No.

IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN CHAVEZ, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIROARI TO
THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

Logan T. Mohs
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
appeals@ pd15.state.fl.us
lmohs@pd15.state.fl.us

TABLE OF CONTENTS (APPENDIX)

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

AGUSTIN CHAVEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D19-157

[May 7, 2020]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Cheryl Caracuzzo, Judge; L.T. Case No. 50-2017-CF-009149-AXXX-MB.

Carey Haughwout, Public Defender, and Logan T. Mohs, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Melynda L. Melear, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GROSS, GERBER and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

FELONY DIVISION Z
CASE NO. 50-2017-CF-009149-AXXX-MB

STATE OF FLORIDA

v.

AGUSTIN A CHAVEZ,
Defendant.
_____/

ORDER DENYING DEFENDANT'S THIRD MOTION TO CORRECT SENTENCING ERROR

THIS CAUSE came before the Court on Defendant's Third Motion to Correct Sentencing Errors, filed on December 23, 2019, pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) ("Motion"). The Court has carefully examined Defendant's Motion, the court file, and is otherwise fully advised in the premises.

STATEMENT OF THE CASE AND FACTS

On June 18, 2018, Defendant was charged by Amended Information with Robbery with a Deadly Weapon ("Counts 1 and 2") and Aggravated Battery (Deadly Weapon) ("Count 3"). Defendant proceeded to a jury trial and on October 19, 2018, the jury found Defendant guilty as charged. On November 5, 2018, the court entered an Order Granting Defendant's Motion for Judgment of Acquittal on Count 2. On January 2, 2019, Defendant was adjudicated guilty on Counts 1 and 3 and sentenced as a prison releasee reoffender ("PRR") to life in the Department of Corrections ("DOC") on Count 1 and to fifteen (15) years in the DOC on Count 3 with both sentences running concurrently. Defendant was awarded 473 days' credit for time served. On January 16, 2019, Defendant appealed his conviction and sentences.

On September 11, 2019, Defendant filed a Motion to Correct Sentencing Errors pursuant to Florida Rule of Criminal Procedure 3.800 (b)(2) which was granted by the Court on

September 20, 2019. On October 21, 2019, Defendant filed a Second Motion to Correct Sentencing Errors pursuant to Florida Rule of Criminal Procedure 3.800 (b)(2) which was granted by the Court on November 22, 2019. The Court entered an Amended Judgment correcting a scrivener's error on November 21, 2019 *nunc pro tunc* to January 2, 2019. On December 23, 2019, Defendant filed the instant Motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2).

LEGAL ANALYSIS AND RULING

In his Motion, Defendant argues that his PRR sentences violate the Sixth Amendment and he raises two arguments in support. First, Defendant argues that the "prior record exemption" to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013) should be overturned because (1) historical tradition require it to be overturned and (2) the exception affords too much opportunity for the State to perform an end-run around the Sixth Amendment. Second, Defendant argues that the "prior record exemption" does not apply under the facts of this case because (1) there is a question regarding identity and (2) the exception does not permit a judicial finding of a defendant's prior release date.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and beyond a reasonable doubt, except for facts of prior convictions. *Apprendi*, 530 U.S. at 490 (2000) (holding that "[o]ther that the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt".). Florida case-law squarely establishes that the facts necessary to establish PRR eligibility are facts of prior convictions and, therefore, do not need to be submitted to a jury and proven beyond a reasonable doubt. *Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015); *Gurley v. State*, 906 So. 2d 1264, 1265 (Fla. 4th DCA 2005) (stating that the date of the defendant's release from prison under the PRR statute is analogous to the fact of a prior conviction).

Accordingly, it is hereby

ORDERED that Defendant's Third Motion to Correct Sentencing Error is **DENIED.**

DONE AND ORDERED, in West Palm Beach, Palm Beach County, Florida this 3rd day of January, 2020.

50-2017-CF-009149-AXXX-MB 01/03/2020
Cheryl A. Caracuzzo Judge

50-2017-CF-009149-AXXX-MB 01/03/2020
Cheryl A. Caracuzzo
Judge

COPIES TO:

Logan T. Mohs, Esq., Assistant Public Defender	421 Third Street/6th Floor West Palm Beach, FL 33401	lmohs@pd15.org appeals@pd15.org jharring@pd15.org
Luisa Berti, Esq., & Bryan Puolton, Esq., Assistant State Attorneys	401 North Dixie Highway West Palm Beach, FL 33401	lberti@sa15.org bpoulton@sa15.org FELDIVZ@sa15.org e-postconviction@sa15.org
Perry Thurston, Esq. & Kemar Thomas, Esq., Assistant Public Defenders	421 Third Street/6th Floor West Palm Beach, FL 33401	pthurston@pd15.org kthomas@pd15.org FELDIVZ@pd15.org
Celia Ternzio, Assistant Attorney General	1515 North Flagler Drive Suite 900 West Palm Beach, FL 33401	crimappwpb@myfloridalegal.com

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

May 27, 2020

CASE NO.: 4D19-0157
L.T. No.: 17CF009149AMB

AGUSTIN CHAVEZ v. STATE OF FLORIDA

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's May 20, 2020 motion for written opinion, certification, and rehearing is denied.

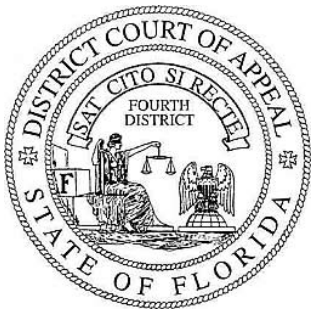
Served:

cc: Attorney General-W.P.B. Public Defender-P.B. Karen E. Ehrlich
Logan Mohs Melynda L. Melear

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

[Subsections (1)-(8) omitted]

(9)(a) 1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
a. Treason;
b. Murder;
c. Manslaughter;
d. Sexual battery;
e. Carjacking;
f. Home-invasion robbery;
g. Robbery;
h. Arson;
i. Kidnapping;
j. Aggravated assault with a deadly weapon;
k. Aggravated battery;
l. Aggravated stalking;
m. Aircraft piracy;
n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
o. Any felony that involves the use or threat of physical force or violence against an individual;
p. Armed burglary;
q. Burglary of a dwelling or burglary of an occupied structure; or
r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5);

within 3 years after being released from a state correctional facility operated by the Department of Corrections or a private vendor, a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence, or a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

2. "Prison releasee reoffender" also means any defendant who commits or attempts to commit any offense listed in sub-subparagraphs (a)1.a.--r. while the defendant was serving a prison sentence or on escape status from a state correctional facility operated by the Department of Corrections or a private vendor or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

a. For a felony punishable by life, by a term of imprisonment for life;
b. For a felony of the first degree, by a term of imprisonment of 30 years;
c. For a felony of the second degree, by a term of imprisonment of 15 years; and
d. For a felony of the third degree, by a term of imprisonment of 5 years.

(b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

(c) Nothing in this subsection shall prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084 or any other provision of law.

(d) 1. It is the intent of the Legislature that offenders previously released from prison or a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection, unless the state attorney determines that extenuating circumstances exist which preclude the just prosecution of the offender, including whether the victim recommends that the offender not be sentenced as provided in this subsection.

2. For every case in which the offender meets the criteria in paragraph (a) and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.

BE IT REMEMBERED that the following proceedings were had in the above-entitled cause of action before the HONORABLE CHERYL A. CARACUZZO, one of the Judges of the aforesaid Court, at the Palm Beach County Courthouse, 205 North Dixie Highway, located in the City of West Palm Beach, County of Palm Beach, State of Florida, on Wednesday, January 2, 2019, with appearances as hereinbefore noted, to-wit:

* * * * *

THE COURT: Are we almost ready? Because I'm now 15 minutes behind schedule. We've got seven people waiting for you guys to finish up paperwork, which should have been completed before court. I've been on this bench 15 minutes. Are we ready? I have my next hearing right now.

MS. BERTI: The State can call our first witness.

THE COURT: Well, yeah --

MS. BERTI: We're ready to proceed.

THE COURT: Okay, let's go.

WHEREUPON:

THOMAS BROOKS,

having been called as a witness on the State's behalf, and after being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE WITNESS: Yes.

THE COURT: Sir, good afternoon. Feel free to move that chair around as you see fit. If I can just remind you to speak into the microphone? Are we plugged back in?

Okay, great. Whenever you're ready.

DIRECT EXAMINATION

BY MS. BERTI:

Q. Detective, can you please state your name and spell your last name for the record? And also state where you work.

A. Detective Thomas Brooks. My last name is spelled B-R-O-O-K-S.

Q. And what's your badge number?

A. 7912.

Q. And where do you work?

A. The Palm Beach County Sheriff's Office.

Q. How long have you worked for the Palm Beach County Sheriff's Office?

A. Since June 3rd, 2005.

Q. And were you working at -- what is your actual capacity that you work in?

A. I'm a violent crimes detective assigned to the Robbery Unit.

Q. And were you working in that capacity in September of 2017?

A. I was.

Q. Does every PBSO case number have a unique case -- does every PBSO case have a unique case number?

A. Yes.

Q. And how does that get assigned?

A. By dispatch through our CAD system.

Q. And with regard to the case that you're here to testify about today, did in fact this case have a unique case number assigned to it?

A. It did.

Q. And do you remember that off the top of your head? Or would you like a copy of your report to refresh your recollection as to the case number in this case?

A. I believe it is 17-128145.

Q. Okay. Did you take anyone into custody under that case number in September of 2017?

A. I did.

Q. And do you remember specifically the date that you took someone into custody?
A. I'd have to refresh.
Q. Okay.
MS. BERTI: Permission to approach the witness, Judge?
THE COURT: You may.
Q. (By Ms. Berti) Is your memory refreshed by taking a look at that? And just let me know.
A. It is.
Q. Okay. And what was the date that you took someone into custody under this case number?
A. 9/17/2017.
Q. And who, in fact, did you take into custody under this case number on that date?
A. Agustin Chavez.
Q. Do you see Mr. Chavez here in the courtroom today?
A. I do.
Q. Can you point to him and identify him by an article of clothing he's wearing?
A. He's wearing a blue jumpsuit from the jail.
MS. BERTI: And let the record reflect that the witness has identified the

defendant.

THE COURT: It will reflect.

Q. (By Ms. Berti) Over the course of your investigation, did you fill out -- actually, I'm going to have you take a look at what's in front of you there.

What are you looking at there that you used to refresh your recollection?

A. It's an arrest or notice to appear booking sheet.

Q. Okay. And over the course of your investigation in this case with regard to Mr. Chavez, did you have an opportunity to fill out all of the biographical information on that sheet?

A. I did.

Q. And you had mentioned that Mr. Chavez's name is Agustin Chavez, correct?

A. Correct.

Q. Do you see that name reflected on that sheet?

A. I do.

Q. Does Mr. Chavez have a date of birth on that booking sheet?

A. He does.

Q. And what is his date of birth?

A. February 10th, 1990.
Q. Okay. Does it have a -- we're referring to him as Mr., but does it have a sex listed for Mr. Chavez?
A. It does, for male.
Q. Male?
A. Yes.
Q. Okay. Does it have a race listed?
A. Yes, it does. It's "W" for White.
Q. And does it have a height or weight listed?
A. Yes.
Q. What is Mr. Chavez's height?
A. Detail on this sheet is five foot, six inches.
Q. And how about his weight?
A. One hundred and 50 pounds.
Q. Okay. And I'm going to show to you -- well, I'm going to show to defense first what will be marked as State's Exhibit number 1.

MS. BERTI: Permission to approach the witness?

THE COURT: You may.

Q. (By Ms. Berti) Detective, I want you to take a look at this. And then when you're done

looking at it, just let me know if you recognize what I'm showing to you.

A. Thank you. I do.

Q. Okay.

MS. BERTI: And Judge, at this time, the State would move into evidence what's marked for identification as State's Exhibit 1 as a business record -- as a certified business record.

THE COURT: Okay. Any objection?

MR. THURSTON: No objection, Judge. I'd just reserve to cross-examine him on it.

THE COURT: Okay, no problem. Number 1 will be in evidence without objection.

(State's Exhibit 1 admitted)

Q. (By Ms. Berti) Okay. Detective, please take a look at that document that you have in front of you. Do you recognize what that document is?

A. I do.

Q. And what is that?

A. This is what we refer to as a pen pack, but it's from the Office of Executive Clemency and

all of his records.

Q. Okay. So his records from prison essentially?

A. Correct.

Q. Okay. And is there a name associated with that pen pack?

A. Yes.

Q. And what is the name associated with that pen pack?

A. There's multiple with a/k/a's.

Q. Okay. What is the name?

A. It's Antonio A. Chavez.

Q. What else?

A. Agustin A. Chavez.

Q. Tell -- if you wouldn't mind, just telling us what all of the names are with their a/k/a's?

A. Agustin A. Chavez, Agustin Chavez, Agustin Antonio Chavez, with multiple spellings.

Q. And is at least one of those names consistent with the name that you booked Mr. Agustin Chavez in under?

A. It is.

Q. Okay. Is there a date of birth on that pen pack?

A. There is two.

Q. Okay. So tell us what those two dates of birth are?

A. After the date of birth is 02/12/1990, along with an a/k/a of 02/10/1990.

Q. And is at least one of those dates of birth consistent with the booking information that you received when you arrested Mr. Chavez in September of 2017?

A. It is.

Q. And which one is it?

A. 02/10 of 1990.

Q. Okay. And does it list a race on there for Mr. Chavez?

A. Not on the first sheet. But, however, I will look further in the sheet. Yes, White.

Q. Okay. And is that consistent with the booking information that you booked in Agustin Chavez in under on September 17th of 2017?

A. It is.

Q. Does it have a height?

A. It does.

Q. And what is the height listed on that pen pack?

A. Five foot, six inches.

Q. Is that consistent with the information you got on September 17th of 2017?
A. It is.
Q. Does it have a weight for Mr. Chavez on there?
A. It does.
Q. And what is the weight that it has?
A. One hundred and 60 pounds.
Q. Okay. And what is the difference between the booking information you got and the weight -- the weight differential between those two weights?
A. The weight here is 160 pounds. However, I had 150 pounds. So ten pounds of difference.
Q. Okay. Does that document, that package that you have up there, does that contain any fingerprints?
A. It does.
Q. Okay. And do the fingerprints have a name associated with them?
A. They do.
Q. And what's that name?
A. Agustin Chavez.
Q. And does that pen pack also have a photograph on it?

A. It does.
Q. And how many photographs?
A. Two.
Q. Are those photographs consistent with Mr. Chavez as you encountered him on September 17th of 2017?
A. They are.
Q. Are they consistent with the gentleman that you see here in the courtroom today?
A. They are.
Q. On that penitentiary pack, does it have a date that tells you when, in fact, Mr. Chavez went into custody -- into the Department of Corrections' custody most recently?
A. It does.
Q. And what is that date?
A. Let's see. It appears to be 1/14 of '13.
Q. Okay. And does it have a date that Mr. Chavez was released from the Department of Corrections on that pen pack?
A. It does, 06/17 of '17.
Q. Okay. And how many months prior to your arrest of Mr. Chavez was he released from the Department of Corrections?

A. Three months.
Q. Okay.
MS. BERTI: I have nothing further of this witness, Judge.
THE COURT: All right. Any cross-examination?
MR. THURSTON: Yes, Judge, just briefly.

CROSS-EXAMINATION

BY MR. THURSTON:

Q. Detective Brooks.
A. Yes, sir.
Q. You've got both of those Exhibits in front of you?
A. I do.
Q. Okay. And with regard to your arrest and notice to appear, you said you had a date of birth of February 10th, 1990?
A. Correct.
Q. How did you obtain that date?
A. Through our database at the Sheriff's Department.
Q. Okay. And that's not information that you received from Mr. Chavez, correct?
A. Not from me; no, sir.

Q. Does any of your documents that you have have a different date of birth?

A. As in the documents presented in front of me?

Q. Yeah, the two. You've got the --

A. There's one that has February 12th, 1990. And it has an a/k/a next to it of February 10th, 1990.

Q. Do you know what his date of birth is?

A. It appears on this document to be either 2/12/1990, also is known to use 2/10 of 1990.

MR. THURSTON: I have no further questions, Judge.

THE COURT: Okay. Any redirect?

MS. BERTI: No, Judge.

THE COURT: Okay. May this witness step down?

MS. BERTI: Yes, Judge.

THE COURT: All right. Thank you, sir.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Turn to the State to call your next witness.

MR. VERES: Your Honor, at this

time the State calls Leonard Parsons.

MS. LAURIE: Judge, I'm actually going to switch out your scoresheet. They contested a trafficking. I just --

THE COURT: You just took it off? Okay.

WHEREUPON:

LEONARD PARSONS,

having been called as a witness on the State's behalf, and after being first duly sworn by the Clerk, was examined and testified under oath as follows:

THE WITNESS: I do.

THE COURT: Good afternoon, sir. Feel free to make yourself comfortable in that chair. You can move it around as you see fit. And if I can just remind you to speak into the microphone?

DIRECT EXAMINATION

BY MR. VERES:

Q. Good afternoon, Mr. Parsons. Can you spell your last name -- or state your full name and spell your last name for the record?

A. My name is Leonard Parsons, P-A-R-S-O-N-S.

Q. And where do you currently work?

A. I'm currently employed as a latent print examiner with the Palm Beach County Sheriff's Office.

Q. And how long have you worked as a print examiner?

A. I have a combined total of 31 years, 18 as a fingerprint examiner and 13 as a latent print examiner.

Q. Okay. Can you briefly describe what some of your duties are there?

A. I receive latents that were submitted by different law enforcement agencies, whether it be the PBSO or some local agencies, federal agencies. I compare them to known standards of an individual if I have them. And determine if they originated from the same source.

Q. Okay. And were you asked to do that kind of work in this case?

A. In this particular case, it was a fingerprint standard that was recorded to fingerprint standards that were previously recorded.

Q. Okay. And what is the unique case number, if you know, assigned to this case?

A. 17-128145 is the PBSO number. And then there's a court case number, as well.

Q. Okay. And did you render a written report in this case?

A. I did.

Q. Okay. And is that unique case number assigned to your report?

A. Yes.

Q. Okay. Now, did you actually go and collect the fingerprint standard in this case?

A. Yes, I did.

Q. And where did you do that?

A. I recorded them at the main detention center on December the 10th, 2018.

Q. Okay. And do you see the person whose fingerprints you collected present here in the courtroom?

A. Yes.

Q. Can you please point to them and identify them by something they're wearing?

A. The gentleman sitting in the corner over there in the dark jumpsuit.

Q. Thank you.

MR. VERES: Let the record reflect that the witness has identified the defendant.

THE COURT: It will reflect.

MR. VERES: Thank you. Your Honor, may I approach?

THE COURT: You may.

Q. (By Mr. Veres) I'm handing you what's been premarked as State's Exhibit 2 for identification. Do you recognize that?

A. Yes.

Q. And how do you recognize that?

A. It has my name and my identification num -- my ID number on it that I recorded the fingerprints.

Q. Okay. And do you see a PBSO case number on that document?

A. Court case number. Yes, and a PBSO number.

Q. Okay. And does that PBSO case number match the PBSO case number that you know to have been assigned to this case?

A. Yes.

Q. Okay. And do you see the defendant's name on that document?

A. Yes.

Q. And what is that name you see?

A. Agustin A. Chavez.

MR. THURSTON: Objection, hearsay, Judge.

THE COURT: Sustained.

Q. (By Mr. Veres) Did the defendant himself write his name on the document that you have?

A. Yes.

Q. Okay. And what is the date of birth of the defendant?

A. I have two dates of birth, 2/10 of 1990 and an a/k/a birth of -- date of birth of 2/12 of 1990.

Q. And what is the name that the defendant wrote on that document?

A. From what I can read, Agustin Chavez.

Q. Okay. Now, what date did you collect those prints on?

A. December 10th, 2018.

MR. VERES: Your Honor, at this time, the State would move State's Exhibit 2 into evidence.

THE COURT: Any objection?

MR. THURSTON: No objection, Your Honor.

THE COURT: Number 2 will be in evidence without objection.

(State's Exhibit 2 admitted)

Q. (By Mr. Veres) Now at some point, did you receive items to compare those fingerprints to?

A. Yes.

(Brief pause in the proceedings)

MR. VERES: Your Honor, may I approach?

THE COURT: You may.

Q. (By Mr. Veres) I'm approaching with what's been entered as State's 1. Now, do you recognize that?

A. Yes.

Q. Okay. And whose name do you recognize on that document?

MR. THURSTON: Objection, hearsay.

THE COURT: Overruled.

A. Agustin Chavez.

Q. (By Mr. Veres) Okay. Is that the same person whose prints you took in this case?

A. Yes.

Q. Okay. And how do you know that?

A. I compared the recorded fingerprints that I did on the 10th of December to the fingerprint document here. And I used the

identifying number, which was the court case number, along with the pen pack number.

Q. Okay.

MR. VERES: One moment, Judge.

THE COURT: Okay.

(Brief pause in the proceedings)

Q. (By Mr. Veres) Now at some point in this case, did you receive items to compare those fingerprints to?

A. Yes.

Q. Okay. And what is the document that I just handed to you?

A. It's the fingerprint document from the Department of Corrections.

Q. Okay. And are there prints contained in that document?

A. Yes.

Q. Okay. Now at any point, did you compare the prints contained in that document to the prints that you eventually collected from the defendant?

A. Yes.

Q. And on what did you do that?

A. I have it dated as December 10th, 2018.

Q. And did you indicate that date on that

document?

A. Yes.

Q. And do you see your signature on that document?

A. Yes.

Q. Okay. And which finger -- from which hand did you compare the prints to?

A. In this particular one, it's the right thumb of the defendant to the right thumb of the document -- fingerprint document.

Q. Okay. And what did you ultimately determine?

A. That they originated from the same source.

Q. Okay. And did you receive any other fingerprints in this case to evaluate?

A. Yes.

MR. VERES: Your Honor, may I approach?

THE COURT: You may. Is this -- just so our record is clear, what are you showing him, what Exhibit?

MR. VERES: It's State's Exhibit 3.

THE COURT: Three? I thought you

already showed him something before that. Did I miss something?

MS. BERTI: That was already in evidence.

THE COURT: That was -- so before, you were referring to number 2 or 1? Just so I know.

MS. BERTI: The last one would have been State's 1. And the one that was introduced through this witness would be State's 2.

THE COURT: Okay. And then he was comparing those two together?

MS. BERTI: Correct.

THE COURT: Okay, gotcha. So now you're showing him number 3? Okay, thank you.

Q. (By Mr. Veres) And what case number do you see documented on those prints?

A. There's a case number of the fingerprints that I compared, along with the case number assigned to this particular document.

Q. And is the case number assigned to that particular document 12-CF-007402?

A. Yes.

Q. Okay. And what is the name on those

prints?

A. Agustin A. Chavez.

Q. And what is the defendant's race on that document?

A. It's listed as White male.

Q. And what is the Social Security number that's listed?

A. [redacted].

Q. And the date of birth?

A. 2/12 of 1990.

Q. Okay. And do you see your initials and the date on that document?

A. Yes.

Q. Okay. And do you see a unique PBSO case number on that document?

A. Yes.

Q. And what is that number?

A. 17-128145.

MR. VERES: Your Honor, at this time, the State would move State's Exhibit 3 into evidence.

THE COURT: Any objection to 3?

MR. THURSTON: No objection.

THE COURT: All right. Number 3 is in evidence without objection.

(State's Exhibit 3 admitted)

Q. (By Mr. Veres) Now, did you compare any of the fingerprints in this case to the known standards that you collected from the defendant?

A. Yes.

Q. Okay. And which finger did you compare to the known standards?

A. In this particular comparison, I used the left thumb. Compared these -- the fingerprints that I recorded to the fingerprints of this document and determined they originated from the same source.

Q. And that same source would be the defendant who sits in court today?

A. Yes.

Q. And who is that defendant?

A. Mr. Chavez.

Q. Okay.

MR. VERES: One moment, Judge.

THE COURT: Okay.

(Brief pause in the proceedings)

MR. VERES: Nothing further, Judge.

THE COURT: Okay. Cross-examination?

MR. THURSTON: Thank you, Judge.

CROSS-EXAMINATION

BY MR. THURSTON:

Q. Mr. Parsons, how are you doing?

A. Fine, thank you.

Q. When you talked about Exhibit 3, the last one that you compared, you indicated a date of birth of 12/12 -- I'm sorry. You indicated a date of birth of February 12th, 1990?

A. That's what's stated -- written on the document.

Q. You didn't write that on there?

A. No.

Q. Neither did the defendant write that on there?

MS. BERTI: Objection, speculation.

THE COURT: Sustained.

Q. (By Mr. Thurston) Going back to your Exhibit 2, you said that you witnessed Mr. Chavez write his name on that document?

A. Yes.

Q. And then you said that it was an alternative date of birth, 12 -- February 10th or February 12th, 1990. Did he write that on there?

A. No.
Q. Who wrote that on there?
A. I was able to take those off the fingerprints that I compared, the documents.
Q. Okay. So he wrote his name, but you wrote everything else on there?
A. Yes, sir.
Q. And you also indicated that you rolled his prints from when you went to the jail on 12/10 of 2018; was that correct?
A. Yes, sir.
Q. And is it that same date that you made this comparison to all three of those other documents on 12/10?
A. Yes, sir.
Q. And the two -- the document that you obtained on 12/10 of 2018, you compared those to two other documents, correct?
A. The fingerprint standards that I recorded, I compared to two documents; yes, sir.
Q. And it was the case -- what was the two case numbers again that you compared it to?
A. The Department of Corrections number --
Q. Yes.
A. -- AW26512, which was listed on the

copies that I received along with these fingerprints.

Q. Okay.

A. And the second case number was on the standards that I compared, which was 12-CF-007 -- I'm not sure if that's -- it's 902 or 402, the way it's written.

Q. So one would be a comparison to a court case number. And one you compared it to a Florida Department of Corrections' number?

A. Yes, sir.

MR. THURSTON: Judge, I have nothing further.

THE COURT: Okay. Any redirect?

MR. VERES: Briefly, Judge.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. VERES:

Q. Mr. Parsons, when you took the defendant's prints, at any point in time did you see a bracelet of any sort being worn by the defendant?

A. Yes, sir. I looked at his ID bracelet.

Q. Okay. And what sort of ID information was contained on that bracelet?

A. The defendant's name, Agustin Chavez.
Q. And you were able to confirm the identifying information that was on his bracelet?
A. Yes, sir, I looked at it.
Q. Okay.
MR. VERES: One moment, Judge.
THE COURT: Okay.
(Brief pause in the proceedings)
MR. VERES: Nothing further, Judge.
THE COURT: All right. May this witness step down and be excused?
MS. BERTI: Yes, Judge.
THE COURT: Okay, great. Thank you, sir.
(Witness excused)
THE COURT: I'll turn to the State. Do you have any other witnesses?
MS. BERTI: No further witnesses, Judge.
THE COURT: Okay. Does defense have any witnesses it wishes to present?
MR. THURSTON: No, Judge, I do not.
THE COURT: Okay.

MR. THURSTON: I would just indicate to the Court that I did receive calls before I came into court --

THE COURT: That you received what? I'm sorry; I couldn't hear you.

MR. THURSTON: Oh, I'm sorry, Judge.

THE COURT: Calls?

MR. THURSTON: I received calls.

THE COURT: Okay. Why don't you come on up to a microphone just so I can make sure you're getting picked up. Are you about to tell me what witnesses said? Or something --

MR. THURSTON: Yeah, just what witnesses.

THE COURT: Oh, okay. For purposes of sentencing?

MR. THURSTON: Yes, Judge.

THE COURT: Okay. Before we get there, I just want to make sure. Have you had an opportunity to go over the scoresheet that was just handed me? Apparently they've taken off the trafficking, is that --

MS. LAURIE: It was a trafficking

of cocaine that evidently shouldn't have been there. I took it off.

THE COURT: Okay. So that's been removed. Have you seen that? And any objection to the scoresheet?

MR. THURSTON: Judge, I saw the initial scoresheet. We did object to that. And if that's taken off, then we don't have an objection.

THE COURT: Okay. So then moving -- if there's no other witnesses, do you want to move to arguments? Or do you want to proffer some witness testimony, Mr. Thurston?

MR. THURSTON: Judge, I just want to proffer the witness testimony.

THE COURT: Okay. Okay, go ahead.

MR. THURSTON: And it's witness Myrna Permeda (phonetic), who's the mother of the defendant, just asking that the Court show leniency towards her son.

And also asking that she -- if the Court sentences him, that he be sentenced to somewhere locally because of the family's lack of resources, as well as his sisters, Manuela, and Esmeralda Chavez, with the same request.

THE COURT: Okay. All right. So then we'll move to -- I'm assuming what everybody's been talking about here is pen packs. And is the defendant PRR? Is that the State's position?

MS. BERTI: Yes, Judge. The State at this point would ask that the Court take under consideration the fact that this defendant has been released from prison not only within three years, but within three months.

The State does believe that we've met our evidentiary burden in establishing that, namely through the testimony of these two witnesses who identified the defendant for the Court by name, by his date of birth, by his race, his height, a very similar weight, his sex, in addition to obviously the fingerprint evidence.

We had the print examiner testify to the fact that not only are the known standards taken from this defendant consistent with his most recent judgment for which he did go to prison, but additionally with his penitentiary packet.

The penitentiary packet obviously speaks for itself. But importantly, it also contains a photograph -- actually, if I could approach? I know the Court actually hasn't seen it.

THE COURT: Yeah, I haven't seen it yet. I was just going to -- thanks.

MS. BERTI: Not only does that pen pack contain all of the biographical information that we've been going over to include his name, which obviously does have some a/k/a's; his date of birth, which has these two a/k/a's; his race, his sex, his height and weight.

But most importantly, it has the photograph of the defendant, which obviously the Court can take a look at and make observations on its own as to whether or not that pen pack, in fact, is Mr. Chavez's pen pack.

So at this time, Judge, the State is asking the Court to find that, in fact, Mr. Chavez is a prison releasee reoffender. He was released from prison on June 17th of 2017. And the offense date in this case is September

17th of 2017.

So he does fit within the definition of prison releasee reoffender as to both crimes, robbery while in possession of a deadly weapon is a PRR -- well, is a PRR offense, as well as aggravated battery with a deadly weapon.

So the State is asking the Court to make that finding and then would ask the Court to proceed to sentencing under that sentencing guideline.

THE COURT: Okay. Mr. Thurston, argument on that?

MR. THURSTON: Yes, Judge. I would object to him being classified as PRR.

Also, I would just indicate to the Court that the -- with regards to the date of birth that's being reflected, everything that's been brought into evidence saying that his date of birth was 12/10 (sic) is inaccurate in that he is -- in fact, his date of birth is 12/12 (sic). And that that brings into question the reliability of the documents that's being utilized to declare him a PRR.

THE COURT: Okay. Based on the

pen pack that I've just seen, it does provide a photograph which the Court is looking at and taking notice that Mr. Chavez does appear to be the same person as listed in this photograph. It does give a date of birth of 12/12/1990 (sic). I do also recognize that in the court documents, there is an a/k/a of I believe February 10th, 1990.

However, on the totality of all of the evidence presented before me, based on the officer's testimony as well as Mr. Parsons' testimony, I have no reasonable doubt that this evidence is sufficient to prove that the defendant is, in fact, a prison releasee reoffender.

The pen pack indicates that he has been released within the three years from committing this crime. And I think as the State pointed out, it was actually a couple of months. So I'm finding that they have met their burden. I am finding that the defendant is a prison releasee reoffender and therefore will proceed to sentencing based on that.

Which now that I've declared him a PRR, I believe that the statute mandates that

I sentence him to the maximum. Is that correct, Mr. Thurston?

MR. THURSTON: Well, Judge, I know that there is a statute involved that mandates that. But I would be making arguments against that.

THE COURT: Okay, go ahead.

MR. THURSTON: As well as wanting the Court to possibly hear from Mr. Chavez, if he would like to address the Court.

THE COURT: Sure, of course. And what's your argument that I'm not -- that I'm at liberty not to follow the law as the legislature has pointed out? Once I find him PRR, I don't believe I have discretion.

MR. THURSTON: Well, Judge, I think that -- certainly there is a statute. But I think that the Constitution of the United States and the provision in Amendment Eight which indicates cruel and unusual punishment would dictate that this Court do have authority to not sentence him in that.

And my argument for that, Judge, would be that we're dealing with here a non-homicidal offense. And when you think

about the penalty that this statute mandates, it's life in prison. And I think that that in light of the fact that we're talking about neither of which -- the predicate offense or the offense that we're here for, neither are to that magnitude.

And I think that in light of -- as applied to his circumstances, of Mr. Chavez, that the Court would be well within its rights to indicate that the United States Constitution in Amendment Eight would dictate that, to sentence him -- to dictate to that statute under these circumstances would violate his constitutional rights.

THE COURT: Okay. Any other argument?

MR. THURSTON: No, Your Honor.

THE COURT: All right. So what I'm hearing is that you're kind of doing an oral motion to declare the PRR sentencing scheme as unconstitutional, as violating Amendment Eight with regard to cruel and unusual punishment?

MR. THURSTON: Well, Judge, as applied. Not to declare it unconstitutional,

but as applied to this offense --

THE COURT: Okay.

MR. THURSTON: -- wherein there is -- these are non-homicidal, either of the offenses are. I think that applies to this case, yes, that's what I'm asking, Judge.

THE COURT: Okay. And that will be denied.

So now that I've declared him as PRR. And obviously, is there an argument that somehow this Court has discretion to sentence him as anything other than life in prison or no? It was just the --

MR. THURSTON: Just my constitutional argument, Judge.

THE COURT: Okay. I just wanted to make sure I heard everything.

So, you said Mr. Chavez may want to say something? I don't know if he would like to before I announce sentencing? You can come on up, sir.

Mr. Chavez, you understand that by law, once I declare you a PRR, I have no discretion. It's life in prison. I think we went over this before trial, I believe.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. But did you want to say something?

THE DEFENDANT: Yes, Ma'am.

THE COURT: Okay.

THE DEFENDANT: I just wanted to apologize to the Court for everybody that participated in my trial that had anything to do with my case.

I made a mistake. And I know I've got to -- I've got to pay the consequences. I wanted to say that I feel that I was not given a fair trial, you know.

And that I hope that you take into consideration my situation and getting out of prison, I didn't have too much to look forward to out there. And I was in a jam and a messed up situation in life. And I made a mistake. And if you can have mercy on me.

THE COURT: Okay, all right. Anything else, sir? Okay.

All right, sir. Having found that you do meet the criteria for being declared a PRR, I am declaring you a prison releasee reoffender.

Having been convicted of a first-degree punishable by life for robbery with a deadly weapon. And you know I dismissed that second count, right? Did your attorney tell you that?

THE DEFENDANT: Yes, Ma'am.

THE COURT: Okay. So on Count -- I believe it was Count I; am I correct?

MS. BERTI: The named victim I believe appears as Count I in the Information. And the unnamed victim --

THE COURT: That's what I thought, okay. So as to Count I, that robbery with a deadly weapon, I'm sentencing you to life in prison without the possibility of parole.

And with the aggravated battery, which I believe was Count III?

MS. BERTI: Three.

THE COURT: Okay. I'm sentencing you to the statutory maximum, which I believe is 15 years in the Department of Corrections.

Those will run concurrent to each other.

Do you have credit -- the amount of time of credit? I know that there was

testimony that he's been in since 9/17, I believe, of 2017; is that correct? If someone can --

MS. BERTI: I can do that very quickly.

THE COURT: Okay.

MS. BERTI: Just also as -- just for clarification purposes as to Count II, you are also declaring him to be a prison release reoffender?

THE COURT: Yes, I declared him on both.

(Brief pause in the proceedings)

THE COURT: We're going to get your credit for your time served, sir, so I can orally pronounce that.

And then, Mr. Thurston, if you want to prepare an order for housing somewhere you said local, I'll be happy to sign that for you.

MR. THURSTON: Judge, I would prepare an order for a recommendation. But also I would ask the Court -- I would also prepare an order if the Court could hold him here if they choose not to place him for at

least 30 to 45 days --

THE COURT: I have no idea what you just said to me. Say it again; sorry.

MR. THURSTON: Judge, I would prepare an order requesting a recommendation for placement.

THE COURT: Okay.

MR. THURSTON: But that doesn't mean they're going to do that.

THE COURT: Right. No, I know.

MR. THURSTON: So I would ask the Court to enter an order holding him here in Palm Beach for the next 30 days just so -- in case he's sent somewhere else, the family will at least have a month to visit with him.

THE COURT: Okay. That request is denied. But I will do a local placement.

MR. THURSTON: Thank you, Your Honor.

MS. BERTI: And Judge, with regard to the defendant's credit, it would be from September 17th of 2017 to today, which comes out to 473 days.

THE COURT: All right. And you'll get credit, sir, for 473 days as time served.

Okay. Anything else to come before the Court on this matter?

MR. THURSTON: Judge, for purposes -- I'm going to file an appellate package.

THE COURT: Okay.

MR. THURSTON: But could we declare him indigent for purposes of appeal?

THE COURT: Yes, let's go ahead and declare -- yeah, Mr. Chavez indigent for purposes of the appeal and any costs associated with it.

MS. BERTI: And Judge, I also have the judgment, which I believe Your Honor's --

MS. LAURIE: I gave it to the Court.

MS. BERTI: Oh, you have? Okay.

THE COURT: Yeah, I think I signed -- well, I know I signed fingerprints. Hold on. Let me make sure. Yes, I signed it, okay.

THE CLERK: And Your Honor, court costs, are they going to be a judgment?

THE COURT: Yes. And do we have one, two and three? I have one.

THE CLERK: I have three.

THE COURT: Okay, let's make sure we have -- here's one. You have two now and three?

THE CLERK: Yes.

THE COURT: Okay. All right. Anything else that we need to do?

MS. BERTI: Nothing further from the State.

THE COURT: All right. We'll be in recess till the next case is ready.

MS. BERTI: Thank you, Judge.

(The proceedings concluded at 2:22 p.m.)

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

v.

AGUSTIN CHAVEZ,
Defendant
_____/

CASE NO. 50-2017-CF-009149-AXXX-MB

APPEAL NO. 4D19-0157

THIRD MOTION TO CORRECT SENTENCING ERRORS

The Defendant, through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), moves this Court to conduct a de novo resentencing hearing. This is Defendant's third (and final) motion related to his current sentence.

Undersigned counsel notes that the rules provide this Court with 60 days to rule on this motion, at which point it will be deemed automatically denied. Fla. R. Crim. P. 3.800(b)(2)(B). This Court may extend its time to rule or extend its time to conduct a new sentencing hearing, but it must do so explicitly and must do so before the expiration of the 60 days. *See Miran v. State*, 46 So. 3d 186, 188 (Fla. 2d DCA 2010) (describing both an order for the State to respond *and* an order extending jurisdiction as having been entered).

Statement of the Case

Defendant was adjudicated guilty of robbery with a deadly weapon and of aggravated battery with a deadly weapon. [Exhibit A]. He was sentenced as a prison releasee reoffender to life in prison on the robbery count and to fifteen years in prison on the battery count. [Ex. B]. The relief sought in this motion is a de novo resentencing hearing.

Defendant's PRR Sentences Violate the Sixth Amendment[1]

Preliminary Statement

Before beginning this argument, undersigned counsel recognizes that this Court must, under the current case law, deny the first argument raised below after the general background ("The 'Prior Record Exception' Should Be Overturned"), as well as the second sub-part of the second argument ("The 'prior record exception' does not apply to the date of release"). Counsel recognizes that *State v. Wilson*, 203 So. 3d 192 (Fla. 4th DCA 2016), read alongside *Lopez v. State*, 135 So. 3d 539 (Fla. 2d DCA 2014), which *Wilson* cites, stands squarely against those arguments.

---

[1] Although this motion focuses on Defendant's PRR sentences, the argument raised also applies to the inclusion of his alleged prior record on his scoresheet. Because the PRR sentences are mandatory, however, the scoresheet error is harmless. The fact that this motion does not spend time outside this footnote arguing that the scoresheet is incorrect should not be interpreted as a concession that the prior record on the scoresheet is accurate, and should not be viewed as a waiver of an objection to those points in any future sentencing hearing. The prior record section of the scoresheet violates the Sixth and Fourteenth Amendments.

However, counsel believes he has a good faith argument that *Wilson*, *Lopez*, and any similar cases were wrongly decided and should be overturned. In order to pursue this claim on appeal he must raise this issue in this Court so that it is preserved for consideration by the courts that can make the legal change required by the Sixth Amendment. *See Sandoval v. State*, 884 So. 2d 214, 216 n.1 (Fla. 2d DCA 2004) ("Counsel has the responsibility to make such objections at sentencing as may be necessary to keep the defendant's case in an appellate 'pipeline.'"); *see also* R. Regulating Fla. Bar 4-3.1 (stating that a lawyer may assert an issue involving "a good faith argument for an extension, modification, or reversal of existing law"); *United States v. Marseille*, 377 F.3d 1249 (11th Cir. 2004), 1257 & n.14 (defendant making an argument he knows must lose for purposes of preserving it for a later court).

Defendant also notes that there does not appear to be any binding precedent with regard to the first sub-part of the second argument raised below ("The 'prior record exception' does not apply when there is a question of identity").[2] This Court therefore can, and should, grant this motion based on that argument.

Argument — General Background

Florida's PRR statute violates the Sixth and Fourteenth Amendments in that it allows a judge to find facts that increase a defendant's minimum sentence by a

[2] If undersigned counsel has missed such a case in his research, he would simply restate his obligation to raise this argument along with the others.

preponderance of the evidence. *See* § 775.082(9)(a)3., Fla. Stat.[3] The constitutional deficiency is twofold: first, the Constitution requires that the fact-finder be a jury rather than the judge; and second, the standard of proof under the Constitution must be "beyond a reasonable doubt" rather than "preponderance of the evidence."[4] Defendant raises this issue as both a facial challenge to the PRR statute's constitutionality in all cases, but also as both a facial and an as-applied challenge to its constitutionality under the specific facts of his case.

The general principle applicable to heightened minimum sentences is clear: a jury must make the factual findings beyond a reasonable doubt. This rule was first made explicit in *Alleyne v. United States*, 570 U.S. 99 (2013), which states that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at 103. Under the PRR statute, a person found to be a PRR "is not eligible for sentencing under the sentencing guidelines and must be sentenced" to the maximum sentence normally allowed—life for a crime punishable by life, and 15 years for a second-degree felony. § 775.082(9)(a)3., Fla. Stat. In many situations, this mandatory sentence will be greater than the minimum otherwise allowed. *See* §§ 921.0012-.0027 (the Criminal Punishment

---

[3] This statute does not specify a fact-finder, but as a matter of practice in Florida the factual findings are made by a judge.

[4] These two go hand-in-hand. For ease of reading, this motion primarily refers to the jury-finding requirement, but all arguments are intended to apply equally to both claims.

Code (CPC)). Here, this was true: Defendant's minimum sentence under the CPC was 136.28 months in prison (approximately 11 years), whereas his minimum sentences under the PRR statute were, for his two counts, 15 years and life. [Ex. C]. There is therefore no doubt that the PRR statute implicates the *Alleyne* rule by increasing the mandatory minimum punishment for offenses. *See Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015) (rejecting an *Alleyne* argument to a PRR sentence on the merits, but recognizing that *Alleyne* was implicated).

There is also no doubt that the PRR statute violates *Alleyne*'s strict dictates by allowing a judge, rather than a jury, to find the necessary facts to increase the mandatory minimum sentence.

The determinative question is therefore whether the "prior record exception" to *Alleyne* is constitutionally valid. As described below, it originated only as dicta in the United States Supreme Court, and the arguments against it are based on both historical precedent and on the Supreme Court's more recent focus on the effect of statutes rather than the legislative labels given to various provisions. The exception should therefore be overturned and abolished altogether. Alternatively, even if the exception survives, it should not apply to the specific sorts of facts at issue in this case.

The "Prior Record Exception" Should Be Overturned

The prior record exception to the rule that a jury must find facts raising the maximum or minimum ends of a sentencing range is not viable and should be overturned. Making this argument requires detailing both the exception's origins and its evolution.

Legal Background

The earliest case necessary to understand the exception's current troublesome position is *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). There, the Supreme Court held that possession of a firearm during an offense was, under the statute at issue, properly characterized as a "sentencing consideration" rather than as an element of an offense. *Id.* at 91. In a brief final paragraph, the Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[5] *Id.* at 93. Although *McMillan* did not deal with a prior record, this final paragraph is the important first step in what led to that exception today.

The next case in this development is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Like *McMillan*, *Almendarez-Torres* is not directly on point because, although it did deal with a prior record, it dealt with it in the context of an

[5] The bulk of the opinion is devoted to making the sentencing-factor/element distinction; the conclusion drawn after that determination was made appears to have been foregone.

indictment rather than in the context of sentencing. *Id.* at 226. Because only elements, not sentencing considerations, must be included in an indictment, the question before the Court was which of these two groups a prior record was part of. *Id.* at 228. Based in large part on the fact that recidivism "is as typical a sentencing factor as one might imagine," phrased later as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" the Court held that a prior record is a sentencing factor rather than an element of the offense. *Id.* at 230, 243, 247. However, it is important to remember that this holding was intended to determine what must be charged in an indictment; it in fact explicitly left open the question about what standard of proof might be required for a sentencing factor that raised the maximum permissible sentence. *Id.* at 247-48.

Jones v. United States, 526 U.S. 227 (1999), is next on the legal journey. As with the previous two cases, the Court recognized that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Id.* at 232. Left unsaid, but implied as an essential part of that sentence, is the fact that, at the time, sentencing considerations had none of those three requirements. After determining that the relevant statute (not involving prior records) specified

elements rather than sentencing factors, *id.* at 239, the Court moved on to discuss counter-arguments to its holding. Relevant here is its discussion of *Almendarez-Torres*, where the Court recognized that its prior case did not deal with the question of jury findings, and instead was limited to what must be charged in an indictment. *Id.* at 248-49. The Court did recognize that a prior record was "potentially distinguishable" from other sentencing factors, based on the fact that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249. But it did not have to dive into that question further.

Our journey now arrives at the first of the two seminal cases on this issue: *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi*'s basic holding was that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. However, the holding included a brief statement before the language just quoted: "Other than the fact of a prior conviction, any fact that increases the penalty . . . ." *Id.* So where did that language come from, and why was it included in the holding?

The first mention of a prior record exception is found in section IV of the Court's opinion, where the Court discusses *McMillan* and *Almendarez-Torres*. *Id.* at 485-90. The Court recognized that *Almendarez-Torres* "represents at best an

exceptional departure from the historic practice [of connecting a sentencing range to the elements of a crime]." *Id.* at 487. Further discussion revealed that "Almendarez-Torres had *admitted* the three earlier convictions," meaning that "the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488.[6]

Just as Almendarez-Torres did not challenge the validity of his prior convictions in his case, Apprendi did not challenge the validity of *Almendarez-Torres* in his. *Id.* at 489. The Court recognized that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," but declined to revisit it, instead choosing "to treat the case as a narrow exception to the general rule." *Id.* at 489-90. This statement hearkened back to the one quoted above—*Almendarez-Torres* was "at best an exceptional departure from" historic practice; at worst (and in actuality), it was simply incorrect.

---

[6] Later, the Court used similar language to distinguish a prior record from the sentencing factors at issue: "[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496.

As can be seen from a close reading of *Apprendi*, the "[o]ther than the fact of a prior conviction" line was therefore far from a thoughtful and deliberate statement of a clear exception to the general rule being stated. It was, instead, a recognition of a prior precedent that was questionable but had gone unquestioned.

Nearly two years to-the-day after *Apprendi*, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002).[7] *Ring* dealt with a challenge to an Arizona death-penalty scheme previously upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 588-89. This time around, the Court invalidated the Arizona structure, which allowed a judge to make aggravation findings, because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602. In other words, the Court further eroded any distinction between an "element of a crime" and a "sentencing factor," at least insofar as the Sixth Amendment is concerned. *See id.* at 604-05. Notably, as was the case in *Apprendi*, Ring "[did] not challenge *Almendarez-Torres*" because his case did not involve past-conviction aggravating circumstances. *Id.* at 597 n.4.

---

[7] The same day, the Court also decided *Harris v. United States*, 536 U.S. 545 (2002). *Harris* held that *McMillan* was still good law after *Apprendi*, meaning that an increase in the lower end of a sentencing range could be found by a judge. *Id.* at 568. However, *Harris* was overturned by *Alleyne v. United States*, 570 U.S. 99 (2013), discussed below, making it not of particular importance to the overall argument presented. But it is still worth noting for its historical context.

Shepard v. United States, 544 U.S. 13 (2005), raised the question about what documents a trial court can look to when determining whether a prior conviction was for a certain crime, when the exact nature of that crime affects whether an enhancement to the current crime would apply. *Id.* at 16. Because allowing a trial court to consider police reports would violate *Apprendi*, the Court held that courts may only consider agreed-upon or objectively verifiable facts of prior offenses, not those that may be subject to dispute like the facts in a police report. *Id.* In so holding, the Court recognized that *Almendarez-Torres* allows a court to take judicial notice of prior convictions, but it held that records like police reports are "too far removed from the conclusive significance of a prior judicial record" to allow *Almendarez-Torres* to apply. *Id.* at 25.

Justice Thomas concurred, but in doing so he recognized that "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence." *Id.* at 27 (Thomas, J., concurring). Justice Thomas recognized that "a majority of the Court now recognizes that *Almendares-Torres* was wrongly decided," and he suggested that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.* at 28.

In 2013, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013), the second of the two seminal cases (*Apprendi* being the first). There, the Court undid the distinction between maximum and minimum sentences.

Id. at 103. The bottom line of *Alleyne* was that *Harris*, in which the Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment," was overruled.[8] *Id.* Notably for present purposes, just as in *Apprendi* itself, the defendant in *Alleyne* did not challenge the *Almendarez-Torres* prior record exception, so the majority "[did] not revisit it for purposes of [its] decision." *Id.* at 111 n.1.

Finally, the Court's most recent foray into *Apprendi* jurisprudence—*United States v. Haymond*, 139 S. Ct. 2369 (2019)—also did not involve any argument or challenge to the prior record exception. *See id.* at 2377 n.3. It simply applied *Alleyne* to a federal statute mandating a heightened sentence when supervised release is revoked for certain reasons. *See id.* at 2373-74.

Of course, the United States Supreme Court was not the only court acting during the time period between *McMillan* in 1986 and the present day. The first Florida cases of note are the simultaneously-issued, nearly identical cases of *Robinson v. State*, 793 So. 2d 891 (Fla. 2001), and *McGregor v. State*, 789 So. 2d 976 (Fla. 2001).[9] There, the defendants argued that the PRR statute violates the Sixth and Fourteenth Amendments as interpreted by *Apprendi*. *Robinson*, 793 So. 2d at 892. The Florida Supreme Court rejected that argument because of

---

[8] Justice Sotomayor's concurrence makes clear that *McMillan* was also overruled. *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring).

[9] Because *Robinson* has been cited about twice as often as *McGregor*, and because the two are nearly identical, this motion limits itself to citing only *Robinson*.

McMillan, which was at the time still good law. *Id.* at 893. Because the PRR statute does not affect the maximum penalty of a crime (instead only raising the minimum to be equal to the maximum), it did not violate *Apprendi*. *Id.* Although the court quoted the "[o]ther than the fact of a prior conviction" language from *Apprendi*, its holding was not based on this exception. *Id.* at 892-93.

Around the same time, however, the Fourth District Court of Appeal decided *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001). There, the court held that "the findings required under the habitual felony offender statute [which deal with prior convictions] fall within *Apprendi's* 'recidivism' exception." *Id.* at 893-94. This holding was reaffirmed in *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004). Similar holdings over the years, applying the prior record exception to HFO and PRR sentences, have issued from the various District Courts of Appeal around the state. *E.g.*, *Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004). Finally, the Florida Supreme Court did adopt the prior record exception as an alternative holding in its affirmance in *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004), which raised an *Apprendi* challenge to a habitualization statute.

Argument

The prior record exception to *Apprendi* and *Alleyne* should be overturned both in Florida and federally.

To start, it is important to recognize that the prior record exception is not in fact binding law from the United States Supreme Court. Although *Apprendi* includes the prior record exception in its holding—"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"—the exception is dicta. *Apprendi*, 530 U.S. at 490.

Judicial dicta is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although the prior record exception was certainly considered and passed on by the Supreme Court, it was not essential to the decision in *Apprendi* because the case did not involve the defendant's prior record. Because of that, it was not directly addressed by the Court.

And in fact, the same is true of all post-*Apprendi* cases. As described above, no case would have turned out differently had the exception not been present. The exception is therefore best viewed not as something mandatorily required by the

supremacy clause, but rather as a "we'll decide this later" exception put to the side by a Court hesitant to wade into unnecessary and treacherous waters. *See Apprendi*, 530 U.S. at 489 (dodging the question of whether the *Almendarez-Torres* exception was correct).

The Florida courts that consider this case should therefore recognize that nothing about *Apprendi*, *Alleyne*, or the related United States Supreme Court cases require the prior record exception be applied. Instead, it is only Florida precedent that commands it. Because the Florida Supreme Court applied the prior record exception as an alternative holding in *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004), both this Court and the Fourth DCA are bound. *See Parsons v. Fed. Realty Corp.*, 143 So. 912 , 920 (Fla. 1931) (stating that alternative holdings are binding, not dicta).[10] The Florida Supreme Court, however, should consider this issue on its merits and not feel compelled to apply the prior record exception out of a misplaced belief that it is commanded by the United States Supreme Court.

But that only establishes that both the Florida Supreme Court and the United States Supreme Court have the power to overturn the prior record exception. The more important issue is why that action should be taken. There are two reasons: first, because the exception flies in the face of the Sixth Amendment and historical roots; and second, because the distinction between sentencing factors and criminal

[10] Remember, however, that the prior record exception was not an alternative holding in *Apprendi*. As described above, the exception was dicta.

elements has eroded, resulting in unsustainable distinctions whereby a prior record is in some cases an element required to be proven to a jury and in others it is a sentencing factor allowed to be found by a judge.

As detailed by Justice Thomas in his concurrence in *Apprendi*, the long historical tradition has been to view "every fact that is by law a basis for imposing or increasing punishment" as an element and thus subject to a requirement for a jury finding. *Apprendi*, 530 U.S. at 499-518 (Thomas, J., concurring) (quote at 501 and 518); *see also id.* at 477-85 (majority opinion). Notably, this included recidivism enhancements. *Id.* at 506-09 (Thomas, J., concurring). The reason was simple: the question of a prior record "is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment." *Id.* at 508 (quoting *Hines v. State*, 26 Ga. 614, 616 (1859)). The *McMillan* distinction between "elements" and "sentencing factors" was therefore itself a relatively modern and groundbreaking distinction, not one arising from the common law or tradition. *Id.* at 500, 518.

This historical analysis, however, is not the end of the story. As Justice Thomas recognizes toward the end of his concurrence, the Sixth Amendment question is not "whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence," but rather "[w]hat matters is the way by which a fact enters the sentence." *Id.* at 520-21. If the fact merely

influences a court's discretion, it is a sentencing factor and need not be tried by a jury. *Id.* at 521. If, on the other hand, it sets or increases the punishment as a matter of law, then it is an element and must have a jury determination. *Id.*

The oddity of disconnecting recidivism from any other sentencing factor was also identified by Justice Scalia in his dissent in *Almendarez-Torres*. There, Justice Scalia questioned "how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue." *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting). The only way that could be true is if recidivism was a special exception to a general rule, but that conclusion would be "doubtful." *Id.*; *see also id.* at 258-60 (showing how a recidivist exception would go against precedent); *see also Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (calling the holding of *Almendarez-Torres* a "grave constitutional error affecting the most fundamental of rights").

The prior record exception is therefore without any justifiable legal foundation. The historical practice was to have all elements, including recidivist elements, found by a jury. *McMillan* created a new distinction between sentencing factors and elements, and that distinction persisted through various cases. But *McMillan* is no longer good law. *See Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). And the overall trend in modern case law has been to undo the

distinction *McMillan* created and repair the case's grave constitutional error. The final remnant of the distinction appears to be the prior record exception. It is time for that too to be put to rest. The Sixth Amendment and historical tradition require it to be overturned.

The second reason to reject the prior record exception is because it allows legislatures to play games with language to defeat or avoid the limits of the Sixth Amendment. Florida has multiple crimes where the existence of a prior commission of a similar crime is an element of the new crime charged. For example, repeated convictions for DUI can escalate to the crime to a felony. *See* § 316.193(2), Fla. Stat.; *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000). The same is true of felony petit theft. § 812.014(3); *Smith v. State*, 771 So. 2d 1189 (Fla. 5th DCA 2000). And of course, the crime of being a felon in possession of a firearm requires that the person be a felon—that is, have a prior conviction. § 790.23(1). In each of those cases, a jury is required to make the necessary findings of the prior conviction, either in a bifurcated proceeding (DUI and theft) or as an element turning innocent conduct criminal (felon in possession). *See Harbaugh*, 754 So. 2d at 694 (DUI); *Smith*, 771 So. 2d at 1191 (theft); *Rodriguez v. State*, 174 So. 3d 457, 458 (Fla. 4th DCA 2015) (describing the instructions to be given, although focusing on the non-felon elements).

But if the prior record exception to *Apprendi* and *Alleyne* is constitutional, this entire structure could be avoided if the legislature simply created a PRR-like statute imposing heightened maximum sentences based on prior records. That is, rather than having the elements of felony petit theft include a prior felony, the legislature could simply declare that any person convicted of petit theft, who is then found during sentencing to have a prior offense for the same crime, could be sentenced to up to five years in prison notwithstanding the ordinary maximum sentence for that crime. Whether a judge or jury has to make the finding of a prior felony would depend only on how the legislature structured the statutes, which is exactly what the *Apprendi* line of cases has sought to avoid. *See Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than authorized by the jury's guilty verdict."); *see also id.* (calling the distinction between elements and sentencing factors "constitutionally novel and elusive").

The prior record exception affords too much opportunity for states to perform an end-run around the Sixth Amendment by categorizing some prior records as elements and others as sentencing enhancements. Prior records are prior records and should be treated alike. And as shown by the requirement to have a jury determine a person's prior record in situations like those described above, the

Sixth Amendment requires that the alike treatment should be to require a jury determination of a prior record in all cases.[11]

Because the prior record exception is not mandated by the United States Supreme Court, Florida may do away with it. And regardless of whether Florida may, or if the United States Supreme Court is the only body that can, the prior record exception should be overturned. This should be done first because the Sixth Amendment should not have exceptions, as shown by its history and argued by various Justices since the prior record exception began to take form. And second, because in its current form, the prior record exception invites the very inconsistency and legally myopic focus on labels that *Apprendi* and company reject. A prior record is a prior record. Whether the crime is "repeated DUI" or the crime is "DUI" and an enhancement is "prior DUI," the end result is the same. A court that can should reject the distinction, overturn the prior record exception, and hold that *all* factors that raise the legal minimum or maximum penalty faced by a defendant must be proven by the State to a jury beyond a reasonable doubt.

---

[11] That is, all cases where the maximum or minimum sentences are increased by the determination. This argument is not intended to suggest that trial courts cannot consider prior records to determine a sentence within a defined range. *See Alleyne*, 570 U.S. at 116-17.

The "Prior Record Exception" Does Not Apply Under the Facts of this Case

The remainder of this motion proceeds under the assumption that this Court has rejected the above argument against the prior record exception as a whole. However, even if the prior record exception does have a place in Florida and United States jurisprudence, its application has expanded beyond its justification. This case presents two ways in which the prior record exception should be found unconstitutional both facially and as-applied: it should not apply when there are legitimate questions of identity, and it should not apply to facts such as a prison release date which do not inhere in the prior record itself.[12]

The 'prior record exception' does not apply when there is a question of identity.

Although the concept of proving someone's prior record may seem straightforward, there are a number of elements that must actually be established. First, there must have been a judgment against a person. Second, that judgment must be for a specific crime. And third, the person the judgment is entered against must actually be the person who is now being sentenced. The first two steps prove that there is *a* prior record. The third step is what proves that the record proven to exist is in fact *the defendant's* prior record. Additionally, in the context of statutes

[12] These questions exist in all cases, making this a facial challenge. But they also are particularly at issue in this case, meaning that even if the facial challenge fails, the prior record exception (and therefore the PRR statute) are unconstitutional as applied to Defendant.

like the PRR statute, there are further elements that must be established related to incarceration. It must be established that the judgment for a specific crime (element two) led to a sentence of incarceration. It must then be established that the incarceration has not legally ended, or that it ended within the past three years. And of course, like with the third step described above, it must be established that the person who was released after a sentence of incarceration was in fact the defendant sitting before the court. It cannot be enough to prove that *someone* was convicted and then released from prison within the past three years, it must be proved that *the defendant* is that person. *See* § 775.082(9), Fla. Stat. (listing all criteria for a PRR sentence).

The distinction drawn above is not revelatory. In fact, Florida courts around the state have been applying it since before *Apprendi* was decided. *See, e.g.*, *Hargrove v. State*, 987 So. 2d 679, 680 (Fla. 2d DCA 2007); *Wilson v. State*, 830 So. 2d 244, 245 (Fla. 4th DCA 2002); *Rivera v. State*, 825 So. 2d 500, 501 (Fla. 2d DCA 2002); *Hemmy v. State*, 835 So. 2d 272 (Fla. 2d DCA 2001); *Wencel v. State*, 768 So. 2d 494, 495 (Fla. 4th DCA 2000); *Brown v. State*, 701 So. 2d 410, 410 (Fla. 1st DCA 1997); *Louis v. State*, 647 So. 2d 324, 325 (Fla. 2d DCA 1994); *Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st DCA 1991). In all of those cases, the issue was whether the State introduced sufficient evidence to meet its burden of proof to show that the defendant had a prior conviction. The judgments

were fine on their faces, but the State failed to adequately connect the judgments to the defendants. The cases were therefore all reversed.

This case also involves the distinction between *someone* having a prior record and the defendant *being that someone*. The only difference with the cases string-cited above is that Defendant is not challenging the sufficiency of the State's evidence, but rather the fact-finder to whom that evidence was presented. Even assuming the Constitution allows a judge to make a finding that a prior record exists, it does not allow the judge to make the completely separate finding that the record reflects the legal history of the person sitting before them—no matter how much evidence the State introduces. To see why this distinction matters, it is important again to look at the reasoning behind the prior record exception's existence as described by the Supreme Court.

Although the prior record exception has its roots in *Almendarez-Torres*, *Jones* is where the justification for treating a prior record different from any other fact took clear form. The Court in *Jones* suggested that the reason for a distinction was that "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249. In other words, a prior record is different from any other fact because the defendant has already had the opportunity to

dispute the allegations. The Constitution does not guarantee the defendant a second chance to claim he is not guilty of whatever crime he was previously convicted of because he was already afforded the full panoply of trial rights the first time around. It is only when there are new allegations for which those rights have not yet been afforded that the Sixth Amendment requires a jury finding before the sentencing range can be changed.

Apprendi continued to apply this reasoning. Recognizing that *Almendarez-Torres* was "at best an exceptional departure from . . . historic practice," the Court relied on the fact that "Almendarez-Torres had *admitted* the three earlier convictions" and noted that those convictions "had been entered pursuant to proceedings with substantial procedural safeguards of their own." *Apprendi*, 530 U.S. at 487-88. Said slightly differently shortly thereafter, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488. This sentiment was repeated one more time at the close of the opinion when the Court rejected the prosecution's argument: "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to

require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496.

In *Shepard*, the Court drew a distinction between disputed facts that were controlled by *Almendarez-Torres*—those that have "the conclusive significance of a prior judicial record—and those that are closer to the debatable findings "subject to *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25. The Court held that police reports were more akin to the latter and therefore that a judge could not rely on the contents of those reports in prior cases when making a determination of what the prior conviction actually was for. *Id.* What *Shepard* therefore reveals is that, even when a prior conviction is what is being considered, there are facts related to and involved with the conviction that may still be in dispute in future cases.

What these cases[13] show is that the prior record exception makes logical and legal sense only when it is applied to those things for which constitutional procedural safeguards have already been applied. When the question is "did the person on the judgment commit this previous crime?" the answer can be found by a judge because the person on the judgment has already had the benefit of a jury to make that determination. But when the question is "was the crime committed of type X or type Y," that question can be answered by a judge only if the objective judicial records are beyond dispute. A judge cannot answer that question through

[13] Notably, *Alleyne* did not address the issue of the prior record exception, so no justification was given in that case. *Alleyne*, 570 U.S. at 111 n.1.

reliance on such things as police reports, which the defendant would have had no meaningful constitutional method to challenge. *See generally Shepard*.

Here, the issue of identity is one of those facts that, although closely related to the prior conviction, is not inherent in the objective judgment. It is important to note that there are two questions of identity: first, was the prior crime committed by the person charged in that case; and second, was the person convicted in the prior case the same person as the defendant in front of the court for sentencing for this subsequent case? The justification for the prior record exception deals only with the first question. A jury has already been impaneled (or a plea entered) to determine that the original defendant committed the originally-charged crime. But no jury has ever answered the second question of whether that same individual who was previously convicted is in fact the person in front of the court for sentencing on a subsequent crime, because the sentencing hearing on the subsequent crime would be the first time this question would naturally arise.

This case presents a clear instance of where this distinction matters. Unlike Almendarez-Torres, who admitted that the prior record was accurate and was in fact his own, the Defendant in this case objects to the conclusion that the records introduced are his at all. Defendant does not concede the accuracy of the prior records (those things that may be able to be found by a judge) because he has no knowledge of their truth, but the more important challenge, at least for this section

of this motion, is to the prior records' applicability to him as an individual. Simply put, the court records may establish that *someone* received a prison sentence following certain crimes, but they do not establish that that same person was released from prison within three years of Defendant's crimes, and they also do not establish that either of those potential people were in fact Defendant himself.

Defendant has a right to have a jury make all findings related to his minimum and maximum sentences. The only situation in which he would not have that right is where a jury has already made the determination and a simple record check can confirm it. That is why, if Defendant admitted he was the person from the prior judgments, he would not be entitled to a new trial on the original facts to prove those crimes occurred. But he does not make that admission. The State therefore is required to prove that Defendant is the same person as was previously convicted. And it must prove that in accordance with the Sixth Amendment right to a jury trial. The prior record exception cannot constitutionally apply to the question of whether a defendant was the same person as someone previously convicted, it can only apply to the questions of whether a previous conviction exists and what that conviction was for.

Because there is a legitimate question as to whether the prior record information introduced at sentencing is in any way related to Defendant,[14] a jury determination beyond a reasonable doubt of that fact was required. Assuming the prior record exception is not overturned in its entirety, it still should only be applied to those aspects of a prior record that can be conclusively established by indisputable court records that reflect facts already found by a jury in accordance with the Sixth Amendment. Those aspects do not include the disputed question in this case of whether the records for "Augustin A. Chavez" born "02/12/90" refer to the person before the court for sentencing—"Agustin A Chavez," born "02/10/1990." [*Compare* Ex. A *with* Ex. D].[15]

The Sixth Amendment as interpreted by *Alleyne* requires a jury to make the finding beyond a reasonable doubt that "Agustin A Chavez" is in fact "Augustin A. Chavez." Because the PRR statute allowed the trial judge to make that determination by a preponderance of the evidence, it is unconstitutional both facially and as applied to the facts of this case.

---

[14] This case involves different spellings of names, as well as different birthdays. It therefore is not necessary for any court to pass on the question of whether a defendant could challenge a prior record as being his when there are no discrepancies. Such a case may need to be determined at some point, but the question of whether there must be a prima facie showing of a contested issue of fact, and what that might look like, does not need to be decided today.

[15] Defendant recognizes there was evidence that the two men were the same, but that simply makes the issue clearer. It is a jury's job to evaluate evidence and make factual findings based on its determination of reliability and credibility.

The 'prior record exception' does not apply to the date of release.

As explained in the previous section, the justification for the prior record assumption rests on the premise that a jury has already considered the defendant's claim, and therefore that there is no need for a second jury to reconsider those claims when a judge can simply find them to be true. But as is the case with identity, discussed above, so too is the question of a release date from prison one that has never been resolved in accordance with the Sixth Amendment. The prior record exception to *Apprendi* and *Alleyne* therefore cannot permit a judicial finding of a defendant's prior release date, as is permitted by Florida's PRR statute. Instead, the question of the date of release must be submitted to the jury.

Because this argument is largely the same as that made above, and because it is foreclosed by binding precedent on this Court as explained at the outset,[16] Defendant will not belabor it here. The basic structure of the argument is simply that the date of release, like the identity of the current and previous defendants, is not in fact derivative of a conviction itself.

To briefly make this point clear, imagine a scenario in which a person is released from prison early due to the application of gain time. But due to human or technological error, the exact date of release is misidentified on the prison's prison documentation. Three years later, the person commits another crime and the State

[16] *See State v. Wilson*, 203 So. 3d 192, 193-94 (Fla. 4th DCA 2016); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014),

seeks a PRR sentence. It turns out, however, that the person would be ineligible for PRR given their actual date of release, but that they appear eligible given the date on their documentation.

This sort of error does occur. For example, in *Mitchell v. Mitchell*, 198 So. 3d 1096 (Fla. 4th DCA 2016), the Fourth DCA noted a disconcerting feature of its record. *Id.* at 1097 n.1. Somehow the official Broward County clerk's timestamp on a petition was for a time earlier than when the events that the petition described occurred. *Id.* The Fourth DCA did not have to dig further into how this error arose, but the fact that it did is all that matters here. People, even those in the clerk's office or in a prison records room, make mistakes, and official records are not always accurate.

The above possibility shows the need to have a jury make the factual determination of when a person was released from prison. The conviction itself does not provide for an actual date of release, and prison records may be erroneous through misconduct, incompetence, or innocent accident. The fact that the prison records are not even records of the court, but instead are records of the State itself as a party to the case, only increases the concern with placing blind trust in their accuracy.

Because the date of release from prison is not in fact derivative of a prior conviction, and because no jury has ever made the determination of when the

actual date of release was, the prior record exception cannot be applied to the date of release without running afoul of the Sixth and Fourteenth Amendments.

Conclusion

For the reasons described above (especially the identity argument that is not precluded by binding case law), Defendant respectfully moves this Court to conduct a de novo resentencing hearing at which *Alleyne* will preclude a non-jury-found PRR designation.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Attorney for Agustin Chavez
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF SERVICE

I hereby certify that copy hereof has been furnished to Assistant Attorney General Celia Terenzio, CrimAppWPB@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401; Hon. Cheryl Caracuzzo, 205 N. Dixie Hwy, West Palm Beach, FL 33401; Assistant State Attorneys Luisa Berti and Bryan Poulton, both at 401 N. Dixie Highway, West Palm Beach, FL 33401; Assistant Public Defenders Perry Thurston, Jr., and Kemar Thomas, both at 421 Third St., West Palm Beach, FL 33401; and Agustin Chavez W26512, Florida State Prison, PO Box 800, Raiford, FL 32083, this 23d day of December, 2019.

/s/ Logan T. Mohs
Of Counsel

Exhibit A

Defendant's 12/23/2019 Motion to Correct Sentencing Errors

Judgment
(2 pages)

IN THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2017CF009149AMB
DIV: Z
OBTS NUMBER:

STATE OF FLORIDA

v.

AGUSTIN A. CHAVEZ,
W/M,
02/10/1990, [redacted]
_____/

[ ] PROBATION VIOLATOR
[ ] COMMUNITY CONTROL VIOLATOR
[ ] RETRIAL
[ ] RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by PUBLIC DEFENDER - DIVISION Z – Perry Thurston (attorney)

[X] Having been tried and found guilty of the following crime(s):	[ ] Having entered a plea of guilty to the following crime(s):	[ ] Having entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE
1	Robbery with a Deadly Weapon	812.13(1)and(2)(a)	1F PBL
3	Aggravated Battery (Deadly Weapon Bodily Harm)	784.045(1)(a)2 and (2)	2F

[X] and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[X] and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.

[ ] and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED [ ] The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on [ ] probation and/or [ ] Community Control under the supervision of the Dept. Of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED [ ] The Court hereby defers imposition of sentence until

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 2nd day of January 2019.

Cheryl Caracappa
CIRCUIT COURT JUDGE

FILED
Circuit Criminal Department
JAN 02 2019
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

1 of 2

IN THE CRIMINAL DIVISION OF THE CIRCUIT/COUNTY COURT OF THE FIFTEENTH JUDICAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. **50-2017-CF-009149-AXXX-MB** DIV. **Z: Felony - Z (Circuit)**

OBTS NUMBER: **5002317974**

STATE OF FLORIDA

V

AGUSTIN A CHAVEZ
DEFENDANT

[ ] COMMUNITY CONTROL VIOLATOR

[ ] PROBATION VIOLATION

February 10, 1990[1]	WHITE[1]	Male[1]	
DATE OF BIRTH	RACE	GENDER	SOCIAL SECURITY NUMBER

The fingerprints below are those of said Defendant taken by Deputy Sheriff ADEA, SEAN 9114

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	4. R. RING	5. R. LITTLE
				
6. L. THUMB	**7. L. INDEX**	**8. L. MIDDLE**	**9. L. RING**	**10. L. LITTLE**
				

THE COURT CERTIFIES that the fingerprints shown above are those of the Defendant and were placed thereon by said Defendant in the Court's presence in Open Court at Palm Beach County, Florida, this 2nd of January, 2019.

Cheryl Caracappa

CIRCUIT/COUNTY COURT JUDGE

2 of 2

Exhibit B

Defendant's 12/23/2019 Motion to Correct Sentencing Errors

Sentence Orders
(7 pages)

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 17CF009149AXX

OBTS NO.: _____

Agustin Chavez /
DEFENDANT

SENTENCE

(As to Count(s) 1)

The Defendant, being personally before this Court, accompanied by the Defendant's attorney of record, PD, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____ pursuant to §_____, Florida Statutes, plus all costs and additional charges as outlined in the Order assessing additional charges, costs and fines as set forth in a separate order entered herein.

The Defendant is hereby committed to the custody of the:

[✓] Department of Corrections
[ ] Sheriff of Palm Beach County, Florida
[ ] Department of Corrections as a youthful offender

for a term of Life. It is further ordered that the Defendant shall be allowed a total of 473 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run [ ] consecutive to [✓] concurrent with (check one) the following:

[ ] Any active sentence being served
[✓] Specific sentences: Counts 1 & 3

[ ] The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s)_____

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

[ ] The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.

[ ] Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE and **ORDERED** in open court in Palm Beach County, Florida this 2nd day of January, 2019.

Cheryl Caracappa
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 17CF009149AXX

OBTS NO.: _____

Agustin Chavez /
DEFENDANT

SENTENCE
(As to Count(s) 3 _____)

The Defendant, being personally before this Court, accompanied by the Defendant's attorney of record, PD _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____ pursuant to §_____, Florida Statutes, plus all costs and additional charges as outlined in the Order assessing additional charges, costs and fines as set forth in a separate order entered herein.

The Defendant is hereby committed to the custody of the:
[X] Department of Corrections
[ ] Sheriff of Palm Beach County, Florida
[ ] Department of Corrections as a youthful offender
for a term of 15 YRS. It is further ordered that the Defendant shall be allowed a total of 473 days as credit for time incarcerated prior to imposition of this sentence. It is further ordered that the composite term of all sentences imposed for the counts specified in the order shall run [ ] consecutive to [X] concurrent with (check one) the following:
[ ] Any active sentence being served
[X] Specific sentences: Counts 1 & 3

[ ] The instant sentence is based upon the Court having previously placed the Defendant on probation and having subsequently revoked the Defendant's probation for violation(s) of condition(s)_____

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

17CF ~~9149~~ A90 XXX

[ ] The Sentencing Court objects to the Defendant being placed into the Youthful Offender Basic Training Program pursuant to Florida Statute §958.045.

[ ] Pursuant to §322.055, 322.056, 322.26, 322.274, Florida Statutes, The Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of the Court is ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

DONE and **ORDERED** in open court in Palm Beach County, Florida this 2nd day of January, 2019.

Cheryl Caracappa
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SENTENCE WITH SPECIAL PROVISIONS

(As to Count(s) 1c3)

Defendant: Agustin Chavez

Case Number: 17CF009149AXX

OBTS Number: _____

The Defendant, being personally before this Court, accompanied by the defendant's attorney of record, PD, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why Defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

By appropriate notation, the following additional provisions apply to the sentence imposed:

—

FIREARM
It is further ordered that the _____ (___) year minimum imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

1c3

PRISON RELEASEE RE-OFFENDER
The Defendant is adjudicated a prison release re-offender and has been sentenced in accordance with the provisions of Florida Statute 775.082(9). The Defendant shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Additionally, the Defendant must serve 100 percent of the statutory maximum. The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

—

DRUG TRAFFICKING
It is further ordered that the _____ mandatory minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

—

CONTROLLED SUBSTANCE WITHIN 1,000 FEET OF SCHOOL
It is further ordered that the 3-year minimum imprisonment provision of section 893.13(1)(c)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

—

HABITUAL FELONY OFFENDER
The Defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the Court are set forth in a separate order or stated on the record in Open Court.

—

HABITUAL VIOLENT FELONY OFFENDER
The Defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of ____ year(s) must be served prior to release. The requisite findings by the Court are set forth in a separate order or stated on the record in Open Court.

THREE TIME VIOLENT FELONY OFFENDER
The Defendant is adjudicated a three-time violent felony offender and has been sentenced in accordance with the provisions of Florida Statute 775.084(4)(c). The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

VIOLENT CAREER CRIMINAL
The Defendant is adjudicated a habitual violent offender and has been sentenced to an extended term in accordance with the provisions of Florida Statute 775.084(4)(d). A minimum term of _____ years must be served prior to release. The requisite findings by the Court are set forth in a separate order or stated in the record in Open Court.

DUI MANSLAUGHTER
It is further ordered that the Defendant shall serve a mandatory minimum of four (4) years before release in accordance with Florida Statute 316.193.

LAW ENFORCEMENT PROTECTION ACT
It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with section 775.0823, Florida Statutes. (Offenses committed before January 1, 1994)

CRIMES AGAINST LAW ENFORCEMENT OFFICERS (check one)
[____] The Defendant having been convicted of Aggravated Assault on a Law Enforcement Officer, it is further ordered that the Defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(2)(c).
[____] The Defendant having been convicted of Aggravated Battery on a Law Enforcement Officer, it is further ordered that the Defendant shall serve a minimum of 5 years before release in accordance with Florida Statute 784.07(2)(d).
[____] The Defendant having been convicted of Battery on a Law Enforcement Officer and having possessed a firearm or destructive device during the commission of said offense, it is further ordered that the Defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(3)(a).

CAPITAL OFFENSE
It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes. (Offenses committed before October 1, 1995)

SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN
It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count. (Offenses committed before January 1, 1994)

TAKING A LAW ENFORCEMENT OFFICER'S FIREARM
It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count. (Offenses committed before January 1, 1994)

SEXUAL OFFENDER/SEXUAL PREDATOR DETERMINATIONS:

SEXUAL PREDATOR
The Defendant is adjudicated a sexual predator as set forth in section 775.21, Florida Statutes.

SEXUAL OFFENDER
The Defendant meets the criteria for a sexual offender as set forth in section 943.0435(1)(a)1a., b., c., or d.

AGE OF VICTIM
The victim was _____ years of age at the time of the offense.

AGE OF DEFENDANT
The Defendant was _____ years of age at the time of the offense.

Case No 17CF009149AXX
Defendant: Agustin Chavez

RELATIONSHIP TO VICTIM
The Defendant is not the victim's parent or guardian.

SEXUAL ACTIVITY [F.S. 800.04(4)]
The offense _____ did _____ did not involve sexual activity.

USE OF FORCE OR COERCION [F.S. 800.04(4)]
The sexual activity described herein _____ did _____ did not involve the use of force or coercion.

USE OF FORCE OR COERCION/UNCLOTHED GENITALS [F.S. 800.04(5)]
The molestation _____ did _____ did not involve unclothed genitals or genital area.
The molestation _____ did _____ did not involve the use of force or coercion.

OTHER PROVISIONS:

CRIMINAL GANG ACTIVITY
The felony conviction is for an offense that was found, pursuant to section 874.04, Florida Statutes, to have been committed for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

RETENTION OF JURISDICTION
The Court retains jurisdiction over the Defendant pursuant to section 947.16(4), Florida Statutes.

SUSPENDED AND/OR SPLIT SENTENCES:

Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in a separate order entered herein.

However, after serving a period of _____ imprisonment the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections, according to the terms and conditions of probation as set forth in a separate order entered herein.

Followed by a period of _____ on probation under the supervision of the Department of Corrections, according to the terms and conditions of probation as set forth in a separate order entered herein.

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

DONE AND ORDERED in Open Court at Palm Beach County, Florida on this 2nd day of January, 20 19.

Cheryl Caracappa
Circuit Judge

Exhibit C

Defendant's 12/23/2019 Motion to Correct Sentencing Errors

Scoresheet
(3 pages)

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

The Criminal Punishment Code Scoresheet Preparation Manual is available at: http://www.dc.state.fl.us/pub/sen_cpcm/index.html

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE
1/2/2019	☐DC ☒SAO Berti Levison ~~GRIMES, KRISTEN~~	PALM BEACH	CARACUZZO, CHERYL

5. NAME (LAST, FIRST,M.I.)	6. DOB	8. RACE	10. PRIMARY OFF.DATE	12
CHAVEZ, AGUSTIN A.	2/10/1990	☐B ☒W ☐OTHER	9/16/2017	PLEA ☐
	7. DC # W26512	9. GENDER ☒M ☐F	11. PRIMARY DOCKET # 17CF009149AMB	TRIAL ☑

I. PRIMARY OFFENSE: If Qualifier, please check ☐A ☐S ☐C ☐R (A=Attempt, S=Solicitation, C=Conspiration, R=Reclassification)

FELONY DEGREE	F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
1PBL	812.13 1 2A	ROBBERY WITH A DEADLY WEAPON	9	

(Level - Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116) **I. 92.00**

Prior capital felony triples Primary Offense points ☐

II. ADDITIONAL OFFENSE(S): Supplemental page attached ☐

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS		POINTS		TOTAL
	1	784.045 1A1 2	8	☐ ☐ ☐ ☐	1	x	37	=	37
Description	AGGRAVATED BATTERY (DEADLY WEAPON AND BODILY HARM)								
				☐ ☐ ☐ ☐		x		=	0
Description									
				☐ ☐ ☐ ☐		x		=	0
Description									

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐ **Supplemental page points** 0.00

II. 37.00

III. VICTIM INJURY:

		Number	Total			Number	Total
2nd Degree Murder	240 X		= 0	Slight	4 X		= 0
Death	120 X		= 0	Sex Penetration	80 X		= 0
Severe	40 X		= 0	Sex Contact	40 X		= 0
Moderate	18 X	1	= 18				

III. 18.00

IV. PRIOR RECORD: Supplemental page attached ☒

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER		POINTS		TOTAL
1	812.133 1 2a	9	☐ ☐ ☐ ☐	CARJACKING (DEADLY WEAPON)	1	x	23	=	23
2	784.045 1a1 2 2	7	☐ ☐ ☐ ☐	AGG BATTERY (DEADLY WEAPON BODILY HARM)	1	x	14	=	14
3	812.014 1 2c	2	☐ ☐ ☐ ☐	GRAND THEFT	1	x	0.8	=	0.8
3	893.13 6a	3	☐ ☐ ☐ ☐	POSSESSION OF COCAINE	1	x	1.6	=	1.6
2	810.02 1 3b	7	☐ ☐ ☐ ☐	ATTEMPT TO COMMIT BURGLARY OF A DWELLING	1	x	14	=	14
1	784.03 1	M	☐ ☐ ☐ ☐	BATTERY	3	x	0.2	=	0.6

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29) **Supplemental page points** 8.70

IV. 62.70

Page 1 Subtotal: 209.70

FILED
Circuit Criminal Department
JAN 02 2019
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

NAME (LAST, FIRST, MI)	DOCKET #
CHAVEZ, AGUSTIN A.	**17CF009149AMB**

Page 1 Subtotal: **209.70**

V. Legal Status violation = 4 Points
☐ Escape ☐ Fleeing ☐ Failure to appear ☐ Supersedeas bond ☐ Incarceration ☐ Pretrial intervention or diversion program
☐ Court imposed or post prison release community supervision resulting in a conviction **V.** _____

VI. Community Sanction violation before the court for sentencing **VI.** **0.00**
☐ Probation ☐ Community Control ☐ Pretrial Intervention or diversion
☐ 6 points for any violation other than new felony conviction x _____ each successive violation OR
☐ New felony conviction = 12 points x _____ each successive violation if new offense results in conviction before or at same time as sentence for violation of probation OR
☐ 12 points x _____ each successive violation for a violent felony offender of special concern when the violation is not based solely on failure to pay costs, fines, or restitution OR
☐ New felony conviction = 24 points x _____ each successive violation for a violent felony offender of special concern if new offense results in a conviction before or at the sametime for violation of probation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points **VII.** _____

VIII. Prior Serious Felony = 30 Points **VIII.** _____

Subtotal Sentence Points **209.70**

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enf. Protect.			Drug Trafficker	Motor Vehicle Theft	Criminal Gang Offense	Domestic Violence in the Presence of Related Child (offenses committed on or after 3/12/07)	Adult-on-Minor Sex Offense (offenses committed on or after 10/1/14)
_____ x 1.5	_____ x 2.0	_____ x 2.5	_____ x 1.5	_____ x 1.5	_____ x 1.5	_____ x 1.5	_____ x 2.0

Enhancement Subtotal Sentence Points **IX.** **0.00**

TOTAL SENTENCE POINTS **209.70**

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non_state prison sanction. If the total sentence points are 22 points or less, see Section 775.082(10), Florida Statutes, to determine if the court must sentence the offender to a non_state prison sanction.

If total sentence points are greater than 44:

209.7 (total sentence points) minus 28 = **181.7** x.75 = **136.28** (lowest permissible prison sentence in months)

If total sentence points are 60 points or less and court makes findings pursuant to both Florida Statutes 948.20 and 397.334(3), the court may place the defendant into a treatment-based drug court program.

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the Code exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

LIFE + 15 YEARS
maximum sentence in years

		Years	Months	Days
☒ State Prison	☒ Life			
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation	☐ Modified			

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison release reoffender, or a ☐ mandatory minimum applies.
☐ Mitigated Departure ☐ Plea Bargain ☐ Prison Diversion Program
Other Reason _____

JUDGE'S SIGNATURE Cheryl Caracappa

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

RULE 3.992(b) CRIMINAL PUNISHMENT CODE SUPPLEMENTAL SCORESHEET

NAME (LAST, FIRST, M.I.)	DOCKET#	DATE OF SENTENCE
CHAVEZ, AGUSTIN A.	17CF009149AMB	1-2-19

II. ADDITIONAL OFFENSE(S):

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS		POINTS		TOTAL
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

II. 0.00

IV. PRIOR RECORD:

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER		POINTS		TOTAL
3 /	812.13 1 2C /	5 /	☐ ☐ ☐ ☐	ATTEMPTED ROBBERY /	1	x	3.6	=	3.6
2 /	812.019 1 /	5 /	☐ ☐ ☐ ☐	DEALING IN STOLEN PROPERTY /	1	x	3.6	=	3.6
3 /	538.04 4a /	1 /	☐ ☐ ☐ ☐	FALSE VERIFICATION OF OWNERSHIP /	1	x	0.5	=	0.5
* /	/	M /	☐ ☐ ☐ ☐	VARIOUS MISD /	5	x	0.2	=	1
/	/	/	☐ ☐ ☐ ☐	/		x		=	0
/	/	/	☐ ☐ ☐ ☐	/		x		=	0

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

IV. 8.70

Reasons for Departure - Mitigating Circumstances

(reasons may be checked here or written on the scoresheet)

☐ Legitimate, uncoerced plea bargain.

☐ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.

☐ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.

☐ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.

☐ The need for payment of restitution to the victim outweighs the need for a prison sentence.

☐ The victim was an initiator, willing participant, aggressor, or provoker of the incident.

☐ The defendant acted under extreme duress or under the domination of another person.

☐ Before the identity of the defendant was determined, the victim was substantially compensated.

☐ The defendant cooperated with the State to resolve the current offense or any other offense.

☐ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.

☐ At the time of the offense the defendant was too young to appreciate the consequences of the OFFENSE.

☐ The defendant is to be sentenced as a youthful offender.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence.

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

Exhibit D

Defendant's 12/23/2019 Motion to Correct Sentencing Errors

First Page of DOC Records Introduced at Sentencing
(1 page)

FLORIDA DEPARTMENT OF CORRECTIONS

XXXX 4 W26512 USER ID: XXXXXXX
NAME: CHAVEZ, AUGUSTIN A. DOC NO: W26512 STATUS: INACTIVE

OVERALL INMATE RECORD AS OF 10/31/17 TIME: 12:16

THE FOLLOWING INFORMATION IS FROM THE RECORD OF THE INMATE NAMED ABOVE. SOME DATA AS WELL AS RELEASE DATE(S) ARE SUBJECT TO CHANGE WITH THE AWARD OF AND/OR FORFEITURE OF GAIN TIME OR PROVISIONAL CREDITS OR WITH A CHANGE IN SENTENCE STRUCTURE OR INMATE STATUS.

LOCATION:
OVERALL TERM: 5 YRS 0MOS 0DAYS
CUSTODY GR: CLOSE SINCE: 03/01/13
DATE OF BIRTH: 02/12/90 SEX: MALE
BIRTHPLACE: FLORIDA HT: 5' 6"
SOC.SEC.NO.:
FILE IMAGING: COMPLETE RECORD IMAGED
PROVISIONAL RELEASE DATE: NO CREDITS
TENTATIVE RELEASE DATE: 06/17/2017
LAST PROV.AWARD: 0 DAYS ON / /
LAST GAIN TIME: 0 DAYS ON 05/31/17
RACE: WHITE EYES: BROWN
FBI NO: FDLE:

****

THE FOLLOWING DATES ARE SET BY THE FLORIDA COMMISSION ON OFFENDER REVIEW.
QUESTIONS ABOUT THESE DATES SHOULD BE DIRECTED TO THAT AGENCY AT (850)488-1655.
CONTROL RELEASE DATE: / / PRESUMPTIVE PAROLE DATE: 99/99/9999

****

INMATE SENTENCES AS OF 10/31/17 TIME: 12:16

THE PRIOR INMATE RECORD REFLECTS THE DATE THE OFFENDER WAS RELEASED.
EXTERNAL MOVEMENTS WILL REFLECT THE TYPE OF RELEASE.
THE CURRENT INMATE RECORD IS COMPRISED OF CONCURRENT AND/OR CONSECUTIVE SENTENCES WHICH ARE COMBINED TO ESTABLISH THE OVERALL TERM.

--- PRIOR INCARCERATION ---

IMPOSED	COUNTY	CASE NO.	OFFENSE	YRS	MO	DY	RELEASED
02/27/09	PALM BEACH	50-0712445	BURG/DWELL/(ATTEMPT)	1	6	0	02/13/10

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 06 UNIFORM: 502007CF012445AXXXMB
85% MINIMUM RELEASE DATE: 11/23/2009

--- LATEST INCARCERATION ---

01/09/13	PALM BEACH	50-1208119	TRAFFIC IN STOLEN PR	2	8	0	10/25/14

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 05
85% MINIMUM RELEASE DATE: 10/09/2014

01/09/13	PALM BEACH	50-1208119	COMMERCIAL FRAUD < $	2	8	0	10/25/14

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 01
85% MINIMUM RELEASE DATE: 10/09/2014

01/14/13	PALM BEACH	50-1207402	ROBB. NO GU(ATTEMPT)	5	0	0	06/17/17

SPEC.PROV.: PAROLE INEL

Malinda A. Graham CSAC 10/31/2017

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

AGUSTIN CHAVEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 4D19-0157
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit
In and For Palm Beach County

CAREY HAUGHWOUT
Public Defender
Fifteenth Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, Rules, and Other

STATEMENT OF THE CASE AND FACTS

Appellant Agustin Chavez beat up two men behind a convenience store before looking in their pockets and leaving the scene. [T. 250-51].[1] More details of the theories of the case are provided below, but in short the State believed this was a robbery, whereas Chavez argued he acted in self-defense when the men turned on him, and that the purported theft was only him seeking to obtain his own property back. [T. 245, 250-51]. The video evidence does not clearly show what led to the eventual confrontation. [*See* State's Exhibit 3 (on disc)].

The State originally charged Chavez with two counts: robbery against the victim named Garciamendez,[2] and resisting an officer without violence.[3] [R. 68-69]. A few days later the State filed an amended information, changing the listed birthdate for Chavez from 02/12/1990 to 02/10/1990. [R. 68-69, 72-73]. Those informations were both filed in October of 2017. [R. 69, 73].

Chavez's attorney deposed Garciamendez and the arresting officer on February 14, 2018. [*See* R. 145]. On June 18, 2018, the State amended the charges to be robbery *with a deadly weapon* of Garciamendez, robbery with a deadly weapon of the second victim believed to be named Ismael Perez, and

[1] The April 8, 2019 record and all supplemental records are denoted by [R. XX]; the pagination is continuous through these documents. The April 8, 2019 transcript is denoted by [T. XX].
[2] Garciamendez's name is spelled various ways throughout the record.
[3] The resisting charge was related to his eventual arrest at a different location. [*See* R. 59-60]. It is not particularly relevant to this appeal except to note its existence.

aggravated battery with a deadly weapon on the second victim. [R. 110-11]. The deadly weapon alleged was a glass bottle.[4] [R. 111].

On July 9, 2018, Chavez moved to redepose Garciamendez and the officers in the case. [R. 136-37]. The reason given was the State's amendment of the information. [R. 136]. Chavez argued that his original deposition, performed four months before the amendment, had not covered topics related to the new charges and the now enhanced first charge. [R. 136]. A few weeks later, Chavez amended his motion to redepose by adding additional details regarding the procedural history of the case. [R. 145-47].

At a hearing on the motion, Chavez specifically argued that his previous depositions, conducted before the State amended its charging information, did not involve any meaningful discussion about the bottle. [R. 472-73]. That was because the original information did not mention a weapon, which the bottle was alleged to be. [R. 472-73]. Additionally, the previous depositions occurred before one of the alleged victims was ever involved in the case. [R. 474].

The State argued that Chavez had already covered the issue of the bottle because some questions regarding that had been asked at the earlier depositions. [R. 475-77]. After hearing these arguments, the trial court denied the motion to redepose the witnesses. [R. 481].

[4] The bottle is only specifically mentioned in Count Three, but based on the record as a whole the bottle is clearly what is referenced in the other counts.

At trial, the State's theory of the case was that Garciamendez and Perez were having some beers behind a convenience store when they joined Chavez to drink with him. [T. 244]. Chavez then attacked the two men with a beer bottle. [T. 245]. After the attack, he went through their pockets and took money. [T. 245].

Chavez's position was that this was not an unprovoked attack. [T. 248]. Instead, the incident the State described was actually the second part of a meeting between the men. [T. 248]. The first part was the men drinking in front of the store, which was not captured by any video. [T. 248]. The men agreed to buy drugs from Chavez, so all three went behind the store to do that deal. [T. 249]. The two men then attempted to rob Chavez of his drugs. [T. 249]. When the men began to hold their own beer bottles aggressively, as if they were about to his Chavez, he retaliated in self-defense by punching one of them. [T. 249-50]. After Chavez successfully defended himself, he went through the men's pockets not for money, but for the crack pipe they had stolen from him while smoking. [T. 251]. When he could not find the pipe, he took Garciamendez's shoes instead. [T. 388].

The fundamental question for the jury in this case was therefore whether Chavez was a robber, or whether he was a robbery victim who managed to fight off his assailants. [T. 252].

Both Garciamendez and Chavez testified consistently with the theories of the case described above. [T. 254-308, 380-417]. Perez did not testify, as he could not be located.[5] [*See* T. 146]. Chavez's attorney extensively cross-examined Garciamendez, impeaching him with his inconsistent deposition testimony. [T. 281-307]. A key focus of this impeachment was on how Garciamendez said in his deposition that Chavez hit him with his fist rather than with a bottle. [T. 283-89, 294].

The jury found Chavez guilty as charged on all three counts, specifically finding that he carried a deadly weapon (and a weapon generally) during the robberies. [R. 168-69; T. 586-87]. After the trial, the court granted a reserved motion for judgment of acquittal on Count Two, leaving only Counts One and Three for sentencing. [R. 214].

At sentencing, the State offered evidence that Chavez qualified as a Prison Releasee Reoffender. [R. 383-409]. The trial court recognized some discrepancies with the evidence, but nevertheless determined that the evidence was sufficient for it to find Chavez qualified. [R. 414-15]. Based on that finding, the court sentenced Chavez to life in prison for Count One and to 15 years in prison for Count Three. [R. 224-30, 419-20].

[5] Because of this, the information was amended a final time mid-trial to omit his name and to proceed with just "John Doe" as the victim name. [R. 160-61].

Chavez timely appealed. [R. 239-40].[6]

During the pendency of this appeal, Chavez filed a 3.800(b)(2) motion arguing that the Prison Releasee Reoffender statute was unconstitutional both facially and as-applied, because the necessary findings were not made by a jury. [R. 563-94]. The trial court denied that motion. [R. 612-14].

[6] The trial court sentenced Chavez on January 2, 2019. [R. 225]. Chavez's notice of appeal was filed two weeks later, on January 16, 2019. [R. 239]. This Court has jurisdiction. Fla. R. App. P. 9.030(b)(1)(A) (jurisdiction over final orders), 9.140(b)(1) (permitting appeals by criminal defendants), 9.140(b)(3) (allowing 30 days for a notice of appeal).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion by not allowing Chavez to redepose the alleged victim and relevant officers after the State amended its information to include two new charges and an enhancement to its original charge. Chavez therefore was essentially precluded from having any deposition on these important elements and charges.

The prior record exception to *Apprendi* and *Alleyne* should be overruled. Even if it does survive in some manner, it should not apply to the facts of this case which involve questions of identity and of prison release date.

ARGUMENT

I. The trial court abused its discretion by denying Chavez's motion to redepose witnesses after the State amended its information to add new charges and to enhance one already made.

Standard of Review

Issues related to discovery are reviewed for an abuse of discretion. *See J.S. v. State*, 45 So. 3d 910, 911 (Fla. 4th DCA 2010).

Argument

In criminal cases, "no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause." Fla. R. Crim. P. 3.220(h)(1).

Here, Chavez was originally charged with one count of robbery and one count of resisting an officer without violence. [R. 68-69, 72-73]. Importantly, the robbery charge did not allege the use of any weapon. [R. 68, 72]. It was these charges that were active when Chavez deposed Garciamendez and the arresting officers. [*See* R. 145]. Eight months after the original charges were filed, and four months after the depositions were taken, the State amended the charges to be two counts of robbery and one count of aggravated battery. [R. 110-12]. These amended charges included an entirely new victim, and included the addition of a "deadly weapon" element to all counts. [R. 110-12].

Chavez moved the trial court to permit him to retake the depositions he had already taken of Garciamendez and the arresting officers. [R. 145-46]. The good cause alleged was that there were new charges not covered in the previous depositions, and that the previous depositions had not covered the issue of a weapon in any detail because it was not pertinent to the charges at the time. [R. 145]. However, after the State argued that the bottle was mentioned at the previous depositions, the trial court denied Chavez's motion to redepose. [R. 481].

The trial court abused its discretion by finding that Chavez had not shown good cause for a second deposition. Chavez never had the opportunity to depose the State's key trial witness—Garciamendez—regarding one of the charges he was convicted of (Count Three). And he never had the opportunity to depose that key witness nor either of the arresting officers regarding an essential element of the crimes—the bottle as a deadly weapon.

The importance of the bottle cannot be understated in this case. As originally charged, the robbery would have been a second-degree felony. [R. 72]. Once the bottle was included, it became a first-degree felony punishable by life. [R. 110]. Because this was a prison releasee reoffender case, that change meant that Chavez's exposure increased from a maximum of 15 years in prison to a mandatory life sentence. § 775.082(9), Fla. Stat.

The change made by the State was therefore similar in kind (although greater in magnitude) to an amendment from petit theft to grand theft. A deposition for petit theft could reasonably not include any mention of value, or at least not any in-depth probing of how value was known. If such a deposition were taken, and then the charges amended to include grand theft, the defendant would have no way to depose on a vital element of the charges.

Both this case and the above hypothetical reveal a troublesome and potentially dangerous outcome should this issue be affirmed. The State will be incentivized to bring lower charges missing key elements, allowing depositions to occur without consideration for those elements, and then springing a trap on defendants by increasing the charges. This tactic would essentially deny defendants the right to depose witnesses on the actual charges.

In the trial court, the State relied on *J.S. v. State*, 45 So. 3d 910 (Fla. 4th DCA 2010), in support of its claim that the first depositions were sufficient despite the amended information. J.S.'s original charge was for lewd or lascivious conduct, which requires touching a person "in a lewd or lascivious manner" without regard to where the touching occurs. *Id.* at 910-11. At a deposition, the victim was asked and answered questions about where she was touched. *Id.* at 911. After the charges were amended to lewd and lascivious molestation, which is the same as lewd or lascivious conduct except with specific body parts, J.S. was not

permitted to redepose the witness. *Id.* This Court held that this was not an abuse of discretion under the "particular facts of this case," including defense counsel's admission that he should have covered that area in more detail. *Id.*

J.S. is distinguishable because in that case there was no changed testimony between the deposition and the evidence at trial. From the opinion as a whole, it appears that the victim testified in her deposition that she was touched in the relevant areas, and the charges were amended based on that testimony. *Id.* Then, at trial, presumably she testified consistently (otherwise the verdict makes little sense).

Here, however, Garciamendez changed his testimony at trial and said that he was hit by a bottle when, in the limited discussion at his deposition, he testified it was with a fist. [R. 473; T. 281]. Garciamendez told the jury that the reason for the change was because he was using words that did not translate well. [T. 288]. At the time of the first deposition, it was perfectly reasonable for Chavez to not focus on the fist/bottle distinction because that was irrelevant to the charges brought. But had there been a deadly weapon component to the charges when the deposition occurred, Chavez would have focused on the distinction and made sure to lock Garciamendez into his fist testimony without any language ambiguity. His impeachment at trial regarding the fist and bottle would therefore have been stronger. Additionally, because this was a he-said/he-said swearing context

between Garciamendez and Chavez about who was attempting to rob whom, the impeachment of Garciamendez on the fist/bottle issue would have also served to impeach him with regard to Chavez's overall self-defense claim. To a juror, Garciamendez lying about (or at least not remembering) what happened in one detail might have introduced reasonable doubt as to whether he was testifying incorrectly regarding other details.

A defendant is entitled to conduct depositions regarding the charges against him. He should not be required to anticipate and depose on all possible greater offenses the State Attorney may decide to amend the charges to. And he certainly should not be required to anticipate and depose on charges involving an alleged victim who is not even mentioned in the charging information active at the time of the deposition. Because Chavez was unable to conduct a thorough deposition of the witnesses regarding not-yet-charged crimes and a not-yet-charged aggravating element, as he had no reason to think questions on those topics were necessary, the trial court erred by denying his motion to redepose those witnesses once the necessity became clear.

Chavez therefore respectfully requests that this Court reverse the trial court's abuse of discretion in denying his motion to redepose and to remand for a new trial.

II. The trial court erred by imposing a PRR sentence without a jury finding.

Standard of Review

The denial of a motion to correct sentencing error is reviewed de novo. *Brooks v. State*, 199 So. 3d 974, 976 (Fla. 4th DCA 2016).

Argument

The trial court erred by denying Chavez's 3.800(b)(2) motion that raised the argument reproduced with only minor alterations below. [*See* R. 563-614]. The overall argument is that Chavez's prison releasee reoffender ("PRR") sentences violate the Sixth and Fourteenth Amendments.[7]

Preliminary Statement

Before beginning this argument, undersigned counsel recognizes that this Court must, under the current case law, deny the first argument raised below after the general background ("The 'Prior Record Exception' Should Be Overturned"). The Florida Supreme Court case *Gudinas v. State*, 879 So. 2d 616 (2004), applies the prior record exception as an alternative holding for affirming. *Id.* at 618.

[7] Although this Issue focuses on Chavez's PRR sentences, the argument raised also applies to the inclusion of his alleged prior record on his scoresheet. Because the PRR sentences are mandatory, however, the scoresheet error is harmless. The fact that this brief does not spend time arguing that the scoresheet is incorrect should not be interpreted as a concession that the prior record on the scoresheet is accurate, and should not be viewed as a waiver of an objection to those points or any other scoresheet errors in any future sentencing hearing. The prior record section of the scoresheet violates the Sixth and Fourteenth Amendments.

Although Chavez believes this is wrongly decided, at least in part because the primary case cited is now no longer good law because it relies on yet another now-overruled case, he recognizes it remains binding on this Court at this time. This Court therefore cannot legally grant relief on the first argument.

Additionally, in order to grant relief on the second sub-part of the second argument ("The 'prior record exception' does not apply to the date of release"), this Court would need to go en banc in order to recede from cases such as *State v. Wilson*, 203 So. 3d 192 (Fla. 4th DCA 2016), and *Chapa v. State*, 159 So. 3d 361 (Fla. 4th DCA 2015). Those cases, which adopt the reasoning of *Lopez v. State*, 135 So. 3d 539 (Fla. 2d DCA 2014), stand squarely against this argument. Undersigned counsel notes the requirement to proceed en banc to recede, but is prevented by rule from requesting such disposition at this time. Fla. R. App. P. 9.331(c). He simply wishes to make clear that he knows this argument must fail in this Court if decided only by a panel, but that this Court could grant relief by going en banc if it is so inclined.

However, counsel believes he has a good faith argument that *Gudinas*, *Chapa*, *Wilson*, *Lopez*, and any similar cases were wrongly decided and should be overturned. In order to pursue these claim on appeal he must raise this issue in this Court so that it is preserved for consideration by the courts that can make the legal change required by the Sixth Amendment. *See Sandoval v. State*, 884 So. 2d 214,

216 n.1 (Fla. 2d DCA 2004) ("Counsel has the responsibility to make such objections at sentencing as may be necessary to keep the defendant's case in an appellate 'pipeline.'"); *see also* R. Regulating Fla. Bar 4-3.1 (stating that a lawyer may assert an issue involving "a good faith argument for an extension, modification, or reversal of existing law"); *United States v. Marseille*, 377 F.3d 1249, 1257 & n.14 (11th Cir. 2004) (defendant making an argument he knows must lose for purposes of preserving it for a later court).

Finally, Chavez notes that there does not appear to be any binding precedent with regard to the first sub-part of the second argument raised below ("The 'prior record exception' does not apply when there is a question of identity").[8] A panel of this Court therefore can, and should, grant relief based on that argument.

Argument — General Background

Florida's PRR statute violates the Sixth and Fourteenth Amendments in that it allows a judge to find facts that increase a defendant's minimum sentence by a preponderance of the evidence. *See* § 775.082(9)(a)3., Fla. Stat.[9] The constitutional deficiency is twofold: first, the Constitution requires that the fact-finder be a jury rather than the judge; and second, the standard of proof under the Constitution must be "beyond a reasonable doubt" rather than "preponderance of

[8] If undersigned counsel has missed such a case in his research, he would simply restate his obligation to raise this argument along with the others.

[9] This statute does not specify a fact-finder, but as a matter of practice in Florida the factual findings are made by a judge.

the evidence."[10] Chavez raises this issue as both a facial challenge to the PRR statute's constitutionality in all cases, but also as both a facial and an as-applied challenge to its constitutionality under the specific facts of his case.

The general principle applicable to heightened minimum sentences is clear: a jury must make the factual findings beyond a reasonable doubt. This rule was first made explicit in *Alleyne v. United States*, 570 U.S. 99 (2013), which states that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at 103. Under the PRR statute, a person found to be a PRR "is not eligible for sentencing under the sentencing guidelines and must be sentenced" to the maximum sentence normally allowed—life for a crime punishable by life, and 15 years for a second-degree felony. § 775.082(9)(a)3., Fla. Stat. In many situations, this mandatory sentence will be greater than the minimum otherwise allowed. *See* §§ 921.0012-.0027 (the Criminal Punishment Code (CPC)). Here, this was true: Chavez's minimum sentence under the CPC was 136.28 months in prison (approximately 11 years), whereas his minimum sentences under the PRR statute were, for his two counts, 15 years and life. [R. 232]. There is therefore no doubt that the PRR statute implicates the *Alleyne* rule by increasing the mandatory minimum punishment for offenses. *See Chapa v.*

[10] These two go hand-in-hand. For ease of reading, this Issue primarily refers to the jury-finding requirement, but all arguments are intended to apply equally to both claims.

State, 159 So. 3d 361, 362 (Fla. 4th DCA 2015) (rejecting an *Alleyne* argument to a PRR sentence on the merits, but recognizing that *Alleyne* was implicated).

There is also no doubt that the PRR statute violates *Alleyne*'s strict dictates by allowing a judge, rather than a jury, to find the necessary facts to increase the mandatory minimum sentence.

The determinative question is therefore whether the "prior record exception" to *Alleyne* is constitutionally valid. As described below, it originated only as dicta in the United States Supreme Court, and the arguments against it are based on both historical precedent and on the Supreme Court's more recent focus on the effect of statutes rather than the legislative labels given to various provisions. The exception should therefore be overturned and abolished altogether. Alternatively, even if the exception survives, it should not apply to the specific sorts of facts at issue in this case.

The "Prior Record Exception" Should Be Overturned

The prior record exception to the rule that a jury must find facts raising the maximum or minimum ends of a sentencing range is not viable and should be overturned. Making this argument requires detailing both the exception's origins and its evolution.

Legal Background

The earliest case necessary to understand the exception's current troublesome position is *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). There, the Supreme Court held that possession of a firearm during an offense was, under the statute at issue, properly characterized as a "sentencing consideration" rather than as an element of an offense. *Id.* at 91. In a brief final paragraph, the Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[11] *Id.* at 93. Although *McMillan* did not deal with a prior record, this final paragraph is the important first step in what led to that exception today.

The next case in this development is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Like *McMillan*, *Almendarez-Torres* is not directly on point because, although it did deal with a prior record, it dealt with it in the context of an indictment rather than in the context of sentencing. *Id.* at 226. Because only elements, not sentencing considerations, must be included in an indictment, the question before the Court was which of these two groups a prior record was part of. *Id.* at 228. Based in large part on the fact that recidivism "is as typical a sentencing factor as one might imagine," phrased later as "a traditional, if not the

[11] The bulk of the opinion is devoted to making the sentencing-factor/element distinction; the conclusion drawn after that determination was made appears to have been foregone.

most traditional, basis for a sentencing court's increasing an offender's sentence" the Court held that a prior record is a sentencing factor rather than an element of the offense. *Id.* at 230, 243, 247. However, it is important to remember that this holding was intended to determine what must be charged in an indictment; it in fact explicitly left open the question about what standard of proof might be required for a sentencing factor that raised the maximum permissible sentence. *Id.* at 247-48.

Jones v. United States, 526 U.S. 227 (1999), is next on the legal journey. As with the previous two cases, the Court recognized that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Id.* at 232. Left unsaid, but implied as an essential part of that sentence, is the fact that, at the time, sentencing considerations had none of those three requirements. After determining that the relevant statute (not involving prior records) specified elements rather than sentencing factors, *id.* at 239, the Court moved on to discuss counter-arguments to its holding. Relevant here is its discussion of *Almendarez-Torres*, where the Court recognized that its prior case did not deal with the question of jury findings, and instead was limited to what must be charged in an indictment. *Id.* at 248-49. The Court did recognize that a prior record was

"potentially distinguishable" from other sentencing factors, based on the fact that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249. But it did not have to dive into that question further.

Our journey now arrives at the first of the two seminal cases on this issue: *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi*'s basic holding was that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. However, the holding included a brief statement before the language just quoted: "Other than the fact of a prior conviction, any fact that increases the penalty . . . ." *Id.* So where did that language come from, and why was it included in the holding?

The first mention of a prior record exception is found in section IV of the Court's opinion, where the Court discusses *McMillan* and *Almendarez-Torres*. *Id.* at 485-90. The Court recognized that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice [of connecting a sentencing range to the elements of a crime]." *Id.* at 487. Further discussion revealed that "Almendarez-Torres had *admitted* the three earlier convictions," meaning that "the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in

his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488.[12]

Just as Almendarez-Torres did not challenge the validity of his prior convictions in his case, Apprendi did not challenge the validity of *Almendarez-Torres* in his. *Id.* at 489. The Court recognized that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested," but declined to revisit it, instead choosing "to treat the case as a narrow exception to the general rule." *Id.* at 489-90. This statement hearkened back to the one quoted above—*Almendarez-Torres* was "at best an exceptional departure from" historic practice; at worst (and in actuality), it was simply incorrect.

As can be seen from a close reading of *Apprendi*, the "[o]ther than the fact of a prior conviction" line was therefore far from a thoughtful and deliberate statement of a clear exception to the general rule being stated. It was, instead, a recognition of a prior precedent that was questionable but had gone unquestioned.

Nearly two years to-the-day after *Apprendi*, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002).[13] *Ring* dealt with a challenge

[12] Later, the Court used similar language to distinguish a prior record from the sentencing factors at issue: "[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496.

to an Arizona death-penalty scheme previously upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 588-89. This time around, the Court invalidated the Arizona structure, which allowed a judge to make aggravation findings, because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602. In other words, the Court further eroded any distinction between an "element of a crime" and a "sentencing factor," at least insofar as the Sixth Amendment is concerned. *See id.* at 604-05. Notably, as was the case in *Apprendi*, Ring "[did] not challenge *Almendarez-Torres*" because his case did not involve past-conviction aggravating circumstances. *Id.* at 597 n.4.

Shepard v. United States, 544 U.S. 13 (2005), raised the question about what documents a trial court can look to when determining whether a prior conviction was for a certain crime, when the exact nature of that crime affects whether an enhancement to the current crime would apply. *Id.* at 16. Because allowing a trial court to consider police reports would violate *Apprendi*, the Court held that courts may only consider agreed-upon or objectively verifiable facts of prior offenses, not

[13] The same day, the Court also decided *Harris v. United States*, 536 U.S. 545 (2002). *Harris* held that *McMillan* was still good law after *Apprendi*, meaning that an increase in the lower end of a sentencing range could be found by a judge. *Id.* at 568. However, *Harris* was overturned by *Alleyne v. United States*, 570 U.S. 99 (2013), discussed below, making it not of particular importance to the overall argument presented. But it is still worth noting for its historical context.

those that may be subject to dispute like the facts in a police report. *Id.* In so holding, the Court recognized that *Almendarez-Torres* allows a court to take judicial notice of prior convictions, but it held that records like police reports are "too far removed from the conclusive significance of a prior judicial record" to allow *Almendarez-Torres* to apply. *Id.* at 25.

Justice Thomas concurred, but in doing so he recognized that "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence." *Id.* at 27 (Thomas, J., concurring). Justice Thomas recognized that "a majority of the Court now recognizes that *Almendares-Torres* was wrongly decided," and he suggested that "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability." *Id.* at 28.

In 2013, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013), the second of the two seminal cases (*Apprendi* being the first). There, the Court undid the distinction between maximum and minimum sentences. *Id.* at 103. The bottom line of *Alleyne* was that *Harris*, in which the Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment," was overruled.[14] *Id.* Notably for present purposes, just as in *Apprendi* itself, the defendant in *Alleyne* did not

[14] Justice Sotomayor's concurrence makes clear that *McMillan* was also overruled. *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring).

challenge the *Almendarez-Torres* prior record exception, so the majority "[did] not revisit it for purposes of [its] decision." *Id.* at 111 n.1.

Finally, the Court's most recent foray into *Apprendi* jurisprudence—*United States v. Haymond*, 139 S. Ct. 2369 (2019)—also did not involve any argument or challenge to the prior record exception. *See id.* at 2377 n.3. It simply applied *Alleyne* to a federal statute mandating a heightened sentence when supervised release is revoked for certain reasons. *See id.* at 2373-74.

Of course, the United States Supreme Court was not the only court acting during the time period between *McMillan* in 1986 and the present day. The first Florida cases of note are the simultaneously-issued, nearly identical cases of *Robinson v. State*, 793 So. 2d 891 (Fla. 2001), and *McGregor v. State*, 789 So. 2d 976 (Fla. 2001).[15] There, the defendants argued that the PRR statute violates the Sixth and Fourteenth Amendments as interpreted by *Apprendi*. *Robinson*, 793 So. 2d at 892. The Florida Supreme Court rejected that argument because of *McMillan*, which was at the time still good law. *Id.* at 893. Because the PRR statute does not affect the maximum penalty of a crime (instead only raising the minimum to be equal to the maximum), it did not violate *Apprendi*. *Id.* Although the court quoted the "[o]ther than the fact of a prior conviction" language from *Apprendi*, its holding was not based on this exception. *Id.* at 892-93.

[15] Because *Robinson* has been cited about twice as often as *McGregor*, and because the two are nearly identical, this brief limits itself to citing only *Robinson*.

Around the same time, however, this Court decided *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001). There, the court held that "the findings required under the habitual felony offender statute [which deal with prior convictions] fall within *Apprendi's* 'recidivism' exception." *Id.* at 893-94. This holding was reaffirmed in *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004). Similar holdings over the years, applying the prior record exception to HFO and PRR sentences, have issued from the various District Courts of Appeal around the state. *E.g.*, *Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004). Finally, the Florida Supreme Court did adopt the prior record exception as an alternative holding in its affirmance in *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004), which raised an *Apprendi* challenge to a habitualization statute.

Argument

The prior record exception to *Apprendi* and *Alleyne* should be overturned both in Florida and federally.

To start, it is important to recognize that the prior record exception is not in fact binding law from the United States Supreme Court. Although *Apprendi* includes the prior record exception in its holding—"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"—the exception is dicta. *Apprendi*, 530 U.S. at 490.

Judicial dicta is "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although the prior record exception was certainly considered and passed on by the Supreme Court, it was not essential to the decision in *Apprendi* because the case did not involve the defendant's prior record. Because of that, it was not directly addressed by the Court.

And in fact, the same is true of all post-*Apprendi* cases in the United States Supreme Court. As described above, no case would have turned out differently had the exception not been present. The exception is therefore best viewed not as something mandatorily required by the supremacy clause, but rather as a "we'll decide this later" exception put to the side by a Court hesitant to wade into unnecessary and treacherous waters. *See Apprendi*, 530 U.S. at 489 (dodging the question of whether the *Almendarez-Torres* exception was correct).

The Florida courts that consider this case should therefore recognize that nothing about *Apprendi*, *Alleyne*, or the related United States Supreme Court cases require the prior record exception be applied. Instead, it is only Florida precedent

that commands it. Because the Florida Supreme Court applied the prior record exception as an alternative holding in *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004), this Court is bound. *See Parsons v. Fed. Realty Corp.*, 143 So. 912, 920 (Fla. 1931) (stating that alternative holdings are binding, not dicta).[16] The Florida Supreme Court, however, should consider this issue on its merits and not feel compelled to apply the prior record exception out of a misplaced belief that it is commanded by the United States Supreme Court. This Court should also write on this issue so that it may be addressed in the Florida Supreme Court.

But the above discussion only establishes that both the Florida Supreme Court and the United States Supreme Court have the power to overturn the prior record exception. The more important issue is why that action should be taken. There are two reasons: first, because the exception flies in the face of the Sixth Amendment and historical roots; and second, because the distinction between sentencing factors and criminal elements has eroded, resulting in unsustainable distinctions whereby a prior record is in some cases an element required to be proven to a jury and in others it is a sentencing factor allowed to be found by a judge.

As detailed by Justice Thomas in his concurrence in *Apprendi*, the long historical tradition has been to view "every fact that is by law a basis for imposing

[16] Remember, however, that the prior record exception was not an alternative holding in *Apprendi*. As described above, the exception was dicta.

or increasing punishment" as an element and thus subject to a requirement for a jury finding. *Apprendi*, 530 U.S. at 499-518 (Thomas, J., concurring) (quote at 501 and 518); *see also id.* at 477-85 (majority opinion). Notably, this included recidivism enhancements. *Id.* at 506-09 (Thomas, J., concurring). The reason was simple: the question of a prior record "is certainly one of the first importance to the accused, for if it is true, he becomes subject to a greatly increased punishment." *Id.* at 508 (quoting *Hines v. State*, 26 Ga. 614, 616 (1859)). The *McMillan* distinction between "elements" and "sentencing factors" was therefore itself a relatively modern and groundbreaking distinction, not one arising from the common law or tradition. *Id.* at 500, 518.

This historical analysis, however, is not the end of the story. As Justice Thomas recognizes toward the end of his concurrence, the Sixth Amendment question is not "whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence," but rather "[w]hat matters is the way by which a fact enters the sentence." *Id.* at 520-21. If the fact merely influences a court's discretion, it is a sentencing factor and need not be tried by a jury. *Id.* at 521. If, on the other hand, it sets or increases the punishment as a matter of law, then it is an element and must have a jury determination. *Id.*

The oddity of disconnecting recidivism from any other sentencing factor was also identified by Justice Scalia in his dissent in *Almendarez-Torres*. There,

Justice Scalia questioned "how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue." *Almendarez-Torres*, 523 U.S. at 258 (Scalia, J., dissenting). The only way that could be true is if recidivism was a special exception to a general rule, but that conclusion would be "doubtful." *Id.*; *see also id.* at 258-60 (showing how a recidivist exception would go against precedent); *see also Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting) (calling the holding of *Almendarez-Torres* a "grave constitutional error affecting the most fundamental of rights").

The prior record exception is therefore without any justifiable legal foundation. The historical practice was to have all elements, including recidivist elements, found by a jury. *McMillan* created a new distinction between sentencing factors and elements, and that distinction persisted through various cases. But *McMillan* is no longer good law. *See Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). And the overall trend in modern case law has been to undo the distinction *McMillan* created and repair the case's grave constitutional error. The final remnant of the distinction appears to be the prior record exception. It is time for that too to be put to rest. The Sixth Amendment and historical tradition require it to be overturned.

The second reason to reject the prior record exception is because it allows legislatures to play games with language to defeat or avoid the limits of the Sixth Amendment. Florida has multiple crimes where the existence of a prior commission of a similar crime is an element of the new crime charged. For example, repeated convictions for DUI can escalate to the crime to a felony. *See* § 316.193(2), Fla. Stat.; *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000). The same is true of felony petit theft. § 812.014(3); *Smith v. State*, 771 So. 2d 1189 (Fla. 5th DCA 2000). And of course, the crime of being a felon in possession of a firearm requires that the person be a felon—that is, have a prior conviction. § 790.23(1). In each of those cases, a jury is required to make the necessary findings of the prior conviction, either in a bifurcated proceeding (DUI and theft) or as an element turning innocent conduct criminal (felon in possession). *See Harbaugh*, 754 So. 2d at 694 (DUI); *Smith*, 771 So. 2d at 1191 (theft); *Rodriguez v. State*, 174 So. 3d 457, 458 (Fla. 4th DCA 2015) (describing the instructions to be given, although focusing on the non-felon elements).

But if the prior record exception to *Apprendi* and *Alleyne* is constitutional, this entire structure could be avoided if the legislature simply created a PRR-like statute imposing heightened maximum sentences based on prior records. That is, rather than having the elements of felony petit theft include a prior felony, the legislature could simply declare that any person convicted of petit theft, who is

then found during sentencing to have a prior offense for the same crime, could be sentenced to up to five years in prison notwithstanding the ordinary maximum sentence for that crime. Whether a judge or jury has to make the finding of a prior felony would depend only on how the legislature structured the statutes, which is exactly what the *Apprendi* line of cases has sought to avoid. *See Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than authorized by the jury's guilty verdict."); *see also id.* (calling the distinction between elements and sentencing factors "constitutionally novel and elusive").

The prior record exception affords too much opportunity for states to perform an end-run around the Sixth Amendment by categorizing some prior records as elements and others as sentencing enhancements. Prior records are prior records and should be treated alike. And as shown by the requirement to have a jury determine a person's prior record in situations like those described above, the Sixth Amendment requires that the alike treatment should be to require a jury determination of a prior record in all cases.[17]

Because the prior record exception is not mandated by the United States Supreme Court, Florida may do away with it. And regardless of whether Florida

[17] That is, all cases where the maximum or minimum sentences are increased by the determination. This argument is not intended to suggest that trial courts cannot consider prior records to determine a sentence within a defined range. *See Alleyne*, 570 U.S. at 116-17.

may, or if the United States Supreme Court is the only body that can, the prior record exception should be overturned. This should be done first because the Sixth Amendment should not have exceptions, as shown by its history and argued by various Justices since the prior record exception began to take form. And second, because in its current form, the prior record exception invites the very inconsistency and legally myopic focus on labels that *Apprendi* and company reject. A prior record is a prior record. Whether the crime is "repeated DUI" or the crime is "DUI" and an enhancement is "prior DUI," the end result is the same. A court that can should reject the distinction, overturn the prior record exception, and hold that *all* factors that raise the legal minimum or maximum penalty faced by a defendant must be proven by the State to a jury beyond a reasonable doubt.

The "Prior Record Exception" Does Not Apply Under the Facts of this Case

The remainder of this Issue proceeds under the assumption that this Court has rejected the above argument against the prior record exception as a whole. However, even if the prior record exception does have a place in Florida and United States jurisprudence, its application has expanded beyond its justification. This case presents two ways in which the prior record exception should be found unconstitutional both facially and as-applied: it should not apply when there are

legitimate questions of identity, and it should not apply to facts such as a prison release date which do not inhere in the prior record itself.[18]

The "prior record exception" does not apply when there is a question of identity.

Although the concept of proving someone's prior record may seem straightforward, there are a number of elements that must actually be established. First, there must have been a judgment against a person. Second, that judgment must be for a specific crime. And third, the person the judgment is entered against must actually be the person who is now being sentenced. The first two steps prove that there is *a* prior record. The third step is what proves that the record proven to exist is in fact *the defendant's* prior record. Additionally, in the context of statutes like the PRR statute, there are further elements that must be established related to incarceration. It must be established that the judgment for a specific crime (element two) led to a sentence of incarceration. It must then be established that the incarceration has not legally ended, or that it ended within the past three years. And of course, like with the third step described above, it must be established that the person who was released after a sentence of incarceration was in fact the defendant sitting before the court. It cannot be enough to prove that *someone* was

[18] These questions exist in all cases, making this a facial challenge. But they also are particularly at issue in this case, meaning that even if the facial challenge fails, the prior record exception (and therefore the PRR statute) are unconstitutional as applied to Chavez.

convicted and then released from prison within the past three years, it must be proved that *the defendant* is that person. *See* § 775.082(9), Fla. Stat. (listing all criteria for a PRR sentence).

The distinction drawn above is not revelatory. In fact, Florida courts around the state have been applying it since before *Apprendi* was decided. *See, e.g.*, *Hargrove v. State*, 987 So. 2d 679, 680 (Fla. 2d DCA 2007); *Wilson v. State*, 830 So. 2d 244, 245 (Fla. 4th DCA 2002); *Rivera v. State*, 825 So. 2d 500, 501 (Fla. 2d DCA 2002); *Hemmy v. State*, 835 So. 2d 272 (Fla. 2d DCA 2001); *Wencel v. State*, 768 So. 2d 494, 495 (Fla. 4th DCA 2000); *Brown v. State*, 701 So. 2d 410, 410 (Fla. 1st DCA 1997); *Louis v. State*, 647 So. 2d 324, 325 (Fla. 2d DCA 1994); *Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st DCA 1991). In all of those cases, the issue was whether the State introduced sufficient evidence to meet its burden of proof to show that the defendant had a prior conviction. The judgments were fine on their faces, but the State failed to adequately connect the judgments to the defendants. The cases were therefore all reversed.

This case also involves the distinction between *someone* having a prior record and the defendant *being that someone*. The only difference with the cases string-cited above is that Chavez is not challenging the sufficiency of the State's evidence, but rather the fact-finder to whom that evidence was presented. Even assuming the Constitution allows a judge to make a finding that a prior record

exists, it does not allow the judge to make the completely separate finding that the record reflects the legal history of the person sitting before them—no matter how much evidence the State introduces. To see why this distinction matters, it is important again to look at the reasoning behind the prior record exception's existence as described by the Supreme Court.

Although the prior record exception has its roots in *Almendarez-Torres*, *Jones* is where the justification for treating a prior record different from any other fact took clear form. The Court in *Jones* suggested that the reason for a distinction was that "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249. In other words, a prior record is different from any other fact because the defendant has already had the opportunity to dispute the allegations. The Constitution does not guarantee the defendant a second chance to claim he is not guilty of whatever crime he was previously convicted of because he was already afforded the full panoply of trial rights the first time around. It is only when there are new allegations for which those rights have not yet been afforded that the Sixth Amendment requires a jury finding before the sentencing range can be changed.

Apprendi continued to apply this reasoning. Recognizing that *Almendarez-Torres* was "at best an exceptional departure from . . . historic practice," the Court relied on the fact that "Almendarez-Torres had *admitted* the three earlier convictions" and noted that those convictions "had been entered pursuant to proceedings with substantial procedural safeguards of their own." *Apprendi*, 530 U.S. at 487-88. Said slightly differently shortly thereafter, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488. This sentiment was repeated one more time at the close of the opinion when the Court rejected the prosecution's argument: "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496.

In *Shepard*, the Court drew a distinction between disputed facts that were controlled by *Almendarez-Torres*—those that have "the conclusive significance of a prior judicial record""—and those that are closer to the debatable findings "subject to *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25. The Court held that police reports were more akin to the latter and therefore that a judge could not rely

on the contents of those reports in prior cases when making a determination of what the prior conviction actually was for. *Id.* What *Shepard* therefore reveals is that, even when a prior conviction is what is being considered, there are facts related to and involved with the conviction that may still be in dispute in future cases.

What these cases[19] show is that the prior record exception makes logical and legal sense only when it is applied to those things for which constitutional procedural safeguards have already been applied. When the question is "did the person on the judgment commit this previous crime?" the answer can be found by a judge because the person on the judgment has already had the benefit of a jury to make that determination. But when the question is "was the crime committed of type X or type Y," that question can be answered by a judge only if the objective judicial records are beyond dispute. A judge cannot answer that question through reliance on such things as police reports, which the defendant would have had no meaningful constitutional method to challenge. *See generally Shepard*.

Here, the issue of identity is one of those facts that, although closely related to the prior conviction, is not inherent in the objective judgment. It is important to note that there are two questions of identity: first, was the prior crime committed by the person charged in that case; and second, was the person convicted in the

[19] Notably, *Alleyne* did not address the issue of the prior record exception, so no justification was given in that case. *Alleyne*, 570 U.S. at 111 n.1.

prior case the same person as the defendant in front of the court for sentencing for this subsequent case? The justification for the prior record exception deals only with the first question. A jury has already been impaneled (or a plea entered) to determine that the original defendant committed the originally-charged crime. But no jury has ever answered the second question of whether that same individual who was previously convicted is in fact the person in front of the court for sentencing on a subsequent crime, because the sentencing hearing on the subsequent crime would be the first time this question would naturally arise.

This case presents a clear instance of where this distinction matters. Unlike Almendarez-Torres, who admitted that the prior record was accurate and was in fact his own, Chavez objects to the conclusion that the records introduced in this case are his at all. Chavez does not concede the accuracy of the prior records (those things that may be able to be found by a judge) because he has no knowledge of their truth, but the more important challenge, at least for this section of this Issue, is to the prior records' applicability to him as an individual. Simply put, the court records may establish that *someone* received a prison sentence following certain crimes, but they do not establish that that same person was released from prison within three years of Chavez's crimes, and they also do not establish that either of those potential people were in fact Chavez himself.

Chavez has a right to have a jury make all findings related to his minimum and maximum sentences. The only situation in which he would not have that right is where a jury has already made the determination and a simple record check can confirm it. That is why, if Chavez admitted he was the person from the prior judgments, he would not be entitled to a new trial on the original facts to prove those crimes occurred. But he does not make that admission. The State therefore is required to prove that Chavez is the same person as was previously convicted. And it must prove that in accordance with the Sixth Amendment right to a jury trial. The prior record exception cannot constitutionally apply to the question of whether a defendant was the same person as someone previously convicted, it can only apply to the questions of whether a previous conviction exists and what that conviction was for.

Because there is a legitimate question as to whether the prior record information introduced at sentencing is in any way related to Chavez,[20] a jury determination beyond a reasonable doubt of that fact was required. Assuming the prior record exception is not overturned in its entirety, it still should only be applied to those aspects of a prior record that can be conclusively established by

[20] This case involves different spellings of names, as well as different birthdays. It therefore is not necessary for any court to pass on the question of whether a defendant could challenge a prior record as being his when there are no discrepancies. Such a case may need to be decided someday, but the question of whether there must be a prima facie showing of a contested issue of fact, and what that might look like, does not need to be decided yet.

indisputable court records that reflect facts already found by a jury in accordance with the Sixth Amendment. Those aspects do not include the disputed question in this case of whether the records for "Augustin A. Chavez" born "02/12/90" refer to the person before the court for sentencing—"Agustin A Chavez," born "02/10/1990." [*Compare* R. 222 (judgment in this case) *with* R. 444 (DOC records)].[21]

The Sixth Amendment as interpreted by *Alleyne* requires a jury to make the finding beyond a reasonable doubt that "Agustin A Chavez" is in fact "Augustin A. Chavez." Because the PRR statute allowed the trial judge to make that determination by a preponderance of the evidence, it is unconstitutional both facially and as applied to the facts of this case.

The "prior record exception" does not apply to the date of release.

As explained in the previous section, the justification for the prior record assumption rests on the premise that a jury has already considered the defendant's claim, and therefore that there is no need for a second jury to reconsider those claims when a judge can simply find them to be true. But as is the case with identity, discussed above, so too is the question of a release date from prison one that has never been resolved in accordance with the Sixth Amendment. The prior

[21] Chavez recognizes there was evidence that the two men were the same, but that simply makes the issue clearer. It is a jury's job to evaluate evidence and make factual findings based on its determination of reliability and credibility.

record exception to *Apprendi* and *Alleyne* therefore cannot permit a judicial finding of a defendant's prior release date, as is permitted by Florida's PRR statute. Instead, the question of the date of release must be submitted to the jury.

Because this argument is largely the same as that made above, and because it is foreclosed by binding precedent on a panel of this Court as explained at the outset,[22] Chavez will not belabor it here. The basic structure of the argument is simply that the date of release, like the identity of the current and previous defendants, is not in fact derivative of a conviction itself.

To briefly make this point clear, imagine a scenario in which a person is released from prison early due to the application of gain time. But due to human or technological error, the exact date of release is misidentified on the prison's prison documentation. Three years later, the person commits another crime and the State seeks a PRR sentence. It turns out, however, that the person would be ineligible for PRR given their actual date of release, but that they appear eligible given the date on their documentation.

This sort of error does occur. For example, in *Mitchell v. Mitchell*, 198 So. 3d 1096 (Fla. 4th DCA 2016), this Court noted a disconcerting feature of its record. *Id.* at 1097 n.1. Somehow the official Broward County clerk's timestamp

[22] *See State v. Wilson*, 203 So. 3d 192, 193-94 (Fla. 4th DCA 2016); *Chapa v. State*, 159 So. 3d 361 (Fla. 4th DCA 2015); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014),

on a petition was for a time earlier than when the events that the petition described occurred. *Id.* This Court did not have to dig further into how this error arose, but the fact that it did is all that matters here. People, even those in the clerk's office or in a prison records room, make mistakes, and official records are not always accurate.

The above possibility shows the need to have a jury make the factual determination of when a person was released from prison. The conviction itself does not provide for an actual date of release, and prison records may be erroneous through misconduct, incompetence, or innocent accident. The fact that the prison records are not even records of the court, but instead are records of the State itself as a party to the case, only increases the concern with placing blind trust in their accuracy.

Because the date of release from prison is not in fact derivative of a prior conviction, and because no jury has ever made the determination of when the actual date of release was, the prior record exception cannot be applied to the date of release without running afoul of the Sixth and Fourteenth Amendments.

Issue Conclusion

For the reasons described above (especially the identity argument that is not precluded by binding case law), Chavez respectfully requests that this Court reverse his sentences and remand for a de novo resentencing hearing at which

Alleyne will preclude a non-jury-found PRR designation. Alternatively, Chavez requests that this Court at least write on this issue so that he can appeal this case further.

CONCLUSION

Because the trial court abused its discretion by not permitting a second deposition of the victim after drastic amendments to the information were made, Chavez respectfully requests that this Court reverse his convictions and remand for a new trial.

Alternatively, because imposing a PRR sentence without a jury finding violates the Sixth Amendment, Chavez respectfully requests that this Court reverse his sentence and remand for resentencing. If this Court affirms, he requests a written opinion so that further argument can be made in the Florida Supreme Court or the United States Supreme Court.

Respectfully submitted,

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF SERVICEs

I certify that this brief was electronically filed with the Court and a copy of it was served to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 4th day of February, 2020.

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 0120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF COMPLIANCE

I certify this brief has been prepared and filed in Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

AGUSTIN CHAVEZ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Case No. 4D19-157

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
Attorney General

MELYNDA L. MELEAR
Senior Assistant Attorney General
Florida Bar No. 765570
Office of the Attorney General
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561) 837-5016
(561) 837-5108(Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

CASES **PAGE#**

Cases

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Chavez." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

R = Record on Appeal

T = Transcript on Appeal

IB = Initial Brief

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's Statement of the Case and Facts, but makes the following clarifications and additions:

1. At the hearing on Appellant's motion to re-depose the witnesses, defense counsel said that the basis was that additional charges had been filed (R. 471-472). He said that a deadly weapon, a bottle, had been interjected into the charges (R. 472). He told the court that in his deposition the victim said that there was no weapon and that Appellant used his fist (R. 473). He noted that Detective Acierno had said in his deposition that there were bottles on the scene but that they were

not used in the offense (R. 473). He also said that there was a second victim in the additional charges and stated that he needed to explore the additional charges with the victim and the arresting officer (R. 474, 476).

The prosecutor objected to the motion and said that counsel had already deposed the victim and the arresting officer (R. 475-476). She said that counsel had already asked the victim about the weapon and did not indicate what other questions that he had (R. 475, 477). She stated that the victim did not remember being hit in the face with the bottle and had indicated to counsel that there were numerous factors that occurred when he was being physically attacked (R. 479). She stated that the video showed that the victim was unconscious at several points during the incident (R. 479).

The prosecutor pointed out that counsel had already asked Officer Acierno about a weapon, and the officer said that he was not aware of one (R. 477). She added that the officer was basing his testimony off of the surveillance video so that she did not think that there was a good cause basis for asking him the same question again (R. 477). The prosecutor told the court that the officer did not have any new evidence or knowledge about a weapon and maintained that the State was basing the bottle as a deadly weapon because of the way that it was used in the surveillance video (R. 478). She stated that she had told defense counsel this on numerous occasions (R. 478).

2. The victim, Carlos Mendez, testified that Appellant asked him for money and then started hitting him and his friend (T. 263-264). He said that Appellant kicked him a lot and left him nearly dead (T 267). He was in the hospital for five days (T. 268). His friend was also hurt but he left, and Mr. Mendez never saw him again (T. 268). He recognized the video of the fight outside of the store, and the video was admitted into evidence (T. 276-280).

On cross-examination, defense counsel asked the victim if he indicated in his deposition that Appellant hit him with his fist (T. 283). The victim said that Appellant was holding a bottle when he hit him (T. 283). Counsel pointed out that the victim had said that Appellant had hit him with his fist in the deposition, and the victim responded that he was explaining to counsel that Appellant had come at his head and left him in serious shape (T. 283). Then the victim said that Appellant had hit him with his fist and that was what he felt at his head (T. 284).

Counsel read into evidence a statement from the deposition in which Appellant said that he did not see a weapon and that he was hit with a fist (T. 284, 287). The victim admitted that he had said that (T. 287). He said that he was sad and that the conversation at the deposition was in Spanish (T. 288). Counsel said that the victim had never mentioned a bottle until he came to court, and the victim questioned that but also apologized (T. 288-289).

Later in cross-examination, the victim indicated that Appellant had grabbed a bottle, and counsel asked him why he had not said that before that day (T. 294). The victim responded that he was scared and that he did not like to say everything (T. 294).

3. The State also introduced into evidence the video surveillance from inside the Kwik Stop store (T. 311, 315).

4. Deputy Thomas Brooks testified that his first contact in this case was at JFK Hospital to talk with the victims (T. 322-323). Back at the scene, he discovered that there was a surveillance tape from inside the store and for at the rear of the store (T. 329).

5. The records custodian for inmate telephone call recordings identified a CD of a jail call that is relevant to this case (T. 343).

6. In his testimony, Appellant admitted that he hit the victim(s) first (T. 387). He admitted that he used a bottle once (T. 387). He said that he had the bottle in his hand already at the time that he punched the victim(s) (T. 407). He said that he used the bottle (T. 408).

On cross, Appellant conceded that in the jail call, he did not mention crack, or that the guys had threatened him (T. 409). He did not say in the call that he was protecting himself or that he was acting in self-defense (T. 409, 410). He agreed

that he said that he beat up two guys and that they didn't stand a chance (T. 409-410). He also said in the call that he kept on beating their asses (T. 410).

7. In closing, defense counsel noted that the victim had said in his deposition that Appellant came out with his fist (T. 486). He asked if it made sense that someone who was going to commit a robbery would bring a fist and take a bottle from the victims (T. 486).

SUMMARY OF ARGUMENT

Issue I: The trial court did not abuse its discretion in denying the motion to re-depose witnesses. Appellant failed to show good cause for needing to re-depose the witnesses. Defense counsel had already asked the witnesses about whether Appellant used a weapon. The officer never testified at trial, and, in any event, only had knowledge to the extent of his having viewed the surveillance video. Any error was harmless.

Issue II: Appellant's prison releasee reoffender sentence does not violate his right to a jury finding. The sentence was properly imposed pursuant to the recidivism statute. A judge can properly determine whether a defendant was released within three years of the offense for purposes of the prison releasee reoffender statute, as such a fact is directly derivative of the fact of a prior conviction. Any error is harmless because a jury would have made the same findings to impose the sentence.

ARGUMENT

ISSUE I: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO RE-DEPOSE WITNESSES.

A. Preservation

Appellant preserved this issue for review by filing a motion to re-depose the witnesses.

B. Standard of Review

Matters related to granting or limiting discovery rests within the sound discretion of the trial judge. Freeman v. State, 818 So.2d 580, 583 (Fla. 5th DCA 2002); Gray v. State, 640 So.2d 186, 191 (Fla. 1st DCA 1994).

C. Discussion

Appellant argues that the trial court abused its discretion in denying his motion to re-depose the victim and arresting officer. Rule 3.220(h), Florida Rules of Criminal Procedure, provides that "no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause shown." Appellee maintains that Appellant failed to show good cause for needing to re-depose the witnesses.

In Freeman, the court noted that the trial court had carefully considered the defendant's arguments supporting his request to re-depose the witness before denying the motion. Freeman, 818 So. 2d at 583. In Woodson v. State, 739 So. 2d 1210, 1211 (Fla. 3d DCA 1999), the court looked at what information was already

available to the defendant and how counsel was able to effectively cross-examine the witness in finding that the trial court did not abuse its discretion in denying the motion to re-depose the witness.

Here, the trial court considered Appellant's arguments and the State's responses. Counsel admitted that he had already asked about a weapon in the depositions of the witnesses. The prosecutor reiterated this and gave reasons why the witnesses had nothing more to offer on the topic. See J.S. v. State, 45 So. 3d 910, 911 (Fla. 4th DCA 2010)(State informed the trial court that questions had already been asked of the victim on the subjects which counsel wished to inquire in a second deposition).

At the hearing on Appellant's motion to re-depose the witnesses, defense counsel said that the basis was that additional charges had been filed (R. 471-472). He said that a deadly weapon, a bottle, had been interjected into the charges (R. 472). He told the court that in his deposition the victim said that there was no weapon and that Appellant used his fist (R. 473). He noted that Detective Acierno had said in his deposition that there were bottles on the scene but that they were not used in the offense (R. 473). He also said that there was a second victim in the additional charges and stated that he needed to explore the additional charges with the victim and the arresting officer (R. 474, 476).

The prosecutor objected to the motion and said that counsel had already deposed the victim and the arresting officer (R. 475-476). She said that counsel had already asked the victim about the weapon and did not indicate what other questions that he had (R. 475, 477). She stated that the victim did not remember being hit in the face with the bottle and had indicated to counsel that there were numerous factors that occurred when he was being physically attacked (R. 479). She stated that the video showed that the victim was unconscious at several points during the incident (R. 479).

The prosecutor pointed out that counsel had already asked Officer Acierno about a weapon, and the officer said that he was not aware of one (R. 477). She added that the officer was basing his testimony off of the surveillance video so that she did not think that there was a good cause basis for asking him the same question again (R. 477). The prosecutor told the court that the officer did not have any new evidence or knowledge about a weapon and maintained that the State was basing the bottle as a deadly weapon because of the way that it was used in the surveillance video (R. 478). She said that she had told this to defense counsel numerous times (R. 478).

The first amended information charging Appellant with use of a deadly weapon and referencing a second victim was filed on June 18, 2018 (R. 110-111). The hearing on the motion to re-depose witnesses was held on August 2, 2018 (R

465). The State notes that at a hearing on July 16, 2018, the prosecutor had informed the court that the victim is an undocumented worker and was waiting to move to Georgia and that the prosecution was concerned that it would lose him if the case was continued. At a hearing on June 18, 2018, the prosecutor explained that the victim was going to leave and was waiting for the trial to do so (R. 308).

Any error is harmless beyond a reasonable doubt. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id. Here, counsel was able to thoroughly cross-examine the victim about whether a bottle was used and further able to impeach him as to why he did not mention a bottle in his deposition.

Defense counsel asked the victim if he indicated in his deposition that Appellant hit him with his fist (T. 283). The victim said that Appellant was holding a bottle when he hit him (T. 283). Counsel pointed out that the victim had said that Appellant had hit him with his fist in the deposition, and the victim responded that he was explaining to counsel that Appellant had come at his head and left him in serious shape (T. 283). Then the victim said that Appellant had hit him with his fist and that was what he felt at his head (T. 284).

Counsel read into evidence a statement from the deposition in which Appellant said that he did not see a weapon and that he was hit with a fist (T. 284, 287). The

victim admitted that he had said that (T. 287). He said that he was sad and that the conversation at the deposition was in Spanish (T. 288). Counsel said that the victim had never mentioned a bottle until he came to court, and the victim questioned that but also apologized (T. 288-289).

Later in cross-examination, the victim indicated that Appellant had grabbed a bottle, and counsel asked him why he had not said that before that day (T. 294). The victim responded that he was scared and that he did not like to say everything (T. 294).

In closing, defense counsel noted that the victim had said in his deposition that Appellant came out with his fist (T. 486). He asked if it made sense that someone who was going to commit a robbery would bring a fist a bottle from the victims (T. 486).

With regard to the arresting officer, Officer Acierno did not testify at trial. Deputy Thomas Brooks testified a trial, but he said that his first contact in this case was at JFK Hospital to talk with the victims (T. 322-323).

Of course, the State presented a surveillance video from behind the store where the encounter took place. The jury could view the interaction between Appellant and the victim. Furthermore, Appellant admitted in his testimony that he hit the victim(s) first (T. 387). He admitted that he used a bottle once (T. 387).

He said that he had the bottle in his hand already at the time that he punched the victim(s) (T. 407). He said that he used the bottle (T. 408).

On cross, Appellant conceded that in the jail call, he did not mention crack, or that the guys had threatened him (T. 409). He did not say in the call that he was protecting himself or that he was acting in self-defense (T. 409, 410). He agreed that he said that he beat up two guys and that they didn't stand a chance (T. 409-410). He also said in the call that he kept on beating their asses (T. 410).

Finally, because defense counsel noted that a second victim was referenced in the amended information, the State points out that Appellant was acquitted on Count 2 with regard to that victim (R. 214).

ISSUE II: THE TRIAL COURT PROPERLY SENTENCED APPELLANT AS A PRISON RELEASEE REOFFENDER.

A. Preservation

Petitioner raised this argument in the 3.800(b) motion.

B. Standard of Review

"We review the constitutionality of a sentence under a *de novo* standard." St. Val v. State, 174 So. 3d 447, 448 (Fla. 4th DCA 2015).

C. Discussion

Appellant argues that this court should reconsider the prior record exception to the requirement of a jury finding on a sentencing factor. Appellee responds that

the case law is clear that the prior records exception remains viable and that it may be relied on in prison releasee reoffender sentencing. It asserts that the exception was properly applied in this case.

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court of the United States held that a trial court was prohibited from enhancing a defendant's sentence beyond the statutory maximum based on factors other than those submitted to a jury, unless the factor was a prior conviction. In Alleyne v. United States, 570 U.S. 99 (2013), this rationale was extended to minimum sentence increases.

In Alleyne, the Supreme Court held that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." Id. at 2162. However, in a footnote, the Alleyne decision clarified that the decision does not apply to recidivism statutes. The first footnote in the decision states:

> In Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.

Alleyne, 133 S.Ct. at 2160 n.1.

The Almendarez-Torres decision referenced in Alleyne examined a federal statute that authorized a lengthier sentence for a deported alien's return to the United States where the initial deportation was subsequent to a

conviction for an aggravated felony. Almendarez-Torres, 523 U.S. at 226. In Almendarez-Torres, the Supreme Court of the United States rejected the argument that the Government was "required to prove to the jury that the defendant was previously deported 'subsequent to a conviction for commission of an aggravated felony.'" *Id.* at 234-35. The recognition in Alleyne that Almendarez-Torres is still good law confirms that Alleyne does not apply to recidivism statutes.

The prison releasee reoffender statute is not materially different from the recidivism statute in Almendarez-Torres. Both statutes require proof of a prior conviction and proof of the timing of the prior conviction or release from prison. In Gurley v. State, 906 So.2d 1264 (Fla. 4th DCA 2005), this Court stated that "[r]ecidivist sentencing statutes based on a defendant's prior criminal record fall outside of *Apprendi* and *Blakely*" and that "the date of a defendant's release from prison under the prison releasee reoffender statute is analogous to the fact of a prior conviction." Id. at 1265; see also St. Louis v. State, 985 So. 2d 16, 18 (Fla. 4th DCA 2008) (affirming the defendant's habitual offender sentence while reaffirming its prior holding that Apprendi "does not apply to recidivism statutes and entitle a defendant to have a jury determine, beyond a reasonable doubt, the existence of predicate convictions necessary for imposing a habitual felony offender sentence," (citations omitted)).

This Court rejected a similar challenge to the prison releasee reoffender statute in State v. Wilson, 203 So.3d 192 (Fla. 4th DCA 2016). In Wilson, this Court held that the trial court could impose a prison releasee reoffender sentence in the absence of finding by the jury that the defendant qualified for such enhanced sentencing. See also Robinson v. State, 793 So. 2d 891, 893 (Fla. 2001) (Apprendi does not require that a defendant's release within three years be proved to a jury beyond a reasonable doubt); McDowell v. State, 789 So.2d 956 (Fla. 2001) (a defendant's prior release from prison, as will make him subject to sentence under the Prison Releasee Reoffender Act, is not required under Apprendi to be submitted to the jury and proved beyond a reasonable doubt); Chapa v. State, 159 So.3d 361 (Fla. 4th DCA 2014) (the facts found by the judge under the Act are not elements of the offense and are within the "prior conviction" exception to Apprendi).

United States v. Haymond, 139 S. Ct. 2369 (2019) is the only Supreme Court precedent referenced in Appellant's initial brief on the need for a jury finding in sentencing that was decided after this court's decisions in Wilson and Chapa (IB. 23). In Haymond, the Supreme Court noted that it had recognized an exception to Apprendi's general rule in holding in Almendarez-Torres that prosecutors need not prove to the jury the fact of a defendant's prior conviction. 139 S. Ct. at 2377, n.3.

Appellee asserts that Appellant has not provided a convincing reason for this court to overturn its controlling precedent on this issue. Appellant points only to

situations in which the jury must find a prior offense as an element of a charged offense (IB. 28-30). The First District in Williams v. State, 143 So. 3d 423 (Fla. 1st DCA 2014) explained "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' *of the charged offense*.' Williams, 143 So. 3d at 424, citing Alleyne, 133 S.Ct. at 2158 (italics in original). "The key fact pertinent to PRR sentencing—whether the defendant committed the charged offense within three years of release from prison—is not an ingredient of the charged offense. Rather, it relates to the fact of a prior conviction." Id. Hence, Appellant's comparison of a prison releasee reoffender sentence to an element of an offense for a conviction, like in the case of felony theft, is misplaced.

Appellant argues that the sentencing court violated Apprendi by considering whether Appellant was the person who committed the prior offenses (IB. 32-39). In the plurality decision of Shepard v. United States, 544 U.S. 13, 15-16 (2005), cited by Appellant, the Supreme Court considered the Armed Career Criminal Act, providing for a minimum prison term for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies, which makes a burglary a violent felony only if it is committed in a building or in an enclosed space, a "generic burglary," as opposed to in a boat or motor vehicle. The court held that in the case of a plea to burglary, the court could only make a sentencing

determination under the Act as to whether the defendant previously pled to generic burglary based on the charging document, plea agreement or plea colloquy, and not non-conclusive records which the prior trial court might not have considered. Shepard, 544 U.S. at 21, 26.

Here, the trial court actually acted within the confines of Shepard. It relied on conclusive court records, certified copies of prior convictions and the certified pen pack, in making its determination. The court in Shepard explained that the state statute at play in that case did not require a finding of generic burglary (whether it was committed in a building or closed space), so that the charging document did not narrow the charge, and, therefore, the only other items that could be relied on would be trial findings or rulings, admissions or accepted facts in the colloquy. 544 U.S. at 25. It further explained, "[i]n a nongeneric State, the fact necessary to show a generic crime is not established by the record of conviction as it would be in a generic State when a judicial finding of a disputed prior conviction is made on the authority of Almendarez-Torres." Id. (complete citation from opinion not given). Appellee submits that this language from the Supreme Court again recognizes that Almendarez-Torres permits a judicial finding on the record of a prior conviction established by conclusive court records.

Appellant makes the argument that the prior record exception does not encompass the date of release. Appellee notes that the above-cited cases in Florida,

finding that that the trial court may impose a prior releasee reoffender sentence, have disagreed. Accord Murphy v. State, 277 So. 3d 242 (Fla. 1st DCA 2017)(court rejected argument that a prison releasee reoffender sentence is unconstitutional if a jury did not make the finding that the defendant was released within the previous three years). Appellee maintains that the date of release is a type of finding based on conclusive court records as discussed in Stephens.

Regardless, before this Court considers remand, it should first determine whether the trial court's error was harmless. The United States Supreme Court held in Washington v. Recuenco, 548 U.S. 212 (2006) that a harmless-error analysis is to be utilized as "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not a structural error." Id. at 220. The Florida Supreme Court has adopted the Recuenco analysis. See Galindez v. State, 955 So. 2d 517, 522-23 (Fla. 2007) ("Finally, in Recuenco, the Supreme Court reversed the Washington Supreme Court's holding that harmless error analysis does not apply to *Apprendi* error. Accordingly, to the extent some of our pre-*Apprendi* decisions may suggest that the failure to submit factual issues to the jury is not subject to harmless error analysis, *Recuenco* has superseded them.")

Any reasonable jury would have determined Appellant to have committed a qualifying offense under section 775.082(9), Florida Statutes, and to have done so within three years of having been committed to a qualifying institution so that any

error was harmless. See Galindez, 955 So. 2d at 522-23; Recuenco, 548 U.S. at 212. See generally State v. Anderson, 905 So. 2d 111, 112 (Fla. 2005) (adopting test that incorrect scoresheet error is harmless if the record conclusively demonstrated that the same sentence would have been imposed).

Defense counsel states in the initial brief that Appellant "is not challenging the sufficiency of the State's evidence." (IB. 33). At trial, without objection, the State introduced the pen pack from the Office of Executive Clemency and all of Appellant's prison records (R. 388-415, 439-429). The pen pack is for Agustin Chavez, White, with a birthdate of 2/12/1990 with an a/k/a of 2/10/1990, which is the date Appellant gave the arresting officer (R. 390). Weight and height are also provided, along with fingerprints consistent with Appellant's, and a **photograph** (R. 391-392, 405, 413, 415). The pen pack indicated Appellant's release date from custody (R. 392, 415). The given release date is 6/17/17 on an attempted robbery for which Appellant was convicted on 1/14/2013 (R. 444, 457-459). Appellant was alleged to have committed the instant offense on September 16, 2017, wich was within two months of his prior release date (R. 110-111).

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via the Florida e-Filing Portal to Logan Mohs, Assistant Public Defender, appeals@pd15.state.fl.us, lmohs@pd15.state.fl.us, on February 12th, 2020.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
ASHLEY MOODY
ATTORNEY GENERAL

/s Melynda Melear

By: MELYNDA L. MELEAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 765570
Attorney for Appellee, State of Fla.
Office of the Attorney General
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561) 837-5016
(561) 837-5108(Fax)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

AGUSTIN CHAVEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 4D19-0157
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit
In and For Palm Beach County

CAREY HAUGHWOUT
Public Defender
Fifteenth Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ARGUMENT

I. The trial court abused its discretion by denying Chavez's motion to redepose witnesses after the State amended its information to add new charges and to enhance one already made.

Argument

Chavez was not permitted to depose the State's key witness, nor the arresting officer, on the charges he went to trial on. Instead, he was limited to his first deposition, which was conducted based on entirely different and less-severe charges. The trial court's decision to limit Chavez to this insufficient deposition was an abuse of discretion.

The State relies on three cases, but it does not develop any argument comparing the facts of those cases to the facts of this case. The first, *Freeman v. State*, 818 So. 2d 580 (Fla. 5th DCA 2002), contains no facts at all and therefore is of little use for anything beyond the standard of review to be applied. *See id.*at 583 (referring only to the trial court's consideration of Freeman's arguments, but not explaining what those arguments were).

The second, *Woodson v. State*, 739 So. 2d 1210 (Fla. 3d DCA 1999), contains a bit more detail, but it is easily distinguishable from this case. In *Woodson*, the deposition sought was a third deposition of a DNA expert. *Id.* at 1211. The topics sought to be covered were general matters related to the testing done, and there is no indication in the opinion that there was any change of

circumstance that would have made it reasonable for Woodson to have not covered those topics in the earlier depositions. *Id.* Finally, the State actually provided defense counsel with all the information the deposition would have given, and that information was used for effective cross-examination. *Id.* Here, in contrast, Chavez sought only a second deposition, not a third; the topics sought to be covered were the new charges and enhancement that he had no reason to cover in detail in the first deposition; and Chavez's cross-examination of Garciamendez was not as thorough as it would have been had he been able to conduct a deposition and get more detailed answers regarding questions such as whether a bottle or fist was used. *Woodson* is distinguishable.

Third, the State cites *J.S. v. State*, 45 So. 3d 910 (Fla. 4th DCA 2010), which was also discussed in the trial court. Chavez will rely on his Initial Brief's discussion of this case.

After a non-argumentative recitation of the facts, the State moves straight into an argument that any error was harmless because Chavez was able to cross-examine the victim about the bottle. However, although the cross-examination of Garciamendez was as extensive as possible given the circumstances, it cannot be fairly characterized as "thorough." A key portion of this impeachment was Garciamendez's deposition statement that Chavez hit him with a fist rather than a

bottle. [T. 283-89, 294].[1] However, Garciamendez was able to explain this changed story by telling the jury that his original words simply did not translate well. [T. 288]. Had Chavez been allowed a second deposition of Garciamendez, either this explanation would have come out earlier (thereby avoiding Chavez's counsel appearing unprepared to the jury), or Garciamendez would have confirmed in more clear language that Chavez in fact used a fist (thereby weakening his trial explanation for his inconsistent statements). A second deposition therefore would have made a large difference to the preparation for and execution of Chavez's cross-examination of Garciamendez. The fact that some impeachment was possible does not mean that a thorough impeachment was possible. Chavez asks this Court to recognize that he was procedurally prejudiced by his inability to conduct a deposition of Garciamendez and the relevant officers on the charges he was actually facing.[2]

Next, the State seems to suggest at the end of this section that this error is harmless because Chavez testified that he used a bottle at one point. There are two problems with this claim. First, Chavez may not have testified at all had

[1] The Initial Brief is cited as [IB XX], the State's Response is cited as [AB XX], and the record is cited in the manner indicated in the Initial Brief.

[2] The concept of procedural prejudice normally arises when there is a discovery violation. *See Dabbs v. State*, 229 So. 3d 359, 360-61 (Fla. 4th DCA 2017). But Chavez suggests that the same analysis is appropriate here. Whether it is the State failing to turn over evidence, or the trial court precluding the deposition being taken, the end result of the defendant being not fully prepared for trial is the same.

Garciamendez been able to be more thoroughly impeached. The trial court's abuse of discretion in precluding a second deposition "effectively deprived appellant of the opportunity to make his decision whether or not to testify 'in an atmosphere free of coercion or intimidation.'" *Andrews v. State*, 443 So. 2d 78, 84 (Fla. 1983) (quoting *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976)). Of course it was not the trial court's intent to coerce or intimidate Chavez with regard to his decision to testify, but the trial court's abuse of discretion nevertheless placed Chavez in a position where he had to make a decision that very well might have been made the opposite way but for the error. Second, although Chavez did admit to using a bottle, he admitted only to using it "once." [T. 387]. He was found guilty of two counts involving two separate victims. [R. 168-69]. Even if it is viewed as uncoerced, there is nothing about Chavez's testimony that would guarantee the jury would have convicted him on both counts when he admitted to only one (and where it was ambiguous which one he in fact was admitting).

Finally, the State argues that the second victim is irrelevant because Chavez was acquitted on Count Two. However, Count Three also involved the second victim, and Chavez was adjudicated guilty on that count. [R. 111, 222]. The second victim was therefore highly relevant.

Because Chavez was not allowed to conduct complete depositions regarding the charges he was actually facing, the trial court abused its discretion. Chavez

respectfully requests that this Court reverse his convictions and remand for new trial proceedings.

II. The trial court erred by imposing a PRR sentence without a jury finding.

Argument

The prior record exception to *Apprendi*[3] and *Alleyne*[4] should be overturned. Doing so would make clear that Chavez's prison releasee reoffender sentences violate the Sixth and Fourteenth Amendments.

The State's argument on this point is primarily that precedent has established the prior record exception and that this Court should therefore apply it. For the most part, Chavez agrees. As noted in his Initial Brief, Chavez recognizes that this Court cannot overturn the prior record exception, and that it would have to recede from its precedent in order to not apply the exception to the date of release. [IB 12-14]. However, again as described in the Initial Brief, this Court is not bound on the identity argument made.[5] And even if this Court does believe it is bound but agrees with Chavez's arguments, it would be appropriate to write an opinion explaining that position but recognizing the binding case law preventing a reversal.

---

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[4] *Alleyne v. United States*, 570 U.S. 99 (2013).
[5] Chavez notes that the State has failed to raise any merits argument with respect to this identity argument. He therefore relies on his Initial Brief for this point.

The existence of precedent against Chavez in this case does not address the heart of the issue which is whether that precedent is itself correct.

Before moving into that argument, however, Chavez does wish to clarify one statement from the State regarding the precedent. The State argues that "[t]he recognition in Alleyne that Almendarez-Torres is still good law confirms that Alleyne does not apply to recidivism statutes." [AB 13]. The implication of this statement is that *Alleyne* adopted the prior record exception as a clear holding. However, as argued in the Initial Brief, [IB 22-23, 36 n.19], the Supreme Court did not confer its blessing on the prior record exception, it merely "[did] not revisit it" because "the parties [did] not contest [its] vitality." *Alleyne*, 570 U.S. at 111 n.1. The State is technically correct that *Alleyne* does not apply to recidivism statutes (if it did, this issue likely would have been resolved years ago), but to the extent it is suggesting *Alleyne* endorses its inapplicability, it is incorrect.

The State's first argument on the correctness of the prior record exception is to claim that the PRR statute is not comparable to an element of an offense. [AB 15]. But this claim ignores *Alleyne*'s explicit definition of an "element": "any fact that increases the mandatory minimum." *Alleyne*, 570 U.S. at 103. It also ignores the modern trend of the Supreme Court to eliminate any Sixth Amendment distinction between an "element" and a "sentencing factor." *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 602, 604-05 (2002); *see also Apprendi*, 530 U.S. at 500,

518 (Thomas, J., concurring) (revealing how the distinction between the two arose in the 1980s without any historical grounding). In fact, the case that created that distinction, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), was overturned by *Alleyne* itself. *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). Chavez recognizes that there has been a distinction drawn between an "element" and a "sentencing factor," and that the PRR statute is normally viewed as the latter. But Chavez's argument, which the State does not address, is that this distinction is itself no longer valid.

Next, the State argues that the PRR statute actually falls within the confines of *Shepard v. United States*, 544 U.S. 13 (2005), which allows a trial court to look at certain objective documents to determine whether a prior conviction was for a certain crime. *Id.* at 16. The State makes two errors here. First is that it argues "the certified pen pack" is the sort of record contemplated by *Shepard*. But the pen pack is a document created by the State itself, or at least by a private company contracted by the State, and is therefore far more akin to the police report rejected by *Shepard* than to the judicially-created records *Shepard* approves of. Second, to the extent that the trial court's finding was based on conclusive and objective judicial records, those records did not provide a conclusive and objective answer to the question of identity.[6] *Someone* was convicted of the prior crimes relied upon

[6] Again, the State has ignored this vitally important question.

by the trial court, that much is objectively and conclusively true. But was the person sitting in the courtroom before the judge for sentencing in the later case that same person who was convicted before? The records do not conclusively prove that fact. It is only through a weighing of evidence and credibility that a fact-finder can determine the records match the individual, and a determination that requires that sort of weighing is not something that can be known with "conclusive significance." *Id.* at 25.

The State's final argument on this issue is that any error here was harmless because "[a]ny reasonable jury would have determined Appellant to have committed" the necessary predicate offenses for a PRR sentence. [AB 17]. Chavez disagrees. It would have been perfectly reasonable for a jury to look at the documents in this case, containing multiple spellings for the name Agustin/Augustin, along with multiple birthdates, and conclude that the State did not prove *beyond a reasonable doubt* that the people were the same.[7] As noted in

[7] Additionally, Chavez suggests that the harmless error test suggested by the State in this case itself violates the Sixth and Fourteenth Amendments. If the State forces a defendant to have a bench trial rather than a jury trial on the question of guilt, it would be inappropriate for the question on appeal to be whether guilt was clear and obvious. Instead, this sort of structural error always requires reversal. *See Abrams v. State*, 777 So. 2d 1205, 1206 (Fla. 4th DCA 2001). The distinction that has been drawn for some elements, or some "sentencing factors," to have a harmless error analysis should be abolished. *See Johnson v. State*, 994 So. 2d 960, 968-73 (Fla. 2008) (Anstead, J., dissenting) (advocating for this result). However, even if the harmless error test is applied, the State has failed to meet its burden under the unique facts of this case.

the Initial Brief, this Court need not decide whether the issue raised in this case would be harmless if there were no discrepancies in the record. This case is particularly unique in that the records introduced themselves create a question regarding identity. A case in which the prior record documents exactly match the information for the defendant may result in a different outcome, but that question can be left until such a case arises.

Chavez's jury found that he committed certain crimes, and the jury's finding alone would have subjected him to a certain mandatory minimum sentencing floor. Because the trial court itself made factual findings under the PRR statute, Chavez's minimum sentencing floor was raised. This raising of the sentencing floor without a jury finding violated *Alleyne*. Because the prior record exception to *Alleyne* should be abolished, and because it does not even apply to the question of identity, Chavez's sentences should be reversed.

CONCLUSION

For the foregoing reasons, as well as those argued in the Initial Brief, Chavez respectfully requests that this Court reverse his convictions and remand for a new trial. He requests alternatively that this Court reverse his sentences and remand for resentencing, or at the very least that this Court write a detailed opinion on the PRR issue so that further argument can be made in other courts.

Respectfully submitted,

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF SERVICE

I certify that this brief was electronically filed with the Court and a copy of it was served to Melynda L. Melear, Senior Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 30th day of March, 2020.

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 0120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF COMPLIANCE

I certify this brief has been prepared and filed in Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

AGUSTIN CHAVEZ, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 4D19-0157

APPELLANT'S MOTION FOR WRITTEN OPINION, FOR CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE, AND FOR REHEARING

Appellant Agustin Chavez, through undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.330, respectfully moves this Court for a written opinion and the certification of a question of great public importance. To the extent a motion for rehearing is technically necessary to allow this Court to change the outcome of the case if the act of writing the opinion changes the Court's views, Chavez also moves for rehearing.

Case Background

Appellant was convicted of one count of robbery with a deadly weapon and one count of aggravated battery with a deadly weapon. He was sentenced as a

Prison Releasee Reoffender to life in prison on the robbery count and to 15 years in prison on the battery count.

On appeal, Appellant raised two issues. The first dealt with a motion to redepose witnesses; that issue is not raised in this motion. The second argued that the "prior record exception" that allowed the trial court to impose PRR sentences without jury findings was unconstitutional; that issue is the subject of this motion.

This Court affirmed in an unwritten per curiam opinion.

Argument

Motion for Written Opinion and Certification

A motion for written opinion is appropriate when such an opinion would provide: "a legitimate basis for supreme court review." Fla. R. App. P. 9.330(a)(2)(D). The Florida Supreme Court has discretionary jurisdiction over decisions that "expressly construe a provision of the state or federal constitution" and those that "pass upon a question certified to be of great public importance." Fla. R. App. P. 9.030(a)(2)(A)(ii), (v). This case implicates both of these grounds for jurisdiction.

Whether this Court affirms or reverses on the prior record exception issue, it will have "expressly construe[d] a provision of the . . . federal constitution," specifically the Sixth Amendment right to a trial by jury. *Id.* at (ii). Either the Sixth Amendment requires jury trials for PRR sentencing or it does not, but no

matter which is the case this Court's opinion will necessarily trigger the first basis for supreme court review.

Additionally, this issue is one of great public importance, and Appellant respectfully moves this Court to certify it as such.[1] *See* Fla. R. App. P. 9.330(a)(2)(C). The right to a jury trial is certainly of paramount importance to a just society, and the large number of cases that involve some aspect of prior-record enhancement demonstrates that this is not an isolated issue.

Appellant recognizes the existence of precedent against him on the bulk of the issue he raised to this Court, but that is all the more reason why a written opinion and certification is necessary. As argued in Appellant's briefs, it appears that a large body of case law has grown out of a misunderstanding of the United State's Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In that case, the Supreme Court explicitly declined to address the question of whether the Sixth Amendment right to a jury trial applied to "the fact of a prior conviction." *Id.* at 485-90. It created an "exception," but in context that exception was not a holding but rather a limitation of the holding. The Supreme Court held

[1] Appellant respectfully suggests the language: "IS THERE AN EXCEPTION TO THE SIXTH AMENDMENT RIGHT TO JURY TRIALS FOR FACTS RELATED TO A CRIMINAL DEFENDANT'S PRIOR RECORD, RAISED DURING SENTENCING TO ENHANCE THE POTENTIAL SENTENCE; AND IF SO, DOES THAT EXCEPTION APPLY TO THE QUESTION OF WHETHER THE PRIOR RECORDS INTRODUCED ARE IN FACT THOSE OF THE DEFENDANT BEFORE THE COURT FOR SENTENCING?"

that the Sixth Amendment applied to all non-prior-conviction facts, but left for another day the question of whether it also applied to prior-conviction facts. But since that decision, Florida courts (as well as those around the country) have taken the Supreme Court's language to mean that it was explicitly carving out an exception rather than simply not addressing the issue. And, again as described in the briefs, the Supreme Court has indicated multiple times that it is inclined to finally address, for the first time, the question it left to the side.

But having that question addressed requires a case reaching the Court. This case provides a perfect vehicle for both the Florida Supreme Court to reconsider whether the prior record exception actually is mandated by United States Supreme Court precedent, and for the United States Supreme Court itself to clarify the matter once and for all. Appellant respectfully moves this Court for a written opinion and for certification of a question of great public importance so that he can make his argument, which appears to be yet-unaddressed by any court in Florida,[2] in those courts that can grant him relief.

Motion for Rehearing

This Court's per curiam affirmance of this case prevents Appellant from being able to "state with particularity the points of law or fact that, in the opinion

[2] This point is important to emphasize: because litigants and courts have misunderstood *Apprendi* to create an explicit exception rather than as leaving the question for another day, there has not been an analysis performed on the issue argued by Appellant. This important question sits silently unanswered.

of the movant, the court has overlooked or misapprehended." Fla. R. App. P. 9.330(a)(2)(A). However, for the reasons argued in the briefs, Appellant respectfully believes that this Court erred in its decision to affirm. To the extent that a specific motion for rehearing is procedurally required in order for this Court to reconsider its decisions if it grants the motion for written opinion, Appellant is including this section for that purpose.

Appellant respectfully moves this Court to rehear his case, and to reverse on either or both of the issues raised.

Conclusion

For the reasons described above, Appellant respectfully moves this Court to write a written opinion on this case and to certify a question of great public importance. In an abundance of caution in case it is technically required, Appellant also moves for rehearing so that this Court may reconsider the outcome when writing the requested opinion.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
Fifteenth Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

CERTIFICATE OF SERVICE

I certify that this motion was electronically filed with the Court and a copy of it was served to Melynda L. Melear, Senior Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 20th day of May, 2020.

/s/ Logan T. Mohs
Logan T. Mohs
Assistant Public Defender
Florida Bar No. 120490
lmohs@pd15.state.fl.us
appeals@pd15.org

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

AGUSTIN CHAVEZ,

Appellant,

v. **CASE NO. 4D19-157**

STATE OF FLORIDA,

Appellee.

RESPONSE TO MOTION FOR WRITTEN OPINION, FOR CERTIFICATION OF QUESTION OF IMPORTANCE AND FOR REHEARING

Appellee, the State of Florida, opposes Appellant's motion for written opinion, certification of question of importance, and rehearing, and states:

1. Rule 9.330(2)(D), Florida Rules of Appellate Procedure, provides that a motion for written opinion shall set forth the reasons that the party believes that a written opinion would provide a legitimate basis for supreme court review, an explanation of deviation from prior precedent, or guidance to the parties or lower tribunal. Appellant has not made a sufficient showing that a written opinion is warranted in this case. Specifically, Appellant has not shown that a question of great public importance is necessary in this case.

2. Appellant states that his second ground on appeal, on whether a jury finding is required for prison releasee reoffender sentencing, is in need of examination by the Florida Supreme Court on a question of great public importance. The case law, by way of holdings by this court, the Florida Supreme Court and other district courts, is clear, though, that the prior records exception remains viable and that it may be relied on in prison releasee reoffender sentencing.

This Court rejected a challenge to the prison releasee reoffender statute in State v. Wilson, 203 So.3d 192 (Fla. 4th DCA 2016). In Wilson, this Court held that the trial court could impose a prison releasee reoffender sentence in the absence of finding by the jury that the defendant qualified for such enhanced sentencing. Other panels and courts have ruled similarly. See also Robinson v. State, 793 So. 2d 891, 893 (Fla. 2001) (Apprendi does not require that a defendant's release within three years be proved to a jury beyond a reasonable doubt); McDowell v. State, 789 So.2d 956 (Fla. 2001) (a defendant's prior release from prison, as will make him subject to sentence under the Prison Releasee Reoffender Act, is not required under Apprendi to be submitted to the jury and proved beyond a reasonable doubt); Murphy v. State, 277 So. 3d 242 (Fla. 1st DCA 2017)(court rejected argument that a prison releasee reoffender sentence is unconstitutional if a jury did not make the finding that the defendant was released within the previous three years); Chapa v.

State, 159 So.3d 361 (Fla. 4th DCA 2014) (the facts found by the judge under the Act are not elements of the offense and are within the "prior conviction" exception to Apprendi); Williams v. State, 143 So. 3d 423, 424 (Fla. 1st DCA 2014)("[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' *of the charged offense*. The key fact pertinent to PRR sentencing—whether the defendant committed the charged offense within three years of release from prison—is not an ingredient of the charged offense. Rather, it relates to the fact of a prior conviction.").

United States v. Haymond, 139 S. Ct. 2369 (2019), relied on by Appellant in his brief, also recognized an exception to Apprendi's general rule in that prosecutors need not prove to the jury the fact of a defendant's prior conviction. 139 S. Ct. at 2377, n.3.

WHEREFORE, Appellee asks this court to deny Appellant's motion.

Respectfully submitted,

ASHLEY MOODY
Attorney General
Tallahassee, Florida

/s Melynda Melear

MELYNDA L. MELEAR
Senior Assistant Attorney General
Florida Bar #765570
1515 North Flagler Drive

Suite 900
West Palm Beach, FL 33401
Telephone: (561) 837-5016
CrimAppWPB@myfloridalegal.com

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing response has been e-filed and furnished via the e-Portal system to Logan Mohs, lmohs@pd15.state.fl.us Assistant Public Defender, on this 23rd day of May, 2020.

/s Melynda L. Melear
_____
Of Counsel

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA

vs.

AGUSTIN A. CHAVEZ, 0303312,
W/M, 02/12/1990, [redacted]
BN: 2017032546
_____/

CASE NO. 2017CF009149AMB
CRIMINAL DIVISION "Z" (KG)

INFORMATION FOR:

1) ROBBERY
2) RESIST OFFICER WITHOUT VIOLENCE

In the Name and by Authority of the State of Florida:

DAVID ARONBERG, State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that:

COUNT 1: AGUSTIN A. CHAVEZ on or about September 16, 2017, in the County of Palm Beach and State of Florida, did knowingly take away U.S. currency, of some value, from the person or custody of CARLOS ENRIQUE GARCIAMENDEZ, with the intent to permanently or temporarily deprive CARLOS ENRIQUE GARCIAMENDEZ or any other person not the defendant(s) of the property and in the course of the taking there was the use of force, violence, assault, or putting in fear, contrary to Florida Statute 812.13(1)and(2)(c). (2 DEG FEL)

COUNT 2: AGUSTIN A. CHAVEZ on or between September 16, 2017 and September 17, 2017, in the County of Palm Beach and State of Florida, did resist, obstruct or oppose THOMAS BROOKS and/or FRANK ACIERNO and/or IAN GOODMAN law enforcement officers of the PALM BEACH COUNTY SHERIFF'S OFFICE in the execution of a legal process or in the

Case No. «CASE_NUMBER»

lawful execution of a legal duty, without offering or doing violence to the person of such officers, contrary to Florida Statute 843.02. (1 DEG MISD)

DAVID ARONBERG
STATE ATTORNEY

By: CHRISTY L ROGERS
FL. BAR NO. 0388815
Assistant State Attorney
Fifteenth Judicial Circuit

STATE OF FLORIDA
COUNTY OF PALM BEACH

Appeared before me, CHRISTY L ROGERS, Assistant State Attorney for Palm Beach County, Florida, personally known to me, 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 as true, and which, if true, would constitute the offense therein charged, that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense.

Assistant State Attorney

Sworn to and subscribed to before me this 16 day of October, 2017.

Sharon O. Whittaker
NOTARY PUBLIC, State of Florida

SHARON O WHITTAKER
Commission # GG 123682
Expires August 30, 2021
Bonded Thru Budget Notary Services

CLR/sw

FCIC REFERENCE NUMBERS:
1) ROBBERY SAGES:1299 FDLE REC NO:2815
2) RESIST OFFICER WITHOUT VIOLENCE SAGES:4801 FDLE REC NO:3143

DEF:A 1) ROBBERY WITH A WEAPON (812.13 1 2b) (1F) DISPO: NF
DEF:A 2) GRAND THEFT (812.014 1 2c) (3F) DISPO: NF

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record (Information) indicates that confidential information is included within the document being filed; to wit: Social Security Number, § 119.0714.

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
STATE OF FLORIDA

STATE OF FLORIDA

vs.

AGUSTIN A. CHAVEZ, 0303312,
W/M, 02/10/1990, [redacted]
BN: 2017032546

CASE NO. 2017CF009149AMB
CRIMINAL DIVISION "Z" (KG)

_____/

FILED
17 OCT 23 AM 11:11
SHARON R. BOCK, CLERK
PALM BEACH COUNTY, FL
CRIMINAL DIVISION

AMENDED INFORMATION FOR:

1) ROBBERY
2) RESIST OFFICER WITHOUT VIOLENCE

In the Name and by Authority of the State of Florida:

DAVID ARONBERG, State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that:

COUNT 1: AGUSTIN A. CHAVEZ on or about September 16, 2017, in the County of Palm Beach and State of Florida, did knowingly take away U.S. currency, of some value, from the person or custody of CARLOS ENRIQUE GARCIAMENDEZ, with the intent to permanently or temporarily deprive CARLOS ENRIQUE GARCIAMENDEZ or any other person not the defendant(s) of the property and in the course of the taking there was the use of force, violence, assault, or putting in fear, contrary to Florida Statute 812.13(1)and(2)(c). (2 DEG FEL)

COUNT 2: AGUSTIN A. CHAVEZ on or between September 16, 2017 and September 17, 2017, in the County of Palm Beach and State of Florida, did resist, obstruct or oppose THOMAS BROOKS and/or FRANK ACIERNO and/or IAN GOODMAN a law enforcement officer of the PALM BEACH COUNTY SHERIFF'S OFFICE in the execution of a legal process or in the

Case No. 2017CF009149AMB

lawful execution of a legal duty, without offering or doing violence to the person of such officer, contrary to Florida Statute 843.02. (1 DEG MISD)

DAVID ARONBERG
STATE ATTORNEY

By: CHRISTY L ROGERS
FL. BAR NO. 0388815
Assistant State Attorney
Fifteenth Judicial Circuit

STATE OF FLORIDA
COUNTY OF PALM BEACH

Appeared before me, CHRISTY L ROGERS, Assistant State Attorney for Palm Beach County, Florida, personally known to me, 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 as true, and which, if true, would constitute the offense therein charged, that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense.

Assistant ~~State~~ Attorney

Sworn to and subscribed to before me this 23 day of October, 2017.

NOTARY PUBLIC, State of Florida

CLR/sw

NOTARY PUBLIC STATE OF FLORIDA
MEGAN E. MCCARTHY
MY COMMISSION # FF 978079
EXPIRES: April 4, 2020
Bonded Thru Budget Notary Services

Case No. 2017CF009149AMB

FCIC REFERENCE NUMBERS:
1) ROBBERY SAGES:1299 FDLE REC NO:2815
2) RESIST OFFICER WITHOUT VIOLENCE SAGES:4801 FDLE REC NO:3143

DEF:A 1) ROBBERY WITH A WEAPON (812.13 1 2b) (1F) DISPO: NF
DEF:A 2) GRAND THEFT (812.014 1 2c) (3F) DISPO: NF

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record (Information) indicates that confidential information is included within the document being filed; to wit: Social Security Number, § 119.0714.

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2017CF009149AMB DIVISION: "Z"
(EW)

STATE OF FLORIDA

vs.

AGUSTIN A. CHAVEZ,
0303312, W/M, 02/10/1990, [redacted]
AKA
AUGUSTIN CHAVEZ,
0303312, W/M, 01/23/1991
And AKA
AUGUSTIN ANTONIO CHAVEZ,
0303312, W/M, 02/12/1990, [redacted]
And AKA
AUGUSTIN A CHAVEZ,
W/M, 02/10/1990, [redacted]
BN: 2017032546
_____/

FILED
Circuit Criminal Department
JUN 18 2018
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

AMENDED
INFORMATION FOR:

1) **ROBBERY WITH A DEADLY WEAPON**
2) **ROBBERY WITH A DEADLY WEAPON**
3) **AGGRAVATED BATTERY (DEADLY WEAPON)**

In the Name and by Authority of the State of Florida:

DAVID ARONBERG, State Attorney for the Fifteenth Judicial Circuit, Palm Beach County, Florida, by and through his undersigned Assistant State Attorney, charges that:

COUNT 1: AGUSTIN A. CHAVEZ on or about September 16, 2017, in the County of Palm Beach and State of Florida, did knowingly take away U.S. currency and/or cell phone and/or shoes, of some value, from the person or custody of CARLOS ENRIQUE GARCIAMENDEZ, with the intent to permanently or temporarily deprive CARLOS ENRIQUE GARCIAMENDEZ or any other person not the defendant of the property and in the course of the taking there was the use of force, violence, assault, or putting in fear, and in the course of committing the robbery AGUSTIN A. CHAVEZ carried a firearm or other deadly weapon, contrary to Florida Statute 812.13(1)and(2)(a). (1 DEG FEL, PBL)

Case No. 2017CF009149AMB

COUNT 2: AGUSTIN A. CHAVEZ on or about September 16, 2017, in the County of Palm Beach and State of Florida, did knowingly take away a wallet and/or personal property of some value, from the person or custody of ISMAEL PEREZ aka JOHN DOE, Hispanic male, DOB: 02/19/1982, wearing a blue shirt, depicted on surveillance video, with the intent to permanently or temporarily deprive ISMAEL PEREZ aka JOHN DOE, Hispanic male, DOB: 02/19/1982, wearing a blue shirt, depicted on surveillance video or any other person not the defendant of the property and in the course of the taking there was the use of force, violence, assault, or putting in fear, and in the course of committing the robbery AGUSTIN A. CHAVEZ carried a firearm or other deadly weapon, contrary to Florida Statute 812.13(1)and(2)(a). (1 DEG FEL, PBL)

COUNT 3: AGUSTIN A. CHAVEZ on or about September 16, 2017, in the County of Palm Beach and State of Florida, did actually and intentionally touch or strike ISMAEL PEREZ aka JOHN DOE, Hispanic male, DOB: 02/19/1982, wearing a blue shirt, depicted on surveillance video against the will of ISMAEL PEREZ aka JOHN DOE, Hispanic male, DOB: 02/19/1982, wearing a blue shirt, depicted on surveillance video, and in doing so used a glass bottle, a deadly weapon, contrary to Florida Statute 784.045(1)(a)2 and (2). (2 DEG FEL)

DAVID ARONBERG
STATE ATTORNEY

By: EMILY WALTERS
FL. BAR NO. 098826
Assistant State Attorney
Fifteenth Judicial Circuit

STATE OF FLORIDA
COUNTY OF PALM BEACH

Appeared before me, EMILY WALTERS, Assistant State Attorney for Palm Beach County, Florida, personally known to me, 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 as true, and which, if true, would constitute the offense therein charged, that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense.

Assistant State Attorney

Sworn to and subscribed to before me this 15 day of June, 2018.

Case No. 2017CF009149AMB

NOTARY PUBLIC, State of Florida

EW/*

LINDA MOBERG
MY COMMISSION # FF 192020
EXPIRES: February 10, 2019
Bonded Thru Budget Notary Services

CITATION NO.:

FCIC REFERENCE NUMBERS:
1) ROBBERY WITH A DEADLY WEAPON SAGES:1299 FDLE REC NO:2813
2) ROBBERY WITH A DEADLY WEAPON SAGES:1299 FDLE REC NO:2813
3) AGGRAVATED BATTERY (deadly weapon) SAGES:1318 FDLE REC NO:4134

DEF:A 2) RESIST OFFICER WITHOUT VIOLENCE (843.02) (1M) DISPO: NP DEF:A 1) ROBBERY (812.13 1 2c) (2F) DISPO: NP

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record (Information) indicates that confidential information is included within the document being filed; to wit: Social Security Number, § 119.0714.

IN THE CIRCUIT COURT, FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2017CF009149AMB
DIV: Z
OBTS NUMBER:

STATE OF FLORIDA

v.

AGUSTIN A. CHAVEZ,
W/M,
02/10/1990, [redacted]
_____/

[ ] PROBATION VIOLATOR
[ ] COMMUNITY CONTROL VIOLATOR
[ ] RETRIAL
[ ] RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by PUBLIC DEFENDER - DIVISION Z – Perry Thurston (attorney)

[X] Having been tried and found guilty of the following crime(s):	[ ] Having entered a plea of guilty to the following crime(s):	[ ] Having entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE
1	Robbery with a Deadly Weapon	812.13(1)and(2)(a)	1F PBL
3	Aggravated Battery (Deadly Weapon Bodily Harm)	784.045(1)(a)2 and (2)	2F

[X] and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[X] and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.

[ ] and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED [ ] The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on [ ] probation and/or [ ] Community Control under the supervision of the Dept. Of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED [ ] The Court hereby defers imposition of sentence until

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 2nd day of January 2019.

Cheryl Caracappa
CIRCUIT COURT JUDGE

FILED
Circuit Criminal Department
JAN 02 2019
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

1 of 2

IN THE CRIMINAL DIVISION OF THE CIRCUIT/COUNTY COURT OF THE FIFTEENTH JUDICAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. **50-2017-CF-009149-AXXX-MB** DIV. **Z: Felony - Z (Circuit)**

OBTS NUMBER: **5002317974**

STATE OF FLORIDA

V

AGUSTIN A CHAVEZ
DEFENDANT

[ ] COMMUNITY CONTROL VIOLATOR

[ ] PROBATION VIOLATION

February 10, 1990[⊥]	**WHITE**[⊥]	**Male**[⊥]	
DATE OF BIRTH	RACE	GENDER	SOCIAL SECURITY NUMBER

The fingerprints below are those of said Defendant taken by Deputy Sheriff ADEA, SEAN 9114

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	4. R. RING	5. R. LITTLE
				
6. L. THUMB	**7. L. INDEX**	**8. L. MIDDLE**	**9. L. RING**	**10. L. LITTLE**
				

THE COURT CERTIFIES that the fingerprints shown above are those of the Defendant and were placed thereon by said Defendant in the Court's presence in Open Court at Palm Beach County, Florida, this 2nd of January, 2019.

Cheryl Caracappa

CIRCUIT/COUNTY COURT JUDGE

2 of 2

A209

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

The Criminal Punishment Code Scoresheet Preparation Manual is available at: http://www.dc.state.fl.us/pub/sen_cpcm/index.html

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE
1/2/2019	☐ DC ☒ SAO Berti Levison ~~GRIMES, KRISTEN~~	PALM BEACH	CARACUZZO, CHERYL

5. NAME (LAST, FIRST, M.I.)	6. DOB	8. RACE	10. PRIMARY OFF. DATE	12
CHAVEZ, AGUSTIN A.	2/10/1990	☐ B ☒ W ☐ OTHER	9/16/2017	PLEA ☐
	7. DC #	9. GENDER	11. PRIMARY DOCKET #	TRIAL ☑
	W26512	☒ M ☐ F	17CF009149AMB	

I. PRIMARY OFFENSE: If Qualifier, please check ☐ A ☐ S ☐ C ☐ R (A=Attempt, S=Solicitation, C=Conspiration, R=Reclassification)

FELONY DEGREE	F.S.#	DESCRIPTION	OFFENSE LEVEL	POINTS
1PBL	812.13 1 2A	ROBBERY WITH A DEADLY WEAPON	9	

(Level - Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116) **I. 92.00**

Prior capital felony triples Primary Offense points ☐

II. ADDITIONAL OFFENSE(S): Supplemental page attached ☐

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS		POINTS		TOTAL
	1	784.045 1A1 2	8	☐ ☐ ☐ ☐	1	x	37	=	37
Description	AGGRAVATED BATTERY (DEADLY WEAPON AND BODILY HARM)								
				☐ ☐ ☐ ☐		x		=	0
Description									
				☐ ☐ ☐ ☐		x		=	0
Description									

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐ **Supplemental page points** 0.00

II. 37.00

III. VICTIM INJURY:

		Number	Total			Number	Total
2nd Degree Murder	240 X		= 0	Slight	4 X		= 0
Death	120 X		= 0	Sex Penetration	80 X		= 0
Severe	40 X		= 0	Sex Contact	40 X		= 0
Moderate	18 X	1	= 18				

III. 18.00

IV. PRIOR RECORD: Supplemental page attached ☒

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER		POINTS		TOTAL
1	812.133 1 2a	9	☐ ☐ ☐ ☐	CARJACKING (DEADLY WEAPON)	1	x	23	=	23
2	784.045 1a1 2 2	7	☐ ☐ ☐ ☐	AGG BATTERY (DEADLY WEAPON BODILY HARM)	1	x	14	=	14
3	812.014 1 2c	2	☐ ☐ ☐ ☐	GRAND THEFT	1	x	0.8	=	0.8
3	893.13 6a	3	☐ ☐ ☐ ☐	POSSESSION OF COCAINE	1	x	1.6	=	1.6
2	810.02 1 3b	7	☐ ☐ ☐ ☐	ATTEMPT TO COMMIT BURGLARY OF A DWELLING	1	x	14	=	14
1	784.03 1	M	☐ ☐ ☐ ☐	BATTERY	3	x	0.2	=	0.6

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29) **Supplemental page points** 8.70

IV. 62.70

Page 1 Subtotal: 209.70

FILED
Circuit Criminal Department
JAN 02 2019
SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

NAME (LAST, FIRST, MI)	DOCKET #
CHAVEZ, AGUSTIN A.	**17CF009149AMB**

Page 1 Subtotal: 209.70

V. Legal Status violation = 4 Points
☐ Escape ☐ Fleeing ☐ Failure to appear ☐ Supersedeas bond ☐ Incarceration ☐ Pretrial intervention or diversion program
☐ Court imposed or post prison release community supervision resulting in a conviction **V.** _____

VI. Community Sanction violation before the court for sentencing **VI.** 0.00
☐ Probation ☐ Community Control ☐ Pretrial Intervention or diversion
☐ 6 points for any violation other than new felony conviction x _____ each successive violation OR
☐ New felony conviction = 12 points x _____ each successive violation if new offense results in conviction before or at same time as sentence for violation of probation OR
☐ 12 points x _____ each successive violation for a violent felony offender of special concern when the violation is not based solely on failure to pay costs, fines, or restitution OR
☐ New felony conviction = 24 points x _____ each successive violation for a violent felony offender of special concern if new offense results in a conviction before or at the sametime for violation of probation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points **VII.** _____

VIII. Prior Serious Felony = 30 Points **VIII.** _____

Subtotal Sentence Points 209.70

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enf. Protect.			Drug Trafficker	Motor Vehicle Theft	Criminal Gang Offense	Domestic Violence in the Presence of Related Child (offenses committed on or after 3/12/07)	Adult-on-Minor Sex Offense (offenses committed on or after 10/1/14)
_____ x 1.5	_____ x 2.0	_____ x 2.5	_____ x 1.5	_____ x 1.5	_____ x 1.5	_____ x 1.5	_____ x 2.0

Enhancement Subtotal Sentence Points **IX.** 0.00

TOTAL SENTENCE POINTS 209.70

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non_state prison sanction. If the total sentence points are 22 points or less, see Section 775.082(10), Florida Statutes, to determine if the court must sentence the offender to a non_state prison sanction.

If total sentence points are greater than 44:

209.7 (total sentence points) minus 28 = **181.7** x.75 = **136.28** (lowest permissible prison sentence in months)

If total sentence points are 60 points or less and court makes findings pursuant to both Florida Statutes 948.20 and 397.334(3), the court may place the defendant into a treatment-based drug court program.

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the Code exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

LIFE + 15 YEARS
maximum sentence in years

		Years	Months	Days
☒ State Prison	☒ Life			
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation	☐ Modified			

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison release reoffender, or a ☐ mandatory minimum applies.
☐ Mitigated Departure ☐ Plea Bargain ☐ Prison Diversion Program
Other Reason _____

JUDGE'S SIGNATURE Cheryl Caracappa

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

A211

RULE 3.992(b) CRIMINAL PUNISHMENT CODE SUPPLEMENTAL SCORESHEET

NAME (LAST, FIRST,M.I.)	DOCKET#	DATE OF SENTENCE
CHAVEZ, AGUSTIN A.	17CF009149AMB	1-2-19

II. ADDITIONAL OFFENSE(S):

DOCKET#	FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	COUNTS		POINTS		TOTAL
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									
/	/	/		☐ ☐ ☐ ☐		x		=	0
Description									

(Level - Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

II. 0.00

IV. PRIOR RECORD:

FEL/MM DEGREE	F.S.#	OFFENSE LEVEL	QUALIFY A S C R	DESCRIPTION	NUMBER		POINTS		TOTAL
3 /	812.13 1 2C /	5 /	☐ ☐ ☐ ☐	ATTEMPTED ROBBERY /	1	x	3.6	=	3.6
2 /	812.019 1 /	5 /	☐ ☐ ☐ ☐	DEALING IN STOLEN PROPERTY /	1	x	3.6	=	3.6
3 /	538.04 4a /	1 /	☐ ☐ ☐ ☐	FALSE VERIFICATION OF OWNERSHIP /	1	x	0.5	=	0.5
* /	/	M /	☐ ☐ ☐ ☐	VARIOUS MISD /	5	x	0.2	=	1
/	/	/	☐ ☐ ☐ ☐	/		x		=	0
/	/	/	☐ ☐ ☐ ☐	/		x		=	0

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

IV. 8.70

Reasons for Departure - Mitigating Circumstances

(reasons may be checked here or written on the scoresheet)

- ☐ Legitimate, uncoerced plea bargain.
- ☐ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- ☐ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- ☐ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
- ☐ The need for payment of restitution to the victim outweighs the need for a prison sentence.
- ☐ The victim was an initiator, willing participant, aggressor, or provoker of the incident.
- ☐ The defendant acted under extreme duress or under the domination of another person.
- ☐ Before the identity of the defendant was determined, the victim was substantially compensated.
- ☐ The defendant cooperated with the State to resolve the current offense or any other offense.
- ☐ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- ☐ At the time of the offense the defendant was too young to appreciate the consequences of the OFFENSE.
- ☐ The defendant is to be sentenced as a youthful offender.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence.

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

STATE OF FLORIDA
OFFICE OF EXECUTIVE CLEMENCY

RICK SCOTT, GOVERNOR, CHAIRMAN
PAM BONDI, ATTORNEY GENERAL
JIMMY PATRONIS, CHIEF FINANCIAL OFFICER
ADAM PUTNAM, COMMISSIONER OF AGRICULTURE
and CONSUMER SERVICES

JULIA McCALL, COORDINATOR

4070 Esplanade Way, Tallahassee, Florida 32399-2450
Phone: (850) 488-2952 Fax: (850) 488-0695
Toll Free: 1-800-435-8286

STATE OF FLORIDA,
COUNTY OF LEON

I HEREBY CERTIFY that I, Julia McCall, am Coordinator of the Office of Executive Clemency of the State of Florida. I further certify that this seal is the official seal of the State of Florida. As Coordinator of the Office of Executive Clemency, I am custodian of the records of the clemency office. Staff has made a thorough search of the clemency records and there is no record of restoration of civil rights; specific authority to own, possess or use firearms; or a pardon of any kind, having been granted by the Governor and Cabinet of the State of Florida to **ANTONIO A. CHAVEZ A/K/A AGUSTIN A. CHAVEZ A/K/A AUGUSTIN A. CHAVEZ A/K/A AUGUSTIN CHAVEZ A/K/A AUGUSTIN ANTONIO CHAVEZ, DOB: 02/12/1990 A/K/A 02/10/1990,** in connection with a conviction in the State of Florida. In addition, there is no application pending for clemency at this time for the above-named person.

Julia McCall, Coordinator
Office of Executive Clemency of the State of Florida

October 30, 2017

BUSINESS RECORD CERTIFICATION
CUSTODIAN OF RECORDS
OFFICE OF EXECUTIVE CLEMENCY
4070 ESPLANADE WAY, TALLAHASSEE, FL 32399-2450

I, Julia McCall, hereby certify that I am the Records Custodian for the Office of Executive Clemency. As part of my regular duties, I maintain custody of the official records of the Office of Executive Clemency.

I, Julia McCall, hereby further certify that the following memorandum, report, record, or data compilation, to-wit:

CERTIFICATE OF NO PARDON: **ANTONIO A. CHAVEZ A/K/A AGUSTIN A. CHAVEZ A/K/A AUGUSTIN A. CHAVEZ A/K/A AUGUSTIN CHAVEZ A/K/A AUGUSTIN ANTONIO CHAVEZ, DOB: 02/12/1990 A/K/A 02/10/1990,**

(a) that the attached document is a true and correct original of the official record generated by the Office of Executive Clemency;
(b) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
(c) was kept in the course of the regularly conducted activity of; and
(d) was made as a regular practice in the course of the regularly conducted activity.

Signature

October 30, 2017
Date

STATE OF FLORIDA
COUNTY OF LEON

Before me this day personally appeared Julia McCall, who, being duly sworn, deposes and acknowledges that the information contained in this affidavit is true and correct.

Sworn to and subscribed before me this 30 day of October 2017.

Personally Known ✓

NOTARY PUBLIC, State of Florida

My commission expires:

BRITTANY MILLIGAN
MY COMMISSION # GG 078151
EXPIRES: March 1, 2021
Bonded Thru Budget Notary Services

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
RICK SCOTT
Secretary
JULIE L. JONES

501 South Calhoun Street, Tallahassee, FL 32399-2500
http://www.dc.state.fl.us

State of Florida)

County of Leon)

I, MALINDA A. GRAHAM, CORRECTIONAL SERVICES ASST CONSULTANT, Central Records Office, State of Florida Department of Corrections, do hereby certify the attached documents to be correct copies of documents in the file of **AUGUSTIN A. CHAVEZ, DC No. W26512**, as the same appears in the Official Records in this Office. Given under my hand and the official seal of the Florida Department of Corrections, this 10/31/2017.

Malinda A. Graham
MALINDA A. GRAHAM
CORRECTIONAL SERVICES ASST CONSULTANT

SEAL

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
RICK SCOTT
Secretary
JULIE L. JONES

501 South Calhoun Street, Tallahassee, FL 32399-2500 http://www.dc.state.fl.us

CERTIFICATION OF RECORDS

I, MALINDA A. GRAHAM, hereby certify that I am a custodian of records of the Florida Department of Corrections, located at 501 South Calhoun Street, Tallahassee, Florida 32399-2500. Pursuant to sections 90.803(6), 90.803(8), and 90.902(11), Florida Statutes, I hereby certify the following:

a) that as part of my regular duties I maintain custody and control of the official records of the Florida Department of Corrections,

b) that the attached DC14 computer data record of **AUGUSTIN A. CHAVEZ, DC No. W26512**, consisting of **7** page/s, reflects entries of information that were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters,

c) that it is the regular practice of the Florida Department of Corrections to make, keep, and maintain the attached computer data during the course of regularly conducted business,

d) and that the attached computer data record is a true and correct copy of the original record contained in the official records of the Florida Department of Corrections maintained pursuant to Section 945.25.

Pursuant to Section 92.524, Florida Statues, I state under the penalties of perjury that I have read the foregoing certification and the facts stated in it are true.

Given under my hand and the official seal of the Florida Department of Corrections, this 10/31/2017.

Malinda A. Graham

MALINDA A. GRAHAM
CORRECTIONAL SERVICES ASST
CONSULTANT

SEAL

FLORIDA DEPARTMENT OF CORRECTIONS

XXXX 4 W26512 USER ID: XXXXXXX
NAME: CHAVEZ, AUGUSTIN A. DOC NO: W26512 STATUS: INACTIVE

OVERALL INMATE RECORD AS OF 10/31/17 TIME: 12:16

THE FOLLOWING INFORMATION IS FROM THE RECORD OF THE INMATE NAMED ABOVE. SOME DATA AS WELL AS RELEASE DATE(S) ARE SUBJECT TO CHANGE WITH THE AWARD OF AND/OR FORFEITURE OF GAIN TIME OR PROVISIONAL CREDITS OR WITH A CHANGE IN SENTENCE STRUCTURE OR INMATE STATUS.

LOCATION:
OVERALL TERM: 5 YRS 0MOS 0DAYS
CUSTODY GR: CLOSE SINCE: 03/01/13
DATE OF BIRTH: 02/12/90 SEX: MALE
BIRTHPLACE: FLORIDA HT: 5' 6"
SOC.SEC.NO.:
FILE IMAGING: COMPLETE RECORD IMAGED
PROVISIONAL RELEASE DATE: NO CREDITS
TENTATIVE RELEASE DATE: 06/17/2017
LAST PROV.AWARD: 0 DAYS ON / /
LAST GAIN TIME: 0 DAYS ON 05/31/17
RACE: WHITE EYES: BROWN
FBI NO: FDLE:

****
THE FOLLOWING DATES ARE SET BY THE FLORIDA COMMISSION ON OFFENDER REVIEW.
QUESTIONS ABOUT THESE DATES SHOULD BE DIRECTED TO THAT AGENCY AT (850)488-1655.
CONTROL RELEASE DATE: / / PRESUMPTIVE PAROLE DATE: 99/99/9999
****

INMATE SENTENCES AS OF 10/31/17 TIME: 12:16

THE PRIOR INMATE RECORD REFLECTS THE DATE THE OFFENDER WAS RELEASED.
EXTERNAL MOVEMENTS WILL REFLECT THE TYPE OF RELEASE.
THE CURRENT INMATE RECORD IS COMPRISED OF CONCURRENT AND/OR CONSECUTIVE SENTENCES WHICH ARE COMBINED TO ESTABLISH THE OVERALL TERM.

--- PRIOR INCARCERATION ---

IMPOSED	COUNTY	CASE NO.	OFFENSE	YRS	MO	DY	RELEASED
02/27/09	PALM BEACH	50-0712445	BURG/DWELL/(ATTEMPT)	1	6	0	02/13/10

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 06 UNIFORM: 502007CF012445AXXXMB
85% MINIMUM RELEASE DATE: 11/23/2009

--- LATEST INCARCERATION ---

01/09/13	PALM BEACH	50-1208119	TRAFFIC IN STOLEN PR	2	8	0	10/25/14

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 05
85% MINIMUM RELEASE DATE: 10/09/2014

01/09/13	PALM BEACH	50-1208119	COMMERCIAL FRAUD < $	2	8	0	10/25/14

SPEC.PROV.: PAROLE INEL
SENTENCING GUIDELINES OFFENSE LEVEL: 01
85% MINIMUM RELEASE DATE: 10/09/2014

01/14/13	PALM BEACH	50-1207402	ROBB. NO GU(ATTEMPT)	5	0	0	06/17/17

SPEC.PROV.: PAROLE INEL

Malinda A. Graham CSAC 10/31/2017

SENTENCING GUIDELINES OFFENSE LEVEL: 05
85% MINIMUM RELEASE DATE: 09/16/2016

INMATE DETAINERS AS OF 10/31/17 TIME: 12:16

THE FOLLOWING REFLECTS DETAINERS AGAINST THIS RECORD, AND/OR REQUESTS TO BE NOTIFIED PRIOR TO RELEASE OF THE INMATE.

FILED	TYPE	--- PRIOR INCARCERATION --- AUTHORITY	CHARGE(S)	REMOVED
NO DETAINER RECORDS FOUND				

INMATE MOVEMENT/TRANSFER HISTORY AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT MOVEMENT BY THE INMATE BETWEEN DEPARTMENT FACILITIES AS WELL AS RELEASES AND RETURNS FROM OUTSIDE AGENCIES.

DATE	MOVEMENT TYPE	--- PRIOR INCARCERATION --- DESTINATION/LOCATION	FROM
03/09/09	NEW COMMITMENT	S.F.R.C.	PALM BEACH
04/08/09	TRANSFERRED TO	LANCASTER C.I.	S.F.R.C.
04/08/09	IN TRANSIT AT	R.M.C.- MAIN UNIT	S.F.R.C.
04/13/09	TRANSFERRED TO	LANCASTER C.I.	R.M.C.- MAIN UNIT
02/13/10	EXPIRATION	PALM BEACH	LANCASTER C.I.
.			
	--- LATEST INCARCERATION ---		
02/04/13	NEW COMMITMENT	S.F.R.C.	PALM BEACH
02/13/13	TRANSFERRED TO	OKEECHOBEE C.I.	S.F.R.C.
05/21/14	TRANSFERRED TO	HARDEE C.I.	OKEECHOBEE C.I.
05/21/14	IN TRANSIT AT	S.F.R.C.	OKEECHOBEE C.I.
05/22/14	TRANSFERRED TO	HARDEE C.I.	S.F.R.C.
05/22/14	IN TRANSIT AT	CFRC-MAIN	S.F.R.C.
05/27/14	TRANSFERRED TO	HARDEE C.I.	CFRC-MAIN
04/14/15	TRANSFERRED TO	SANTA ROSA ANNEX	HARDEE C.I.
04/14/15	IN TRANSIT AT	CFRC-MAIN	HARDEE C.I.
04/16/15	TRANSFERRED TO	SANTA ROSA ANNEX	CFRC-MAIN
04/16/15	IN TRANSIT AT	R.M.C.- MAIN UNIT	CFRC-MAIN
04/21/15	TRANSFERRED TO	SANTA ROSA ANNEX	R.M.C.- MAIN UNIT
04/21/15	IN TRANSIT AT	NWFRC ANNEX.	R.M.C.- MAIN UNIT
04/28/15	TRANSFERRED TO	SANTA ROSA ANNEX	NWFRC ANNEX.
04/28/15	TRANSFERRED TO	SANTA ROSA C.I.	SANTA ROSA ANNEX
03/15/16	TRANSFERRED TO	SANTA ROSA ANNEX	SANTA ROSA C.I.
03/15/16	TRANSFERRED TO	GULF C.I.- ANNEX	SANTA ROSA ANNEX
03/15/16	IN TRANSIT AT	NWFRC ANNEX.	SANTA ROSA ANNEX
03/16/16	TRANSFERRED TO	GULF C.I.- ANNEX	NWFRC ANNEX.
03/16/16	TRANSFERRED TO	GULF C.I.	GULF C.I.- ANNEX

06/17/17 EXPIRATION PALM BEACH GULF C.I.

INMATE DISCIPLINARY ACTIONS AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT DISCIPLINARY ACTIONS AGAINST THE INMATE
FOR VIOLATION OF THE RULE CITED AND INDICATE THE GAIN TIME DAYS LOST.

--- PRIOR INCARCERATION ---

DATE	DAYS	VIOLATION	LOCATION
05/01/09	14	UNAUTHORIZED ABSENCE	LANCASTER C.I.
07/27/09	30	UNAUTHORIZED ABSENCE	LANCASTER C.I.
09/01/09	15	FIGHTING	LANCASTER C.I.
10/04/09	180	ASSAULT/ATT/INMATE	LANCASTER C.I.

--- LATEST INCARCERATION ---

06/18/13	0	UNAUTH POS CELL/WIRELESS DV	OKEECHOBEE C.I.
07/01/13	0	DISOBEYING ORDER	OKEECHOBEE C.I.
08/25/13	0	POSS OF STIMULANTS	OKEECHOBEE C.I.
08/25/13	0	POSS/TOBACCO-NON DEATH ROW	OKEECHOBEE C.I.
09/29/13	0	DISOBEYING ORDER	OKEECHOBEE C.I.
01/21/14	0	UNAUTHORIZED ABSENCE	OKEECHOBEE C.I.
05/09/14	0	BATTERY/ATT/INMATE	OKEECHOBEE C.I.
12/19/14	0	BEING IN UNAUTH AREA	HARDEE C.I.
02/01/15	0	POSS OF WEAPONS	HARDEE C.I.
03/30/15	0	DISOBEYING ORDER	HARDEE C.I.
08/11/16	0	BEING IN UNAUTH AREA	GULF C.I.
02/24/17	0	BEING IN UNAUTH AREA	GULF C.I.
04/28/17	0	FIGHTING	GULF C.I.
05/22/17	0	DISORDERLY CONDUCT	GULF C.I.

INMATE CLASSIFICATION ACTIONS AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT CLASSIFICATION ACTIONS TAKEN REGARDING
THE INMATE.

--- PRIOR INCARCERATION ---

DATE	TYPE	CUSTODY	LOCATION
03/24/09	INITIAL	MEDIUM	S.F.R.C.
09/16/09	SCHEDULE	MEDIUM	LANCASTER C.I.

--- LATEST INCARCERATION ---

02/12/13	INITIAL	MEDIUM	S.F.R.C.
03/01/13	SCHEDULE	CLOSE	OKEECHOBEE C.I.

CONTROL RELEASE ACTIONS AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT CONTROL RELEASE ACTIONS TAKEN BY THE FLORIDA COMMISSION ON OFFENDER REVIEW FOR THIS INMATE INCLUDING ANY ADVANCEMENTS OF THE INMATE'S CONTROL RELEASE DATE.

DATE	TYPE	--- PRIOR INCARCERATION --- DAYS	REASON

NO CONTROL RELEASE RECORDS

OFFENDER NAMES AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT ALL NAMES BY WHICH THE OFFENDER IS KNOWN.

TYPE	NAME
TRUE	CHAVEZ, AUGUSTIN A.
COMMIT.	CHAVEZ, AGUSTIN A.
COMMIT.	CHAVEZ, AGUSTIN
COMMIT.	CHAVEZ, ANTONIO A.
COMMIT.	CHAVEZ, AUGUSTIN A.
FDLE NM	CHAVEZ, ANTONIO A.

GAIN TIME(GT)& PROVISIONAL CREDITS(PC) AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT ONLY THAT GT AND PC WHICH HAS BEEN USED TO COMPUTE THE INMATE'S OVERALL RELEASE DATE. NOT SHOWN IS GT AND PC PREVIOUSLY EARNED THAT DOES NOT AFFECT THE RELEASE DATES DUE TO MANDATORY TERMS, OTHER SENTENCING PROVISIONS, REVOCATIONS, OR ESCAPE CONVICTIONS.

--- PRIOR INCARCERATION --- AWARDED	TYPE	DAYS	AWARDED	TYPE	DAYS
03/31/09	STP GT	6			
04/30/09	STP GT	4			

INTERNAL MOVEMENTS AS OF 10/31/17 TIME: 12:16

THE FOLLOWING ENTRIES REFLECT THE OFFENDER'S INTERNAL MOVEMENTS AND JOB ASSIGNMENTS DURING INCARCERATION

--- PRIOR INCARCERATION ---

DATE	FACILITY	HOUSING	ASSIGNMENT AM	ASSIGNMENT PM
03/09/2009	S.F.R.C.	XXXXXX	RECEPTION/ORIENT	RECEPTION/ORIENT
04/08/2009	R.M.C.- MAIN UNIT	XXXXXX	IN-TRANSIT	IN-TRANSIT
04/13/2009	LANCASTER C.I.	XXXXXX	EXTENDED DAY	EXTENDED DAY
04/20/2009	LANCASTER C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
04/22/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	LABORER-FOOD SER
06/01/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	LABORER-FOOD SER
07/06/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	INSIDE GROUNDS
09/01/2009	LANCASTER C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
09/08/2009	LANCASTER C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
09/20/2009	LANCASTER C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
09/21/2009	LANCASTER C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
09/22/2009	LANCASTER C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
09/25/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	INSIDE GROUNDS
10/05/2009	LANCASTER C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
10/27/2009	LANCASTER C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
12/09/2009	LANCASTER C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
12/14/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	INSIDE GROUNDS
12/18/2009	LANCASTER C.I.	XXXXXX	ACADEMIC STUDENT	INSIDE GROUNDS

--- LATEST INCARCERATION ---

02/04/2013	S.F.R.C.	XXXXXX	RECEPTION/ORIENT	RECEPTION/ORIENT
02/13/2013	OKEECHOBEE C.I.	XXXXXX	RECEPTION/ORIENT	RECEPTION/ORIENT
02/22/2013	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
03/22/2013	OKEECHOBEE C.I.	XXXXXX	LITERACY TUTORIN	LABORER-WELLNESS
05/21/2013	OKEECHOBEE C.I.	XXXXXX	LITERACY TUTORIN	LABORER-WELLNESS
05/24/2013	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
06/18/2013	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
06/25/2013	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
07/09/2013	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
07/29/2013	OKEECHOBEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
08/02/2013	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
08/25/2013	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
09/03/2013	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
10/08/2013	OKEECHOBEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
10/10/2013	OKEECHOBEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
10/11/2013	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
11/14/2013	OKEECHOBEE C.I.	XXXXXX	CONF-ADMIN/PROTE	CONF-ADMIN/PROTE
12/10/2013	OKEECHOBEE C.I.	XXXXXX	CONF-ADMIN/PROTE	CONF-ADMIN/PROTE
12/13/2013	OKEECHOBEE C.I.	XXXXXX	CONF-ADMIN/PROTE	CONF-ADMIN/PROTE
12/13/2013	OKEECHOBEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
12/20/2013	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
01/28/2014	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
02/14/2014	OKEECHOBEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
02/21/2014	OKEECHOBEE C.I.	XXXXXX	LABORER-WELLNESS	LABORER-WELLNESS
05/02/2014	OKEECHOBEE C.I.	XXXXXX	CONF-ADMIN/PROTE	CONF-ADMIN/PROTE

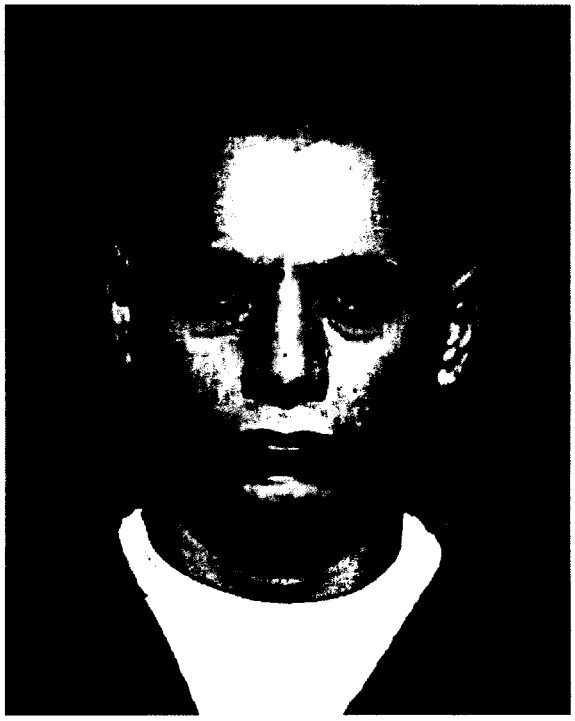
05/06/2014	OKEECHOBEE C.I.	XXXXXX	CONF-ADMIN/PROTE	CONF-ADMIN/PROTE
05/15/2014	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/21/2014	OKEECHOBEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/21/2014	S.F.R.C.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/22/2014	CFRC-MAIN	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/24/2014	CFRC-MAIN	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/27/2014	HARDEE C.I.	XXXXXX	RECEPTION/ORIENT	RECEPTION/ORIENT
06/05/2014	HARDEE C.I.	XXXXXX	INSIDE GROUNDS	INSIDE GROUNDS
07/17/2014	HARDEE C.I.	XXXXXX	INSIDE GROUNDS	STUDENT IN ITA-L
10/09/2014	HARDEE C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
10/16/2014	HARDEE C.I.	XXXXXX	HOUSEMAN	STUDENT IN ITA-L
11/26/2014	HARDEE C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
12/31/2014	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
01/09/2015	HARDEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
01/16/2015	HARDEE C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
01/16/2015	HARDEE C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
02/01/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
02/03/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
02/05/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
03/13/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
03/31/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
04/02/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
04/05/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
04/07/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
04/10/2015	HARDEE C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
04/14/2015	CFRC-MAIN	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
04/16/2015	R.M.C.- MAIN UNIT	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
04/21/2015	NWFRC ANNEX.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
04/28/2015	SANTA ROSA C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/06/2015	SANTA ROSA C.I.	XXXXXX	CLOSE-MANAGEMENT	CLOSE-MANAGEMENT
05/13/2015	SANTA ROSA C.I.	XXXXXX	CLOSE-MANAGEMENT	CLOSE-MANAGEMENT
09/18/2015	SANTA ROSA C.I.	XXXXXX	CLOSE-MANAGEMENT	CLOSE-MANAGEMENT
09/18/2015	SANTA ROSA C.I.	XXXXXX	CLOSE-MANAGEMENT	CLOSE-MANAGEMENT
09/19/2015	SANTA ROSA C.I.	XXXXXX	CLOSE MANAGEMENT	CLOSE MANAGEMENT
10/01/2015	SANTA ROSA C.I.	XXXXXX	CLOSE MANAGEMENT	CLOSE MANAGEMENT
03/03/2016	SANTA ROSA C.I.	XXXXXX	CLOSE MANAGEMENT	CLOSE MANAGEMENT
03/07/2016	SANTA ROSA C.I.	XXXXXX	CLOSE MANAGEMENT	CLOSE MANAGEMENT
03/14/2016	SANTA ROSA C.I.	XXXXXX	CLOSE MANAGEMENT	CLOSE MANAGEMENT
03/15/2016	NWFRC ANNEX.	XXXXXX	IN-TRANSIT	IN-TRANSIT
03/16/2016	GULF C.I.	XXXXXX	RECEPTION/ORIENT	RECEPTION/ORIENT
03/25/2016	GULF C.I.	XXXXXX	INSIDE GROUNDS	INSIDE GROUNDS
03/30/2016	GULF C.I.	XXXXXX	STUDENT IN ITA-L	HOUSEMAN
06/02/2016	GULF C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
09/23/2016	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
10/09/2016	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
10/12/2016	GULF C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
10/20/2016	GULF C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
11/16/2016	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
12/09/2016	GULF C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
12/21/2016	GULF C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
01/12/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
01/19/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
01/19/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
01/20/2017	GULF C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN

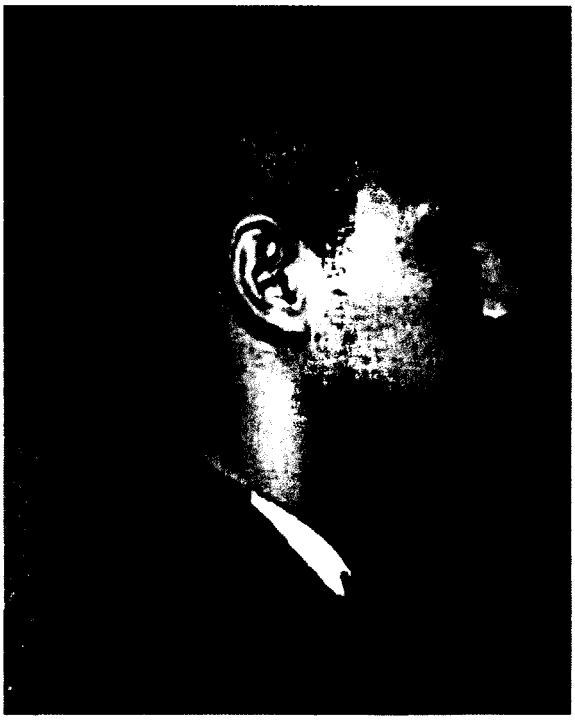
01/25/2017	GULF C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
02/24/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
02/27/2017	GULF C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
03/02/2017	GULF C.I.	XXXXXX	HOUSEMAN	HOUSEMAN
04/28/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
05/02/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
05/14/2017	GULF C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC
05/15/2017	GULF C.I.	XXXXXX	UNASSIGNED-OPEN	UNASSIGNED-OPEN
05/22/2017	GULF C.I.	XXXXXX	CONFINEMENT-ADMI	CONFINEMENT-ADMI
05/25/2017	GULF C.I.	XXXXXX	CONFINEMENT-DISC	CONFINEMENT-DISC

State Of Florida
Department Of Corrections

REC. CTR.: 402 **Photo Identification Card** **2/12/2013**

Name: CHAVEZ, AUGUSTIN ANTONIO **DC#:** A-W26512 **Date Received:** 02/04/2013
Circuit: 15 **County:** PALM BEACH **Date Sentenced:** 01/09/2013
Crime: ROBB. NO GUN/DDLY.WPN ; (ATTEMPT) COMMERCIAL FRAUD < $300 ; TRAFFIC IN STOLEN PROPERTY
MAND. TERM: 5 YR 0 MO (RE-OFFENDER PUNISHMENT ACT);CURRENT TERM: 5 YR 0 MO 0 DA





Race: WHITE **Sex:** MALE **DOB:** 02/12/1990 **Next Photo Year:** 2018
Height: 5' 06" **Weight:** 160 lbs. **Build:** MEDIUM **FP Class:**
Hair: BROWN **Eyes:** BROWN **Complexion:** LIGHT
Marks: MOLE-FACE-MOLE
Scars: SCAR-FACE-SCAR

Home: LAKE WORTH, FLORIDA **Where Born:** WEST PALM, FLORIDA

Notify in Case of Emergency: FIRMINA RODRIGUEZ **Relation:** GRANDMOT
55 MORMAK DRIVE LAKE WORTH, FL 33461 (561) 541-0173

LEAVE BLANK | CRIMINAL | (STAPLE HERE) | LEAVE BLANK

1350058864

STATE USAGE | NFF SECOND SUBMISSION | APPROXIMATE CLASS | AMPUTATION | SCAR

FD-249 (Rev. 3-1-10)

A224

CONFIDENTIAL

STATE USAGE

LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

CHAVEZ, AGUSTIN

SIGNATURE OF PERSON FINGERPRINTED | SOCIAL SECURITY NO. | LEAVE BLANK

OV Item # 1 C
17-128145

ALIASES/MAIDEN
LAST NAME, FIRST NAME, MIDDLE NAME, SUFFIX

DC#: A-W26517

FBI NO.	STATE IDENTIFICATION NO	DATE OF BIRTH MM DD YY	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
		02/12/1990	M	W	000	000	XXX	XXX

12/10/18

R. THUMB | 2. R. INDEX | 3. R. MIDDLE | 4. R. RING | 5. R. LITTLE

6. L. THUMB | 7. L. INDEX | 8. L. MIDDLE | 9. L. RING | 10. L. LITTLE

LXMRK # 20130204-11:23

LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY | RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY

FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIRCUIT COURT

CASE NO: 2017CF009149AMB
OBTS NUMBER:

DIV: Z

STATE OF FLORIDA X

v.

AGUSTIN A. CHAVEZ,
H/M AKA: 2/10/90
2/18/90

[ ] PROBATION VIOLATOR
[ ] COMMUNITY CONTROL VIOLATOR
[ ] RETRIAL
[ ] RESENTENCE

17-128145

FINGERPRINTS-FOR IDENTIFICATION

The fingerprints below are those of said Defendant taken by LEONARD J. PARSONS, C.L.P.E.

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	4. R. RING	5. R. LITTLE

6. L. THUMB	7. L. INDEX	8. L. MIDDLE	9. L. RING	10. L. LITTLE

I HEREBY CERTIFY that the above and foregoing fingerprints on this document are the fingerprints of the Defendant, AGUSTIN A. CHAVEZ, and that they were placed thereon by said Defendant in my presence in Open Court on this 10TH day of DECEMBER, 2018.

Latent Print Examiner

IN THE COUNTY/CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. 12CF007402A _____ DIV. V

STATE OF FLORIDA

v.

Agustin A Chavez
DEFENDANT

w/m 2/12/90 [redacted]

OV 1764#5

17-178145

FINGERPRINTS OF DEFENDANT

The fingerprints below are those of said Defendant taken by D/S Robert Cuadra #4592, Deputy Sheriff/Baliff

1. R. THUMB	2. R. INDEX	3. R. MIDDLE	1. R. RING	1. R. LITTLE
				
6. L. THUMB	**7. L. INDEX**	**8. L. MIDDLE**	**9. L. RING**	**10. L. LITTLE**
				

AFIS (L. THUMB)
AGUSTIN A. CHAVEZ
CASE# 2017CF009149AMB
12-10-18

I HEREBY CERTIFY the fingerprints shown above are those of the Defendant and were placed thereon by said Defendant in my presence in Open Court in Palm Beach County, Florida, this 14 day of Jan, 20 13

STATE OF FLORIDA • PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office with redactions, if any as required by law.
THIS 4 DAY OF _____ 20 17
SHARON R. BOCK
CLERK & COMPTROLLER
By _____ DEPUTY CLERK

_____
COUNTY/CIRCUIT COURT JUDGE

REV. 1/99

500.10

FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
CIRCUIT COURT

CASE NO: 2012CF007402AMB
OBTS NUMBER:

DIV: V

STATE OF FLORIDA

v.

AUGUSTIN ANTONIO CHAVEZ
W/M, 02/12/1990, [redacted]
_____/

[ ] PROBATION VIOLATOR
[ ] COMMUNITY CONTROL VIOLATOR
[ ] RETRIAL
[ ] RESENTENCE

JUDGMENT

The above defendant, being personally before this Court represented by PUBLIC DEFENDER - Gan v.U (attorney)

[ ] Having been tried and found guilty of the following crime(s):	[✓] Having entered a plea of guilty to the following crime(s):	[ ] Having entered a plea of nolo contendere to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE
1	Attempted Robbery	777.04(1) + 812.13(1) + (2)(c)	3F

[✓] and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

[✓] and being a qualified offender pursuant to s. 943.325, the Defendant shall be required to submit DNA samples as required by law.

[ ] and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

SENTENCE STAYED [ ] The Court hereby stays and withholds imposition of sentence as to count(s) and places the Defendant on [ ] probation and/or [ ] Community Control under the supervision of the Dept. Of Corrections (conditions of probation set forth in separate order).

SENTENCE DEFERRED [ ] The Court hereby defers imposition of sentence until _____.

The Defendant in Open Court was advised of his right to appeal from the Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

DONE AND ORDERED in Open Court at Palm Beach County, Florida, this 14 day of Jan, 2013.

CIRCUIT COURT JUDGE

STATE OF FLORIDA • PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office with redactions, if any as required by law.
THIS 1 DAY OF NOV 20 17
SHARON R. BOCK
CLERK & COMPTROLLER
By _____
DEPUTY CLERK

Feb 2012

A228

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

v.

Chavez, Agustin
Defendant

FILED
Circuit Criminal Department
JAN 14 2013
SHARON R. BOCK, CLERK
CIRCUIT & COUNTY COURTS
(CRIM DIV.)

CASE NO.: 12CF007402AXX

OBTS NO.: _____

SENTENCE

As to Count (s) 1 - lesser Attempt Robbery

The Defendant, being personally before this Court, accompanied by Mr. Graves, his/her attorney of record, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____ pursuant to § _____, Fla. Stat., plus all court costs and additional charges as outlined in the separate order assessing additional charges, costs and fines entered herein.

The Defendant is hereby committed to the custody of the:

✓ Department of Corrections
_____ Sheriff of Palm Beach County, Florida
_____ Department of Corrections as a Youthful Offender

to be imprisoned for a term of 60 months. It is further ordered that the Defendant shall be allowed a total of 210 days as credit for time incarcerated prior to imposition of this sentence.

IT IS FURTHER ORDERED that the composite terms of all sentences imposed for the counts specified in the order shall run (CHECK ONE) ____ consecutive to ✓ concurrent with (CHECK ONE) the following:

_____ any active sentence being served
✓ specific sentences 12CF008119AXX

In the event the above sentence is to the Department of Corrections, the Sheriff of Palm Beach County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of the Judgment and Sentence, and any other documents specified by Florida Statute. Additionally, pursuant to §947.16(4), Florida Statutes, the Court retains jurisdiction over the Defendant.

_____ Pursuant to §§322.055, 322.056, 322.26, 322.274, Fla. Stat., the Department of Highway Safety and Motor Vehicles is directed to revoke the Defendant's privilege to drive. The Clerk of Court is ordered to report the conviction and revocation to the Department of Highway Safety and Motor Vehicles.

The defendant in open court was advised of the right to appeal from this sentence by filing Notice of Appeal within thirty (30) days from this date with the Clerk of Court. The Defendant was also advised of the right to the assistance of counsel in taking said appeal at the expense of the State upon a showing of indigency.

DONE AND ORDERED in open court at West Palm Beach, Palm Beach County, Florida this 14 day of Jan, 2013.

STATE OF FLORIDA • PALM BEACH COUNTY
I hereby certify that the foregoing is a true copy of the record in my office with redactions, if any as required by law.
THIS 1 DAY OF Jan 20 13
SHARON R. BOCK
CLERK & COMPTROLLER
By 000458
DEPUTY CLERK

_____
CIRCUIT JUDGE

Rev. 7/2010

Form 14.1 A

A229

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

SENTENCE (continued)

(As to Count(s) ____ | lesser Attempt Robbery)

Defendant Chavez, Agustin

Case Number 12CF007402AXX

By appropriate notation, the following provisions apply to the sentence imposed:

FIREARM	[ ]	It is further ordered that the _____ year minimum provisions of Florida Statute 775.087(2) are hereby imposed for the sentence specified in the count.
PRISON RELEASEE REOFFENDER	[X]	The Defendant is adjudicated a prison releasee reoffender and has been sentenced in accordance with the provisions of Florida Statute 775.082(9). The Defendant shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Additionally, the Defendant must serve 100 percent of the court imposed sentence. The requisite findings by the court are set forth in a separate order or stated in the record in open court.
SALE OF CONTROLLED SUBSTANCE W/IN 1000' OF A SCHOOL	[ ]	It is further ordered that the 3 year minimum provisions of Florida Statute 893.13(1)(c)1, are hereby imposed for the sentence specified in this count.
DRUG TRAFFICKING	[ ]	It is further ordered that the _____ year mandatory minimum provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this count.
CRIMES AGAINST LAW ENFORCEMENT OFFICERS	[ ]	The Defendant having been convicted of Aggravated Assault on a Law Enforcement Officer, it is further ordered that the defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(2)(c).
	[ ]	The Defendant having been convicted of Aggravated Battery on a Law Enforcement Officer, it is further ordered that the defendant shall serve a minimum of 5 years before release in accordance with Florida Statute 784.07(2)(d).
	[ ]	The Defendant having been convicted of Battery on a Law Enforcement Officer and having possessed a firearm or destructive device during the commission of said offense, it is further ordered that the defendant shall serve a minimum of 3 years before release in accordance with Florida Statute 784.07(3)(a).

DONE AND ORDERED in Open Court at West Palm Beach, Palm Beach County, Florida this 14 day of January, 2013.

_____
CIRCUIT COURT JUDGE

Form Circuit 5B (rev. 5/2010)