ORIGINAL

21-6059

No. 21-_____

SUPREME COURT OF THE UNITED STATES

JIMMIE **BARGE**,

Petitioner,

vs.

STATE OF **FLORIDA**,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Eleventh Circuit
Case No.: 21-11566-J

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS

Question One: Is the Florida State trial court erring when sentencing Petitioner to minimum mandatory term of life in prison because the Prison Releasee Reoffender (PRR) statute without submitting it to the jury, violating both *Apprendi* and *Alleyne*? This is particularly true after a State Circuit Judge ruled that it was unconstitutional. The Certificate of Appealability (COA) should have been granted in the Eleventh Circuit Court of Appeals since a reasonable jurist found the court's assessment of the constitutional claims debatable or wrong pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Miller-El v. Cockrell*, 537 U.S. 336 (2003).

Question Two: Is the State of Florida's Trial Court violating the Equal Protection Clause by denying a defendant's objections to three of the State's peremptory challenges when it failed to conduct a proper Melbourne [v. State, 679 So.2d 759 (Fla. 1996)] Inquiry?

Question Three: Is the State of Florida sanctions deficient proof of use of a knife or threatened use of a knife that would likely cause death or great bodily harm rendering the evidence wholly insufficient to prove any crime except that of carrying a weapon while committing robbery, denying defendant's Fourteenth Amendment Rights to Due Process?

Question Four: Is the Florida State trial court limiting and conditioning defense's cross-examination of an adverse witness on whether Petitioner was going to testify, which violated Petitioner's Fifth Amendment privilege against compelled self-incrimination, as well as his Sixth Amendment right to confront his accuser and his right to present his defense – Due Process Clause?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State Direct Appeal: *Barge v. State of Florida*, 224 So.3d 210 (Fla. 1st DCA 2017).

State Collateral Proceeding: *Barge v. State of Florida*, 274 So.3d 343 (Fla. 1st DCA 2019).

Federal Collateral Proceeding: *Barge v. Secretary, Florida Department of Corrections,* Case No.: 3:20-cv-00405-LC-EMT (N.D. Fla. April 4, 2021)

Federal Collateral Proceeding Appeal: *Barge v. Secretary, Florida Department of Corrections,* Case No.: 21-11566-J (11th Cir. July 14, 2021)

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IN THE
SUPREME COURT OF THE UNITED STATES

Petition for Writ of Certiorari

Petitioner, Jimmie Barge, an inmate currently incarcerated at Graceville Correctional Facility in Graceville, Florida acting *pro se* respectfully petitions this Court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals, Atlanta, Georgia, being Petitioner's court of last resort which conflict with the decisions of other the United States Supreme Court.

Opinions Below

The opinion of the United States Court of Appeals appears at Appendix: A to the petition and is unpublished at this time. The opinion was issued on July 14, 2021.

The opinion of the United States District court appears at Appendix: B to the petition and is unpublished.

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Jurisdiction

The date on which the United States Court of Appeals decided Petitioner's case was July 14, 2021.

No petition for rehearing was filed in petitioner's case.

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

Constitutional and Statutory Provisions Involved

United States Constitution, Second and Fourteenth Amendments: This Court holds that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right of self-defense extends that right as against the states.

The clearly established federal law in which Petitioner Barge relies on are the cases of *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(Ineffective assistance of counsel); *Batson v. Kentucky*, 476 U.S. 79 (1986)(The striking of a single African-American juror for racial reasons violates the Equal Protection Clause); and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) ("[E]stablishes that the prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently. . . .").

Florida statute § 775.082(9) violates *Apprendi*, 530 U.S. 466 (2000), *Blakely*, 542 U.S. 296 (2004), *Alleyne*, 570 U.S. 99 (2013), *Williams*, 242 So.3d 280 (Fla. 2018), and *Brown*, 260 So.3d 147 (Fla. 2018) because the Fifth and Sixth Amendments require that the finding in question be made by a jury and that the facts necessary to support that finding be proven beyond a reasonable doubt.

Statement of the Case and Facts

Procedural Posture

Petitioner Barge is a state prisoner in Florida, serving a life sentence. Barge was convicted after proceeding to trial for the charges of robbery with a deadly weapon.

Barge timely appealed both the judgment and conviction to the state appellate court, raising four grounds. The court Per Curiam Affirmed without a written opinion.

Barge timely filed his post-conviction relief motion, rule 3.850, however, the motion was dismissed due to noncompliance with the oath requirements. Barge timely appealed and the state appellate court agreed with the post-conviction court issuing a Per Curiam Affirmed without written opinion.

Barge timely filed his petition for writ of habeas corpus, (2254) where the district court reached the merits of all grounds and denied relief. Barge timely objected and was denied. Barge timely filed an application for a certificate of appealability in the federal district court but was denied. Barge then timely appealed to the Eleventh Circuit Court of Appeals and filed an application for a certificate of appealability where the court denied. Barge timely filed this instant petition.

Argument Posture

I. The Certificate of Appealability (COA) in the Eleventh Circuit Court of Appeals should have been granted since a reasonable jurist found the court's assessment of the constitutional claims debatable or wrong pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Miller-El v. Cockrell*, 537 U.S. 336 (2003).

On December 8, 2020, Florida's Honorable Circuit Judge, Tom Young declared Florida's Statute §775.082(9) unconstitutional. §775.082(9) is the statute which governs the Prisoner

Releasee Reoffender Act (PRR). Refer to *State of Florida v. Ricky Tyrone Neal*, No.: 1999-CF-010077-A-O (Fla 9th Cir. Orange County December 8, 2020).

The trial court erred in sentencing Petitioner to a minimum mandatory term of life in prison because the PRR statute violates *Apprendi* and *Alleyne v. United States*, 570 U.S. 99 (2013). Florida law requires the trial court to make a number of factual findings prior to the imposition of a PRR sentence. The factual findings are not encompassed within the *Apprendi* exception for the "fact of a prior conviction." If they were, the trial court would not have had to make these findings in the sentencing hearing below. The trial court erred by failing to submit the PRR predicate findings to the jury (assuming *arguendo* they were correct, which they were not.) Apprendi applies to minimum mandatory sentences. *Hurst v. United States*, 136 S.Ct. 616, 621 (2016), citing *Alleyne*.

II. Barge is an African-American male. Defense counsel made a challenge to three jurors on the basis of the State's use of a peremptories because the state impermissibly exercised strikes to exclude white males. Barge's counsel did not renew her objections before the jury was sworn, however, there is nothing in the record to indicate that between objection and when the jury was sworn Barge was satisfied with the venire.

The trial court failed to engage in determining the genuineness of the reason given by the State to strike the three jurors as required by state law. The trial court's failure mandates reversal and remand for a new trial.

III. Barge's conviction of robbery with a deadly weapon must be reduced to robbery with a weapon because the state did not prove that the knife Barge carried was "used or threatened to be used in a way likely to produce or cause great bodily harm." The surveillance video clearly shows, and the clerks testimony is consistent with the video, that nothing Barge did or said could be objectively interpreted as threatening. The video shows that Barge did not make any

threatening motion toward the clerk with the knife, which remained at his side the entire time he was with the clerk, and Barge never verbally threatened to use it or to harm the clerk in any way. The clerk's subjective feeling of fear is legally insufficient to support the conviction of robbery with a deadly weapon.

IV. Barge's defense was that he and the store clerk (Carrigan) had a social relationship, they went to a dog park together after Carrigan's work, which is when Carrigan stole $50 from him and that was the money Barge demanded and Carrigan returned when Barge went to the Circle K store. Carrigan testified that when Barge came to the store there was money on the counter that Carrigan had placed there that he was going to put in anti-theft bags. Barge walked past that money when he demanded Carrigan return his $50.

During cross examination, Carrigan denied going to a dog park with Barge, stealing money from him and promising to return it. The trial court improperly sustained the prosecutor's objection to defense counsel's questions about what Carrigan told law enforcement about his social relationship with Barge on the basis that her questions would not be in good faith, his testimony struck, and no further testimony permitted, unless Barge testified.

The trial court's decision ruling that Barge had to testify otherwise the court would strike Carrigan's testimony and prohibit further cross examination going towards his defense was wrong.

The trial court violated Barge's Fifth Amendment privilege against compelled self-incrimination and Sixth Amendment right to confront his accuser and present his defense guaranteed by the due process clauses of the Fifth Amendment and Article 1, § 9, of the Florida Constitution.

Reasons for Granting the Writ

Petitioner was sentenced to life for robbery with a deadly weapon after a trial by jury. The issues that were raised to the state and federal courts were: error during jury selection with respect to peremptory strikes, error in denying a motion for judgment of acquittal, an erroneous ruling that violated Petitioner's Fifth Amendment privilege against compelled self-incrimination and his Sixth Amendment right to confront his accuser and present his defense and a request that this Court revisit precedent ruling that Florida Prison Releasee Reoffender (PRR) statute does not violate *Apprendi v. New Jersey,* 530 U.S. 466 (2000), or *Alleyne v. United States*, 570 U.S. 99 (2013) and Petitioner's Fifth and Sixth Amendment rights under both the federal and state constitutions, given the recent decision, *Husrt v. Florida*, 136 S.Ct. 616 (2016).

Question One: **Is the Florida State trial court erring when sentencing Petitioner to minimum mandatory term of life in prison because the Prison Releasee Reoffender (PRR) statute without submitting it to the jury, violating both *Apprendi* and *Alleyne*? This is particularly true after a State Circuit Judge ruled that it was unconstitutional. The Certificate of Appealability (COA) should have been granted in the Eleventh Circuit Court of Appeals since a reasonable jurist found the court's assessment of the constitutional claims debatable or wrong pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Miller-El v. Cockrell*, 537 U.S. 336 (2003).**

Petitioner Barge alleges Florida law requires the trial court to make a number of predicate factual findings prior to imposing a Prison Releasee Reoffender (PRR) sentence. Barge alleges the trial court violated *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) by making the predicate PRR findings instead of submitting them to the jury for determination. He contends this Court extended *Apprendi* to facts underlying a minimum mandatory sentence, such as a PRR sentence, in *Alleyne v. United States*, 570 U.S. (2013). Barge asserts he presented this claim on direct appeal and has exhausted it with the federal courts.

On December 8, 2020, Florida's Honorable Circuit Judge, Tom Young declared Florida's Statute §775.082(9) unconstitutional (Appendix: C) and stated:

> [I] think that *Alleyne* and *Haymond*, which is only a plurality opinion, but I think that the broad and unequivocal language the the Supreme Court has used, combined with the way *Williams v. State*, 242 So.3d 280, Florida Supreme Court 2018, quotes Alleyne, I'm going to find that the statute can't be constitutionally applied because the fact is an aggravating factor and, thus, a constituent element and has to be submitted to the jury and proven beyond a reasonable doubt, just as

> a prior conviction would have to be submitted to a jury and proven in order to obtain a conviction for possession of a firearm by a convicted felon or, as [defense counsel] argued before, driving while license suspended type charge. So I'm going to grant the motion.

Refer to *State of Florida v. Ricky Tyrone Neal*, No.: 1999-CF-010077-A-O (Fla 9th Cir. Orange County December 8, 2020).

The Certificate of Appealability (COA) in the Eleventh Circuit Court of Appeals should have been granted since a reasonable jurist found the court's assessment of the constitutional claims debatable or wrong pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Miller-El v. Cockrell*, 537 U.S. 336 (2003).

The State contends that although Barge presented this claim on direct appeal, he did not preserve it in the trial court. Barge relies on the rebuttal of only the constitutionality of the statute under which Barge was sentenced being the kind of alleged error which must be considered for the first time on appeal because the argument surrounding the statute's validity raised a fundamental error. *Trushin v. State,* 425 So.2d 1126, 1130 (Fla. 1983). Therefore, the State contends the claim in unexhausted and procedurally defaulted. The State also argues that the claim lacks merit, because this Court has not extended *Alleyne's* holding to "nullify" the *Apprendi* exception for sentencing factors that are based on the fact of a prior conviction, which is the basis for a PRR sentence. The State asserts this is the reason why the State's First District Court of Appeal's rejection of this claim was not contrary to or unreasonable application of *Apprendi* or *Alleyne*.

Petitioner Barge echoed the exact argument that his appellate counsel raised in Florida's First Direct Court of Appeal during his direct appeal. As appellate counsel pointed out this case is "certworthy," because federal circuit courts of appeals are in conflict over this issue.

When Barge filed his Application for Certificate of Appealability with the Eleventh Circuit Court of Appeals, the Florida Senate was reviewing a proposal revising the sentencing structure for prison release reoffenders (PRR) statute (F.S. § 775.082). This change includes reducing the mandatory life sentence to a term of imprisonment of 25 years and shall also be applied retroactively. The bill has passed the Appropriations Committee by a unanimous vote and was introduced to the Senate Judiciary Committee, where it died on the Senate floor.

Barge's trial court found him to be eligible for a Prison Releasee Reoffender designation thereby making him ineligible for sentencing under the sentencing guidelines, and sentenced him to a mandatory term of life in prison in violation of *Alleyne*. The trial court's imposition of the mandatory life sentence was unconstitutional because the facts necessary to impose this sanction was not found by a jury beyond a reasonable doubt as required by the Sixth Amendment to the Constitution of the United States and because the state did not allege all the necessary elements in the information filed in this case in violation of Barge's Fifth and Sixth Amendment rights.

This Court recently noted, pertinent here:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, be an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ----, ----, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States, v. Booker*, 543 U.S. 220, 125 S,Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. [343], 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S., at ----, 133 S.Ct., at 2166 and, in *Ring [v. Arizona]*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, Capital punishment. (Emphasis supplied).

Hurst v. United States, 136 S.Ct. at 616, 621 (2016).

The rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to the imposition of minimum mandatory sentences[1]. *Alleyne*. Applicant's Barge's minimum mandatory PRR sentence of life in prison violates *Alleyne* because: (1) the temporal relationship (within 3 three years) between the current offense and release from prison was determined by the judge rather than the jury; (2) the lack of "extenuating circumstances" which "preclude" the "just" imposition of a PRR sentence was determined by the prosecutor rather than a jury; and (3) Barge's qualification as a prison releasee reoffender was established by a preponderance of the evidence rather than beyond a reasonable doubt.

In Florida, a defendant may not be sentenced as a prison release reoffender except on a finding that the present offense of conviction was committed within 3 years of release from prison for a crime punishable by a term of more than one year in the State of Florida. § 775.082(9)(a)1., Fla. Stat.. This statute requires two factual findings: (1) temporal relationship between the date of the current offense and date of release from prison; and (2) maximum sentence in excess of one year for the prior conviction. These are factual findings that are required under Florida law in order to support imposition of the PRR minimum mandatory sentences. Since minimum mandatory sentences come within *Apprendi*, these factual findings must be made by the jury. *Alleyne*.

A similar argument was rejected in *Calloway v. State*, 914 So.2d 12 (Fla. 2nd DCA 2005), and *Gordon v. State*, 787 So.2d 892 (Fla. 4th DCA 2001). The illogic of *Calloway* and *Gordon* should be readily apparent. If the "temporal relationship" were encompassed in the "fact of a prior conviction," it would not be necessary for the trial court to make factual finding to impose

1 Barge acknowledges that numerous courts have found that Florida's PRR statute does not violate *Alleyne* and *Apprendi*. See, *Gudinas v. State*, 879 So.2d 616 (Fla. 2004); *Williams v. State*, 143 So.3d 423 (Fla. 1st DCA 2014); *Moore v. State*, 78 So.3d 118 (Fla. 1st DCA 2012); *Kirkland v. State*, 67 So.3d 1147 (Fla. 1st DCA 2011); *Dinkins v. State*, 976 So.2d 660 (Fla 1st DCA 2008; *Calloway v. State*, 914 So.2d 12 (Fla. 2nd DCA 2005); *Gordon v. State*, 787 So.2d 892 (Fla. 4th DCA 2001). Nonetheless, Petitioner urges this Court to review precedent given in *Hurst v. Florida*, 136 S.Ct. 616 (2016).

sentence for the present offense of conviction. It is absurd to pretend that the date of the present offense is broadly encompassed in the "fact of a prior conviction" when the present offense had not yet been committed at the time of the entry of the prior judgment. Even *Calloway* recognized the "fact of Calloway's release from his prison sentence is not the same as a bare fact of a prior conviction," but employed the unjustified fiction that the date of release is "directly derivative" from the prior conviction. *Calloway*, 914 So.2d at 14. But *Apprendi* does not support an exception for facts that may be "directly derived" from the fact of a prior conviction. Analysis employed in *Calloway* constitutes "judicial activism" at its worst. State law requires a finding of fact. Because the state law requires a finding of fact, federal law requires that the finding be made by a jury. *Apprendi*; *Alleyne*; see also, *United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007)(temporal relationship between date of removal and offense of conviction does not fall within *Apprendi* exception for "fact of prior conviction" and must be alleged in indictment and found by jury); *State v. Perez*, 196 Or. App. 364, 102 P.3d 705 (2004) (defendant's probationary status not within *Apprendi* exception for "fact of prior conviction" and must be found by jury), reversed on other grounds, 131 P.3d 168 (Or. 2006). Second, not every offender who qualifies as a prison releasee reoffender is subject to PRR sentencing. State law gives the prosecutor the discretion to determine that "extenuating circumstances exist which preclude the just prosecution of the offender [as a prison releasee reoffender.]" § 775.082(9(d)1., Fla. Stat.. Thus, there is a presumption that imposition of a PRR sentence is "just" if the offender qualifies under the letter of the law, although that presumption is rebuttable at the discretion of the prosecutor. Whether "extenuating circumstances exist" is a question of fact. Whether the presumption is rebutted is a question of fact. These questions must be resolved by the jury. *Alleyne*. This rebutable presumption of a *de facto* element of the offense is

unconstitutional. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin,* 471 U.S. 307 (1985). But see, *Robbinson v. State*, 784 So.2d 1246 (Fla. 3rd DCA 2001).

Therefore, this Court's decisions in *Apprendi, Blakely v. Washington*, 542 U.S. 296 (2004), *Alleyne*, and the Florida Supreme Court's decisions in *Williams v. State*, 242 So.3d 280 (Fla. 2018), and *Brown v. State*, 260 So.3d 147 (Fla. 2018), apply to Mr. Barge's sentencing scheme.

Pursuant to Florida Statutes § 775.082(9)(a)1., an individual is classified as a prison release reoffender if he commits or attempts to commit one of the listed offense within 3 years of being released from a sentence of incarceration imposed for a felony conviction.

Section 775.082(9)(a)3. Provides the following:

> 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.

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

Thus, if the State proves by a preponderance of the evidence that a defendant qualifies as a prison releasee reoffender, a trial court is required by § 775.082(9) to sentence the defendant to

the statutory maximum sentence for the offense of conviction and the defendant must serve 100% of that sentence day-for-day.

If the trial court concludes that the State establishes the Mr. Barge is a prison releasee reoffender pursuant to the requirement of Fla. Stat. § 775.082(9), the court will be required to sentence Mr. Barge to life in prison. A life sentence would be required despite the fact that Mr. Barge's criminal punishment code Scoresheet prescribes a lowest permissible sentence of 93.7 months. (Appendix: D).

Therefore, designation of Mr. Barge as a prison releasee reoffender completely removes discretion from the trial judge to sentence Mr. Barge to a term of imprisonment between 93.7 months in prison and term of life in prison, and requires the judge to impose a minimum mandatory sentence of life in prison.

Section 775.082(9) is unconstitutional on its face and as applied to Mr. Barge because it requires that a defendant's minimum mandatory sentence be increased based upon a finding by the trial judge that the defendant committed the offense of conviction within 3 years of being released from prison. The Statute permits the trial court to make this finding if the State proves by a preponderance **of the evidence** that the defendant committed the offense of conviction within 3 years of being released from prison.

The statute violates *Apprendi*, *Blakely*, *Alleyne*, *Williams*, and *Brown*, because the Fifth and Sixth Amendments require that the finding in question be made by a jury and that the facts necessary to support that finding be proven beyond a reasonable doubt.

In *Apprendi*, this Court held that any fact, other than a prior conviction, that increases the maximum sentence a defendant faces must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466.

In *Blakely*, this Court reversed a defendant's 93-month prison sentence. This Court held that *Apprendi* applied where a trial judge exceeded the maximum sentence of 53 months in prison supported solely by the facts admitted in the defendant's plea. The trial judge made an additional finding of fact not made by the jury to justify the aggravated sentence of 90 months in prison. 542 U.S. 296.

In *Alleyne*, this this Court held that facts increase the minimum mandatory sentence that must be imposed by the sentencing court must be submitted to the jury and proven beyond a reasonable doubt. In reaching that conclusion, the Court reasoned that, where a fact aggravates the legally prescribed range of allowable sentences, the fact must be found by a jury, regardless of what sentence the defendant might have received if a different range had been applicable. This Court receded from its prior decision in *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), which held that facts necessary to support a minimum mandatory sentence could be proven by a preponderance of the evidence. The Court also receded from its decision in *Harris v, United States,* 536 U.S. 545 (2002), which held that a trial judge could make findings of the fact that support the imposition of a minimum mandatory sentence. *Alleyne,* 570 U.S. 99.

In *Williams,* the Florida Supreme Court held that, pursuant to Alleyne, the finding as to whether the defendant actually killed, intended to kill, or attempted to kill the victim required by Fla. Stat. § 775.082(1)(b), a different statute at issue in Mr. Barge's case, st also be found by a jury beyond a reasonable doubt. The Florida Supreme Court noted that this finding "aggravates the legally permissible range of allowable sentences by increasing the sentencing floor from zero to forty years." 242 So.3d at 288.

Most importantly, in *Brown*, the Florida Supreme Court recently held that Fla. Stat. § 775.082(10), also a different statute that is at issue in Mr. Barge's case, is unconstitutional because it requires the trial judge, not a jury, to make a finding which increase the defendant's

maximum sentence. Section 775.082(10) requires that a defendant whose total sentence points on the criminal punishment code scoresheet are 22 or less must be sentenced to a nonstate prison sanction unless "the court makes written findings that a nonstate prison sanction could present a danger to the public." If the trial court makes that written finding, it then has the discretion to impose a prison sentence. 260 So.3d at 148-151.

There is no meaningful distinction between § 775.082(1) and § 775.082(10), which were addressed by the Florida Supreme Court in *Williams* and *Brown*, and § 812.13(2)(a), which is at issue in Mr. Barge's case. Sections 775.082(1) and (10) both impermissibly permitted a trial judge to increase a defendant's sentence based on a finding of fact not made by the jury beyond a reasonable doubt.

In Mr. Barge's case, the jury did not make a finding that he committed the offense for which he is being sentenced within 3 years of being released from prison. For the same reasons articulated by the Florida Supreme Court in Williams and Brown, it would now be improper for the trial judge to make that finding instead of a jury, and for the trial judge to only require that the State prove the fact by a preponderance of the evidence as set forth in § 775.082(9)(a)3.

Here, like in *Williams*, *Brown*, and *Alleyne*, it is inescapable that, if the trial judge proceeds to make the finding required by § 775.082(9), it will be aggravating the legally prescribed range of available sentences. Prior to the finding being made, the trial judge has the discretion to sentence Mr. Barge to a term of imprisonment between 93.7 months in prison and term of life in prison. (Appendix: D). After making the finding, the only sentence the trial judge is permitted to impose pursuant to the statute is life in prison. As a result, life in prison would then be the applicable minimum mandatory sentence.

Importantly, Petitioner has not located a single district court decision that addresses whether the Florida Supreme Court's decisions in Brown and Williams apply equally to § 775.082(9).

The last time the Florida Supreme Court addressed the constitutionally of § 775.082(9) was in *Robinson v. State*, 793 So.2d 891 (Fla. 2001). In *Robinson,* the Florida Supreme Court rejected the defendant's argument that § 775.082(9) was unconstitutional based on *Apprendi.* The Court reasoned that the *Apprendi* Court made it clear that the decision only addresses situations where a defendant's maximum sentence was increased. The Court reasoned that *Apprendi* did not overrule *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), which held that a fact which required the imposition of a minimum mandatory sentence was not one which needed to be proven to a jury beyond a reasonable doubt. *Robinson*, 793 So.2d at 893.

The Florida Supreme Court's decision in *Robinson* was unequivocally overruled by this Court's decision in *Alleyne*. In *Alleyne*, this Court explicitly overruled *McMillan* and held that the rule announced in *Apprendi* applies equally to facts necessary to support the imposition of a minimum mandatory sentence. 570 U.S. 99.

For the aforementioned reasons, this Court should conclude that § 775.082(9) violates the Fifth and Sixth Amendments to the United States Constitution. This Court should declare the Florida statute unconstitutional, decline to find Mr. Barge to be a prison releasee reoffender, and direct for resentencing pursuant to his criminal punishment code scoresheet.

Finally, these findings of fact were established by a preponderance of the evidence. See, § 775.082(9)(a)3., Fla. Stat.. The findings should have been established by the jury under the "beyond a reasonable doubt" standard. *Apprendi; Alleyne*. For the above stated reasons, the

trial court erred in imposing a minimum mandatory term of life for the robbery conviction under the PRR statute.

Question Two: <u>Is the State of Florida's Trial Court violating the Equal Protection Clause by denying a defendant's objections to three of the State's peremptory challenges when it failed to conduct a proper Melbourne [v. State, 679 So.2d 759 (Fla. 1996)] Inquiry?</u>

Petitioner Barge states he is an African-American male. He asserts defense counsel made a "*Neil [v. State,* 457 So.2d 481 (Fla. 1984)]" challenge to the State's use of peremptory strikes on three jurors, on the ground that the State impermissibly exercised the strikes to exclude white males (*id.*). Barge admits that defense counsel did not even renew her objections before the jury was sworn, but he argues the objections were not waived or unpreserved because defense counsel did not indicate she was satisfied with the jury before the jurors were sworn (*id.*). Barge asserts he presented this claim on direct appeal (*id.* at 9).

The State argued and exhaustion defense. The State contended Barge waived appellate review of the issue, and failed to preserve it, because Barge personally informed the trial court that he accepted the jurors who had been selected, and defense counsel failed to renew any objections to the three stricken jurors prior to swearing of the jury (*id.*). The State further argues that Barge's trial counsel failed to preserve the issue by failing to challenge the prosecutor's reasons for striking the jurors as pretextual (*id.*). The State alternatively argues that the State's First District Court of Appeal's silent affirmance of the judgment should be considered an adjudication on the merits, and its adjudication was not contrary to or an unreasonable application of clearly established federal law. Petitioner Barge argued vigorously that clearly established federal law such *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(Ineffective assistance of counsel); *Batson v. Kentucky*, 476 U.S. 79 (1986)(The striking of a single African-American juror for racial reasons violates the Equal Protection Clause); and *Roe v. Flores-*

Ortega, 528 U.S. 470 (2000)("[E]stablishes that the prejudice showing required by *Strickland* is not always fastened to the forum in which counsel performs deficiently. . . .").

Barge also relied on the principles of *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003), as it relates in this case. *Davis* concluded that the standard for prejudice where the defense attorney fails to preserve the challenge to an objectionable juror is "whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Id.* at 1316. The *Davis* court chose this standard because it believed that trial counsel was acting in a separate and distinct role of preserving error on appeal when renewing the objection to the juror before swearing in the jury.

In *Davis* trial counsel raised a meritorious *Batson* challenge during *voir dire*, but failed to renew the objection before the jury was sworn in as required by *Joiner v. State*, 618 So.2d 174, 175-76 (Fla. 1993). 341 F.3d at 1312. Although *Joiner* subsequent claim that the failure to preserve the *Batson* challenge constituted ineffective assistance of counsel was rejected by the Florida's Third District Court of Appeal, however, the Eleventh Circuit Court of Appeals granted him relief pursuant to a federal writ of habeas corpus. *Id.* at 1312, 1317. The Eleventh Circuit considered the decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which involved a notice of appeal that was untimely filed, to support the proposition that *Strickland* at 687, may on occasion require determination of how deficient performance affected the client's appeal, rather than the trial. *Davis*, 341 F.3d at 1314-15. Concluding that counsel's failure to preserve his *Batson* challenge solely affected Davis's appeal, the Eleventh Circuit held that the correct prejudice inquiry under such circumstances was whether there was a reasonable likelihood of a more favorable outcome on appeal. *Id.* at 1315-16.

A lot of Florida case's majority rejects the *Davis* analysis, because the necessity to renew the objection before the swearing in of the jury is to assure that events had not transpired

subsequent to the objection to make the defendant satisfied with the jury chosen. Thus, the majority concludes that the purpose of renewing the objection is related to the trial, and counsel is not performing in an appellate role only. While most of the majority's legal conclusion is correct in general, it does not apply in this case. Defense counsel requested additional peremptories throughout *voir dire*, all of which were denied by the trial court.

The trial court erred in granting the State's peremptory challenges to the prospective jurors without engaging in a determination of the genuineness of the reason for the peremptory, as required under *Melbourne v. State*, 679 So.2d 759 (Fla. 1996). It was fatally insufficient for the trial court in this case to merely say in response to the State's reason for its strikes that they were not a pretext and not to proceed to step 3 and to conduct the genuineness step in the *Melbourne* analysis before sustaining the strikes. The trial court in this case was required to make a *Melbourne* step 3 determination of the genuineness of the State's reason for its peremptories as to the three prospective jurors and the failure of the trial court to conduct a step 3 analysis is reversible error. The record in this case shows that the trial court failed to determine the genuineness of the State's challenge state when the state improperly exercised a peremptory strike to exclude three (3) prospective Africa-American jurors.

To make matters worse Barge's trial counsel did not renew their objection or did not made an adequate request for additional peremptories or received a definitive ruling on their request, they had not preserved the issue for appeal. Clearly, counsel's deficient performance in this case consisted of their failure to properly preserve the juror challenges for appeal, not their trial performance of bringing this to the attention of the trial judge to reconsider his prior rulings.

Florida case law makes clear that if the juror challenge had been properly preserved in all respects under *Joiner v. State*, 618 So.2d 174 (Fla. 1993), then the appellate court would have reversed on appeal, and Barge would have received a new trial as objectionable jurors sat on his

case. Under the facts of this case, the *Davis* standard should apply. Sometimes a lawyer's failure to challenge a juror may be a matter of trial strategy, however it was not pointed out in this case. Therefore, having failed to make any argument whatsoever in the trial court regarding a juror, so that the trial court could inquire further or examine the juror's qualifications, the appropriate standard should be to determine from the record whether a biased juror sat on the case. To the contrary, under the facts of this case the failure to preserve a cause challenge is simply not a matter of trial strategy.

Question Three: Is the State of Florida sanctions deficient proof of use of a knife or threatened use of a knife that would likely cause death or great bodily harm rendering the evidence wholly insufficient to prove any crime except that of carrying a weapon while committing robbery, denying defendant's Fourteenth Amendment Rights to Due Process?

Petitioner Barge alleges the surveillance video of the Circle K store he allegedly robbed supported the testimony of the store's employee, that Barge did not say or do anything that could be objectively interpreted as threatening. Barge alleges the video shows he did not make any threatening motion toward Mr. Carrigan (store clerk) with the knife he was carrying at his side throughout the alleged robbery. Barge alleges the video also shows he never verbally threatened to use the knife or to harm Carrigan in any way. Barge contends Mr. Carrigan's subjective feelings of fear was legally insufficient the Fourteenth Amendment's Due Process Clause guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, (1970). This Court announced the federal standard for determining the sufficiency of the evidence to support a conviction in *Jackson v. Virginia*, 443 U.S. 307 (1979). See *Fiore v. White*, 531 U.S. 225, 228-229 (2001) ("We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.") (citing *Jackson*, 443 U.S. at 316 and

Winship, 397 U.S. at 364); see also *Cavazos v. Smith*, 565 U.S. 1 (2011) ("A reviewing court may satisfy the jury verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. What is more, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court."); *Jackson* standard applies to federal habeas claims attacking the sufficiency of the evidence to support a state conviction.

Here, Barge's Due Process rights have been violated because the State failed to prove any crime except that of carrying a weapon (knife) while committing robbery. The State was required and failed to prove with objective evidence that the knife Barge carried was a "deadly weapon," used or threatened to be used in a way likely to produce death or great bodily harm.

The State ignored the authorities analyzed in Barge's direct appeal briefs that hold that a victim's subjective fears, are insufficient evidence to support the State's theory that Barge used or threatened to use the knife he was carrying in a way likely to produce death or great bodily harm. The video shows, and the alleged victim's testimony is consistent with the video, that nothing Barge did or said could be objectively interpreted as threatening. The video was supplemented into the record on appeal, therefore, both the state trial and appellate courts and now the federal district court erred in their rulings. The court records show that Barge's jury after viewing the video four times – once during trial and three times during closing – requested a definition of "threatened," asking, "Does it have to be actual, physical and/or verbal or just perceived by the victim?" (Emphasis added). The trial court then referred them to the instructions.

Barge's jury was obviously confused because the State elicited testimony from the alleged victim that he was "afraid the knife could injure" him. The State also argued that the jury should rely on the alleged victim's subjective fears and Barge's intent, when the instructions

instructed otherwise. e.g., "He's [the victim] afraid;" "He [Barge] brought that knife to the Circle K with the intention of using that large knife to enable the robbery;" "why else would you walk into the store with a butcher knife unless you intended to use it?" Thus, the count erroneously went to the jury, contrary to the rule of law governing this issue, that it is an objective test and the "nature and actual use of the instrument and not to the subjective fear of the victim or intent of the perpetrator." *Williams v. State*, 651 So.2d 1242 (Fla. 2nd DCA 1995).

Barge understands a sufficiency-of-the-evidence challenge to a state conviction must over-come a doubly deferential standard of review. Petitioner believes he has overcome these hurtles. First, "[t]he evidence is sufficient to support a conviction whenever, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Parker v. Matthews*, 132 S.Ct. 2148, 2152 (2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Second, "a state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas review unless the decision was 'objectively unreasonable.'" *Id.* (*quoting Cavazos v. Smith*, 565 U.S. 1 (2011)). The state's decision is objectively unreasonable.

Therefore, Barge's conviction of violating Florida Statutes § 812.13(1), (2)(a) also violating Barge's federal Right to Due Process because the State failed to prove the elements of armed robbery.

Question Four: Is the Florida State trial court limiting and conditioning defense's cross-examination of an adverse witness on whether Petitioner was going to testify, which violated Petitioner's Fifth Amendment privilege against compelled self-incrimination, as well as his Sixth Amendment right to confront his accuser and his right to present his defense – Due Process Clause?

Petitioner Barge alleges the defense theory was that he and the store clerk (Carrigan), had a social relationship, that Carrigan stole $50 from Barge, and that Barge went to the store on July 1, 2013, to collect his money from Carrigan. Barge alleges during defense counsel's cross-examination of Carrigan, counsel questioned him about whether he went to a dog park with Barge, stole money from Barge, and promised to return it. Barge alleges Mr. Carrigan responded no to these questions. Barge alleges defense counsel then began questioning Mr. Carrigan about whether he told law enforcement about the same matters (i.e., that he had social relationship with Barge, went to a dog park with Barge, stole money from Barge, and promised to return it). Barge alleges the prosecutor objected to the questioning, on the ground that defense counsel was essentially attempting to introduce evidence in the form of her questions. Barge alleges the trial court improperly sustained the prosecutor's objection and warned defense counsel that useless Barge testified to the facts underlying counsel's questions, Carrigan's answers to the questions would be struck, and counsel would be prohibited from further questioning Carrigan about the matters. Barge contends the trial

The Confrontation Clause of the Sixth Amendment of the U.S. Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. Amend. VI. This right of confrontation embodies the right of the defendant to "a meaningful opportunity to present a complete defense."

Crane v. Kentucky, 476 U.S. 683, 690 (1986) (internal quotation marks and citation omitted). This right also "means more than being allowed to confront the witness physically." *Delaware v. Van Arsdall*, 475 U.S. 673, 678, (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315

(1974)). Specifically, it includes the "opportunity of cross-examination." Id. (quoting *Davis*, 415 U.S. at 315-16) (emphasis omitted). Barge understands this right, however, is not absolute. See, *e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 411 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Schriver*, 255 F.3d 45, 55 (2nd Cir. 2001). The right to present evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 55, (1987)). Specifically, a state court may exclude evidence in order to prevent "harassment, prejudice, [or] confusion of the issues," *Crane*, 476 U.S. at 689-90, or otherwise "through the application of evidentiary rules that serve the interests of fairness and reliability." *Chambers*, 410 U.S. at 302.

Challenging a witness's credibility, through cross-examination, means the ability to explore and expose the witness's motivation in testifying as it relates to "...revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him."

The right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the "Due Process of Law" that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the Federal Constitution. *See Faretta v. California*, 422 U.S. 806 (1975); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967); *Boykins v. Wainwright*, 737 F.2d 1539 (11th Cir. 1984), *rehearing denied*, 744 F.2d 97 (11th Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

The Florida trial court asked defense counsel if she had a good faith basis for her questions. Defense counsel responded, saying: "We of course have wide latitude when it comes

to cross examination ... . I do have a good faith basis, but I have a good faith basis from - - well, for this particular line of questioning from my client. But I don't - - I think I have a right to explore this with whether or not he testifies ... . Have a right to explore whether or not it's impeachment."

The trial court said: "If it ends up at the end that you don't have a good faith basis, you may end up losing all of it because I may tell them to strike all of it ... . So I'm going to allow her to ask whatever she think she's got a good faith basis for with that warning ... ." Defense counsel then consulted with Mr. Barge about whether he was going to testify. Barge testified.

As Barge's Appellate Counsel said in her reply brief:

> "A close reading of the record, outlined in his Initial Brief, reveals that defense counsel's questions were neither argumentative nor repetitious and that she had a good faith basis for her questions. It is clear that the trial court impermissibly compelled Barge to testify as a condition to not have certain testimony of an adverse witness stricken and to permit continued cross examination [11] of permissible impeachment questions, in violation of his state and federal Fifth Amendment privilege against compelled self-incrimination and state and federal due process rights to present a defense." (Pages 10 & 11).

The record reveals that the trial judge basically induced Mr. Barge to unwillingly testify at his trial in order for the jury to hear the facts relating to the alleged victim (Mr. Carrigan). The threat by the trial judge to strike defense counsel's cross-examination questions of Mr. Carrigan was significant enough for Mr. Barge to reluctantly testify. This treat by the trial court limited defense counsel's cross-examination of Carrigan as to his personal relationship with Barge. The defense sought to show that Carrigan falsely accused Barge because he was angry with Barge for taking back Barge's $50.00. However, defense counsel's cross-examination was limited by the court's rulings. The exclusion of defense counsel's inquiry as to these specifics were error. See, *Davis v. Alaska*, 415 U.S. 308 (1974); and *Greene v. McElroy*, 360 U.S. 474 (1959). This was similar to serving up spice cake without the spice, or a bloody Mary without vodka. It is the

specifics, the details, the nitty gritty of life that proves or disproves generalities and which permits effective cross-examination. See, *Gamble v. State*, 492 So.2d 1132 (Fla. 5th DCA 1986).

To show that a judge has exceeded his or her wide latitude to impose reasonable limits on a defendant's cross-examination of an adverse witness, "the litigant must show that the exclusion of testimony was 'arbitrary or disproportionate' to its purposes." *Michigan v. Lucas*, 500 U.S. 145, 151 (1991)(quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)); see also *United States v. Scheffer*, 523 U.S. 303, 308 (1998). All that is required in other words is that any limitation on cross-examination be reasonable.

Despite this weighty interest, a defendant's right to cross-examine is not unlimited. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). "In a criminal case, restrictions on the defendant's rights 'to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve.'"

Such language, clear although general, calls for a balancing of interests depending on the circumstances of the case. Factors that the Supreme Court has deemed relevant are the importance of the evidence to an effective defense, *Davis*, 415 U.S. at 319; the scope of the ban involved, *Van Arsdall*, 475 U.S. at 679; and the strength *vel non* of state interests weighing against admission of the evidence. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

By contrast, a trial court's limitation on cross-examination aimed at exposing a witness's motive or bias reaches the core of Confrontation Clause concerns. To justify limiting a defendant's right to confront his accusers on issues of motive and bias, the countervailing policy

interest must be concrete and articulable, not based on surmise or speculation. *See Olden v. Kentucky*, 488 U.S. 227, 232 (1988). Furthermore, a defendant has the right to explore fully each potential motive or source of bias. In *United States v. Martin*, 618 F.3d 705, 728 (7th Cir. 2010), for example, the defendant alleged that his Confrontation Clause rights had been violated when he was not permitted to cross-examine a witness concerning any link "between [the witness's] involvement in [a] pending state murder investigation and his testimony in the federal action." The timing, nature and status of the state murder investigation was probative of bias, and the defense had the right to explore it fully and allow the jury to draw its own conclusions.

DECLARATION

I hereby declare under penalty of perjury that I understand English language or have had it read to me in a language that I understand and therefore, state that the facts set forth are true and correct.

Respectfully submitted,
/s/ Jimmie Barge #211929
Jimmie A. Barge, DC# 211929

CHRISTOPHER ALLEN ROBERTS, JR.
MY COMMISSION # GG 356225
EXPIRES: July 17, 2023
Bonded Thru Notary Public Underwriters

10/12/21

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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