendant requests that the Court "Review this claim *sua sponte* as a Rule 3.800(a) because relief can be decided on the face of the

contends that, the subsequently amended robbery statute, section 813.12, created degrees of severity for the crime of robbery based on whether the offender is armed or not during the commission of the offense. *Id.* Defendant concludes that, "the facts of [his] case demonstrate that he committed a second degree felony under current law and that his sentence is now illegal as it exceeds the statutory maximum. *Id.* Defendant argues that, given the recent amendment to the Florida Constitution allowing for retroactive application of changes in the criminal law regarding punishments, he is entitled to be resentenced from a life sentence to a maximum of 15-years in prison for an unarmed robbery. *Id.*

In regard to Defendant's request, the Court first finds that Defendant is correct, in that the recently approved "Amendment 11" modified Article X, § 9 of the Florida Constitution. Previously, that section specifically stated:

> Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

Fla. Const. Art. X, § 9. However, subsequent to the amendment, and effective January 8, 2019, this section now provides:

> Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal.

Art. X, § 9, Fla. Const. (amended, general election, Nov. 6, 2018). The Court noted that the amendment removed from Art. X, § 9, the language regarding the "amendment" of a criminal statute, and the prohibition of changes to the criminal law affecting "punishments" for crimes committed prior to such changes. However, the Court finds absent from the constitutional change any language indicating whether this change in the constitution should be construed as self-executing, or whether retroactive application of changes in the criminal law requires

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record." *See* Defendant's motion, attached. As such, the Court shall address the instant motion as if filed pursuant to rule 3.800(a).

implementing legislation to become effective. Second, the Court also finds absent from the language of Art. X, § 9 any indication regarding whether the change is now to be applied retroactively to changes that have already occurred in the law prior to its enactment, or whether this change applies only to future changes in the criminal law. The Court notes:

> [W]hen this Court construes a constitutional provision, it will follow construction principles that parallel those of statutory interpretation. *See Ford v. Browning*, 992 So.2d 132, 136 (Fla.2008) (quoting *Zingale v. Powell*, 885 So.2d 277, 282 (Fla.2004)). As with statutory construction, a question with regard to the meaning of a constitutional provision must begin with the examination of that provision's explicit language. *See id.* If that language is "clear, unambiguous, and addresses the matter at issue," it is enforced as written. *Id.* If, however, the provision's language is ambiguous or does not address the exact issue, a court "must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters." *Id.*

W. Florida Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 9 (Fla. 2012).

In that regard, the Court finds that it is apparent from accompanying legislative materials that the intent of the framers of the amendment to Article X, Section 9, was that such amendment would require enacting legislation to become effective. In support of this conclusion, the Court finds that the following two documents, the "Constitution Revision Commission Judicial Committee Proposal Analysis," written December 11, 2017, which Defendant attached to his motion, and the recent "Senate Bill 704," both appear to indicate that the legislature intended that the constitutional amendment requires specific legislation to become effective.

Specifically, the "Constitution Revision Commission Judicial Committee Proposal Analysis," written at the time the amendment was proposed, states that, "A repeal of the Savings Clause will allow to the legislature to retroactively apply lesser sentencing to prisoners currently in prison." *See* Constitution Revision Commission Judicial Committee Proposal Analysis, attached. Additionally, "Senate Bill 704" also indicates that its purpose is to "provid[e] for the retroactive application of amendments, reenactments, or repeals of criminal statutes." *See* Senate

Bill 704, attached. As such, the Court finds that the language of these legislative documents clearly indicate that the understanding of the framers of the amendment was that implementing legislation would be required to effectuate the change to Article X, Section 9, not that the amendment would itself be self-executing or would automatically apply to all past changes in the criminal law. Therefore, the Court finds that the amendment does not affect Defendant's sentence, absent specific legislation that makes the amendment apply to this case.

Furthermore, as to Defendant's claims his life sentence is illegal because it exceeds the 15-year maximum for a second degree felony, the Court finds that he is not entitled to his requested relief. Under rule 3.800(a), "[a] court may at any time correct an illegal sentence imposed by it [...] when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief [...]." Fla. R. Crim. P. 3.800(a). The Second District Court of Appeal has explained the narrow application of rule 3.800(a), stating that "[r]ule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law." *Judge v. State*, 596 So. 2d 73, 77 (Fla. 2d DCA 1991).

In this case, the Court finds that, at the time of the commission of the instant offense, section 813.011, Florida Statues (1971) was in effect, not section 812.13. Section 812.13, Florida Statutes (1975), which created varying degrees of robbery, did not come into effect until October 1, 1975, subsequent to the commission of the instant offense. The controlling statute for punishment is the statute in effect at the time of the commission of the crime. *State v. Battle*, 661 So. 2d 38, 39 (Fla. 2d DCA 1995) (*citing Gilford v. State*, 487 So.2d 53 (Fla. 2d DCA 1986)). As such, the controlling statute regarding sentencing was section 813.011. Section 813.011 provides

that "Robbery" is "a felony of the first degree, punishable by imprisonment in the state prison for life or for any lesser term of years, at the discretion of the court." § 813.011, Fla. Stat. (1971).

Taking into account the controlling statute in effect at the instant offense, the Court finds that the sentence imposed in this case was permissible at the time of sentencing. Therefore, the Court finds that the sentence imposed is not illegal and Defendant is not entitled to his requested relief.

It is therefore **ORDERED AND ADJUDGED** that "Defendant's Motions for Resentencing," is hereby **DENIED**, in accordance with the above Order.

Defendant has thirty days from the date of this Order within which to Appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this 27th day of June, 2019.

MARK R. WOLFE, Circuit Judge

Attachments:

Defendant's Motion
Information
Judgment and Sentence
Constitution Revision Commission Judicial Committee Proposal Analysis
Senate Bill 704

Copies furnished to:

James Burney DC# 034208
Sumter Correctional Institution
9544 County Road 476B
Bushnell, Florida 33513-0667

Office of the State Attorney, Division B

IN THE CIRCUIT COURT OF THRITEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
Criminal Division

JAMES W. BURNEY #034208
Defendant,

v. Case No.: 71-CF-581

STATE OF FLORIDA
Plaintiff.
_____/

Motion for Resentencing

James W. Burney moves this Honorable Court to resentence him within the boundaries of a second degree felony due to the recent change in Article X Section 9 of the Florida Constitution and in support provides:

1. On 4/12/1972, Mr. Burney was convicted after a jury trial in this Court of **unarmed robbery** in violation of section 813.011 Fla. Stat. (1970) and sentenced to life in prison. He was represented by Hillsborough County Assistant Public Defender, Norman Crouch, Esq. (deceased).

2. Burney's case was affirmed on appeal in *Burney v. State*, 276 So.2d 520 (Fla. 2d DCA 1973).

3. Burney filed a Rule 3.800 motion in this Court, raising issues unrelated to the arguments in this motion. The Court denied the motion and it was affirmed on appeal in *Burney v. State*, 561 So.2d 1153 (Fla. 2d DCA 1990)

4. No other motions or petitions were filed in this case.

Memoranda

Florida voters enacted a new constitutional right on November 6, 2018, when they passed Amendment 11, which modified Article X, § 9, of the Florida Constitution. The amendment lifted the constitutional prohibition on retroactive application of sentencing laws as follows:

> Repeal of Criminal Statutes. Repeal ~~or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime previously committed before such repeal.

Article X, § 9, Fla. Const. (2019)

This amendment became effective on January 8, 2019, pursuant to Art. XI, § 5(e), Fla. Const., which provides in pertinent part:

> Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

Burney's motion is filed the same day the amendment to Art. X, § 9, Fla. Const. (2019) became effective. It is the will of the voters and the intent of the legislature that Burney be released after 48 years in prison for a crime that carries a maximum of 15 years based on current law.

Ground One

James Burney Is Entitled Under The Amended Article X, § 9 Of The Florida Constitution To Be Resentenced To A Second-Degree Felony For Unarmed Robbery Under s. 812.13(2)(c)(2018)

James Burney committed an unarmed robbery in 1971 as alleged in his information. This Court imposed a life sentence under s. 813.011 (1970) after a jury trial finding him guilty as charged. This statute, in effect at the time, provided for a life sentence regardless if a weapon was used or not:

s. 813.011 (1970) Robbery defined: penalties.

> Whoever, by force, violence or assault or putting in fear, feloniously, robs, steals and takes away from the person or custody of another, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any lesser term of years, at the discretion of the court.

Notably, this statute does not reference a felony degree like modern statutes because felony degrees did not exist 50 years ago.

Three years after Burney's crime was committed, the legislature amended the robbery statute re-numbering it to s. 813.12 (1974) segmenting it into degrees of severity based on whether a firearm or weapon was used, or if the robbery was unarmed. The facts of Burney's case demonstrate that he committed a second degree felony under current law and that his sentence is now illegal as it exceeds the statutory maximum:

s. 812.13 (2018) Robbery

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
>
> * * *

(2)(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon or other weapon, then the robbery is a felony of the second degree.

s. 775.082 (2018) Penalties. –

(3) A person who has been convicted of any other designated felony may be punished as follows:

* * *

(c) For a felony of the second degree, by a term of years not exceeding 15 years.

The Florida Constitution Article X, Section 9 (2019) now reads as follows:

Repeal of a criminal statute shall not affect prosecution for any crime previously committed before such repeal.

This amended provision entitles Burney to be resentenced from a life sentence to a maximum of 15-years in prison for an unarmed robbery. This will create parity in Burney's sentence with contemporary law. The legislature over the years lessened penalties for crimes like his where the original penalty was deemed excessive or did not serve the interest of justice.[1] This Court has an opportunity here to GRANT this motion in keeping with the constitution and free Mr. Burney after nearly 50 years in prison for a crime he could not receive a life sentence for under the current robbery statute.

Respectfully Submitted,

James William Burney
James W. Burney

[1] See Attachment A – Proposal Analysis, Judicial Committee, Constitutional Revision Commission - December 11, 2017.

WHEREFORE, Mr. Burney requests that the Court grant all relief he is entitled to, including but not limited to:

1. Vacate Burney's sentence and resentence him to a second degree felony under s. 812.13(2)(c) (2018).

2. Issue an order to the State to show cause why relief should not be granted. Require the State to attach portions of the record to its response conclusively refuting this claim.

3. Appoint counsel to litigate this motion due to the novel nature of the claim.

4. Allow Burney 30-days to respond to the States responsive pleading.

5. Provide Burney an opportunity to amend this motion should the Court find that it is facially or legally insufficient.

6. Review this claim *sua sponte* as a Rule 3.800(a) motion since relief can be decided on the face of the record.

7. In the interest of judicial and taxpayer economy, Burney does not require sentencing counsel nor dose he need to be brought back to the county jail and asks the Court to conduct a ministerial resentencing to effect his immediate release.

8. Any other relief this Court deems just and proper.

Certificate of Service

I certify that this motion was provided to a Sumter Correctional Institution official for mailing to this Court and the Honorable Andrew H. Warren, Office of the State Attorney, 419 N. Pierce Street Tampa, FL 33602, on this 23rd day of January, 2019.

James William Burney

James W. Burney #034208
Sumter Correctional Institution
9544 CR 476-B
Bushnell, FL 33513

ATTACHMENT A

Constitution Revision Commission
Judicial Committee
Proposal Analysis

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 20

Relating to: MISCELLANEOUS, Repeal of criminal statutes

Introducer(s): Commissioner Rouson

Article/Section affected:

Date: December 11, 2017

	REFERENCE	ACTION
1.	GP	**Favorable**
2.	JU	**Pre-meeting**

I. SUMMARY:

The Proposal amends section 9 of Article X to provide that the repeal of a criminal statute shall not affect the prosecution of any crime committed before such repeal.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Savings Clause was added to the Florida Constitution in 1885 in response to a high profile criminal case in which a defendant charged with assault could not be prosecuted because the legislature repealed the assault statute and failed to "save" prosecutions for offenses committed before the repeal.[1] The Savings Clause prevents the legislature from making changes to substantive criminal laws, including sentencing laws, retroactive.

Currently, the Florida Constitution provides that the "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Termed the "Ex Post facto" clause, the purpose of the clause is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime.[2] In cases where a statute was found to be unconstitutional, the courts have allowed the amended statute to serve as the governing law in individual cases.[3] The federal government is barred from passing ex post facto laws[4] and in general,

[1] Information provided by Families Against Mandatory Minimums (FAMM) (on file with CRC staff). See Higginbotham v. State, 19 Fla. 557 (1882).
[2] Horton v. Crosby, 848 So.2d 504 (Fla. 3rd DCA 2003).
[3] Horsley v. State, 160 So.3d (Fla. 2015).
[4] US Const. Art I, s. 9, Cl. 3.

individual states are barred from passing ex post facto laws as well.[5] However, the US Supreme Court has held that in some limited circumstances, states may pass ex post facto laws if they have a narrow application, and the "statute's intent was to create a civil and nonpunitive regime."[6] One example of this is the requirement that convicted child sex offenders must register with the state.[7]

Most states and the federal government have Savings Clause statutes that limit retroactivity of changes to criminal and civil statutes.[8] Some states have statutory provisions allowing for retroactivity when it is made explicit in new law.[9] Florida is one of only 3 states (aside from New Mexico and Oklahoma) that have a constitutional savings clause.[10] But the constitutions of New Mexico and Oklahoma prohibit retroactivity of repeals of criminal statutes.[11] Florida is the only state in which the constitution explicitly forbids retroactivity of amendments to criminal statutes.[12]

B. EFFECT OF PROPOSED CHANGES:

While the ex post facto clauses of the federal and state constitutions prevent new punishments "to a crime already consummated, to the detriment or material disadvantage of the wrongdoer,"[13] there is no constitutional limitation on retroactive application of criminal legislation which mollifies criminal sanctions.[14]

The removal of "or amendment" and "or punishment" from the clause would only prevent the repeal of a criminal statute from affecting the prosecution of a crime. However, the removal of the punishment provision could allow courts to consider altering punishment in light of a statute being repealed or amended. For example, in 2014, the legislature amended drug sentencing laws.[15] A defendant who committed certain drug offenses on June 30, 2014 would serve five times longer in prison as a defendant who committed that same offense one day later. A repeal of the Savings Clause will allow to the legislature to retroactively apply lesser sentencing to prisoners currently in prison.

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[5] US Const. Art I s. 10, Cl. 1
[6] *Smith v. Doe*, 538 U.S. 84 (2003).
[7] Id.
[8] Information provided by proposal sponsor (on file with CRC staff).
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The classic definition of an *ex post facto* law appears in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis in the original): 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to *convict the offender*.
[14] *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5103&context=penn_law_review (last visited 11/22/17).
[15] See ch. 2014-176, L.O.F.

C. **FISCAL IMPACT:**

If the proposal is adopted by the voters, the legislature may apply new sentencing guidelines to prisoners currently incarcerated allowing an earlier release and possibly reduce expenses to the state..

III. Additional Information:

A. Statement of Changes:

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.

CLERK OF THE CIRCUIT COURT

DIVISION - B

CASE NO. 5k1 JUDGE WALTER N. BURNSIDE JR.

In The [redacted] Court of Record of The County of Hillsborough and State of Florida

The 14 day of October A.D. 1971 Term, 19 71

THE STATE OF FLORIDA
vs.
JAMES WILLIAM BURNEY

INFORMATION FOR ROBBERY

F. S. 813.011

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA

E. J. SALCINES County Solicitor of the Thirteenth Judicial Circuit in and for the County of Hillsborough, CHARGES that JAMES WILLIAM BURNEY

on the 30th day of August A.D. 19 71, in the County of Hillsborough and State of Florida, did unlawfully, by force, violence, assault or putting in fear, rob, steal and take away from the person or custody of MARIA LUGO,

certain property to-wit: cash, purse and miscellaneous articles,

a further description of which is to the County Solicitor unknown of the value of less than One Hundred ($100) Dollars

in money current in the United States of America, the said JAMES WILLIAM BURNEY,

not being the true owner of the said property.

CIRCUIT COURT

contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

County Solicitor of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida

Personally appeared before me E. J. SALCINES, County Solicitor of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida who, being first duly sworn, says that the allegations as set forth in the foregoing INFORMATION are based upon facts that have been sworn to and which if true would constitute the offense therein charged and that this prosecution is being instituted in good faith.

County Solicitor of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida

Sworn to and subscribed before me this 14 day of October A.D. 1971

By James A. Bond

Notary Public, State of Florida
My Commission Expires Jan. 10, 1975

WITNESSES FOR STATE

G. L. Peterson, G. W. Griffith, W. P. Bebler, Tampa Police Department (01-26920)

W. O. Knowles, Hillsborough County Sheriff's Office (71-26631)

Maria Lugo, 1208 E. 122nd Ave., Tampa

Presented by E. J. SALCINES, County Solicitor and Filed this October 14, 1971.
L. D. SIMMONS, Clerk of the Criminal Court of Record, Hillsborough County, Florida.

By Eva Quesada
Deputy Clerk

On the ____ day of _____, 19____, the defendant _____

arraigned in open Court, and to the within Information pleaded _____

CLERK OF THE CIRCUIT COURT

April 12, 1972

The State of Florida } Information for
vs. }
JAMES WILLIAM BURNEY } ROBBERY

It is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, James William Burney, is guilty as charged in the information.

Now on this day comes in person the defendant, James William Burney,

and being asked by the Court whether he had anything to say why the sentence of the law should not now be pronounced upon him, say s nothing.

It is therefore, the JUDGMENT, ORDER AND SENTENCE of the Court, that you, James William Burney,

for the crime of which you have been and stand convicted, be imprisoned in the State Penitentiary of the State of Florida at hard labor for a period of YOUR NATURAL LIFE, from the date of your delivery to the officers thereof.

(And the Court assessed the defendant $1.00 Court Cost)

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, L. D. Simmons, Clerk of Criminal Court of Record in and for Hillsborough County, do hereby certify the above to be a true and correct copy of the Judgment and Sentence of the Court in the above styled cause.

WITNESS my hand and Seal of said Court, this the 12th day of April A.D., 19 72.

L. D. SIMMONS, Clerk

By: _____
Deputy Clerk

CIRCUIT CRIMINAL