

ORIGINAL

20-7648

No.

FILED

MAR 23 2021

OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

KESNER V. JOASEUS, Jr. — PETITIONER
(Your Name)

STATE OF FLORIDA, et al. VS.
MARK INCH, SEC. FLA. DOC — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

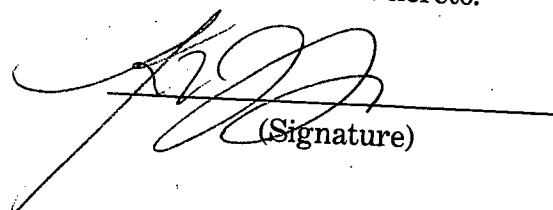
Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

The U.S. Southern District Court of Florida, the 15th Judicial Circuit Court in Florida, The Fourth District Court of Appeals In Florida

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Date:
3/23/21


(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Kesner V. Jonseus, Jr., am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>N/A 0.00</u>	\$ <u>0.00</u>	\$ <u>0.00</u>	\$ <u>0.00</u>
Self-employment	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Income from real property (such as rental income)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Interest and dividends	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Gifts	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Alimony	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Child Support	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Unemployment payments	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Public-assistance (such as welfare)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Other (specify): <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Total monthly income:	\$ <u>0.00</u>	\$ <u>0.00</u>	\$ <u>0.00</u>	\$ <u>0.00</u>

2. List your employment history for the past two years, most recent first. (Gross monthly is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A

4. How much cash do you and your spouse have? \$ 0.00 N/A
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	\$ N/A	\$ N/A
N/A	N/A	\$ N/A	\$ N/A
N/A	N/A	\$ N/A	\$ N/A

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home

Value N/A \$0

Other real estate

Value N/A \$0

Motor Vehicle #1

Year, make & model N/A \$0

Motor Vehicle #2

Year, make & model N/A \$0

Value _____

Other assets

Description N/A

Value _____

\$0

6. State every person, business, or organization owing you or your spouse money, and amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	\$ 0	\$ 0
N/A	\$ 0	\$ 0
N/A	\$ 0	\$ 0

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 0.00	\$ 0.00
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ 0	\$ 0
Home maintenance (repairs and upkeep)	\$ 0	\$ 0
Food	\$ 0	\$ 0
Clothing	\$ 0	\$ 0
Laundry and dry-cleaning	\$ 0	\$ 0
Medical and dental expenses	\$ 0	\$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 0	\$ 0
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	\$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 0	\$ 0
Life	\$ 0	\$ 0
Health	\$ 0	\$ 0
Motor Vehicle	\$ 0	\$ 0
Other: <u>N/A</u>	\$ 0	\$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u>N/A</u>	\$ 0	\$ 0
Installment payments		
Motor Vehicle	\$ 0	\$ 0
Credit card(s)	\$ 0	\$ 0
Department store(s)	\$ 0	\$ 0
Other: <u>N/A</u>	\$ 0	\$ 0
Alimony, maintenance, and support paid to others		
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0	\$ 0
Other (specify): <u>N/A</u>	\$ 0	\$ 0
Total monthly expenses:	\$ 0	\$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No

If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? N/A

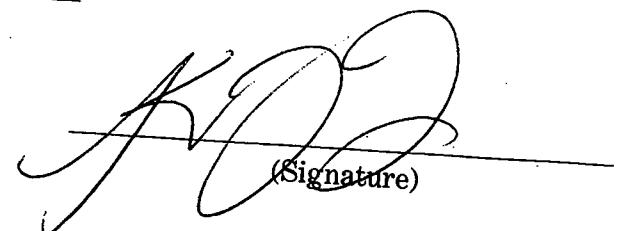
If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 3/23

, 2021


(Signature)

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

STATE OF FLORIDA,

CRIMINAL DIVISION "R"

CASE NO.: 2008-CF-017998-BXXX-MB

2008-CF-017999-BXXX-MB

2008-CF-013148-AXXX-MB

v.

KESNER JOASEUS,
Defendant.

ORDER DENYING DEFENDANT'S SECOND AND SUCCESSIVE MOTION FOR
POST CONVICTION RELIEF, SECOND AND SUCCESSIVE MOTION TO CORRECT
SENTENCE, AND SUPPLEMENTAL SECOND AND SUCCESSIVE MOTION TO
CORRECT SENTENCE

THIS CAUSE came before the Court on the Defendant's Second and Successive Motion for Post-Conviction Relief filed on March 27, 2019, Defendant's Second and Successive Motion to Correct Sentence filed on June 18, 2019, and Defendant's Motion to Supplement Second and Successive 3.800 Postconviction Motion filed on March 23, 2020. The Court has carefully examined and considered the Motions, the record and all pertinent case law.

BACKGROUND

On January 2, 2020, this Court entered an order setting forth the relevant factual and procedural history of Defendant's cases and reclassifying Defendant's March 27, 2019 Motion as a Motion to Correct Illegal Sentence under Rule 3.800(a). The Court then considered the Motion in conjunction with the overlapping arguments raised in Defendant's June 18, 2019 Motion and rejected the following two arguments on their merits: 1) Defendant's forty year sentences in cases 2008-CF-017998-BXXX-MB ("17998") and Case Number 2008-CF-017999-BXXX-MB ("17999") were illegal pursuant to *Graham v. Florida*, 560 U.S. 48, 75 (2010) because Defendant, who was eighteen at the time he committed the underlying offenses, still had a "youthful brain"

and 2) Defendant's sentences in cases 17998 and 17999 were illegal as compared to his co-defendant's sentences. The Court ordered the State to respond to Defendant's third claim that his 131.1 month sentence for a third degree felony in case 2008-CF-13148-AXXX-MB ("13148") was illegal as it exceeded the statutory maximum of sixty months.

The State filed its Response on January 21, 2020, and on January 31, 2020, Defendant filed a reply to the State's response wherein he asserted two new arguments: 1) his forty year sentences in cases 17998 and 17999 were illegal because the Court failed to take Defendant's age at the time of the crime into consideration as a potential mitigating factor, and 2) the Criminal Punishment Code ("CPC") is so vague that it violates the Eighth Amendment's protection against cruel and unusual punishment. Based on documents attached to the State's response, Defendant also moved for leave to amend his pending Motions to add an additional claim. The Court granted Defendant leave to amend and Defendant filed a Motion to Supplement Second and Successive 3.800 Postconviction Motion on March 23, 2020, wherein he challenges his sentence in case 13148 on the grounds that his probation officer did not explain the terms of probation to Defendant. The Court now considers all of Defendant's remaining claims.

ANALYSIS AND RULING

- a) Whether Defendant's Sentence for One Count of Possession of Marijuana with the Intent to Sell in Case 13148 is Illegal Because it Exceeds the Statutory Maximum for a Third Degree Felony?**

In his June 18, 2019 Motion, Defendant asserts that his 131.1 month sentence in case 13148 is illegal because the underlying offense, possession of marijuana with the intent to sell, is a third degree felony punishable by a maximum of sixty months. The State counters that Defendant's 131.1 month sentence for the offense is legal by virtue of the fact that Defendant's lowest permissible sentence ("LPS") on his CPC scoresheet was 131.1 months and section 921.0024(2),

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Florida Statutes, requires imposition of the LPS when the LPS exceeds the statutory maximum for an offense. The Court agrees with the State.

Section 921.0024(2), Florida Statutes (2008) provides, in pertinent part, that:

The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in section s. 775.082, for the primary offense and any additional offenses before the court for sentencing. . . . If the lowest permissible sentence under the code exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed.

Although there is currently a certified conflict between the Second and Fifth District Courts of Appeal regarding whether the phrase “the primary offense and any additional offenses before the court for sentencing” as used in section 921.0024(2) requires application of the LPS to *each* offense individually or to the primary offense and any additional offenses *collectively*—*Gabriel v. State*, 2019 WL 6621255 (Fla. 5th DCA Dec. 6, 2019); *Champagne v. State*, 269 So. 3d 629 (Fla. 2d DCA 2019)—as it stands, the Fourth District Court of Appeal has held that the LPS must be applied to *each* offense at sentencing. *Cunningham v. State*, 22 So. 3d 127, 129 (Fla. 4th DCA 2009). The Fourth DCA’s conclusion, which is echoed by the Second DCA’s *Champagne* decision, is binding on this Court.¹

¹ The Court acknowledges that Judge Warner has written a special concurrence and a dissent indicating that she interprets the LPS as setting a floor for the collective total sentence for all offenses on the CPC scoresheet and, therefore, would hold contrary to *Cunningham*. *Colon v. State*, 199 So. 3d 960, 962 (Fla. 4th DCA 2016) (Warner, J. specially concurring); *Dennard v. State*, 157 So. 3d 1055, 1057-61 (Fla. 4th DCA 2014) (Warner, J. dissenting). The Court further acknowledges that Judge Conner has written a special concurrence wherein he indicated that he interprets the LPS statute as only applying to the primary offense on a CPC scoresheet. *Dennard v. State*, 157 So. 3d 1055, 1056 (Fla. 4th DCA 2014) (Connor, J. specially concurring). Although Judge Warner’s and Judge Conner’s approaches differ, under either of their interpretations, Defendant’s LPS sentence of 131.1 month for a possession of marijuana with the intent to sell in case 13148 would be illegal as the LPS was already met when Defendant was sentenced to 40 years on the primary offense. However, neither Judge Warner’s nor Judge Conner’s special opinions govern in light of *Cunningham*.

The Court also notes that the Fifth DCA relied on Judge Warner’s opinions in support of its holding in *Gabriel*. *Gabriel v. State*, 2019 WL 6621255 (Fla. 5th DCA Dec. 6, 2019). However, the *Gabriel* court went one step further than Judge Warner and held that when the aggregate maximum sentence for all

Accordingly, based on *Cunningham* and *Champagne*, this Court finds that Defendant's LPS sentence of 131.1 months for one count of possession of marijuana with the intent to sell in case 13148 is legal.

b) Whether the CPC violates the Eighth Amendment?

In his reply to the State's response, Defendant cursorily argued that the CPC violates the Eighth Amendment. Although Defendant's reply was not an authorized pleading, the Court writes to note that similar constitutional challenges to the CPC have continuously been rejected by Florida courts. *Hall v. State*, 823 So. 2d 757 (Fla. 2002) (holding that sentencing under the CPC is not arbitrary or unpredictable and does not violate the constitutional prohibition against cruel and unusual punishment); *Bush v. State*, 776 So. 2d 1081 (Fla. 4th DCA 2001); *Hayes v. State*, 780 So. 2d 918 (Fla. 1st DCA 2001) ("Finally, with respect to appellant's arguments that the Criminal Punishment Code is unconstitutional as a denial of due process and as constituting cruel and unusual punishment, thee arguments have been rejected by this court."). Defendant's argument is likewise rejected.

c) Whether Defendant's forty year sentence is illegal because the Court failed to take into account Defendant's age as a mitigating factor

Although this Court denied Defendant's claim regarding juvenile sentencing considerations in its January 2, 2020 Order, in his reply, Defendant seemed to raise an alternative ground: that the Court failed to consider his age as a mitigating factor when sentencing Defendant. This type of

offenses is higher than the LPS, the sentencing court should ignore the LPS altogether when sentencing each individual offense. *Id.* For example, under *Gabriel*, a Defendant being sentenced for four separate third degree felonies (each with a maximum of sixty months, so an aggregate maximum of 240 months) with an LPS of 100 months would be sentenced to far below the LPS on each offense. The result of such an interpretation ignores the punishment goal of the CPC and effectuates an otherwise impermissible downward departure sentence. § 921.0026(1), Fla. Stat. (2008) (prohibiting a downward departure from the LPS outside of limited, enumerated circumstances). Therefore, although Judge Warner's opinions are not binding, this Court does not believe *Gabriel* is in line with the framework outlined by Judge Warner.

claim is not cognizable in a Rule 3.800(a) Motion and is, therefore, denied. *See Rutherford v. State*, 93 So. 3d 1132 (holding that a Rule 3.800(a) motion is not the proper vehicle for challenging the court's failure to consider certain mitigating factors when issuing a sentence).

Further, the Court notes that after it issued its January 2, 2020 Order, the Florida Supreme Court issued its decision in *Pedroza v. State*, 2020 WL 1173747, (Fla. March 12, 2020), wherein it held that a forty year sentence for a for an offense committed by a juvenile offender is not unconstitutional and, therefore, not illegal under *Graham* or *Miller*. Based on this precedent, even if Defendant's previously rejected "youthful brain" argument had merit, his sentence is still legal.

d) Whether Defendant's Sentence is Illegal Because his Probation Officer Did not Explain the Terms of Probation?

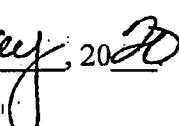
Lastly, Defendant argues that his sentence is illegal because his probation officer did not explain the terms of his probation to Defendant. Defendant's claim is based on the fact that the probation order submitted by the State in its Reply has a line for the probation officer and defendant to sign acknowledging that the probation officer explained the terms of probation to Defendant. Based on this alleged error, Defendant argues that he did not "enter into an agreement to abide by" the terms of his probation.

Putting aside the fact that the State's copy of the probation order most likely came from the order issued by the Court before it was sent to the Department of Corrections for assignment to a probation officer and, therefore, does not conclusively establish that Defendant's probation officer failed to explain the terms of probation to Defendant, Defendant's argument wholly lacks merit. The Court orally pronounced Defendant's probation and entered a written order complying with its oral pronouncement. Therefore, regardless of what transpired between Defendant and his probation officer, Defendant heard the Court announce the terms of his probation and was legally

on probation. *See, e.g., Matthews v. State*, 736 So. 2d 72, 76 (Fla. 4th DCA 1999). No agreement on Defendant's part was required.

Based on the foregoing, it is hereby

ORDERED that Defendant's Second and Successive Motion for Post-Conviction Relief filed on March 27, 2019, Defendant's Second and Successive Motion to Correct Sentence filed on June 18, 2019, and Defendant's Motion to Supplement Second and Successive 3.800 Postconviction Motion filed on March 23, 2020 are **DENIED**. Defendant shall have 30 days to appeal this Order.

DONE AND SIGNED in Chambers, at West Palm Beach, Palm Beach County, Florida,
this 26 day of May, 2020


CAROLINE CAHILL SHEPHERD
CIRCUIT JUDGE

COPIES FURNISHED:

Kesner Joaseus, DC#W36557, Hamilton Annex, 10650 SW 46th Street, Jasper, FL 32052

Office of State Attorney, 401 North Dixie Hwy., West Palm Beach, FL 33401 (e-
postconviction@sa15.org)

APPENDIX "C"

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

January 26, 2021

CASE NO.: 4D20-1497

L.T. No.: 502008CF013148A,
502008CF017999B,
502008CF017998B

KESNER V. JOASEUS, JR.. *C*

v. STATE OF FLORIDA

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant's December 11, 2020 motions for rehearing en banc, written opinion, and certification are denied.

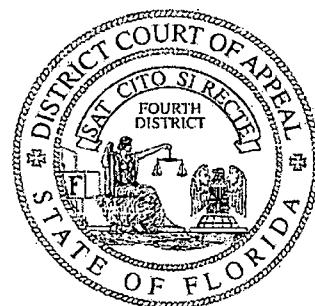
Served:

cc: Attorney General-W.P.B. Kesner V. Joaseus, Jr.. *C*

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



**Additional material
from this filing is
available in the
Clerk's Office.**