No.

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD KINDLE, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

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Counsel of Record

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	:	**INFORMATION FOR:**
	:	
Plaintiff,	:	**MURDER IN THE SECOND DEGREE**
	:	
v.	:	
	:	
REGINALD KINDLE,	:	
	:	
Defendant.	:	
_____	:	

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

MICHAEL J. SATZ, State Attorney for the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that:

REGINALD KINDLE

between the dates of June 26th through June 28th in the year of Two Thousand and Fifteen, A.D., in the County of Broward, State of Florida, did then and there unlawfully and feloniously kill and murder **Sarah Robinson**, a human being, by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life, to wit: by choking **Sarah Robinson** and causing her death by asphyxiation or suffocation, although not necessarily with a premeditated intent to cause the death of **Sarah Robinson**, contrary to Section 782.04(2) of the Florida Statutes.

STATE OF FLORIDA v. REGINALD KINDLE **INFORMATION, PAGE 2**

IDENTIFYING INFORMATION:
BLACK/MALE, DOB: 6/11/1963

COUNTY OF BROWARD

STATE OF FLORIDA

Personally appeared before me Brian T. Cavanagh, duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn, certifies and says that testimony has been received under oath from the material witness or witnesses for the offenses, and the allegations as set forth in the foregoing Information would constitute the offenses charged, and that this prosecution is instituted in good faith.

Brian T. Cavanagh
Assistant State Attorney
Fla. Bar. No. 228621
17th Judicial Circuit
Broward County, Florida

SWORN TO AND SUBSCRIBED before me this 17th day of July 2015.

HOWARD C. FORMAN
Clerk of the Circuit Court
17th Judicial Circuit
Broward County, Florida

By: _____
Deputy Clerk

To the within Information, Defendant pleaded _____

HOWARD C. FORMAN
Clerk of the Circuit Court
17th Judicial Circuit
Broward County, Florida

By: _____
Deputy Clerk

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, :

Plaintiff, :

vs. :

REGINALD KINDLE, :

Defendant. :

CASE NO: 15-008439CF10A

JUDGE: WEEKES

VERDICT

COUNT I

WE, THE JURY, find as follows as to the Defendant in this case: (Check only one)

___A. The Defendant is Guilty of Murder in the Second Degree, as charged in the information.

✓B. The Defendant is Guilty of Manslaughter, a lesser included offense.

___C. The Defendant is Not Guilty.

SO SAY WE ALL, this 8 day of November, A.D. 2019, at Fort Lauderdale, Broward County, Florida.

~~FOREPERSON~~

Mario Giommoni
PRINT NAME

[✓] 17th Judicial Circuit in and for Broward County

CLOCK IN

DIVISION: Criminal FG

SENTENCE

as to Count I

THE STATE OF FLORIDA VS.

DEFENDANT Reginald Kindle

CASE NUMBER 15-8439 CF10A

The Defendant, being personally before this court, accompanied by his attorney, D. Wheeler 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 he sentenced as provided by law, and cause shown,

Check One

☑ and the Court having on 11/8/19 deferred imposition of sentence until this date.

☐ and the Court having previously entered a judgment in this case on the defendant now resentences the defendant.

☐ and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes, plus $_____ as the 5% surcharge required by section 938.04, Florida Statutes.

☑ The Defendant is hereby committed to the custody of the Department of Corrections.

☐ The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.

☐ The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

☐ For a term of Natural Life.

☑ For a term of 20 years.

☐ Said SENTENCE IS SUSPENDED for a period of_____ subject to conditions set forth in this Order.

If "split" sentence, complete either paragraph.

☐ Followed by a period of_____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

☐ However, after serving a period of_____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of the Probation/ Community Control set forth in a separate order entered herein.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served on the State Attorney by: [ ] Hand delivery [ ] U.S. Mail *and to the* Defense Attorney by: [ ] Hand delivery [ ] U.S. Mail this 2 day of May, 20 20

DIVISION: CRIMINAL FG	SENTENCE (AS TO COUNT I)	CASE NUMBER A6 15-8439 CF10A

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision term.

SPECIAL PROVISIONS
(As to Count I)

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

MANDATORY/MINIMUM PROVISIONS:

BATTERY ON THE ELDERLY ☐ It is further ordered that the three (3) year mandatory minimum imprisonment provisions of F.S. 784.08(1) are hereby imposed for the sentence specified in this court.

DRUG TRAFFICKING ☐ It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL ☐ It is further ordered that the three (3) year minimum imprisonment provision of Florida Statute 893.13(1)(e)1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER ☐ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER ☑ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in this sentence in accordance to the provision of Florida Statute 775.084(4). A minimum term of 30 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.

LAW ENFORCEMENT PROTECTION ACT ☐ It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

CAPITAL OFFENSE ☐ It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL ☐ The defendant is adjudicated a violent career criminal offender and has been sentenced to a term in accordance with the provision of Florida Statute 775.084(4)(c). 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.

PRISON RELEASEE REOFFENDER ☐ The defendant is sentenced as a prison releasee reoffender and must serve a term of imprisonment of_____ years in accordance with the provisions of Florida Statute 775.082(8)(a)2.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served on the State Attorney by: [ ] Hand delivery [ ] U.S. Mail and to the Defense Attorney by: [ ] Hand delivery [ ] U.S. Mail this 2nd day of Mar, 20 20

A7

DIVISION: CRIMINAL	SENTENCE (AS TO COUNT I)	CASE NUMBER 15-8439 CF10A

OTHER PROVISIONS

FIREARM/DESTRUCTIVE DEVICE	[ ]	It is further ordered that the _____ year mandatory minimum imprisonment provision of Florida Statute 775.087(2) and (3) is hereby imposed for the sentence specified in this count
THREE-TIME VIOLENT FELONY OFFENDER	[ ]	The Defendant is adjudicated a three-time violent felony offender and has been sentenced to an extended term in accordance with the provisions of Florida Statute 775.084. The requisite findings by the court are set forth in a separate order or as stated on the record in open court.
SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN	[ ]	It is further ordered that the five-year minimum provisions of Florida Statute 790.22(2) are hereby imposed for the sentence specified in this count.
CONTINUING CRIMINAL ENTERPRISE	[ ]	It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.
RETENTION OF JURISDICTION	[ ]	The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16 (3).
JAIL CREDIT	[✓]	It is further ordered that the defendant shall be allowed a total of 1710 days as credit for time incarcerated prior to imposition of this sentence.
PRISON CREDIT	[ ]	It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to re-sentencing.
CONSECUTIVE CONCURRENT AS TO OTHER COUNTS	[ ]	It is further ordered that the sentence imposed by this court shall run _____ consecutive to _____ concurrent with (check one) the sentence set forth in count _____ of this case.
CONSECUTIVE CONCURRENT AS TO OTHER CONVICTIONS	[ ]	It is further ordered that the composite term of all sentences imposed for the courts specified in this order shall run _____ consecutive to _____ concurrent with (check one) the following: _____ Any active sentence being served. _____ Specific Sentences: _____

PSI ORDERED YES [✓] NO [ ]

In the event the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filling notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the court further recommends _____

DONE AND ORDERED in Open Court at Broward County, Florida, this 2nd day of March, 20 20.

X _____
JUDGE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served on the State Attorney by: [ ] Hand Delivery [ ] U.S. Mail and to the Defense Attorney by: [ ] Hand Delivery [ ] U.S. Mail this 2nd day of Mar, 20 20.

_____

ICC 112-78 Criminal Sentence

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

STATE OF FLORIDA,
Plaintiff,

CASE NO: 15-8439CF10A

vs.

REGINALD KINDLE,
Defendant.
_____/

AMENDED[1] MOTION TO CORRECT ILLEGAL SENTENCE

Reginald Kindle moves to correct his illegal Violent Career Criminal sentence pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). If an appeal is pending, a defendant may file a motion to correct a sentencing error in the trial court before filing an initial brief in appellate court. Fla. R. Crim. P. 3.800(b)(2). Kindle so files this Motion.[2]

Summary of Argument

The fact that Kindle was released from prison within five years of his present offense is a fact other than the fact of a prior conviction that raised Kindle's maximum sentence above the statutory maximum for his underlying offense. That fact is therefore subject to the rule in *Apprendi*. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other 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."). Whatever confusion about the scope of the prior-conviction exception that this and other Florida courts might have had, it is now clear that the prior-conviction exception is not a catch-all recidivism exception. The prior-conviction

[1] The undersigned has amended this Motion to correct a scrivener's error on page 3.
[2] If the Court decides to hold a hearing on this Motion, undersigned counsel respectfully requests the right to appear at that hearing and to support the Motion with argument.

exception allows a sentencing court to do no more than merely identify the crime of conviction and its elements. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (ruling that a sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."). The date on which Kindle was released from prison is neither the crime of which Kindle was convicted, nor one of its elements. The Constitution therefore requires a jury, not a judge, to find that fact. Because this Court, rather than a jury, found that Kindle was released from prison within five years of his present offense, and this Court relied on that fact to sentence Kindle above the statutory maximum for his underlying offense, Kindle's sentence violates the Sixth Amendment of the United States Constitution. "[A] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" *See Plot v. State*, 148 So. 3d 90, 94 (Fla. 2014). This Court must now correct it.

Procedural History

This Court sentenced Kindle to 40 years in prison after adjudicating him guilty of manslaughter, a second-degree felony carrying a maximum penalty of 15 years in prison. § 775.082(3)(d), Fla. Stat. This Court sentenced Kindle well above the maximum term for his underlying offense, relying on the Violent Career Criminal statute. *See* § 775.084, Fla. Stat. This Court found that Kindle had the requisite number and kind of qualifying prior convictions and met other statutory criteria requiring that he be sentenced as a Violent Career Criminal. (Sent. Tr. at 93–95); *See* § 775.084, Fla. Stat. Of those criteria, this Court found that Kindle was most recently released from prison on April 12, 2011, and that his current offense, which according to a jury finding occurred between June 26th and 28th of 2015, took place within five years of his release from prison. (Sentencing Transcript, Day 2, at 93–95). The fact that Kindle was released from prison on April 12, 2011 increased Kindle's maximum sentence of 15 years in prison for his

present offense to a *minimum* sentence of 30 years in prison. This Court ultimately sentenced Kindle to 40 years in prison. (Sent. Tr. 95).

This Court sentenced Kindle with the aid of an incorrect sentencing score sheet. The sentencing score sheet before the Court indicated that Kindle's prior conviction under Section 782.051, Florida Statutes, was for a level-ten offense. (R. 4D20-669 at 467.) But a conviction under Section 782.051 is for a level-nine offense. § 931.0022(3)(i), Fla. Stat. Kindle's score sheet therefore counted 29 points for that offense when it should have counted 23.

Relief Sought

Kindle respectfully requests that this Court vacate his illegal sentence and resentence him to a term of imprisonment within the applicable statutory range, the maximum term of which is 15 years in prison. Alternatively, Kindle respectfully requests that this Court resentence him with the benefit of a corrected sentencing score sheet.

Argument

I. The Fact That Kindle Was Released From Prison Within Five Years of His Present Offense Is A Fact Other Than The Fact Of A Prior Conviction That Raised Kindle's Minimum Sentence Above The Statutory Maximum For His Present Offense.

This Court, rather than a jury, found that Kindle was released from prison on April 12, 2011. (Sentencing Transcript, Day 2, at 95.) This finding increased Kindle's maximum sentence of 15 years in prison for his underlying manslaughter offense to a *minimum* sentence of 30 years in prison. *See* § 775.084 Fla. Stat. The Constitution guarantees Kindle the right to have a jury make a finding of this magnitude, one that unmistakably changes the nature of Kindle's sentence. The Sixth Amendment entitles a criminal defendant like Kindle to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510

(1995) (alterations omitted). "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi*, 530 U.S. at 490). Any fact that produces a higher sentencing range must be submitted to a jury and found beyond a reasonable doubt. *Id.* at 146. The fact that Kindle was released from prison on April 12, 2011, produced a higher sentencing range. As such, that fact must be submitted to a jury, and Kindle's sentence, imposed in violation of that right, is unconstitutional. The sole, arguable exception from this constitutional rule is for "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Kindle's release date from prison is not "the fact of a prior conviction."

The "fact of a prior conviction" means exactly, and no more than, what it says. A sentencing court cannot sweep into the "fact of a prior conviction" other factual information, such as when a defendant was released from prison, simply because that information relates to the conviction. While such facts may be facts "about a prior conviction," *Shepard v. United States*, 544 U.S. 13, 24 (2005), they are not "the fact of a prior conviction." It is now well-settled that judicial fact-finding that goes "beyond merely identifying a prior conviction" implicates the Sixth Amendment. *Descamps v. United States*, 570 U.S. 254, 269 (2013). A sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). This Court plainly did more.

These clear rulings from the United States Supreme Court abrogate contrary decisions of Florida courts holding that a judge, rather than a jury, may find the date on which a defendant was released from prison because that fact "relates to the fact of a prior conviction." *See Williams v. State*, 143 So. 3d 423, 424 (Fla. 1st DCA 2014); *see also Chapa v. State*, 159 So. 3d 361, 362 (Fla.

4th DCA 2015) (adopting the 1st DCA's reasoning in *Williams*); *Gordon v. State*, 787 So. 2d 892, 893–94 (Fla. 4th DCA 2001) (describing the prior-conviction exception as a catch-all "recidivism" exception). Facts that merely relate to a prior conviction are "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard v. United States*, 544 U.S. 13, 25 (2005). The only fact that is arguably excepted from *Apprendi* is "the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2252. This Court went beyond finding the simple fact that Kindle had been convicted of a certain crime. It found that Kindle was released from prison on a certain date. That fact is not "the simple fact of a prior conviction," and it doubled Kindle's permissible sentence. A statutory maximum sentence of 15 years in prison became a mandatory minimum sentence of 30 years in prison, a sentence that, if carried out, virtually guarantees that Kindle will spend the rest of his life in prison. Because the date on which Kindle was released from prison is not "the simple fact of a prior conviction," the Sixth and Fourteenth Amendments of the United States Constitution required a jury to find that fact before this Court could use it to increase Kindle's prison sentence above the maximum for his underlying offense. Kindle's sentence therefore violates the Constitution and is illegal. This Court must now correct it.

A. The Prior-Conviction Exception To The Rule In *Apprendi* Does Not Allow A Sentencing Court to Find The Date On Which A Defendant Was Released From Prison

The United States Supreme Court has demonstrated that *Apprendi*'s prior-conviction exception is not a catch-all recidivism exception. The Court has most recently clarified the limits of the prior-conviction exception in a string of cases concerning the Armed Career Criminal Act, Section 924(e), United States Code, the federal analogue to Florida's Violent Career Criminal Act, Section 775.084, Florida Statutes. Like Florida's Violent Career Criminal Act, the Armed Career

Criminal Act (ACCA) imposes a mandatory minimum sentence for felons who, among other things, have a certain number of prior convictions for certain offenses. *See* 18. U.S.C. § 924(e). The Court in its ACCA cases has made the narrowness of the prior-conviction exception crystal clear. A sentencing court must limit its fact-finding under the prior-conviction exception to "merely identifying a prior conviction." *See Descamps*, 570 U.S. at 269. Because this Court did more than merely identify a prior conviction by finding the date on which Kindle was released from prison, Kindle's sentence violates the rule in *Apprendi* and must be corrected.

The Supreme Court's narrow construction of the prior-conviction exception began as soon as the Court recognized that the Sixth Amendment required the rule announced in *Apprendi*, and it is clear that the date on which Kindle was released from prison does not fall within that exception. In *Apprendi*, the Court explained why a prior conviction, of all conceivable facts, might logically be excepted from the rule that any fact that increases a sentence above the permissible maximum for the underlying crime must be submitted to a jury:

> [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. This rationale for the prior-conviction exception clearly would not include Kindle's release date from prison. No jury in an earlier proceeding found that Kindle would be released from prison on a certain date. And Florida's Violent Career Criminal Act plainly allows a judge to find a critical, sentence-altering fact—Kindle's release date—under a lesser standard than proof beyond a reasonable doubt without any right to a jury finding. No reading of *Apprendi* can justify a sentencing court's treating a release date from prison, a fact on which no jury deliberated or rendered a verdict, as a fact carrying the conclusive significance of a prior judgment

of conviction. The Court's prior-conviction-exception caselaw since *Apprendi* solidifies the rule that such supplementary fact-finding is unconstitutional.

Even before *Apprendi*, the Court foreshadowed its Sixth Amendment requirements when it first grappled with the ACCA's sentence-enhancing scheme. Under the ACCA, a defendant's prior convictions, received in either state or federal court, may count as sentence-enhancing prior convictions so long as they are for certain enumerated crimes. 18 U.S.C. § 924(e). Among the potentially qualifying crimes, Congress included "burglary." *See Taylor v. United States*, 495 U.S. 575, 590–91 (1990). In *Taylor*, the Court was asked to decide what Congress meant by "burglary." Did Congress mean common-law (or "generic") burglary? Or whichever definition of "burglary" a state legislature might provide? The Supreme Court decided that Congress intended "burglary" to mean "generic burglary." *See id.* at 598–601. The Court accordingly developed a scheme by which sentencing courts could determine whether a prior conviction should count toward an ACCA sentence enhancement without running afoul of the defendant's Sixth Amendment right to a jury trial. *See id.* at 598–602. The Court mandated that all sentencing courts limit their review of an ACCA defendant's prior convictions to a comparison between the elements of the generic crime and those provided in the crime of conviction's statutory definition. *Id.* at 598–602. This approach prohibited courts from looking into the facts surrounding the prior conviction. *Id.* Under *Taylor*'s categorical approach, federal courts sentencing under the ACCA can count as qualifying convictions only those prior convictions based on state statutes whose elements correspond to the "generic" (or common-law) crime. *Id.* at 599–602. ACCA sentencing courts therefore must decide whether a prior conviction is for a qualifying crime based on the state's definition of the crime alone—the court cannot consider the facts underlying the prior conviction or other non-conclusive facts about the defendant's criminal history. *Id.* As the Court would later recognize, *Taylor*'s

categorical, elements-only approach to counting prior convictions under the ACCA "thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." *Shepard v. United States*, 544 U.S. 13, 24 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. at 490 and *Jones v. United States*, 526 227, 243 n.6 (1999)). In *Shepard* and later ACCA cases, the Court emphasized the rule in *Apprendi* and the limits of its prior-conviction exception.

In *Shepard*, the Supreme Court drew the crucial distinction between the fact of a prior conviction and "a fact about a prior conviction." *Shepard*, 544 U.S. at 25. In sum, the former does not include the latter. *Id.* The Court considered whether Shepard's Massachusetts conviction for burglary counted as an ACCA predicate offense even though Massachusetts' definition included unlawful entries into places such as boats and cars, and thus swept more broadly than generic burglary. 544 U.S. at 16–17. Because the elements of Shepard's Massachusetts burglary offense did not match the elements of generic burglary, the sentencing court properly refused to count the prior conviction. *Id.* The government appealed, arguing that the court could look at police reports to determine whether Shepard's conviction was based on an act consistent with generic burglary. *Id.* at 17–18. The First Circuit agreed with the government and reversed the sentencing court, holding that sentencing courts could examine police reports to determine whether a defendant's guilty plea constituted an admission to a generic offense. *Id.* at 18. The Supreme Court disagreed. The Court opined that, while *Almendarez-Torres* arguably allows sentencing courts to consider "the record of conviction," it does not authorize sentencing courts to dig into other facts relating

to prior convictions. *Id.* at 24–26.[3] The Court then drew the crucial distinction. "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.* The risk of constitutional error in allowing a sentencing court to look into any facts apart from those admitted by the defendant as part of the basis for his prior guilty plea is too great. The Court would later rule not that there is unacceptable risk of constitutional error in allowing a sentencing court to inquire into facts "about a prior conviction." There is simply error.

Eight years later, the Court corrected another Court of Appeal, this time the Ninth Circuit, after that court broadly construed the prior-conviction exception as a license for judicial fact-finding. The Ninth Circuit held that a sentencing court deciding whether to count a prior conviction for burglary under a California statute that defined the crime to include even *lawful* entries could simply review plea colloquies and other documents to determine what the defendant actually did and count the conviction if the defendant "*could have been* convicted" of generic burglary. *Descamps*, 570 U.S. at 264–70 (emphasis in original). On review, the Supreme Court tersely responded, "Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction." *Id.* at 270. The Court explained that its categorical approach "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." *Id.* at 269. Any other finding relating

[3] Notably, Justice Thomas, who concurred in the Court's judgment, departed from the Court in this section of the opinion because the Court did not go far enough. Justice Thomas wrote separately to express his view that (1) *Apprendi* had "eroded" the prior-conviction exception in its entirety, (2) the Court had wrongly decided *Almendarez-Torres*, and (3) as a majority of the Court would later agree, the prior-conviction fact-finding proposed by the government in *Shepard* gave rise "to constitutional error, not doubt." *Id.* at 26–28 (J. Thomas, concurring in part and concurring in the judgment).

to a predicate conviction "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Id.* If the Court made the narrowness of the prior-conviction exception clear in *Descamps*, its decision in *Mathis* made it crystal.

In *Mathis*, the Court again prohibited sentencing courts from doing any fact-finding under the prior-conviction exception that went beyond simply identifying the crime of conviction and its elements. The Court clarified that, even when an otherwise overbroad statute provides alternative means by which a defendant can satisfy a particular element, one of which fits the generic crime, a sentencing court cannot peruse the record to see whether the defendant's conduct satisfied the generic alternative. *Mathis*, 136 S. Ct. at 2251–54. The Court, in its most succinct expression yet, defined the *Apprendi* problem that arises if a sentencing court looks beyond the simple fact of a prior conviction and the elements of the offense underlying it to determine the facts associated with the conviction:

> [A] construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. See *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. *See Shepard*, 544 U.S., at 25, 125 S.Ct. 1254 (plurality opinion); *id.*, at 28, 125 S.Ct. 1254 (THOMAS, J., concurring in part and concurring in judgment) (stating that such an approach would amount to "constitutional error") . . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Id. at 2252. The law is clear.

Kindle's sentence is unconstitutional. The sole finding that a sentencing court can make that increases a defendant's sentence above the maximum for the underlying offense is that the defendant has previously been convicted of a certain crime consisting of certain elements. Any

additional finding, such as when the defendant was released from prison, that increases the defendant's sentence beyond the statutory maximum must be submitted to a jury. Because no jury found that Kindle was released from prison within five years of the date of his present offense, Kindle's sentence violates the Sixth Amendment, and this Court must now correct it.

II. The Prior-Conviction Exception Is Unconstitutional

Kindle maintains that, at the very least, *Apprendi* and its progeny prevent a sentencing court from finding the date of a defendant's release from prison and enhancing a sentencing range based on that fact because that fact is not "the fact of a prior conviction." Kindle also argues separately and alternatively that any prior-conviction exception to the rule in *Apprendi* is unconstitutional. For the reasons that follow, the Supreme Court of Florida's decision in *Eutsey v. State*, 383 So. 2d 219 (1980), which holds that the Constitution does not require a jury to find all facts that expose defendants to increased punishment, is no longer good law. This Court should recognize that the United States Supreme Court's decisions in *Apprendi*, *Alleyne*, and *United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019), abrogate *Eutsey* and all Florida cases that rely on it, *see, e.g., Robinson v. State*, 793 So. 2d 891, 893 (Fla. 2001). Inertia cannot justify forever the imposition of enhanced criminal sanctions based on facts found without the bulwark of a jury.

The prior-conviction exception rests on an erroneous and expressly abandoned conception of the Sixth Amendment. The prior-conviction exception rests entirely on a since-overruled decision: *McMillan v. Pennsylvania,* 477 U.S. 79 (1986). *See United States v. Haymond*, 139 S. Ct. 2369, 2378 (2019) (recognizing the holding in *McMillan* as an "anomaly" inconsistent with the Fifth and Sixth Amendments of the United States Constitution). In *McMillan*, the Supreme Court held that possession of a firearm during an offense is a "sentencing consideration" rather than an element of the offense. *McMillan*, 477 U.S. at 91. The Court ruled that "there is no Sixth

Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* at 93. The rejected logic of this now clearly erroneous ruling persists in the prior-conviction exception, perpetuating an unconstitutional stain on the Sixth Amendment that this Court should remove.

Based squarely on *McMillan*, the Supreme Court decided *Almendarez-Torres v. United States*, 523 U.S. 224–47 (1998), where the Court again entertained the notion that certain facts subjecting defendants to enhanced punishments are not elements, but "sentencing factors." This is no longer the law. There is no such thing as a "sentencing factor" that exists in the ether forever as something discrete from an "element." The Constitution cares not a whit for statutory labels; its concern is with facts that, by operation of law, increase punishments beyond statutory maximums or impose minimums otherwise inapplicable. *See Haymond*, 139 S.Ct. at 2375–85. Because the Court in *Almendarez-Torres* based its decision on a legal distinction that does not exist, *Almendarez-Torres* is plainly incorrect and should not be followed. The rule in *Apprendi, Alleyne*, and *Haymond* applies. A defendant like Kindle has the right to have a jury find every fact that enhances his maximum or minimum sentence.

Even if *Alemendarez-Torres* were still good law, its holding does not authorize the widespread judicial fact-finding that take places under color of the prior-conviction exception. *Almendarez-Torres* involved a prior conviction, but the issue before the Court was the sufficiency of the indictment, specifically whether the government had to allege the fact of a prior conviction. *Id.* at 226. The issue was *not* what aggravating facts a sentencing court could find after a jury had rendered its verdict. The Court in *Apprendi* recognized as much, writing that *Almendarez-Torres* might have been incorrectly decided, and even if it had been correctly decided, its holding did not apply to the *Apprendi* question because the "[*Almendarez-Torres*] Court's extensive discussion of

the term "sentencing factor" virtually ignored the pedigree of the pleading requirement at issue." *Apprendi*, 530 U.S. at 489 n.15. Because only elements, and not sentencing factors, must be included in an indictment, the question before the Court in *Alemendarez-Torres* was to which category a prior conviction belonged. *Almendarez-Torres*, 523 U.S. at 228. The *Almendarez-Torres* Court opined that a prior conviction is a sentencing factor, relying on *McMillan*'s since-overruled holding. *Id.* at 230, 241–47. But, again, this now obviously incorrect holding went to the issue of what must be charged in an indictment; it explicitly left open the question of which standard of proof a fact that raised a defendant's maximum permissible sentence must meet before it could increase the maximum sentence. *Id.* at 247–48. Even if this Court concludes that *Almendarez-Torres* remains good law, this Court should recognize that its holding is limited to the information that must be alleged in an indictment.

The Court decided *Apprendi* two years after *Almendarez-Torres*, and its basic holding *does not authorize* sentencing courts to find the fact of a prior conviction and then increase a sentence above the maximum based on it. In fact, it expressly disavows such a reading of its holding. *Apprendi*'s basic holding is 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. The holding includes a brief statement before the language just quoted: "Other than the fact of a prior conviction, any fact that increases . . . ." *Id.* The question, I expect, this Court is asking is, "Well, why did the Supreme Court include that language?" *Apprendi* includes that language because Apprendi did not challenge a sentence based on a prior conviction. 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. The Court specifically noted 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. 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." *Id.* at 489–90. *Apprendi*'s "[o]ther than the fact of a prior conviction" line is therefore far from a thoughtful and deliberate statement of an exception to the rule. It is, instead, the Court's recognition of a prior precedent that is questionable but not properly challenged. Kindle now challenges *Almendarez-Torres* and the prior-conviction exception ascribed to it. All precedential Supreme Court authority since *Almendarez-Torres* demonstrates that Kindle's challenge should be well-received.

Two years after *Apprendi*, the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *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. The Court in *Ring* invalidated the Arizona scheme, 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. Thus, 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. But the door remains open.

In 2013, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013). The bottom line of *Alleyne* was to overrule *Harris* where the Court held that fact-finding "that increased the mandatory minimum did not implicate the Sixth Amendment." *Alleyne*, 570 U.S. at 107. Just as in *Apprendi* itself, the defendant in *Alleyne* did not challenge the prior record exception, so the majority "[did] not revisit it for purposes of [its] decision." *Id.* at 111 n.1. Again, the door remains open.

Now, Kindle challenges *Almendarez-Torres* and the prior-conviction exception as wholly inconsistent with *Apprendi*, *Alleyne*, and *Haymond*. *Almendarez-Torres* does not authorize the judicial fact-finding on which Kindle's VCC sentence rests. *See Apprendi*, 530 U.S. at 489–90 n.15 (recognizing that the issue in *Almendarez-Torres* was not which facts a sentencing court may find without the aid of a jury, but the "pleading requirement" applicable to an indictment). The Supreme Court's clear rulings in *Apprendi*, *Alleyne*, and *Haymond* that there is no such thing as a "sentencing factor" require and allow for just one constitutional ruling in Kindle's case: a criminal defendant has the right to have a jury find every fact that exposes the defendant to an enhanced sentencing range. Any other ruling would violate the Sixth Amendment. Because no jury found that Kindle has prior convictions meeting the criteria for a VCC sentence, Kindle's sentence is unconstitutional, and this Court must now correct it.

III. Kindle's Score Sheet Is Incorrect And This Error Is Not Harmless

Kindle's sentencing score sheet is incorrect. The score sheet provides that Kindle's prior conviction for attempted felony murder under Section 782.051, Florida Statutes, is for a level ten offense. (R. 4D20-669 at 467). A conviction under Section 782.051 is a level nine offense. § 921.0022(3)(i), Fla. Stat. Kindle's score sheet therefore counted 29 points for that offense when it should have counted 23, and this Court read 283.6 total sentence points when it should have read

277.6. Kindle's lowest permissible prison sentence therefore was 187.2 months, and not the 191.7 months presented on the Scoresheet. "[I]t is essential for the trial court to have the benefit of a properly calculated scoresheet when deciding upon a sentence . . . ." *State v. Anderson*, 905 So. 2d 111, 118 (Fla. 2005). "A score sheet error is not deemed harmless unless the record conclusively shows that the trial court would have imposed the same sentence had it had the benefit of the corrected score sheet." *Cooper v. State*, 902 So. 2d 945, 946 (Fla. 4th DCA 2005) (quoting *Fortner v. State*, 830 So. 2d 174, 175 (Fla. 2d DCA 2002). The record does not conclusively show that the trial court would have imposed the same sentence had it had the benefit of the corrected score sheet. This Court must therefore resentence Kindle.

This Court must resentence Kindle, notwithstanding the Fourth District Court of Appeal's decision in *Rankin v. State*, 174 So. 3d 1092 (4th DCA 2015). *Rankin* held that a guidelines scoresheet is "legally irrelevant" whenever a defendant faces a habitual felony offender sentence. *Id.* at 1098. But a defendant's guidelines scoresheet is always legally relevant, even when the defendant faces a habitual felony offender sentence. A habitual felony offender sentence is illegal if it is below the defendant's guidelines sentence and the court does not provide written reasons for its departure. *See State v. Thermidu*, 963 So. 2d 888, 889 (3d DCA 2007). This simple rule presumes a guidelines calculation. A sentencing court therefore must have the benefit of a scoresheet even if the defendant faces a habitual felony offender sentence.

Whether the court chooses to depart or not, an incorrect score sheet poses serious risks that are not "legally irrelevant." What if the Court considers the score sheet, notes the incorrectly high guidelines sentence, and then, based in part on that mistake of fact, decides to impose a habitual felony offender sentence rather than depart? Such an incorrect score sheet is plainly relevant to the sentence imposed, such that it would be simply disingenuous to call the error harmless.

The mistake in Kindle's score sheet invokes the traditional rule. "A score sheet error is not deemed harmless unless the record conclusively shows that the trial court would have imposed the same sentence had it had the benefit of the corrected score sheet." *Cooper*, 902 So. 2d at 946. Because the record does not conclusively show that this Court would have imposed the same sentence had it had the benefit of the corrected score sheet, this Court must resentence Kindle.

Conclusion

Kindle respectfully requests that this Court find that Kindle's 40-year VCC sentence is illegal. Alternatively, Kindle respectfully requests that this Court resentence him with the benefit of a corrected guidelines score sheet.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this amended motion has been sent by e-service to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Dr., Suite 900, West Palm Beach, FL 33401 at CrimAppWPB@MyFlorida.com; Pascale Achille, Assistant State Attorney, 201 SE 6th St, Suite 7170, Fort Lauderdale, Florida 33301 at pachille@sao17.state.fl.us, courtdocs@sao17.state.fl.us; David B. Wheeler, Lien Lafargue, Partyl A. Oflazian, Assistant Public Defenders, 201 SE 6th Street, Suite 3872, Fort Lauderdale, Florida 33301 at pdcircuit17@browarddefender.org, davidwheeleresq@gmail.com, llafargue@browarddefender.org, poflazian@browarddefender.org; Honorable Mariya Weekes, Broward County Courthouse, 201 S.E. 6th Street, Suite 4820, Fort Lauderdale, FL 33301 at pcoe@17th.flcourts.org; Sonya Graham, Deputy Clerk, Broward County Courthouse, 201 SE 6th Street, Room 4140, Fort Lauderdale, FL 33301 at sgraham@browardclerk.org and appealefilings@browardclerk.org; and electronically filed with this court on the 14th day of September, 2020.

/s/ ROSS BERLIN
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	CASE NO.: 15-008439 CF10A
Plaintiff,	DIVISION: FG
vs.	JUDGE: MARIYA WEEKES
REGINALD KINDLE,	
Defendant.	

_____/

ORDER REQUIRING A RESPONSE BY STATE TO DEFENDANT'S MOTION TO CORRECT SENTENCING ERROR

THIS COURT having received Defendant's Motion to Correct Sentencing Error dated September 11, 2020, filed pursuant to Florida Rules of Criminal Procedure 3.800(b)(2), and this Court being of the opinion that a Response to said Motion by the State is necessary, it is hereby

ORDERED that the Office of the State Attorney of Broward County, State of Florida, shall have **30** days from the date of this order to file a Response to said Motion.

DONE AND ORDERED on September 14, 2020, in Chambers at Fort Lauderdale, Broward County, Florida.

Mariya Weekes
MARIYA WEEKES, Circuit Judge

Copies furnished:

State Attorney's Office, Appeals Division

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

REGINALD KINDLE,
Defendant.
_____/

Case No. 15-8439CF10A
Appeal: 4D20-0669
Judge: WEEKES

STATE'S RESPONSE TO DEFENDANT'S AMENDED MOTION TO CORRECT ILLEGAL SENTENCE

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney who files the instant Response to Defendant's Amended Motion to Correct Illegal Sentence pursuant to Fla.R.Crim.P. 3.800(b)(2) filed September 14, 2020. The State requests Defendant's Amended Motion be denied and provides the following in support thereof:

Procedural History

1. The appellant/defendant was arrested on June 28, 2015. The offense was committed between June 26 and 28, 2015. The probable cause affidavit is attached as a statement of the facts. He was charged by Information with Murder in the Second Degree. The State filed its Notice of Intent to declare the defendant a Habitual Violent Felony Offender (HVFO) and Violent Career Criminal (VCC) on August 10, 2015. (Exhibit A, Booking Report, Probable Cause Affidavit, Information, Notices).

2. Trial began on November 6, 2019. The defendant was convicted of the lesser included offense of manslaughter. (Exhibit B, Record of Trial Proceedings, Clerk's Minutes, Verdict Form, Disposition, Judgment).

3. A presentence investigation (PSI) was ordered. (Exhibit C, PSI).

4. Several sentencing hearings were held:

   a. State's Motion to Take Fingerprints on November 22, 2019. (Exhibit D, Transcript).

   b. Sentencing status on December 17, 2019. (Exhibit E, Transcript).

   c. Sentencing – Day 1 – on February 21, 2020. (Exhibit F, Transcript).

   d. Sentencing – Day 2 – on March 2, 2020. (Exhibit G, Hearing Proceeding, Transcript).

5. At the sentencing hearings, the defendant's certified convictions were moved into evidence. (Exhibits F and G, Transcripts; Exhibit H, Exhibit List, Fingerprints, Certified Convictions).

6. The defendant was sentenced to forty years in Florida State Prison with a thirty year minimum mandatory. (Exhibit I, Scoresheet, Disposition, Sentence).

   a. As addressed further below, the sentencing order indicates the defendant was sentenced to forty years in prison with a thirty-year minimum mandatory as a HVFO. However, the oral sentence was a designation as VCC. (Exhibit G, p. 95). This is also reflected in the scoresheet and the disposition. (Exhibit I). The sentencing order needs to be corrected to comport with the oral pronouncement of the Court, as well as with the scoresheet and the disposition.

Defendant's Allegations

7. The defendant alleges the following instances of illegal sentence in his Amended Motion to Correct Illegal Sentence pursuant to Fla.R.Crim.P. 3.800(b)(2):

   I. The Court, rather than a jury, found the defendant was released from prison within five years of the sentencing offense. His release date is not "the fact of a prior conviction" and must be submitted to a jury. For this reason, the sentence violates the Constitution and is illegal.

I.A. Defendant's release from prison five years within the occurrence of the sentencing offense is not a finding of a prior judgment conviction. A finding of when the defendant was released from prison used to increase the defendant's sentence must be determined by a jury. For this reason, the sentence violates the Constitution and is illegal.

II. In addition to *Apprendi* and its progeny forbidding the date of the defendant's release to be used to enhance a sentence as it is not "the fact of a prior conviction", the defendant also argues the prior-conviction exception in *Apprendi* is unconstitutional as a defendant has the right to have a jury determine every factor used to enhance a sentencing range. For this reason, the sentence violates the Constitution and is illegal.

III. The scoresheet scored defendant's prior conviction for attempted felony murder as a level ten offense and not a level nine offense. Therefore, his total sentence points should have been 277.6 months and not 283.6 months and his lowest permissible prison sentence should have been 187.2 months and not 191.7 months. The error cannot be deemed harmless since the record does not conclusively demonstrate the trial court would have imposed the same sentence if the Court had the use of a corrected scoresheet. Therefore, the defendant must be resentenced.

Analysis

8. As required per Florida Statute 775.084(1)(d)(1), the defendant was convicted as an adult three or more times for an offense in Florida or other qualifying offense. In this instance, the State relied upon three certified copies of conviction to qualify the defendant as VCC. (Exhibits F, G and H).

The first offense was case number 89 0595CFA N1, one count of burglary dwelling in Sarasota County, Florida with a conviction date of July 7, 1989. On November 6, 1991, due to a violation of probation, he was sentenced as a habitual offender (HFO) to seventeen years in prison. (Exhibit F, pp. 9-10; Exhibit H).

The second offense was for case number 19912758F. The charge was burglary dwelling, also committed in Sarasota County, Florida, of which the defendant was convicted on November 6, 1991 and sentenced to seventeen years in prison. He was released from prison on April 12, 2011.

This was the specific offense the State used to declare the defendant VCC. (Exhibit F, p. 10; Exhibit H).

The third offense was case number 86 3666CFA N1. Here, the defendant was convicted on April 2, 1987, again in Sarasota County, Florida, of attempt felony murder with a weapon, conspiracy to commit armed robbery and robbery with a deadly weapon. He was sentenced to seven years in prison. (Exhibit F, pp. 10-11; Exhibit H).

See Exhibit F: Testimony of James Florian, fingerprint analyst, pp. 12-21, and Testimony of Deputy William Spitler, pp. 22-33. *Also see* Exhibit G: Defendant acknowledges his priors, p. 83, Judge's Ruling, pp. 93-96.

9. The defendant has been incarcerated in a Florida state prison. (Exhibit H). *Also See* F.S. 775.084(1)(d)(2). The sentencing felony of which the defendant was convicted was a felony enumerated in subparagraph 1 and committed between June 26 and 28, 2015. (Exhibit A). *Also See* 775.084(1)(d)(3). The defendant had last been released from prison on April 12, 2011, which was within five years of the sentencing offense being committed. (Exhibits F, G and H). *Also See* 775.084(1)(d)(3)(b).

10. The defendant has not received a pardon for any felony or other qualified offense. (Exhibits G and H). *Also See* 775.084(1)(d)(4).

11. A conviction of a felony or other qualified offense necessary has not been set aside in any postconviction proceeding. (Exhibits G and H). *Also See* 775.084(1)(d)(5).

12. Pursuant to F.S. 775.084(1)(d), appellant's sentence was properly enhanced, is constitutional and legal.

13. Examining *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), appellant's sentence is still legal.

14. *Alleyne* holds any fact which raises minimum punishment must be found by a jury and proven beyond a reasonable doubt. However, the facts must be facts associated with the crime charged and not extraneous facts that are unrelated to the charges. Proof of prior convictions does not qualify. Appellant argues the trial court was not permitted, based on *Alleyne* and *Apprendi*, to increase the defendant's sentence based on his release date. However, this argument distorts the meaning of *Alleyne* and *Apprendi,* which must be read together.

While *Alleyne* applies to fact finding that increases the statutory minimum sentence, *Apprendi* applies to cases where findings of fact increase the statutory maximum sentence. As stated in *Alleyne*, "(T)he essential Sixth Amendment inquiry is whether a fact is an essential element of the crime." 133 S.Ct. at 2153. *Also See* U.S. Const. amend. VI. The U.S. Supreme Court specifically limited *Alleyne* stating the "ruling does not mean that any fact that influences judicial discretion must be found by a jury." *Id* at 2153. *Apprendi* specifically excludes prior convictions as "facts" that must be proven beyond a reasonable doubt. ("Other 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." *Apprendi*, 120 S.Ct. at 2362-2363). Sentencing factors are separate and distinct from elements of a crime and can be proved to a judge by a preponderance of the evidence. *See United States v. O'Brien*, 560 U.S. 218 (2010). This includes the determination of the date of the defendant's release from prison.

Thus the defendant's sentence is not illegal as argued in grounds I and I.A. of the defendant's Amended Motion since his release date is analogous to a prior conviction and does

not require the determination of a jury beyond a reasonable doubt. Rather, a judge can make this determination based upon a preponderance of the evidence, as done in this instance.

15. In *Calloway v. State*, 914 So.2d 12 (Fla. 2nd DCA 2005), the appellate court applied the rationale of *Tillman v. State,* 900 So.2d 633 (Fla. 2nd DCA 2005), and concluded "...Calloway's date of release from prison is a part of his prior record and thus does not need to be presented to a jury and proved beyond a reasonable doubt. *See Gurley v. State,* 906 So.2d 1264, 1265 (Fla. 4th DCA 2005)." The *Calloway* Court also acknowledged "(F)or the purpose of applying *Apprendi* and *Blakely,* the date of a defendant's release from prison under the prison releasee reoffender statute is analogous to the fact of a prior conviction under the habitual felony offender statute." The Court also "...recognize(d) that the fact of Calloway's date of release from his prior prison sentence is not the same as a bare fact of a prior conviction, we conclude that it is directly derivative of a prior conviction and therefore does not implicate Sixth Amendment protections. *See United States v. Pineda-Rodriquez,* 133 Fed. Appx. 455, 458 (10th Cir.2005) (additional citations omitted)". *Id* at 14-15.

Also See Lopez v. State, 135 So. 3d 539 (Fla. 2d DCA 2014) (Date of defendant's release from prison for a prior offense could be determined by the trial judge by a preponderance of the evidence and was not required to be submitted to a jury and found beyond a reasonable doubt.).

16. The defendant also argues in Ground I the "clear rulings from the United States Supreme Court abrogate contrary decisions of Florida courts holding that a judge, rather than a jury, may find the date on which a defendant was released from prison because that fact "relates to the fact of a prior conviction." The Florida opinions the defendant alleges are "abrogated" by the U.S. Supreme Court's rulings are *Williams v. State*, 143 So. 3d 423, 424 (Fla. 1st DCA 2014), *Chapa v. State*, 159 So.3d 361, 362 (Fla. 4th DCA 2015) and *Gordon v. State*, 787 So. 2d 892, 893-894 (Fla.

4th DCA 2001). (See the defendant's amended motion, pp. 4-5). However, these Florida cases specifically acknowledged the findings in *Alleyne* and *Apprendi* and distinguished them from the facts and applicable law of those Florida cases.

In *Williams* the appellate court held the defendants did not have the right to a jury determination of the date of the charged offense since that was not an element of the crime. Rather, it related to the fact of a prior conviction. In reaching this conclusion, the First DCA clearly stated:

> ...*Alleyne* leaves intact the Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that "[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." 530 U.S. at 490, 120 S.Ct. 2348. The Florida Supreme Court has held that *Apprendi* does not require a jury to determine whether a defendant committed the charged offense(s) within three years of being released from prison. *Robinson v. State,* 793 So.2d 891, 893 (Fla.2001); *see* § 775.082(9)(a) 1., Fla. Stat. (2011).
>
> *Williams*, 143 So. 3d at 424.

Also see Chapa, supra, where appellant challenged his sentence under the Prison Releasee Reoffender Act (PRR) and argued under *Apprendi* and *Alleyne* the PRR statute unconstitutionally permitted the judge rather than the jury to find appellant qualified as PRR. In affirming the sentence, the Fourth DCA adopted the reasoning of *Williams, supra,* and *Lopez v. State,* 135 So.3d 539 (Fla. 2d DCA 2014), which held facts found by the judge under the PRR statute are not elements of the offense and are within the "prior conviction" exception to *Apprendi.*

Also See Gordon, supra, 787 So. 2d at 893-894. ("...we align ourselves with the Fifth District which has held that the findings required under the habitual felony offender statute fall within *Apprendi's* "recidivism" exception and that nothing in *Apprendi* overruled our supreme court's decision in *Eutsey v. State,* 383 So.2d 219 (Fla.1980), rejecting the notion that a

defendant was entitled to have a jury determine, beyond a reasonable doubt, the existence of the predicates necessary for imposition of a habitual felony offender sentence. *See Wright v. State,* 780 So.2d 216 (Fla. 5th DCA 2001); *see also Jones v. State,* 784 So.2d 1111 (Fla. 2d DCA 2001).").

As these Florida opinions demonstrate, the appellate courts took into consideration the U.S. Supreme Court rulings. Their findings were not contrary to the supreme court rulings but rather interpreted and distinguished the decisions in relationship to the facts and law before the state courts. Therefore, this argument in Ground I of appellant's amended motion fails.

17. As to Ground II, Florida has determined *Apprendi* does not apply to the HFO statute. "The United States Supreme Court expressly acknowledged in *Apprendi* that recidivism is a traditional basis for increasing a sentence and is a fact which does not relate to the commission of the offense before the court." *Wright v. Sta*te, 780 So. 2d 216 (Fla. 5th DCA 2001) (holding the HFO statute is constitutional). *See also Eutsey v. State*, 383 So. 2d 219 (Fla. 1980) (HFO statute does not create a substantive offense. Determination of HFO status is independent of the underlying offense.)

The HVFO statute has also been found constitutional in light of *Apprendi. See Modest v. State*, 892 So. 2d 566, 567 (Fla. 3rd DCA 2005) ("...even if *Apprendi* were retroactive (which it is not), *Apprendi* does not invalidate adjudications under Florida's habitual violent felony offender statute. *See Jackson v. State,* 802 So.2d 387 (Fla. 3d DCA 2001); *Saldo v. State,* 789 So.2d 1150 (Fla. 3d DCA 2001); *Robbinson v. State,* 784 So.2d 1246 (Fla. 3d DCA 2001)").

Likewise, the PRR statute is constitutional in light of *Apprendi. See Calloway, supra.*

Since *Apprendi* does not apply to HFO, HVFO or PRR enhancements, it follows *Alleyne* does not apply. Like the HFO, HVFO and PRR statutes, the VCC statute was enacted to enhance penalties for recidivism and therefore *Apprendi* is inapplicable. *See* § 775.084(1)(d), Fla. Stat.

As a result, defendant's argument in ground II fails. The prior-conviction exception is constitutional and the defendant's sentence is legal.

18. As to ground III in the defendant's amended motion, in *State v. Anderson*, 905 So.2d 111 (Fla. 2005)—as cited by the appellant—the Court approved the would-have-been-imposed harmless error test to scoresheet errors raised on direct appeal or in Fla.R.Crim.P. 3.850 motions. *Id* at 118. In the instant case, the record conclusively demonstrates if the scoresheet reflected the total sentence points as 277.6 months and the lowest permissible prison sentence as 187.2 months the sentence would have been the same. Therefore, even if the scoresheet is incorrect the error is harmless.

Two days of sentencing hearings were held. (Exhibits F and G). The trial judge made findings and determined the defendant qualified as VCC pursuant to Fla.R.Crim.P. 775.084(1)(d). (Exhibit G, pp. 93-95). The Court also considered the defendant's motion for downward departure and declined to exercise her discretion to depart. (Exhibit G, p. 95). The trial judge followed the argument and recommendation of the prosecutor and sentenced the defendant to the maximum sentence of 40 years in prison with a 30-year minimum mandatory as a VCC. (Exhibit G, pp. 87-92; 95-96).

Thus, the record is clear if the scoresheet reflected 6 months less on his total sentence points and 4.5 months less on his lowest permissible prison sentence points, the trial judge would have imposed the maximum penalty. Ground III must be denied as any error in the scoresheet is harmless. The appellant is not entitled to be resentenced.

Correction to Written Sentencing Order

19. The written sentencing order reflects the defendant was sentenced to forty years in prison as a HVFO with a thirty-year minimum mandatory term. This does not comport with the oral pronouncement of the trial court where the defendant was sentenced to forty years in prison with a thirty-year minimum mandatory as a VCC, nor with the scoresheet and disposition. (Exhibit G. p. 95; Exhibit I). Therefore, the written sentencing order must be corrected to comport with the trial judge's oral sentencing pronouncement. *See Williams v. State*, 957 So.2d 600, 603 (Fla. 2005) ("This Court has held that a court's oral pronouncement of a sentence controls over the written sentencing document. *See Ashley v. State,* 850 So.2d 1265, 1268 (Fla.2003); *Justice v. State,* 674 So.2d 123, 126 (Fla.1996).")

Conclusion

20. In conclusion, as stated herein, the defendant's sentence does not violate the Constitution and is a legal sentence. The trial judge's determination of the defendant's release date does not require a determination by a jury and is properly determined by the Court as sentencing factors are separate and distinct from elements of a crime and can be proved to a judge by a preponderance of the evidence. The prior-conviction exception in *Apprendi* is constitutional. The defendant is not entitled to be resentenced as any error in the scoresheet is harmless.

21. The written sentencing order must be corrected to comport with the oral pronouncement of the defendant's adjudication as a VCC.

WHEREFORE, for the reasons stated herein, the State of Florida respectfully requests this Honorable Court:

1. Deny the Defendant's Amended Motion to Correct Illegal Sentence, and
2. Correct the written sentencing document to comport with the oral sentencing

pronouncement of the defendant's adjudication as VCC.

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail on the 7th day of October, 2020 to Ross Berlin, Assistant Public Defender, Attorney for the Defendant, 421 Third Street, 6th Floor, West Palm Beach, FL 33401.

MICHAEL J. SATZ
State Attorney
By: _____
JOANNE LEWIS
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Cc: Office of the Attorney General – Appellate Division

IN THE COUNTY COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO: 15-8439CF10A

vs.

REGINALD KINDLE,
Defendant.
_____/

REPLY IN SUPPORT OF AMENDED MOTION TO CORRECT ILLEGAL SENTENCE

The State's Response does not address the Supreme Court caselaw that Kindle asserts to be dispositive on Point One of his Amended Motion. Am. Mot. at 3–11[1]. Kindle asserted in Point One that the United States Supreme Court's clear rulings prohibiting sentencing courts from enhancing sentences based on facts "about a prior conviction" require this Court to find that his Violent Career Criminal sentence is unconstitutional because the date on which he was released from prison is a "fact **about** a prior conviction" that does not fall within the "fact **of** a prior conviction" exception to the *Apprendi* rule. *See Shepard v. United States*, 544 U.S. 13, 24 (2005) (distinguishing the "fact of a prior conviction" from a fact "about a prior conviction," and ruling that sentencing courts may enhance a defendant's sentence above the maximum for the underlying offense based only on the former); *see also Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("[A sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was [previously] convicted of."); *see further Descamps v. United States*, 570 U.S. 254, 269 (2013) ("[The sentencing] court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would

[1] Kindle's argument in this Reply goes to Point One of his Amended Motion. Kindle rests his positions in Points Two and Three on the arguments presented in his Amended Motion.

(at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction."). Rather than explain how Kindle's sentence comports with these rulings, the State's argument seems to assume that the conclusion of some Florida courts that *Apprendi* provides a catch-all recidivism exception takes precedence over the United States Supreme Court's contrary rulings. Unfortunately for the State, "It is not within [a state court's] province to reconsider and reject" decisions of the United States Supreme Court. *Delancy v. State*, 256 So. 3d 940, 947 (Fla. 4th DCA 2018). And just as "state statutes do not control over United States Supreme Court decisions on matters of federal constitutional law," *Sigler v. State*, 881 So. 2d 14, 19 (Fla. 4th DCA 2004), *aff'd*, 967 So. 2d 835 (Fla. 2007), neither do state court decisions. "It is, rather, the other way around." *Id.* The State does not cite, address, or attempt to distinguish the applicable Supreme Court law that supports Kindle's position, likely because the Supreme Court's rulings are clear and those clear rulings are unfavorable to the State. The State must explain how the Supreme Court's rulings in *Apprendi*, *Shepard*, *Descamps*, and *Mathis* do not entitle Kindle to relief before this Court can disregard the constitutional law that binds it.

As Kindle argued in his Amended Motion, *Apprendi* itself forbids the supplementary judicial fact finding that takes place under Florida's Habitual Violent Felony Offender and Violent Career Criminal statutes. Kindle acknowledged in his Amended Motion that Florida courts could reasonably be excused for misreading *Apprendi*'s "fact of a prior conviction" exception as a catch-all recidivism exception, at least in the complicated aftermath of *Apprendi*. But, in light of the Supreme Court's clear Sixth Amendment rulings since *Apprendi*, particularly those in *Shepard*, *Descamps*, and *Mathis*, that misreading is no longer acceptable. Treating "the fact of a prior conviction" exception as a catch-all recidivism exception is now clearly unconstitutional. Kindle maintains that this Court need look no further than *Apprendi* to recognize the error in the prior

decisions of Florida courts declaring the "fact of a prior conviction" exception a catch-all recidivism exception. *See, e.g., Gordon v. State*, 787 So. 2d 892, 893–94 (Fla. 4th DCA 2001) (describing the prior-conviction exception as a catch-all "recidivism" exception). The rulings in *Shepard*, *Descamps*, and *Mathis* solidify the much narrower scope of *Apprendi*'s "fact of a prior conviction" exception, and Kindle respectfully moves this Court to follow the Supreme Court's declaration of the meaning of the Sixth Amendment, as the Constitution requires this Court to do.

The rule in *Apprendi* is, surprisingly enough, quite simple. "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (alteration and quotation omitted). The purpose of the rule in *Apprendi* is to protect the Sixth Amendment's jury-trial guarantee, the traditional bulwark between the State and a person's liberty in our constitutional system of justice. In plainest terms, the rule in *Apprendi* mandates that before a sentencing court may enhance a sentencing range based on a fact, *a jury must have found that fact beyond a reasonable doubt*. *Id.* at 490–96. *Apprendi*'s focus on the jury-as-constitutional-safeguard justifies the "fact of a prior-conviction" as the sole, arguable exception to the *Apprendi* rule. A sentencing court's finding of the "fact of a prior conviction" does not violate the rule in *Apprendi* because the defendant in the prior case had the right to have a jury render a verdict on the elements of the offense, and it is that verdict, on which the conviction depends, that established beyond a reasonable doubt that the defendant committed the offense. The fact that a jury found the elements of the offense in the previous case arguably eliminates the *Apprendi* problem. As the Supreme Court recognized in *Apprendi*, "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. Under *Apprendi*, it is at least arguably constitutional to allow a sentencing court to find the fact 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." *Id.* A sentencing court may find the fact of the prior conviction because the conviction itself was obtained by the very process that *Apprendi* guarantees: the defendant's Sixth Amendment right to have a jury find beyond a reasonable doubt that the defendant committed an offense. Critically, what the jury found in the prior case is *all* that "the fact of a prior conviction" exception encompasses. As the Supreme Court later explained, "[a sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was [previously] convicted of." *Mathis*, 136 S. Ct. at 2252. A sentencing court may identify the crime of conviction and the elements of the crime *and no more* because that is all the prior judgment of conviction tells us the jury found beyond a reasonable doubt or would have been required to find if the defendant had exercised his right to a jury trial.

This rule clearly does not apply to Kindle's release date from prison. No jury found in any prior proceeding the date on which Kindle was (or would be) released from prison beyond a reasonable doubt. And no jury in this proceeding found the date on which Kindle was released from prison beyond a reasonable doubt. The Constitution commands that a jury stand between the State's allegation that Kindle was released from prison on a certain date and this Court's imposition

of a markedly enhanced sentence[2] based on that fact. Because no jury has ever stood between that fact and Kindle's enhanced sentence, Kindle's sentence violates the Sixth Amendment and is unconstitutional.

As Kindle argued in his Amended Motion, the Supreme Court has refined and applied this reasoning in *Shephard*, *Descamps*, and *Mathis* so clearly that no Florida court can now reasonably be excused for missing the distinction between the fact of a prior conviction and a fact about a prior conviction. "The fact of a prior conviction" includes only, and nothing more than, the prior judgment of conviction and the elements of the offense on which the conviction is based:

> And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. *See* 544 U.S., at 24–26, 125 S.Ct. 1254 (plurality opinion). So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Descamps, 570 U.S. at 269–70. Kindle's release date from prison was not an element of any of the offenses underlying his prior convictions. And it is not an element of the manslaughter offense of which he was convicted in the present case. A sentencing court cannot "rely on its own finding

[2] That is, in this case, the Constitution requires a jury to stand between Kindle's 15-year maximum manslaughter sentence and his 30-year minimum Violent Career Criminal sentence. The fact of Kindle's release date from prison must clear the hurdle of a jury's finding, beyond a reasonable doubt, before that fact can enhance Kindle's maximum sentence.

about a non-elemental fact [about a prior conviction] to increase a defendant's maximum sentence." *Id.* But that is precisely what this Court did in finding Kindle's release date from prison and enhancing his sentence based thereon. Kindle's sentence is therefore unconstitutional.

The Supreme Court has taken repeated pains to clarify this important concept. *Apprendi*'s "fact of a prior conviction" exception tolerates a sentencing court's identifying the prior crime of conviction and the elements underlying the prior crime of conviction *and nothing more* because the elements of the crime are all that the jury found in the prior case:

> [A]llowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea or what the jury in a prior trial must have accepted as the theory of the crime. He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Mathis, 136 S. Ct. at 2252 (citations and quotations removed for clarity). Just as "the fact of a prior conviction" exception does not allow a sentencing court to peruse a prior record to identify facts apart from the elements of the crime and enhance a sentence based on those facts, the exception does not allow a sentencing court to look at a criminal-records database to determine when a defendant was released from prison and more than double the defendant's sentence based on that fact. Because the date on which Kindle was released from prison is not an element of any of his prior offenses, and therefore no jury has ever found beyond a reasonable doubt that Kindle was released from prison on a certain date, that fact does not fall within *Apprendi*'s "fact of a prior conviction" exception. The Sixth Amendment of the United States Constitution requires a jury to

find all facts that expose a defendant to an enhanced sentencing range. Because such a finding is lacking in Kindle's case, Kindle's enhanced punishment is unconstitutional.

CONCLUSION

This Court more than doubled Kindle's maximum sentence based on its own finding of a fact that was never found by a jury beyond a reasonable doubt. Kindle has never waived his right to have a jury make such a finding. Kindle's sentence is therefore unconstitutional, and this Court must now correct it. Kindle respectfully moves this Court to resentence him based on facts found under all applicable constitutional safeguards.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this motion has been sent by e-service to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Dr., Suite 900, West Palm Beach, FL 33401 at CrimAppWPB@MyFlorida.com; Pascale Achille, Assistant State Attorney, 201 SE 6th Street, Suite 7170, Fort Lauderdale, Florida 33301 at courtdocs@sao17.state.fl.us; Joanne Lewis, Assistant State Attorney, 201 S.E. 6th Street, Room 7130, Fort Lauderdale, Florida 33301; David B. Wheeler, Lien Lafargue, Partyl A. Oflazian, Assistant Public Defenders, 201 SE 6th Street, Suite 3872, Fort Lauderdale, Florida 33301 at pdcircuit17@browarddefender.org, davidwheeleresq@gmail.com, llafargue@browarddefender.org, poflazian@browarddefender.org; Honorable Mariya Weekes, Broward County Courthouse, 201 S.E. 6th Street, Suite 4820, Fort Lauderdale, FL 33301 at pcoe@17th.flcourts.org, divfg@17th.flcourts.org; Sonya Graham, Deputy Clerk, Broward County Courthouse, 201 SE 6th Street, Room 4140, Fort Lauderdale, FL 33301 at sgraham@browardclerk.org and appealefilings@browardclerk.org; and electronically filed with this court on the 12th day of October 2020.

/s/ ROSS BERLIN
Ross Berlin
Assistant Public Defender
Florida Bar No. 1018478

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	Case No. 15-8439CF10A
Plaintiff,	Judge: John J. Murphy III
v.	
REGINALD KINDLE,	
Defendant.	

ORDER DENYING DEFENDANT'S
AMENDED MOTION TO CORRECT ILLEGAL SENTENCE

—AND—

ORDER CORRECTING SCRIVNER'S ERROR
ON WRITTEN SENTENCING DOCUMENTS

THIS CAUSE came before the Court upon the Defendant's Amended Motion to Correct Illegal Sentence, pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure, filed through appellate counsel on September 14, 2020. Pursuant to Court Order, the State filed a Response thereto on October 7, 2020. The Court, having examined the instant motion, the State's response, the court file, applicable law, and being otherwise fully advised in the premises, finds as follows:

Defendant was charged with second-degree murder. On November 8, 2019, Defendant was convicted by jury of the lesser-included offense of manslaughter. A presentence Order was entered and a presentence investigation was conducted. Sentencing hearings were held on November 22, 2019, December 17, 2019, February 21, 2020, and March 2, 2020. Defendant's certified convictions were moved into evidence at the sentencing hearings. He was sentenced to forty years in prison, with a thirty-year minimum-mandatory term as a violent career criminal (VCC).[1]

In the instant motion, Defendant raises the following three claims and one subclaim for relief:

[1] The Court's pronouncement was that Defendant is a violent career criminal; however, the written sentencing documents mistakenly indicate a habitual violent felony offender (HVFO), which shall be corrected, *infra*.

Claim 1

The Court, rather than a jury, found that Defendant was released from prison within five years of the sentencing offense. Defendant argues that his release date is not "the fact of a prior conviction" and must be submitted to a jury. He cites as authority *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013). For this reason, the sentence violates the Constitution and is illegal.

Claim 1(a)

Defendant argues that his release from prison five years within the occurrence of the sentencing offense is not a finding of a prior judgment conviction. A finding of when he was released from prison that is used to increase his sentence must be determined by a jury. For this reason, the sentence violates the Constitution and is illegal.

Claim 2

Defendant argues that *Apprendi* and its progeny forbid the date of his release to be used to enhance a sentence as it is not "the fact of a prior conviction." He argues that the prior-conviction exception in *Apprendi* is unconstitutional as a defendant has the right to have a jury determine every factor used to enhance a sentencing range. For this reason, the sentence violates the Constitution and is illegal.

Claim 3

Defendant argues that his scoresheet points were incorrectly calculated, and his total sentence points should have been 277.6 months and not 283.6 months, and his lowest permissible prison sentence should have been 187.2 months and not 191.7 months. He asserts that the error is not harmless since the record does not conclusive demonstrate that the trial court would have imposed the same sentence if it had used a corrected scoresheet. Therefore, he should be resentenced.

The Court adopts and incorporates the legal and factual reasoning that is contained in the State's Response[2] and denies the instant motion. As more fully set forth in the State's Response, the instant motion fails, *inter alia*, for the following reasons:

Claims 1 and 1(a)

Alleyne holds that any fact which raises minimum punishment must be found by a jury and proven beyond a reasonable doubt; however, the facts must be facts associated with the crime charged and not extraneous facts that are unrelated to the charges. Proof of prior convictions does not qualify. While *Alleyne* applies to fact-finding that increases the statutory minimum sentence, *Apprendi* applies to cases where findings of fact increase the statutory maximum sentence. *Apprendi* specifically excludes prior convictions as "fact" that must be proven beyond a reasonable doubt. Sentencing factors are separate and distinct from elements of

[2] The State has certified that a copy of its 259-page Response was electronically sent to counsel for Defendant; as such, an additional copy is not attached hereto.

a crime and can be proved to a judge by a preponderance of the evidence. This includes the determination of the date of a defendant's release from prison. This claim and subclaim are denied.

Claim 2

Florida law has clearly demonstrated that *Apprendi* does not apply to the HFO statute as recidivism is a traditional basis for increasing a sentence and is a fact which does not relate to the commission of the offense before the court. Determination of HFO status is independent of the underlying offense. The HVFO statute has also been found to be constitutional in light of *Apprendi*. *See Modest v. State*, 892 So. 2d 566, 567 (Fla. 3d DCA 2005); *Jackson v. State*, 802 So. 2d 387 (Fla. 3d DCA 2001); *Saldo v. State*, 789 So. 2d 1150 (Fla. 3d DCA 2001); *Robbinson v. State*, 784 So. 2d 1246 (Fla. 3d DCA 2001). Moreover, the PRR statute is constitutional in light of *Apprendi*. *See Calloway v. State*, 914 So. 2d 12 (Fla. 2d DCA 2005). Similar to the HFO, HVFO and PRR statutes, the VCC statute was enacted to enhance penalties for recidivism and therefore *Apprendi* is inapplicable. This claim is denied.

Claim 3

Two days of sentencing hearings were held. The Court made findings and determined that Defendant qualified as a VCC. The Court also considered Defendant's motion for downward departure and declined to exercise its discretion to depart. The trial judge followed the argument and recommendation of the prosecutor and sentenced Defendant to the *maximum* sentence of forty years in prison with a thirty-year minimum-mandatory term as a VCC. The record conclusively demonstrates that if the scoresheet reflected the total sentence points as 277.6 months and the lowest permissible prison sentence as 187.2 months, the sentence would nonetheless have been the same. Therefore, even if the scoresheet is incorrect, the error is harmless. This claim is denied.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Amended Motion to Correct Illegal Sentence is hereby **DENIED**; and it is

FURTHER ORDERED AND ADJUDGED that the **sentencing documents** containing the scrivener's error indicating Defendant's status as a Habitual Violent Felony Offender be **amended** to properly reflect the oral pronouncement of the Court that Defendant's status as a **Violent Career Criminal**.

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida, this 13 day of October, 2020.

JOHN J. MURPHY III
CIRCUIT COURT JUDGE

Copies furnished:

Joanne Lewis, Esq.
Assistant State Attorney

Ross Berlin, Esq.
Assistant Public Defender
Counsel for Defendant
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sought to justify itself precluded a finding of justification."). Because Kindle's sole defense was self-defense and that defense was not extremely weak, the erroneous instruction that negated his sole defense was fundamental error.

The interests of justice present a compelling demand for application of the fundamental error doctrine here. Kindle respectfully requests that this Court hold that the forcible-felony instruction at his trial was fundamental error and reverse his manslaughter conviction.

POINT IV

THE TRIAL COURT ERRED BY SENTENCING KINDLE ABOVE THE MAXIMUM FOR HIS MANSLAUGHTER OFFENSE BASED ON ITS OWN FINDING THAT HE WAS RELEASED FROM PRISON WITHIN FIVE YEARS OF HIS OFFENSE BECAUSE A SENTENCING COURT "CAN DO NO MORE, CONSISTENT WITH THE SIXTH AMENDMENT, THAN DETERMINE WHAT CRIME, WITH WHAT ELEMENTS, THE DEFENDANT WAS CONVICTED OF." *MATHIS V. UNITED STATES*, 136 S. Ct. 2243, 2252 (2016).

A. Background

The trial court sentenced Kindle to 40 years in prison after adjudicating him guilty of manslaughter, a second-degree felony carrying a maximum penalty of 15 years in prison. R 657–59; § 775.082(3)(d), Fla. Stat. The trial court sentenced Kindle well above the maximum term for his underlying offense, relying on the Violent Career Criminal statute. *See* § 775.084(1)(d), Fla. Stat. Based on Department of Corrections records, the trial court found that Kindle was released from prison

within 5 years of his present offense. R 658. This finding was essential to the trial court's imposition of a sentence above 15 years. *See* § 775.084(1)(d)(3)(b), Fla. Stat.

Kindle filed a Motion to Correct Sentencing Error under Rule of Criminal Procedure 3.800(b)(2). R 684. He asserted that his Violent Career Criminal Sentence is unconstitutional because the United States Supreme Court's rulings in *Shepard*, 544 U.S. at 24, *Descamps*, 570 U.S. at 269, and *Mathis*, 136 S. Ct. at 2252, make it absolutely clear that *Apprendi*'s "fact of a prior conviction" exception does not authorize a trial court to find the fact of a defendant's release date from prison. R 684–94. The State responded to the Motion without citing, mentioning, or addressing these rulings, which Kindle contends are dispositive. R 709–19. The trial court denied the Motion, also without mentioning, citing, or addressing the rulings that Kindle contends are dispositive. R 976–79.

B. Standard of Review

"Because a motion to correct a sentencing error involves a purely legal issue, an appellate court's standard of review for such a motion is de novo." *Willard v. State*, 22 So. 3d 864, 864 (Fla. 4th DCA 2009) (internal quotation marks omitted).

C. Argument

Kindle's Violent Career Criminal sentence violates the Sixth Amendment of the United States Constitution. The United States Supreme Court has ruled that facts "*about* a prior conviction" do not fall within "the fact *of* a prior conviction"

exception to the rule in *Apprendi*. *See Shepard v. United States*, 544 U.S. 13, 24 (2005) (emphases added). When the State moves a court to sentence a defendant above the maximum for his underlying offense, the Sixth Amendment limits the sentencing court's fact-finding authority to "merely identifying a prior conviction." *Descamps v. United States*, 570 U.S. 254, 269 (2013). A sentencing judge "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). By finding that Kindle was released from prison within 5 years of his present offense, the trial court plainly did more. Kindle's sentence is therefore unconstitutional.

These clear rulings from the United States Supreme Court abrogate contrary decisions of this and other Florida courts holding that *Apprendi*'s "fact of a prior conviction" exception allows a sentencing court to find a defendant's release date from prison because that fact "relates to the fact of a prior conviction." *See Williams v. State*, 143 So. 3d 423, 424 (Fla. 1st DCA 2014); *see also Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015) (adopting the 1st DCA's reasoning in *Williams*); *Gordon v. State*, 787 So. 2d 892, 893–94 (Fla. 4th DCA 2001) (describing the prior-conviction exception as a catch-all "recidivism" exception). The Supreme Court has made it crystal clear that facts that "relate to" the fact of a prior conviction *do not enjoy* the unique treatment under the Sixth Amendment afforded to the fact of a prior

conviction. Facts that merely relate to a prior conviction are "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25. The only fact that is excepted from the rule in *Apprendi* is "the simple fact of a prior conviction." *Mathis*, 136 S. Ct. at 2252. The trial court did not sentence Kindle to 40 years in prison, a sentence nearly 3 times higher than the statutory maximum for his manslaughter offense, based on "the simple fact of a prior conviction." The trial court found by a preponderance of the evidence, apparently based on hearsay without foundation for an exception, that Kindle was released from prison within 5 years of his present offense. R 658. That fact, which has never been found by a jury beyond a reasonable doubt or admitted by Kindle, cannot be used to sentence Kindle above the maximum for his underlying offense. The Sixth Amendment forbids it.

While Kindle understands that this Court may reasonably be excused for having treated *Apprendi*'s "fact of a prior conviction" exception as a catch-all recidivism exception, that rationale must now come to an end. The "fact of a prior conviction" means exactly, and no more than, what it says, and the Supreme Court's reasoning in *Apprendi* helps to demonstrate why. "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally

clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (alteration and quotation omitted). The rule in *Apprendi* mandates that before a sentencing court may enhance a sentencing range based on any fact, *a jury must have found that fact beyond a reasonable doubt*, or the defendant must have admitted it. *Id.* at 490–96. This reasoning animates the "fact of a prior conviction" exception, and it demonstrates why a defendant's release date from prison does not fall within the exception.

Because the defendant previously enjoyed the right to have a jury find beyond a reasonable doubt whether he committed the offense that underlies his prior conviction, the fact of the prior conviction (and the elements that constitute the crime of conviction) can logically be excepted from the rule in *Apprendi*. But, as the United States Supreme Court explained in *Apprendi*, 530 U.S. at 496:

> [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.

A sentencing court's finding "the fact of a prior conviction" does not violate the rule in *Apprendi* because a jury rendered a verdict on the elements of the offense. That a jury found the elements of the offense in the previous case eliminates the *Apprendi* problem associated with those facts. Critically, *what the jury found* in the prior case is *all* that "the fact of a prior conviction" exception encompasses. As the Supreme

Court has since explained, "[a sentencing judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was [previously] convicted of." *Mathis*, 136 S. Ct. at 2252. A sentencing court may identify the crime of conviction and its elements *and no more* because that is all the prior judgment of conviction tells us the jury found beyond a reasonable doubt or would have been required to find beyond a reasonable doubt if the defendant had exercised his right to a jury trial.

With this understanding, the "fact of a prior conviction" exception clearly does not apply to Kindle's release date from prison. No jury in an earlier proceeding found beyond a reasonable doubt that Kindle would be released from prison on a certain date. And no jury in this or any other proceeding found beyond a reasonable doubt that Kindle was released from prison on a certain date. Not even the trial court in sentencing Kindle found that Kindle was released from prison on a certain date *beyond a reasonable doubt*. Kindle's VCC sentence, which is 25 years longer than the maximum term prescribed for his manslaughter offense, violates the Sixth Amendment of the United States Constitution.

The United States Supreme Court has repeatedly held that "the fact of a prior conviction" does not include facts related to prior convictions. It does not include exhibits in the record of the prior case. It does not include the transcript of the trial or plea hearing. It does not include anything apart from the simple fact of conviction

itself and the elements of the offense, which is all the jury finds proved beyond a reasonable doubt when it renders its verdict. All the way back in 1990, the Court in *Taylor v. United States*, 495 U.S. 575 (1990), foresaw the Sixth Amendment problems that would emerge if sentencing courts looked beyond the simple fact of a prior conviction to inquire into facts related to the conviction.

In *Taylor*, the Court delineated the bounds of judicial fact-finding under the Armed Career Criminal Act (ACCA). *Taylor*, 495 U.S. at 598–602. Under the ACCA, a federal sentencing court can enhance sentences based on prior convictions obtained in either state or federal court, so long as the prior convictions are for certain offenses enumerated by Congress. *See* 18 U.S.C. § 924(e). The problem for sentencing courts tasked with counting prior convictions under the ACCA is that states may define offenses differently. For instance, Michigan did not have a definition of burglary in the 1980s; it classified burglary-type offenses as different grades of "breaking and entering." *Taylor*, 495 U.S. at 591. Meanwhile, California defined "'burglary' so broadly as to include shoplifting and theft of goods from a 'locked' but unoccupied automobile." *Id.* The question that the Supreme Court faced in *Taylor* was what Congress meant when it listed "burglary" as a qualifying offense under the ACCA. The Supreme Court decided that Congress could only have meant generic burglary, and therefore a burglary conviction may count towards an ACCA enhancement only if the conviction is based on a statute that criminalizes generic

burglary and nothing else (such as unlawful entries into cars or boats). *Id.* at 598–602. The *Taylor* Court ruled that sentencing courts cannot look into facts surrounding prior convictions to determine if the defendant's conduct could have met the criteria for generic burglary. *Id.* All the sentencing court can do is compare the elements of the offense as defined by the applicable statute with the elements of generic burglary. *Id.* The Court drew this line based on the defendant's Sixth Amendment right to a jury trial. "If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" *Id.* at 601. Since *Apprendi*, the Supreme Court has consistently reversed sentencing courts that look beyond the simple fact of conviction and the elements of the offense underlying the conviction. *See (in chronological order) Shepard*, 544 U.S. at 24–25; *Descamps*, 570 U.S. at 269–70; *Mathis*, 136 S. Ct. at 2252. As the Court has explained, the simple fact of the conviction and the elements of the offense underlying the conviction are all that is excepted from the rule in *Apprendi* because the elements of the offense are all that the jury finds proved beyond a reasonable doubt when it renders its verdict.

In *Shepard*, the Supreme Court drew the crucial distinction between the fact of a prior conviction and "a fact about a prior conviction." *Shepard*, 544 U.S. at 25. The Court considered whether Shepard's Massachusetts conviction for burglary

counted as an ACCA predicate offense even though Massachusetts' definition included unlawful entries into places such as boats and cars, and thus swept more broadly than generic burglary. 544 U.S. at 16–17. Because the elements of Shepard's Massachusetts burglary offense did not match the elements of generic burglary, the sentencing court properly refused to count the prior conviction. *Id.* The Government appealed, arguing that the court could look at police reports to determine whether Shepard's conviction was based on an act consistent with generic burglary. *Id.* at 17–18. The First Circuit agreed with the Government, but the Supreme Court reversed. *Id.* The Supreme Court opined that *Almendarez-Torres*, 523 U.S. 224 (1998), does not authorize sentencing courts to dig into facts relating to prior convictions. *Id.* at 24–26[7]. "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *Id.* Facts merely "about a prior conviction" are *not* fair game under *Apprendi*.

[7] Notably, Justice Thomas, who concurred in the Court's judgment, departed from the Court in this section of the opinion because the Court did not go far enough. Justice Thomas wrote separately to express his view that (1) *Apprendi* had "eroded" the prior-conviction exception in its entirety, (2) the Court had wrongly decided *Almendarez-Torres*, and (3) as a majority of the Court would later agree, the prior-conviction fact-finding proposed by the government in *Shepard* gave rise "to constitutional error, not doubt." *Id.* at 26–28 (J. Thomas, concurring in part and concurring in the judgment).

Eight years later, the Court corrected another Court of Appeal, this time the Ninth Circuit, after that court broadly construed the prior-conviction exception as a license for judicial fact-finding. The Ninth Circuit had held that a sentencing court deciding whether to count a prior conviction for burglary under California's overbroad statute could simply review plea colloquies and other record documents to determine if the defendant "could have been convicted" of generic burglary. *Descamps*, 570 U.S. at 264–70 (emphasis in original). On review, the Supreme Court tersely responded, "Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction." *Id.* at 270. The Court explained that its approach announced in *Taylor* "merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits." *Id.* at 269. Any other fact-finding relating to a predicate conviction "would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Id.* This is because "the fact of a prior conviction" includes only, and nothing more than the elements of the offense on which the conviction is based:

> And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says,

> or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Descamps, 570 U.S. at 269–70 (internal citations removed for clarity). Kindle's release date from prison is not an element of any of the offenses underlying his prior convictions. And it is not an element of the manslaughter offense of which he was convicted in the present case. A sentencing court cannot "rely on its own finding about a non-elemental fact [about a prior conviction] to increase a defendant's maximum sentence." *Id*. But that is precisely what the trial court did by finding Kindle's release date from prison and enhancing his sentence based thereon. Kindle's sentence is unconstitutional.

The Supreme Court has taken repeated pains to clarify this important concept. *Apprendi*'s "fact of a prior conviction" exception tolerates a sentencing court's identifying the prior conviction and the elements constituting the prior crime of conviction *and nothing more* because the elements of the crime are all that the jury was required to find beyond a reasonable doubt in the prior case:

> [A]llowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. That means a judge cannot go beyond identifying the

> crime of conviction to explore the manner in which the defendant committed that offense. He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea or what the jury in a prior trial must have accepted as the theory of the crime. He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Mathis, 136 S. Ct. at 2252 (internal citations and quotations removed for clarity). Just as "the fact of a prior conviction" exception does not allow a sentencing court to peruse a prior record to find facts apart from the elements of the crime and enhance a sentence based on those facts, the exception does not allow a sentencing court to find when a defendant was released from prison and more than double the defendant's sentence based on that fact. Because the date on which Kindle was released from prison is not an element of any of his prior offenses, and because no jury has ever found beyond a reasonable doubt that Kindle was released from prison on a certain date (and Kindle has never waived his right to have a jury so find), that fact does not fall within *Apprendi*'s "fact of a prior conviction" exception.

The Sixth Amendment of the United States Constitution guarantees a defendant the right to require a jury to find all facts that expose him to an enhanced sentence. The "fact of a prior conviction" exception to the rule in *Apprendi* exists precisely because the defendant previously enjoyed the right to require a jury to find the facts underlying his prior conviction. Because Kindle has never enjoyed the right

to require a jury to find the date on which he was released from prison, Kindle's enhanced punishment based on that fact is unconstitutional.

CONCLUSION

Kindle respectfully requests that this Court reverse his manslaughter conviction and remand the case.

If this Court sees no error requiring reversal of Kindle's manslaughter conviction, Kindle respectfully requests that this Court hold that his 40-year sentence under the Violent Career Criminal Act is unconstitutional and remand for resentencing.

error on appeal"). Defense counsel agreed to the instruction (T 895;897;898).

Finally, based upon the facts pointing to Appellant's guilt, as articulated in Point I, fundamental error did not occur.

POINT IV

APPELLANT'S VIOLENT CAREER CRIMINAL SENTENCE FOR MANSLAUGHTER WAS PROPER (RESTATED)

Appellant does not contest that he qualified as Violent Career Criminal pursuant to § 775.084 (1) (d), Fla. Stat. as he was released from prison within five years of the offense. Instead, he contends his Violent Career Criminal Sentence is unconstitutional and the trial court erred because the *Apprendi v. New Jersey*, 530 U.S. 466 (2000) "fact of a prior conviction" exception does not authorize a trial court to find the fact of a defendant's release date from prison.

The defendant had been last released from prison on April 12, 2011, which was within five years of the sentencing offense being committed. (SR3.800 61-62). *§* 775.084(1)(d)(3)(b), Fla. Stat.. At Appellant's sentencing his certified convictions were moved into evidence (SR3.800 60;124-308).

Under both *Alleyne v. United States*, 133 S.Ct. 2151 (2013) and *Apprendi* Appellant's sentence is legal.

Alleyne holds any fact which raises minimum punishment must be found by a jury and proven beyond a reasonable doubt. However, the facts must be facts associated with the crime charged and not extraneous facts that are unrelated to the charges. Proof of prior convictions does not qualify. While *Alleyne* applies to fact finding that increases the statutory minimum sentence, *Apprendi* applies to cases where findings of fact increase the statutory maximum sentence. As stated in *Alleyne*, "(T)he essential Sixth Amendment inquiry is whether a fact is an essential element of the crime." 133 S.Ct. at 2153.. The US. Supreme Court specifically limited Alleyne stating the "ruling does not mean that any fact that influences judicial discretion must be found by a jury." *Id* at 2153. *Apprendi* specifically excludes prior convictions as "facts" that must be proven beyond a reasonable doubt. ("Other 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." *Apprendi*, 120 S.Ct. at 2362-23 63). Sentencing factors are separate and distinct from elements of a crime and can be proved to a judge by a preponderance of the evidence. *See United States v. O'Brien*, 560 US. 218 (2010). This includes the determination of the date of the defendant's release from prison.

For instance in terms of a PRR sentence, in *Lopez v. State*, 135 So.

3d 539, 540 (Fla. 2d DCA 2014), the Second District concluded that because the question of when a defendant was last released from prison is an issue derived from the record of a prior conviction, it need not be submitted to a jury. *See also Robinson v. State*, 793 So.2d 891, 893 (Fla.2001); *State v. Wilson*, 203 So. 3d 192 (Fla. 4th DCA 2016)(held trial court could impose on defendant, who was convicted of robbery with a firearm and grand theft, a prison releasee reoffender (PRR) sentence in the absence of findings by the jury that the defendant qualified for such enhanced sentencing as jury need not make the requisite findings for PRR sentencing); *Culp v. State*, 141 So. 3d 1279 (Fla. 1st DCA 2014), *cert. denied*, 135 S. Ct. 1897 (2015).

Therefore, because the PRR sentence is recidivist in nature and involves the fact of a prior conviction, it is constitutional after *Alleyne*. Clearly, the same can be said of a violent career criminal sentence. *See al*so *Calloway v. State*, 914 So.2d 12,14 (Fla. 2nd DCA 2005) ("...Calloway's date of release from prison is a part of his prior record and thus does not need to be presented to a jury and proved beyond a reasonable doubt").

In *Dennis v. State*, 784 So. 2d 551, 552 (Fla. 4th DCA 2001) this Court held:

> Judge Dennis timely appeals after a jury convicted him of burglary and petit theft. He was sentenced to ten years in prison as an habitual felony offender and

> violent career criminal, with a ten-year minimum for the violent career criminal status. While we affirm on all issues raised, we write only to discuss Dennis' contention that his sentence was illegal under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi holds that "[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." *Id.* at 490, 120 S.Ct. 2348 (emphasis supplied). Dennis maintains that under *Apprendi,* the court should have had the jury determine that he had the requisite predicate convictions necessary to impose the habitual felony offender and violent career criminal sentence.
>
> We recently rejected a similar claim in *Gordon v. State*, No. 4D00-1607, ---So.2d ----, 2001 WL 418754 (Fla. 4th DCA Apr.25, 2001), wherein we held that the findings required under the habitual felony offender statute fell within *Apprendi's* "recidivism" exception. As in *Gordon,* the facts justifying Dennis' sentence enhancement were not elements of his offense; rather, enhancement was authorized by his habitual felony offender and violent career criminal status under sections 775.084(4) and 775.084(4)(c), Florida Statutes (1999). Such statutes neither alter the maximum penalty for the crime committed nor create a separate offense; they operate "solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Kijewski v. State*, 773 So.2d 124, 125 (Fla. 4th DCA 2000) (discussing Prison Releasee Reoffender statute). Because *Apprendi* is inapplicable to the case at bar, we affirm.

Again, in *Sustakoski v. State*, 992 So. 2d 306, 308-09 (Fla. 4th DCA

2008) this Court held as to the violent career criminal sentencing statute:

> Finally, we have repeatedly rejected the contention, raised by appellant here, that *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), applies to the findings necessary for violent career criminal sentencing. *See, e.g., McBride v. State*, 884 So.2d 476, 478 (Fla. 4th DCA 2004) (holding that "*Blakely* does not entitle a defendant to have a jury determine whether he has the requisite predicate convictions for a habitual felony offender sentence"); *Gudinas v. State*, 879 So.2d 616, 618 (Fla.2004) (habitual violent felony offender sentencing is "unaffected by *Apprendi [v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)]"); *Dennis v. State*, 784 So.2d 551 (Fla. 4th DCA 2001) (*Apprendi* does not require that the requisite predicate convictions necessary to impose a violent career criminal sentence be proved to the jury beyond a reasonable doubt).

As recently as in *McDonald v. State*, 264 So. 3d 202 (Fla. 4th DCA 2019) this Court rejected this argument without further comment that Appellant was unconstitutionally sentenced as a PRR because the trial court judge, rather than the jury, made the predicate findings for PRR status, citing *Chapa v. State*, 159 So.3d 361, 362 (Fla. 4th DCA 2015).

Appellant argues rulings from the United States Supreme Court abrogate contrary decisions of Florida courts holding that a judge, rather than a jury, may find the date on which a defendant was released from prison because that fact "relates to the fact of a prior conviction." He contends those

decisions abrogate cases such as *Williams v. State*, 143 So. 3d 423, 424 (Fla. 1St DCA 2014), *Chapa,*159 So.3d at 362 (Fla. 4th DCA 2015) *rev. denied,* 177 So. 3d 1263 (Fla. 2015) (held where appellant challenged his sentence under the Prison Releasee Reoffender Act (PRR) and argued under *Apprendi* and *Alleyne* the PR statute unconstitutionally permitted the judge rather than the jury to find appellant qualified as PRR, citing the reasoning of *Williams* and *Lopez)*; and *Gordon v. State*, 787 So. 2d 892, 893-894 (Fla. 4th DCA 2001). These decisions were not contrary to Supreme Court rulings but rather interpreted and distinguished the decisions in relationship to the facts and law, respectively.

Appellant acknowledges these cases and Florida precedent and that this court may "reasonably be excused for having treated *Apprendi's* "fact of a prior conviction" exception as a catch-all recidivism exception" but argues that should no longer be the case (IB 45). The principal case he relies upon for his argument is *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Mathis is distinguishable from this case. *Mathis* concerned application of The Armed Career Criminal Act (ACCA) 18 U.S.C. § 924(e), which imposed a 15–year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal convictions "for a violent felony," including "burglary, arson, or

extortion." 18 U.S.C. §§ 924(e)(1), (e)(2)(B)(ii). The Court held because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's prior convictions cannot give rise to ACCA's sentence enhancement. *Id.* at 2251.

Contrary to Appellant's argument, the Supreme Court in *Mathis* observed in reaching it's decison:

> Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns. This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. *See Shepard*, 544 U.S., at 25, 125 S.Ct. 1254 (plurality opinion); id., at 28, 125 S.Ct. 1254 (THOMAS, J., concurring in part and concurring in judgment) (stating that such an approach would amount to "constitutional error"). He is prohibited from conducting such an inquiry himself; and so too he is barred from making a disputed determination about "what the defendant and state judge must have understood as the factual basis of the prior plea" or "what the jury in a prior trial must have accepted as the theory of the crime." *See id.*, at 25, 125 S.Ct. 1254 (plurality opinion); *Descamps,* 570 U.S., at ——–, 133 S.Ct., at 2288. He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.

Mathis, 136 S.Ct. at 2252 (emphasis added)

Appellant is extrapolating "[h]e can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of" from the opinion but that does not concern the fact of a prior conviction, as Florida courts have continually found proper.

Accordingly*, Mathis* does not abrogate *Apprendi* whose decision has been relied upon continually by Florida Courts interpreting the recidivist statutes.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Appellee respectfully requests this Court AFFIRM Appellant's convictions and sentence**.**

Respectfully submitted,
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presumption to protect a defendant's right to a fair trial to the same extent that this Court would apply it to affirm his conviction.

It is improper to suspect that a jury simply disregarded a conflicting instruction. The United States Supreme Court has explained why. "A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin*, 471 U.S. 307, 322 (1985). A suspicion that the jury did not follow instructions opens a Pandora's box that undermines the foundations of our judicial system and creates the appearance of fundamental unfairness. This Court should not follow *Farmer* and its progeny.

Kindle respectfully requests that this Court hold that the forcible-felony instruction violated his right to due process on his self-defense claim, reverse his conviction, and remand for a new trial. *See Lindo*, 283 So. 3d at 871.

IV. KINDLE'S VCC SENTENCE IS UNCONSTITUTIONAL BECAUSE HIS RELEASE DATE FROM PRISON IS NOT THE SIMPLE FACT OF A PRIOR CONVICTION NOR AN ELEMENT OF A PRIOR CONVICTION

The State's reliance on Florida caselaw that contradicts the Supreme Court's interpretation of the Sixth Amendment in *Mathis v.*

United States, 136 S. Ct. 2243, 2252 (2016), and *Descamps v. United States*, 570 U.S. 254, 269 (2013), is misplaced. It is not within this Court's province to reject the United States Supreme Court's interpretation of the United States Constitution. *See Delancy v. State*, 256 So. 3d 940, 947 (Fla. 4th DCA 2018).

The rule in *Apprendi* limits a sentencing court considering enhancement based on a defendant's criminal history to "identifying the defendant's crime of conviction." *Descamps v. United States*, 570 U.S. at 269. A sentencing court "flouts our reasoning . . . by extending judicial factfinding beyond the recognition of a prior conviction." *Id.* Any judicial factfinding beyond merely identifying a prior conviction and its elements violates the Sixth Amendment. *Id.*; *see also Mathis*, 136 S. Ct. at 2252. This is because a jury, not a sentencing court, finds the facts that underlie a conviction. *Id.* It is only those facts that the defendant previously had the right to have a jury find that are excepted from the rule in *Apprendi*. *Id.* "And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id.* at 269–70. Kindle's release date from prison is not an element of any of his prior offenses. Kindle has never enjoyed

the right to have a jury find his release date from prison unanimously and beyond a reasonable doubt. His release date from prison therefore cannot be used to increase his sentence above the maximum for his underlying offense.

This Court misinterpreted the Sixth Amendment by holding that a sentencing court may find facts that relate to a prior conviction because those facts are not elements of the prior offense. *See, e.g., Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015). Finding facts apart from the crime of conviction and its elements is exactly what a sentencing court *cannot* do. *Descamps*, 570 U.S. at 269. A sentencing court "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis*, 136 S. Ct. at 2252. Facts that relate to a prior conviction are not "the simple fact of a prior conviction" and are not excepted from the rule in *Apprendi*. "What crime, with what elements, the defendant was convicted of" are the only facts that are excepted from the rule in *Apprendi*. *Mathis*, 136 S. Ct. at 2252. Kindle's release date from prison is neither a crime, nor the elements of a crime, of which he was previously convicted. A sentencing court therefore cannot use that fact to enhance his

sentence unless Kindle first enjoys the right to have a jury find it unanimously and beyond a reasonable doubt.

Kindle's VCC sentence is unconstitutional. Kindle respectfully requests that this Court reverse it and remand for resentencing.

CONCLUSION

Kindle respectfully requests that this Court grant him a new trial in which he is not forced to wrestle an inert dummy in a "demonstration" of how he defended himself. At that trial, Kindle respectfully requests that he be allowed to introduce evidence of Robinson's prior specific acts of violence because he cleared the minimal hurdle over which all doubts as to the admissibility of evidence supporting his self-defense claim must be resolved in his favor. The forcible-felony instruction must not be read at that trial because it logically negates his sole defense and would violate his right to due process.

Alternatively, Kindle respectfully requests that this Court declare his VCC sentence unconstitutional and remand for resentencing because his sentence subjects him to enhanced punishment based on a fact that he has never enjoyed the right to have a jury find unanimously and beyond a reasonable doubt.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

REGINALD KINDLE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D20-669

[July 22, 2021]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Mariya Weekes, Judge; L.T. Case No. 15008439CF10A.

Carey Haughwout, Public Defender, and Ross Berlin, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

CONNER, C.J., WARNER and GROSS, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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

REGINALD KINDLE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 4D20-669
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____/		

MOTION FOR WRITTEN OPINION

Reginald Kindle, through counsel, respectfully moves this Court to issue a written opinion in accordance with Florida Rule of Appellate Procedure 9.330(a)(2)(D). In support thereof, Kindle states the following.

This Court's written opinion would provide guidance to the parties and the lower tribunal on an issue of first impression. *See* Fla. R. App. P. 9.330(a)(2)(D)(iii)(d). Point One of Kindle's brief raised the issue whether the trial court erred by ordering Kindle to reenact his testimony that a taunting, drunken person jumped off a toilet and

lunged at him, prompting him to act in self-defense, using his own arms to manipulate an inert, foam dummy in place of his assailant over his objection that such a demonstration would not accurately reflect his testimony describing the event. *See* IB at 17 ("Kindle has found no case in the courts of this state or elsewhere in which a trial court ordered a criminal defendant to step down from the stand and 'reenact' his testimony under conditions that made an accurate reenactment impossible."). Because no authority in this state addresses whether a trial court errs by ordering a criminal defendant over his objection to step down from the stand and reenact his testimony under conditions that make an accurate reenactment of his testimony impossible, this Court's written opinion would provide guidance to the parties and the lower tribunal on an issue of first impression.

This Court's written opinion would also provide a legitimate basis for Supreme Court review. *See* Fla. R. App. P. 9.330(D)(i). This Court and the Florida Supreme Court have consistently held that no demonstration can take place before the jury unless the

demonstration will provide an accurate representation of the event or object in question. *See, e.g., State v. Duncan*, 894 So. 2d 817, 829–831 (Fla. 2004); *Williams v. State*, 300 So. 3d 202, 207 (Fla. 4th DCA 2020). The trial court never made such a finding in this case; nor could it reasonably do so. It is impossible that Kindle, using his own arms to move an inert, foam dummy, could accurately demonstrate the event to which he testified. Because it is impossible that the demonstration was an accurate representation of that testimony, and because no other foundation besides that testimony supported the demonstration, a decision from this Court that the demonstration was permissible would conflict with the Supreme Court's precedents that any demonstration in front of the jury must first be shown to be accurate and would therefore provide a legitimate basis for Supreme Court review.

Finally, a written opinion addressing Point Four would provide a legitimate basis for Supreme Court review and guidance to the parties and the lower tribunal on an issue expected to recur in future cases. *See* Fla. R. App. P. 9.330(D)(i), (iii)(b). Kindle asserted in Point

Four that his 40-year sentence pursuant to the Violent Career Criminal statute is unconstitutional under the United States Supreme Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016); *Descamps v. United States*, 570 U.S. 254, 269 (2013); and *Shepard v. United States*, 544 U.S. 13, 24 (2005); because the statute authorized the trial court to enhance Kindle's sentence above the maximum for his underlying offense based on its finding of the date on which Kindle was released from prison. The Supreme Court of the United States has ruled that the only facts excepted from jury consideration under the rule in *Apprendi* "are those constituting elements of the offense" because those are the only facts already found by a jury in the defendant's prior case. *Descamps v. United States*, 570 U.S. 254 at 269–70. Because Kindle's release date from prison does not constitute an element of Kindle's prior offense, no jury has ever found that fact, and Kindle's VCC sentence based on a trial court's finding of that fact violates his Sixth Amendment right to a jury trial. Because this Court and the Florida Supreme Court are bound by the United States Supreme Court's interpretations of the

United States Constitution and because the release-date finding is expected to recur in future cases, a written opinion would provide a legitimate basis for Supreme Court review and guidance to the parties and the lower tribunal on an issue expected to recur in future cases.

Pursuant to Rule 9.330(d), undersigned counsel states:

> I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review and guidance to the parties or lower tribunal on an issue of first impression and an issue expected to recur in future cases.

WHEREFORE, Kindle respectfully moves this Court to issue a written opinion.

Respectfully submitted,

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/s/ Ross F. Berlin
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Florida Bar No. 1018478

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Mitchell A. Egber, Assistant Attorney General, 1515 N. Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 at CrimAppWPB@myfloridalegal.com this 23rd day of July, 2021.

/s/ Ross F. Berlin
Attorney for Appellant

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

August 12, 2021

CASE NO.: 4D20-0669
L.T. No.: 15008439CF10A

REGINALD KINDLE v. STATE OF FLORIDA

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

BY ORDER OF THE COURT:

ORDERED that appellant's July 23, 2021 motion for written opinion is denied.

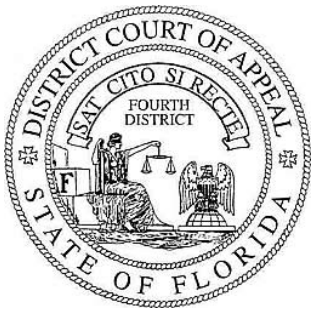
Served:

cc: Attorney General-W.P.B.
Mitchell Alan Egber
Public Defender-P.B.
Paul Edward Petillo
Luke Robert Napodano
Ross Frank Berlin

kr

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



IN THE CIRCUIT COURT OF THE 17TH CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO: 15008439CF10A

State,

vs.

REGINALD KINDLE,

Defendant.
_____/

Hearing before:

HONORABLE JUDGE MARIYA WEEKES

SENTENCING - DAY 1
(Pages 1 - 57)

DATE TAKEN: February 21, 2020
PLACE: Broward County Courthouse
201 SE 6th Street
Courtroom 4810
Fort Lauderdale, Florida 33301

TIME: Commencing at 10:09 a.m. to 11:08 a.m.

Hearing taken before:

Carol Singh, FPR
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APPEARANCES:

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ALSO PRESENT:
N/A

I N D E X

STATE'S EXHIBIT INDEX

(Reporter's note: State's Exhibits were retained by THE COURT.)

DEFENDANT'S EXHIBIT INDEX

* * * NONE * * *

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THE COURT: Good morning, everyone. All right, so, State of Florida vs. Reginald Kindle, Case No. 158439CF10A, we are set for sentencing this morning. I'm sorry we're running a couple minutes late, but I am ready whenever you all are.

MS. ACHILLE: Sure, Judge. I'm just waiting for them to connect the victim's next of kin.

THE COURT: Okay.

MS. ACHILLE: If we can wait just a couple more minutes?

THE COURT: Absolutely.

MS. ACHILLE: Thank you.

MR. WHEELER: Judge, the defense is having an issue this morning with one of our witnesses, Denise Bennet. The issue is that we sent a car transport for her this morning, she required a van. She refused to get in the car without her wheelchair. So she is not going to be here this morning.

THE COURT: And is she a witness you wanted to provide testimony?

MR. WHEELER: She is one of the witnesses that we attempted to put on the stand during the course of the trial.

THE COURT: Okay.

MR. WHEELER: I'm not sure if the Court was

going to be willing to bifurcate the hearing for us?

THE COURT: Well, I mean, since we have the next of kin and everything already on there, I'll do it whichever way you all prefer. If you want to go forward and put on whatever you have today, and then bifurcate it to put on your other witness, I'm happy to do that.

If you want to reset the entire thing, I can do that as well. Whichever, I will --

MS. ACHILLE: Is she able to appear by phone?

THE COURT: -- do that too.

MS. ACHILLE: I mean, my position: I understand that they want this witness as a mitigating witness, but she refused to get in the car so, if she can appear by phone, I would not object to that. But to reset it, how do we know that that won't happen again?

MR. WHEELER: Well, Judge, she was coming in voluntarily, without a subpoena. If necessary, I will serve her with a subpoena and compel her attendance. Of course, I never like doing that to one of our own witnesses.

We do have a pastor that's on his way here, Judge. He was in contact this morning. He's coming from West Palm Beach.

THE COURT: I understand the State's objection, but I will allow you to put on whatever witnesses you want for whatever mitigation you want.

So you all just tell me how you want to do it.

MS. ACHILLE: Do you want her to appear by phone?

THE COURT: No, I mean in terms of if you want to do the whole thing, I mean, if you want her to appear by phone, if you all agree with that, that's fine. If you wanted to bifurcate it and do some of it today, and then finish, that's fine. If you want to reset the whole thing, I can do that too, so.

MR. WHEELER: Judge, I would ask the Court to allow us to bifurcate it. One of our other witnesses that sent us an e-mail told -- that works at the Broward Outreach Center -- informed us that he was short-staffed and could not attend the hearing. I'm not sure if that would change in the future or not. Again, a subpoena would compel his attendance, and I was trying to get him here voluntarily.

THE COURT: All right, why don't we do what we can do today, and then, we'll try to pick a date in the very near future to finish?

MR. WHEELER: And my client's still not here, Judge.

THE COURT: I'm sorry?
MR. WHEELER: I'm sorry, my client's not here.
THE COURT: He is. He's right there.
MR. WHEELER: Oh, sorry.
THE COURT: No, that's okay. I made sure that he got moved over before we started because I want him to sit next to you.
MR. WHEELER: Okay.
THE COURT: All right, so you guys tell me when this is all set up, and then we can just do as much as we can.
MS. ACHILLE: Sure, thank you.
IT: We're ready.
MS. ACHILLE: Okay, thank you.
Good morning, Sergeant Robinson.
MS. ROBINSON: Hello.
THE COURT: Good morning, ma'am. How are you?
MS. ROBINSON: I'm fine.
THE COURT: Okay.
All right, so, State are you ready?
MS. ACHILLE: Yes, State's ready.
THE COURT: All right.
And, Defense, you're ready?
MR. WHEELER: Yes, Judge.
THE COURT: Okay. So we're back on the record

in State of Florida vs. Reginald Kindle, Case No. 158439CF10A. We are set for sentencing this morning. Present is the State, the Defense, as well as Mr. Kindle. We also have Sergeant Robinson, the victim's next of kin, appearing via video conference. And I am ready to proceed whenever you all are.

MS. ACHILLE: Well, Judge, I guess since Mister...

I guess the mitigation will go last. He doesn't have any witnesses here anyhow. So, if I could, I will start to call witnesses. Before I call the first witness, I just want to give a brief, I guess, not opening statement, but overview.

The State filed notice of its intent to declare the defendant as a habitual felony offender on August 10, 2015. And I have copies of that. I confirmed that they were also in Odyssey.

And, also, the State filed its Notice of Intent to Have the Court Declare the Defendant a Violent Career Criminal, pursuant to Florida Statute 775.084, subsection (1)(d), as in Delta, also on August 10, 2015. Does your Honor wish to see copies of that?

THE COURT: Let me see if they're in the system.

MS. ACHILLE: If not, I have extra copies.

(The Court reviewing records.)

THE COURT: Tell me what the date was again?

MS. ACHILLE: August 10, 2015.

Thank you.

(The Court reviewing records.)

THE COURT: All right, so, I see the State's Notice to Have Him Declared a Violent Career Criminal, filed on August 10, 2015, by --

MS. ACHILLE: Yves Laventure.

THE COURT: -- Yves Laventure, in front of Judge Backman. And, then, the State's Notice to Have the Court Declare the Defendant a Habitual Felony Offender on August 10, 2015. Again, by Yves Laventure. So I see that there.

MS. ACHILLE: Okay. And, then, additionally, the offense for which the defendant has been convicted of, the current offense, occurred on June 26th through 28, of 2015. And the testimony that your Honor is about to hear from the State are regarding three certified copies of conviction.

The first one is Case No. 89 0595CFA N1, for conviction of one count of burg dwelling, where the defendant was convicted on July 7, 1989, in Sarasota County, Florida. He was sentenced to an

adjudication, nine years probation, with a special condition of probation was to complete some drug treatment. He also violated his probation and was -- his probation was revoked. And he was sentenced in adjudication for 17 years Florida State Prison, as HOQ, on November 6, 1991. That's the first conviction.

The second conviction will be from 1991, 2758F, as in Frank. For one count of burglary dwelling, convicted on November 6, 1991, in Sarasota County, Florida. The defendant was sentenced to an adjudication, 17 years Florida State Prison, with credit for 71 days time served. He was released from Florida State Prison on April 12, 2011. And, the evidence that you'll hear from the State is that that is the specific conviction that brings the defense of under the statute of violent career criminal within five. Because this is within five years from the offense date of June 2015.

And the third conviction is from 1986, 3666CFA N1, where the defendant was convicted of one count of attempt felony murder with a weapon. Second count was conspiracy to commit armed robbery. Third count was robbery with a deadly weapon.

THE COURT: I didn't get that.

MS. ACHILLE: Oh sorry.

THE COURT: Conspiracy?

MS. ACHILLE: Conspiracy to commit armed robbery.

THE COURT: Okay.

MS. ACHILLE: The third count was robbery with a deadly weapon. And the defendant was convicted on April 2, 1987, in Sarasota County, Florida. His sentence was an adjudication, seven years Florida State Prison, with 105 days credit for time served.

Okay, and, at this time, the State calls James Florian.

THE COURT: All right, give me that case number for the second offense, the berg dwelling again from '91?

MS. ACHILLE: Sure. You said -- what did you need from that, Judge?

THE COURT: The case number again.

MS. ACHILLE: Sure. 19912758F.

THE COURT: Okay, got it.

(Witness entering the courtroom.)

THE COURT: All right, raise your right hand.

Thereupon,

JAMES FLORIAN,

having been first duly sworn or affirmed, was examined

and testified as follows:

THE WITNESS: I do.

THE COURT: Okay, put your hand down. Please, state your name, spell your last name for the record.

THE WITNESS: James Florian, F-l-o-r-i-a-n.

THE COURT: Okay, thank you.

DIRECT EXAMINATION

BY MS. ACHILLE:

Q. Good morning, Mr. Florian. Where do you work, please?

A. Broward Sheriff's Office.

Q. In what capacity?

A. As a fingerprint analyst.

Q. How long have you been with the Sheriff's office in that capacity?

A. About 12 years.

Q. What are your duties?

A. I analyze fingerprints that come in through the jail for inmates, as they're being booked. I also do comparisons for the State Attorney's Office through the ATF and other various agencies.

Q. What training did you have to undergo to become a fingerprint analyst?

A. I had a 40 hour -- I'm sorry, two 40 hours: one basic class and one advanced class. I also had

seven months of training under a supervisor, when I first started.

Q. Okay. Is there a continuing education requirement?

A. Yes, there is.

Q. What is it?

A. We have to have 16 hours a year.

Q. And where are you in that 16 hours?

A. We just started the year so we haven't done anything for this year yet.

Q. Okay. So you're current?

A. I'm current, yes.

Q. Do you hold any certification and/or licenses?

A. I do not.

Q. Okay. What is a 10-print fingerprint comparison?

A. It's when you have two sets of 10-print fingerprints, which basically are impressions of all 10 fingers rolled onto a piece of paper with ink.

Q. Okay. Is your work subject to peer review?

A. Yes, it is.

Q. And, have you testified in court regarding -- as expert fingerprint analyst?

A. Yes, I have.

Q. Okay. How many times would you say?

A. Approximate 14ish. Fourteen times.

Q. Now, as to this case, State of Florida v. Reginald Kindle, did you obtain the known standard fingerprints of the defendant in this case, Reginald Kindle?

A. I did.

MS. ACHILLE: I'm going to show you what I'm marking for identification as State A.

(State's Exhibit No. A, Fingerprints, was marked for identification.)

BY MS. ACHILLE:

Q. Do you recognize it?

(Witness reviewing documents.)

A. I do.

Q. How do you recognize it?

A. It has my signature and my employee number at the bottom.

Q. Okay, and what date did you take those fingerprints?

A. November 22nd of last year, 2019.

Q. And, is it in the same condition as when you rolled the prints and analyzed it?

A. Yes.

MS. ACHILLE: At this time, your Honor, I'd enter into evidence State's A as State's 1.

THE COURT: Defense?

MR. WHEELER: No objection, Judge.

THE COURT: Okay, without objection what's been premarked as State's A will be entered in as State's 1.

(State's Exhibit No. 1, Fingerprints, previously marked as State's A, was received in evidence.)

BY MS. ACHILLE:

Q. Now, the person that you rolled the prints for, that's now entered into evidence as State's 1, do you see them in the courtroom today?

A. Yes, I do.

Q. Okay. Can you please identify that person by an article of clothing and where they're seated in the courtroom?

A. They're at the table behind me, in a tan-colored jumpsuit.

Q. Okay.

MS. ACHILLE: At this time, your Honor, please let the record reflect an in-court identification matching the fingerprints that have been entered into evidence as State's 1.

THE COURT: Okay. The record shall so reflect.

MS. ACHILLE: Thank you.

Now, I'm going to show you three separate items that are going to be comprised as a composite, State's B for identification.

(State's Composite Exhibit No. B, Records of convictions, was marked for identification.)

MS. ACHILLE: And, for the record, the first item is a certified conviction from Sarasota County, Florida, Case No. 89 0595CFA N1; a certified copy of conviction from Case No. 912758F, from Sarasota County, Florida; and the business records of -- from the defendant's Florida Department of Correction's records, comprised of his entire Department of Correction records. And, I believe, that's identified as...

I believe the identification number is 1351013853.

BY MS. ACHILLE:

Q. Okay, can you please take a look at the three items that I've handed to you under State's composite B?

(Witness reviewing documents.)

A. Okay.

Q. Do you recognize the items?

A. Yes. Yes.

Q. How do you recognize them?

A. They have my initials on top of the sheet, and

also my initials on the side.

Q. Okay, and you're referring to the initials on the page where the fingerprints are contained in each judgment, where you actually examined the fingerprints?

A. That's correct.

Q. Okay. And does it -- do the three items that are comprised in State's B appear to be in the same or substantially similar condition as when you analyzed them?

A. Yes, they are.

MS. ACHILLE: At this time, your Honor, I'd move into evidence what's been marked for identification as State's Composite B, as State's Composite 2.

THE COURT: Defense?

MR. WHEELER: Just a moment, Judge.

(Defense reviewing records.)

MR. WHEELER: No objection.

THE COURT: Okay, without objection what's been premarked as State's Composite B will be entered in as State's composite 2.

MS. ACHILLE: Thank you, Judge.

(State's Composite Exhibit No. 2, Records, previously marked as State's Composite B, was received in evidence.)

BY MS. ACHILLE:

Q. All right. First, let's discuss the final judgment, Case No. 89 0595CFA N1. If you can please take a look at that?

(Witness reviewing documents.)

Q. Did you compare and analyze the 10-print in State's Composite 1 to the item of Case No. 89 -- let me just read the case number for the record -- 595CFA N1?

A. Yes, I did.

Q. Okay. And, with respect to the fingerprints for that 1989 conviction, was the analysis that you completed in the case peer-reviewed?

A. Yes, it was.

Q. And what was the result of your analysis as to the 1989 conviction?

A. They came from the same source as the person that I rolled in the report.

Q. Okay, so the source from State's 1 and the source for the 1989 conviction are one in the same?

A. Correct.

Q. Okay. Now, let's take a look at 19912758F?

(Witness reviewing documents.)

A. Okay.

Q. Okay, did you have an opportunity to complete analysis on the 1991 conviction in comparison to the

defendant's fingerprints in State's Exhibit 1?

A. Yes, I did.

Q. And what was -- was the analysis you completed as to the 1991 conviction subject to peer review?

A. Yes, it was.

Q. What was your analysis as to the 1991 conviction?

A. It was the same person.

Q. Okay, so State's Composite -- or, I'm sorry -- State's Exhibit 1, which you've identified as the defendant is one in the same as the 1991 conviction fingerprints?

A. Yes, that's correct.

MS. ACHILLE: Okay. Thank you. And, then, I'll ask you to take a look at the third item in State's B, Composite B. And that would be the Florida Department of Correction's records.

(Witness reviewing documents.)

BY MS. ACHILLE:

Q. And did you have an opportunity to analyze and compare the Florida Department of Correction records to State's 1, which are the known standards of the defendant?

A. Yes, I did.

Q. And was that analysis as to the Department of

Correction records subject to peer review?

A. Yes, it was.

Q. And what was the result of your analysis as to Department of Correction's records?

A. They're one in the same.

Q. Okay. So they're one in the same with the known standards of the defendant in State's 1?

A. Correct.

Q. Okay, thank you.

MS. ACHILLE: No further questions from this witness.

THE COURT: Okay.

All right, Mr. Wheeler, Ms. Lafargue?

MR. WHEELER: Briefly, Judge.

THE COURT: I'm sorry?

MR. WHEELER: Briefly.

THE COURT: Yes, go ahead.

CROSS-EXAMINATION

BY MR. WHEELER:

Q. Good morning, Mr. Florian, how are you doing?

A. Good morning. Good.

Q. Is it true that fingerprints don't change with age?

A. They don't change, no.

Q. Right. I mean, life happens. You might get

like a burn or a scar?

A. A scar, correct.

Q. But, like, for the most part, they don't change.

A. Correct.

Q. So when the 1991 case happened, he was 28 years old; does that sound about right?

A. I don't know his date of birth, sir.

Q. He was born in 1963. Does that sound right?

A. Yes.

Q. So in 1991, he would have been 26 years old?

A. Uh-huh.

Q. In 1986, he would be 23 years old?

A. Correct.

MR. WHEELER: Nothing further.

THE COURT: Thank you.

MS. ACHILLE: Thank you, Mr. Florian. No further direct.

THE COURT: Thank you, Mr. Florian.

(Witness is excused.)

THE COURT: Call your next witness.

MS. ACHILLE: State calls Detective William Spitler, S-p-i-t-l-e-r.

(Witness enters courtroom.)

THE COURT: Raise your right hand, sir.

Thereupon,

WILLIAM SPITLER,

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Okay. You can put your hand down. Please state your name, spell your last name for the record.

THE WITNESS: William J Spitler, S-p-i-t-l-e-r.

THE COURT: You may proceed whenever you are ready.

MS. ACHILLE: Thank you.

DIRECT EXAMINATION

BY MS. ACHILLE:

Q. Is it detective or sergeant?

A. It's deputy right now.

Q. Deputy, okay.

A. I move around.

Q. All right. Deputy Spitler, if you could tell us where you work, sir?

A. I work for the Sarasota County Sheriff's Office.

Q. In what capacity?

A. I am actually the homeless services coordinator. I run the Homeless Outreach Team.

Q. How long have you been with the Sarasota County Sheriff's Officer?

A. About nine years.

Q. And prior to that, where were you employed?

A. I started at the Sarasota Police Department in 1980.

Q. Okay. And how long did you remain there, at the Sarasota Police Department?

A. Close to 30.

Q. Close to 30 years, okay. So you were there in 1986; correct?

A. That is correct.

Q. And in what capacity were you working in 1986?

A. My assignment in 1986, I was a detective.

Q. Okay. Now, what types of crimes did you investigate as a detective in 1986?

A. I did some property crimes in the beginning. And then, I rotated over to what we call the "persons section": robberies, rapes, anything involving a crime of violence, I guess would be.

MS. ACHILLE: Okay. Now, I'm going to segue to a case that you were involved in. That's Case No. 86 3666CFA N1, and I'm going to show you what has been marked for identification --

Did I give you back the stickers by chance? I

had them here.

Oh, I found them.

-- what's been marked for identification as State's C.

(State's Exhibit No. C, 1986 record, was marked for identification.)

BY MS. ACHILLE:

Q. Do you recognize State's C?

(Witness reviewing documents.)

A. Yes, ma'am.

Q. Okay. Now, how is it that you recognize State's C? Why is this case from 1986 significant to you?

A. Well, actually, the victim in this case, after this case and subsequently throughout my career, I worked with him, you know, in the community.

Q. Okay.

A. I remember it. And, to be honest, I pretty much remember a lot.

Q. Okay, you have a photographic memory, I think is what it's called?

A. Yes, ma'am.

Q. Okay. Now, the victim. I believe his name is Roy?

A. Roy Smith.

Q. Roy Smith. Was he described as a pillar in the community?

A. I mean, to the point that, you know, I tell people, you know, the '80s were a different time than what we have now. And Mr. Smith was really, back in the day, was one of the first people that dedicated himself to changing his neighborhood. And he did that very well. To the point that, you know, he had a business in the neighborhood. The neighborhood was -- I don't want to say not real good -- I don't know the exact words that they use now. But, he started an appliance business to help poor people. He had a laundry mat next to it. He brought in services. Subsequently, he became, you know, like the president of the association. And, so, now in Sarasota, in the City of Sarasota, there's a building named after him in that neighborhood.

Q. Okay. So, even to this day, that building is still erect and named after the victim from the 1986 case that you're holding?

A. Correct.

Q. Okay, and you drive by that building every day?

A. It's right next to the homeless shelter, and obviously, I help homeless people every day so I see it every day.

Q. Okay, so in addition to photographic memory,

this assists you in remember this case?

A. Correct. And I also knew, you know, both of the defendants in the case, you know.

Q. Okay. All right, now, when you say you know them, you know them because of your work on the case?

A. Pretty much from being in the neighborhood.

Q. Okay.

A. Once again, we were doing community policing before they actually named it that, but yeah.

Q. Okay. And, you recall that this case resulted in a conviction; correct?

A. That is correct.

Q. And you are familiar and you happen to know the defendant that was convicted in the case, that matches the judgment that you're holding; correct?

A. That is correct.

Q. Okay. Do you see that person today seated in the courtroom?

A. He's right there (indicating), wearing the tan jumpsuit with the glasses on. That's Reggie Kindle.

Q. Okay. And you've know Reggie Kindle even prior to the arrest. What was your involvement in this case, by the way?

A. Well, you know, when the, you know, the crime occurred, and we got assigned a case, and

Detective Schultz got the case. Subsequently, through a coup1e of different things. One of the people in the community, a guy, had the chain. And, then, that was one of the items stolen in the robbery.

Q. Okay.

A. And then, we caught him. And then, he identified, you know, Reginald Kindle as the person that sold him that chain, which then -- that was a couple of months after the robbery. Then, I arrested Reginald Kindle for dealing in stolen property -- was actually the first charge that I charged him with.

Q. Okay. So you were one of the arresting officers for Reggie, as you call him, Reggie Kindle?

A. Mr. Kindle.

Q. Okay.

A. Reginald Kindle.

Q. All right.

MS. ACHILLE: Your Honor, please let the record reflect and in-court identification of the defendant in this case, matching to Case No. 9 -- or excuse me -- 86 3666CFA N1.

THE COURT: Okay, the record will so reflect.

MS. ACHILLE: At this time, the State would move into evidence State's C for identification as State's 3.

THE COURT: Mr. Wheeler?

(Defense reviewing documents).

MR. WHEELER: No objection, Judge.

THE COURT: Okay, what's been premarked as State's C will be entered in as State's 3 without objection.

(State's Exhibit No. 3, 1986 record, previously marked as State's C, was received in evidence.)

BY MS. ACHILLE:

Q. Okay, Deputy Spitler, if you could please tell us, what were the facts of the 1986 case that you assisted in?

A. Like I testified earlier, you know, Mr. Smith, or Roy, owned Best Wrinkle Laundry Mat. And he was closing, and two -- at that point, as official terms -- two unknown black male perpetrators hit him over the head, stabbed him, took his wallet, and drug him inside the building. He had about, I don't know, 100 stitches. He lost permanent hearing in his ear. And they robbed him and left him pretty much for dead. And, like I say, the case kind of came together with, you know, the selling of the evidence and, you know, it just kind of fell together. I mean, it took a couple of months, but it just kind of fell together. But they waited for Roy to lock, you know he went and locked up every night.

You know, you can't leave the laundry mat open all night.

Q. Okay.

A. And they were, you know, waiting on him to show up.

Q. Okay. So, with respect to the two defendants, Reginald Kindle being one of the two, what was Reginald's involvement?

A. You know, per him, he was, you know --

Q. And "him", because there's a bunch of male pronouns?

A. Per -- Per Reggie's statement is he was kind of a bystander in the whole incident, as far as, you know, Ramus, the other codefendant Ramus Green, was the one who actually hit Mr. Smith. And, you know, did all that.

Q. Okay.

A. But, you know, the victim, Mr. Smith, said they both did it.

Q. Okay.

A. You know, he was attacked by two people.

Q. Okay.

A. So, you know, like I say, when I arrested Mr. Kindle, and I stand here today, I don't feel any guilt or remorse for arresting him and seeing him

convicted that he wasn't an unwilling participant in this crime.

Q. Okay. And you recall that Mr. Kindle gave a post-Miranda statement in this case, in the 1986 case?

A. Yes, he did.

Q. Okay. And I believe subsequently pled guilty?

A. That is correct.

MS. ACHILLE: No further questions.

THE COURT: Mr. Wheeler, do you have any cross-examination?

MR. WHEELER: Briefly.

CROSS-EXAMINATION

BY MR. WHEELER:

Q. Good morning.

A. Good morning.

Q. How are you doing?

A. Doing well, thank you.

Q. The case resulted in two convictions; right?

A. That is correct.

Q. All right. Back then, I guess Sarasota was a smaller town?

A. Well --

Q. I think all the towns were small.

A. Being over here today, it's still smaller than Broward County. Yeah, it's a small place. And the

neighborhood they grew up in, it was, you know, small. It still has a community feel to it, I'd like to think.

Q. Okay. The lead investigator on the case was Detective Schultz; is that correct?

A. That is correct.

Q. And he was the one that actually worked closely with the assigned Assistant State Attorney, Mr. Denny?

A. That is correct.

Q. And Mr. Denny was a friend of yours over the years?

A. Correct.

Q. You don't recall what happened in Mr. Green's case, do you?

A. I think -- didn't we discuss that earlier, in the round of deposition?

Q. I think we did.

A. Yeah. He -- he was subsequently convicted. I did not know that. I think that was in our discussion. But, no, I did not follow the subsequent, you know, conviction of Mr. Green, or any of that. And I told you that earlier.

Q. Okay. And you weren't aware that the case went to trial?

A. Until you kind of told me; correct.

Q. And, certainly, Mr. Denny didn't run it by you

that he was calling Mr. Green to -- Mr. Kindle to --

A. No.

Q. -- testify against Mr. Green?

A. No, Mr. Denny didn't have the person -- that type of personality.

Q. Would Mr. Schultz be more aware of that kind of situation?

A. Well, you know, he's retired. And I'm not gonna testify to what Mr. Schultz -- or, Detective Schultz might know.

And as I told you, you know, Assistant State Attorney David Denny died in his 30s of leukemia. So I don't -- I'm not gonna stand here and tell you what -- who's better and who's not. You know, as I told you earlier, David was his own man, so.

Q. Well, Detective Schultz had worked more closely with?

A. In this particular case, if there was any negotiations done, correct, that would have been between those two gentlemen. And I'm not privy to that. That's about the most honest I can be with you, sir.

Q. Okay, I appreciate it.

MR. WHEELER: Nothing further, Judge.

THE COURT: Thank you.

Anything further, Ms. Achille?

MS. ACHILLE: Nothing further.

THE COURT: Okay, thank you very much.

THE WITNESS: Thank you, your Honor.

(Witness is excused.)

MS. ACHILLE: Judge, I saw the witnesses that the State [sic] intends to call.

I do have Sergeant Robinson, who I know spoke the date of conviction. I know that she would more than likely like to ask for a sentencing recommendation. But, if I could, I'd like to, at least, lay out what the State's asking, and then if I could let Miss -- Sergeant Robinson speak after that?

THE COURT: Absolutely.

MS. ACHILLE: Okay. So, under 775.084, subsection (1)(b), the State is asking for the Court to find the defendant a violent career criminal.

In addition to the certified convictions that have been entered into evidence, which would satisfy the statute because they are enumerated as violent felonies, also the felony for which the defendant is convicted, which is a manslaughter, with the current date of offense being June 28th -- June 26th through June 28, 2015. It also would qualify under that statute.

And, also, more importantly, besides these

being violent felonies, the berg dwelling is an enumerated violent felony under the statute.

The facts of the 1986 case also, are particularly troubling, and I think would warrant this type of designation. Starting from 1986, and I know that there may be some mitigating evidence that your Honor may hear, the defendant was originally convicted of a violent crime where he and a codefendant beat a victim to the point where the victim required over 100 stitches, lost partial hearing, and they robbed him. And the -- that sentence was seven years Florida State Prison. He subsequently, Mr. Kindle was subsequently, sentenced to probation on some burglaries.

He also was convicted of -- or sentenced to 17 years Florida State Prison. And, as part of his priors, which your Honor can see as part of the, I believe in the pen pack that's part of State's Composite B, those aren't his only priors. Those are the one that happen to satisfy the violent career criminal statute. His other priors consist of another burglary from 1985, a dealing in stolen property from 1986, all of which he was convicted. And, if, your Honor recalls, the defendant in this case took the stand, and also admitted that he was a

convicted felon and that he was convicted, I believe seven times was the number, and when just doing the simple math of how many counts that he was convicted of in addition to the two other cases, that's consistent with the State's evidence that I represented before your Honor.

I say all that to say one of the things that stood out is in the 1989 case, the defendant's probation was revoked. He was given an opportunity -- and it's all part of the judgments that's there -- he was given an opportunity to complete drug treatment and things of that sort. And he violated, fairly quickly, within that timeframe. He didn't even complete the probation. And then, was sentenced to 17 years as HOQ. His crimes have escalated since then. The defendant has been given an opportunity upon opportunity, whether it's through probation, drug treatment -- because I believe in, specifically in that 1989 judgment, your Honor, it says as part of the paperwork that he was to complete a drug program in Miami. And come down and complete the drug program. Which, he did not. And his crimes continued whereas he continued to burglarize, continued to commit violent crimes, culminating in the manslaughter, which the jury found a manslaughter

conviction in this case.

I would argue, Judge, that based on that, this is the type of defendant that this statute was designed for. He is a violent career criminal. He's already been designated in '89 -- or excuse me -- in 1991, at least, he was designated as habitual. And it's continued to escalate. And, so, I would argue that just finding him as a habitual offender isn't sufficient and doesn't meet the facts. Especially of this current case. You'll recall, because I know your Honor sat through, very attentively, throughout the trial, the fact of this case are -- were extremely violent. The victim in this case, Ms. Sarah Robinson, was strangled to death. The defendant left her there for, I believe it was at least two days; and by his own admission, went out, tried to get more drugs and smoked crack cocaine over her decomposing body. Those were the facts that were at trial. And the jury found him guilty of that. They categorically denied that there was any self-defense claim or else that would have been a justified homicide. And even though they may not have found that it met the burden of depraved mind under Murder II, they certainly found that it was a criminal act for which he was responsible under the

manslaughter statute.

What the State is asking for is for the Court to designate him as a violent career criminal under the statute. And I would be asking for the maximum sentence if he -- if your Honor finds that he's a violent career criminal, he would be eligible up to 40 years in Florida State Prison, with a 30 year min/man, if your Honor finds that to be. Because it is a discretionary min/man under the statute. And I'm asking the Court to use your discretion to find him as that because previously, he's been sentenced, he's been given opportunities to regain into society and become a productive member, and he's done the exact opposite. His crimes have escalated. And now, he's killed someone. And I just -- the -- the facts of this case are disturbing. His criminal history is disturbing. And I think that an appropriate sentence would be under the violent career criminal statute under the max.

And I know that Sergeant Robinson, I can proffer to the Court, and she'll be able to testify that, she's in agreement with this. And I know your Honor heard a little bit about the impact already, about -- that it had on her. She's a member, current member, of the military. I believe

it's the Army. And she had to be notified. She's been on active duty for many, many years. She served our country with the distinguished background. And, had to be notified while on active duty that the defendant killed her mother.

So if I could allow Ms. Robinson -- or Sergeant Robinson -- I'm sorry -- to testify as to her recommendations?

THE COURT: Yes.

Cassandra, can you swear in Sergeant Robinson because I think you might have to step down so she can see you while you're swearing her in?

THE CLERK: Yes.

THE COURT: Thank you.

THE CLERK: Please raise your right hand.

(Technical difficulties with video conference).

THE CLERK: Please raise your right hand.

Thereupon,

NASTESHIA ROBINSON,

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please state your name, and spell your last name for the record.

THE WITNESS: Nasteshia Michelle Robinson, last

name is R-o-b-i-n-s-o-n.

MS. ACHILLE: Thank you.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. ACHILLE:

Q. Good morning, Sergeant Robinson?

A. Good morning.

Q. I know that you were here for the entire trial; correct?

A. Yes.

Q. And you gave some initial remarks while you were here, in person, on the date that the defendant was convicted?

A. Yes.

Q. You are still an active military member; correct?

A. Yes, I am.

Q. Okay, and is the only reason why you're unable to be here today, in person, is because you were unable to get leave?

A. They granted my leave, but I had to fly back and forth on official military business to Fort Knox, Kentucky. Given that I'm a recruiter, there is a lot of times that I'm back and forth out of the United States. So after consideration, we spoke about it, that it was

going to be a little bit too taxing for me to go back and forth from Fort Knox to New Jersey to North Carolina, then down to South Florida. So we made the decision to just do it over the video conference.

Q. Okay. And, I know that you've had some opportunity to think about what you would like to see happen in this case with regard to any sentencing. Could you please let Judge Weekes know what your wishes are as the victim's sole next of kin?

A. Yes.

I can't see anybody, but I can agree 100 percent with your actual -- what you spoke about before I was allowed to speak. Whatever the maximum accountability is for this gentleman, given obviously he has done this particular crime to someone else as well, maybe not to the extent that they are no longer here, but I definitely agree with the State's recommendation.

Q. Okay. And so, you would be asking for the designation, not only for the defendant as a violent career criminal, but you'd be asking for him to be sentenced as the maximum sentence allowed under the law, which would be 40 years, with a 30 year minimum mandatory?

A. Yes, I am.

MS. ACHILLE: Thank you, Sergeant Robinson.

THE COURT: Thank you, Sergeant Robinson.

Mr. Wheeler, do you have any questions you'd like to ask?

MR. WHEELER: No questions, Judge.

THE COURT: Okay.

All right, thank you, Sergeant.

(Witness is excused.)

MS. ACHILLE: Okay, just hang tight. We're still going through the sentencing so you can remain to hear everything else. Thank you.

THE WITNESS: Thank you.

MS. ACHILLE: That's it, Judge, that I have in terms of presentation. I would just -- before I.

THE COURT: I'll allow you, after Mr. Wheeler puts on, whether today or when we're bifurcating it, to make any closing remarks.

MS. ACHILLE: Sure.

THE COURT: So I'm certainly not telling you you're done.

MS. ACHILLE: Okay, Judge.

THE COURT: I didn't know if you had any other witnesses, and then I'll allow Mr. Wheeler to put on anybody that he has. And then, when we bifurcate it, before I actually sentence, I'll allow you all to do your closing arguments in light of all of the

information that's going to come out.

MS. ACHILLE: Okay. I would just -- the only thing I would say before I sit down is that the State has met its burden under the statute. And I don't know if your Honor wants it, but there's -- I'll address it if it becomes an issue because I have additional case law regarding the habitualization, but it doesn't -- if it becomes an issue, I'll address it then.

Thank you, your Honor.

THE COURT: Okay.

Mr. Wheeler?

MR. WHEELER: Thanks, Judge. Your Honor, Defense would call Pastor Terry Blunt.

(Witness enters courtroom.)

THE CLERK: Please raise your right hand.

Thereupon,

TERRY BLUNT,

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: Yes, I do.

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: Terry Blunt, B-l-u-n-t.

MR. WHEELER: May I inquire, Judge?

THE COURT: Yes, Mr. Wheeler.

DIRECT EXAMINATION

BY DEFENSE:

Q. Good morning, Paster. How are you doing?

A. Good morning.

Q. How do you know Mr. Kindle over here (indicating)?

A. I know Reginald from the church. And at one time, he lived in my home. I knew him as one of our employers and worship leaders. I knew him as an active member of Real Time Ministries.

Q. How long have you know him for?

A. Well, about, maybe 12 years.

Q. Twelve years?

A. Uh-huh.

Q. And during that time, have you ever known him to have a substance abuse problem?

A. If he did, he kept it really undercover. So I didn't realize that he had any substance abuse problem. Or the magnitude of his problem.

Q. All right, and his involvement at the church, you said he was helping out in the praising?

A. Various different capacity. He worked with us in various different capacities. We have a homeless ministry where we fed the homeless over on Blunts Road.

No relationship to me, but...

And, also, helping us set up for various events in the community. So he was pretty active, and well respected in our congregation.

Q. Okay. Did you know that he had been to prison before?

A. Yes, yes. I am aware that he had some problems prior to coming to us, as many of the people that we serve and that we reach out to serve, that there are very few people in our community that haven't had some form of contact with the law enforcement, or with the Criminal Justice Department.

Q. And, you said at one point, Reggie actually stayed in your home?

A. Yes. I had a -- at that time, I had a house over in Dillard, on 12th Court. He stayed there a while as he was transitioning, getting himself together.

Q. Okay. And as long as you've known Mr. Kindle, had he ever been violent towards you or have you ever seen him lose his temper?

A. No, no. He's always been pretty even-keeled as far as my interactions with him.

Q. He has a very calm --

A. Demeanor.

Q. -- demeanor?

A. Yes, very calm demeanor.

Q. And he's slow to anger?

A. I've never seen him get beyond that demeanor that I know. He's always been pretty even-keeled.

Q. Okay. And you've described him as being as helpful as he can around the parish?

A. Yes, yes. He was very helpful. Yes.

Q. And these included feeding the homeless and?

A. And on occasion having an opportunity to tell of his prior experiences either with the law, or the trouble that he had overcome at that time. He was -- he would make the people that we had the opportunity to speak with aware that he had problems, and that he had to overcome those problems and those issues.

MR. WHEELER: Judge, I don't have any further questions.

THE COURT: Thank you, Mr. Wheeler.

THE WITNESS: And I'd just like to say for the record, that I do give my condolences to the Robinson Family.

THE COURT: Ms. Achille, do you have any questions?

MS. ACHILLE: Very briefly.

CROSS-EXAMINATION

BY MS. ACHILLE:

Q. Good morning, Pastor Blunt?

A. Good morning.

Q. You said that you know Reginald Kindle from church. What years were they?

A. I met him in 2000 -- about 10, 9 years ago.

Q. The years?

A. Yeah.

Q. Like, give me the years.

A. '04. Somewhere like that. I would have to look on our role book to answer what --

Q. Okay. So you think --

A. I met him at one ministry, which was called The Shepherd of the Lord, which was over by Fort Lauderdale High School. And he left there. He came to our ministry.

Q. Okay. And you think sometime around 2004. How about when he lived with you, what year was that?

A. That was...

Around '09, somewhere like that.

Q. 2009?

A. Yes.

Q. Okay. And how long did he live with you for?

A. He lived in my house. My son was there.

Q. Okay.

A. Yes.

Q. So how long was that for?

A. Maybe six months, something like that.

Q. So when you say, "he lived in your house and your son was there," did you actually live in that house with your son and the defendant?

A. I, at that time, I had dual residence. I had a house in Dillard, I stayed. And I also had a place in -- which we have now -- in Deerfield.

Q. Okay. So you didn't live exclusively in the home with the defendant?

A. No, no. No, not, you know, every night.

Q. Okay. It was from 2009 to when?

A. I'm not sure. And I wouldn't want to state it on the record. So that I'm positive about the actual year --

Q. Okay.

A. But I can say emphatically that he did live in our home.

Q. Was it more than a year he lived with you?

A. No. No, less than a year.

Q. Okay. Less than a year?

A. Uh-huh.

Q. Okay. Less than six months?

A. Probably around six months.

Q. Okay, approximately six months. And you said out of that six months, you weren't there every day; correct?

A. No, I wasn't there every day.

Q. Okay. Now, since the timeframe that you worked with Mr. Kindle in the ministry, and when he lived at your home in 2009, you're aware that the current crime that he's been convicted of happened after that; correct?

A. After 2009?

Q. Yes, sir.

A. So that's why I didn't want to emphatically say.

I know he lived in our home.

Q. Okay, but you're not aware that after he lived with you?

A. He committed this crime.

Q. That he committed this crime?

A. Yes, I am. I am aware of that.

Q. You were aware of that?

A. Yes.

Q. And you're aware that even after working with you in a homeless ministry, and under your tutelage and your mentoring, he still killed someone?

A. I'm aware of that. I'm aware that he had left our home. And he was out on his own at that time.

Q. Right. And still killed someone?

A. Yes, I'm aware of that.

Q. Okay.

MS. ACHILLE: No further questions.

THE COURT: Thank you.

Mr. Wheeler, any redirect?

REDIRECT EXAMINATION

BY MR. WHEELER:

Q. Pastor Blunt --

A. Can I say, for the record --

MS. ACHILLE: Well, Judge, I would just object to a narrative if there's no question pending.

THE COURT: Yes.

Mr. Wheeler?

BY MR. WHEELER:

Q. Let me ask you a couple questions first, Pastor?

A. Sure.

Q. You're not solid on the dates?

A. No, I'm not solid. I'm not solid on the dates.

Q. You're not solid on the length of time?

A. I had my anniversary last night and they had to remind me.

Q. Okay. The man sitting at this -- who is this man sitting at this table (indicating)?

A. That's Reginald Kindle.

Q. All right. You know him face-to-face?

A. Yes.

Q. And you're able to identify him?

A. Yes, I am.

Q. And he's the person that stayed in your house for at least six months?

A. Yes.

Q. Okay. Is there anything else you wanted to tell the Court before we --

A. I just wanted to say the reason why I took interest with Mr. Kindle. I too had a stay with the Criminal Justice Department about 30 something years ago, maybe 40 years ago. And, a judge gave me an opportunity to get my life together. And I took that opportunity, and we started Real Time Ministries. I was in some deep trouble, at that time. And, thank God that the judge gave me an opportunity to turn my life around.

Q. Thank you, Pastor.

THE COURT: Thank you.

Thank you, Pastor.

(Witness is excused.)

THE COURT: Mr. Wheeler, do you have any other

witnesses today?

MR. WHEELER: I don't have any other witnesses today, Judge.

THE COURT: Okay.

All right, so then let's talk about when we can reset the sentencing. I was just looking at my calendar and I am free the afternoon of March 2nd or March 3, all afternoon.

I don't know, I think that should be enough time for you to issue subpoenas if you need to, Mr. Wheeler.

I don't know what your schedule is. But I figured I would throw those dates out because those are probably the earliest dates I have.

MS. ACHILLE: What time starting on the 2nd or the 3rd, your Honor, please?

THE COURT: I am free all -- well, I can probably see...

March 2nd, I could actually, probably, do anytime after, let's say, 10:30.

MS. ACHILLE: Okay.

THE COURT: All day.

And, then, March 3rd, we have some stuff in the morning. So March 3rd it would be after 1:30, or March 2nd, anytime after 10:30.

MS. ACHILLE: March 3rd, after 1:30?

THE COURT: Yes.

MS. ACHILLE: March 2nd, anytime after?

THE COURT: 10:30.

MS. ACHILLE: Okay. State's available either time.

Sergeant Robinson, do you have availability for those dates?

MS. ROBINSON: Can you hear me?

MS. ACHILLE: Yes, we can hear you now.

MS. ROBINSON: I would have to get with my chain of command and see. What did you say, March 2nd, March 3rd?

MS. ACHILLE: Right. At minimum, even if you're unable to appear in person, to appear maybe even in the same fashion today, that you're appearing via live conference?

MS. ROBINSON: Oh, yes. They won't have a problem with that.

MS. ACHILLE: Okay.

And, Judge, there is one thing that I know that Mr. Wheeler filed this morning regarding the Motion for Downward. Can we argue that, since we're here?

THE COURT: Well, I don't know if there was --

Sure, I mean we can argue that. Or, I don't

know if you wanted to put on all of your witnesses first, and then make all of the legal arguments for everything?

MR. WHEELER: Judge, it was my intent to argue the Motion for Downward Departure after the Court's made its decision whether or not to designate him a VCC or HF. Obviously, if the Court designates him a violent career criminal, and the Court chooses to impose a minimum mandatory sentence, obviously a downward departure is not going to be available for the Court to consider.

THE COURT: And here is what I was going say: Since the regard to the VCC is discretionary, I was going to wait to make my determination until I hear all of your mitigation as well.

MR. WHEELER: Thank you.

THE COURT: Because that would, obviously, take into consideration whether or not I use my discretion, regardless of whether I think the State has met its burden in terms of whether he legally qualifies. So, I would like to hear from everybody's witnesses first, and then we can address all of the legal issues at the end. I think it just makes more sense that way.

MS. ACHILLE: Okay.

MR. WHEELER: Judge, I would prefer to start March 2nd at 10:30, if the Court has available?

THE COURT: Yes.

MR. WHEELER: If we bleed into the afternoon, I'll make sure my afternoon is left open.

THE COURT: Yes, I mean, as of -- 10:30 is fine. I'll give you --

MS. ACHILLE: Okay.

THE COURT: And you tell me how much time you need because right now, I'm free as of 10:30 for the whole day. So I can give you guys as much time as you want.

MS. ACHILLE: I don't have any additional witnesses that I intend to put on. And it would just be argument as to the remaining outstanding issues, which I've laid out for what the State's asking for. And, then, I just have, I guess, some rebuttal for the Motion for Downward. So I'm not asking for a lot of additional -- more time. I don't know.

THE COURT: Right.

So how many witnesses do you intend to call? And I will listen to as many as you have, so --

MR. WHEELER: Right.

THE COURT: -- you tell me how much time you need.

MR. WHEELER: Judge, I'm hoping for two that morning.

THE COURT: Two witnesses?

MR. WHEELER: Two witnesses.

THE COURT: Okay.

MR. WHEELER: So that might take an hour. And then, I'd read an e-mail to the Court. That might take us to lunchtime.

THE COURT: Okay.

MR. WHEELER: So, if we do everything, we just plow through and do argument, and then finish if we have time.

THE COURT: Okay, that's fine.

MS. ACHILLE: I'm so sorry.

THE COURT: No problem.

MS. ACHILLE: Mr. Wheeler indicated off record, do you have the e-mail now? I only ask because I was just saying that I know her honor said if we can do as much as we can today, maybe shorten the time that we have to be there on the 2nd?

MR. WHEELER: The issue is I have it, but I didn't print a copy for the Court.

MS. ACHILLE: Oh, okay.

MR. WHEELER: So, I did also double-check, and I didn't bring a copy. My apologies.

THE COURT: All right, so why don't we then set it for 10:30 on March 2nd. And then I'll keep the early afternoon open for you guys all as well, in case we bleed through --

MR. WHEELER: Thank you, Judge.

THE COURT: -- into the early afternoon because I don't want to keep the staff here during lunch.

MR. WHEELER: Certainly.

THE COURT: And then we'll finish. Okay, if there are any issues before that, you all let me know. Otherwise, I'll hang on to all of this.

MR. WHEELER: Thanks, Judge.

MS. ACHILLE: Okay, thank you.

THE COURT: You're welcome.

MS. ACHILLE: Thank you, Sergeant Robinson.

MS. ROBINSON: Thank you.

(Thereupon, the proceedings were adjourned at 11:08 a.m.)

C E R T I F I C A T E

- - -

I, Carol Singh,Florida Professional Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 2nd of April, 2020.

Carol Singh, FPR

IN THE CIRCUIT COURT OF THE 17TH CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO: 15008439CF10A

State,

vs.

REGINALD KINDLE,

Defendant.
_____/

Hearing before:

HONORABLE JUDGE MARIYA WEEKES

SENTENCING - DAY 2
(Page 58 - 101)

DATE TAKEN: March 2, 2020
PLACE: Broward County Courthouse
201 SE 6th Street
Courtroom 4810
Fort Lauderdale, Florida 33301

TIME: Commencing at 10:42 a.m. to 11:38 a.m.

Hearing taken before:

Carol Singh, FPR
Florida Professional Reporter
Empire Legal Reporting
110 SE 6th Street, Suite 1701
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ALSO PRESENT:
NASTESHIA ROBINSON, via video conference

I N D E X

STATE'S EXHIBIT INDEX

* * * NONE * * *

DEFENDANT'S EXHIBIT INDEX

(Reporter's note: Defendant's Exhibit was retained by THE COURT.)

- - -

THE COURT: We are on the record in State of Florida vs. Reginald Kindle, Case No. 158439CF10. This is the continuation of the sentencing that we started. Present is the State, the Defense, Mr. Kindle, as well as the victim's next of kin who's appearing via video conferencing.

MR. WHEELER: Judge, thank you for allowing us to bifurcate. If I can just call our first witness?

THE COURT: Sure.

MR. WHEELER: Judge, Defense would like to call Denise Bennett to testify.

THE COURT: I'm sorry?

MR. WHEELER: Denise Bennett.

THE COURT: Yes.

(Witness entering the courtroom.)

MR. WHEELER: Judge, where would you like her?

THE COURT: Wherever you want her.

MR. WHEELER: I understand.

Right here is fine.

THE CLERK: Can you raise your right hand?

Thereupon,

DENISE BENNETT,

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: Yes.

THE CLERK: Please state your name. Spell your first and last name for the record.

THE WITNESS: Denise Bennett. D-e-n-i-s-e, Bennett, B-e-n-n-e-t-t.

MR. WHEELER: May I inquire, Judge?

THE COURT: Yes, Mr. Wheeler.

DIRECT EXAMINATION

BY MR. WHEELER:

Q. Ms. Bennett, good morning?

A. Good morning.

Q. Thank you for being here this morning. You testified briefly during the course of the trial; is that correct?

A. Yes.

Q. I just want to make sure the Judge is able to hear exactly what you're acknowledging who Reggie is and how long you've known him for. So how long have you known Reginald Kindle for?

A. Over 25 years.

Q. And how do you know him?

MS. ACHILLE: I have to ask her to speak up. She's very soft-spoken and I can't hear her too good.

THE COURT: Yes. And if she's having a hard time, I don't know if maybe we can get her closer to the witness stand, then we can move over the

microphone?

Unless you can project your voice? Whatever is easier for you.

THE WITNESS: I can try.

THE COURT: Okay, there you go.

MS. ACHILLE: That's good.

THE COURT: All right, just like that.

BY MR. WHEELER:

Q. So you said you've known Reggie for 25 years?

A. Yes.

Q. How do you know him?

A. He was a roommate.

Q. Okay. And you know that he's been in and out of prison before; yes?

A. Yes.

Q. Were you aware what for?

A. No.

Q. This last time that he stayed with you, how long did he stay with you for?

A. Four months.

Q. Okay. And he stayed there with Sarah?

A. Yes.

Q. Okay. How many people were living in your house at the time?

A. A lot.

Q. So where would they sleep?

A. In the living room.

Q. Did they have like, a partition or any privacy?

A. Somewhat of a partition. A man-made partition.

Q. Okay. The time that you've know Reggie, has he always worked?

A. Yes.

Q. What about Sarah, was she working at the time?

A. Off and on.

Q. Okay. What can you tell the Court about their relationship, as far as you know?

A. Bittersweet.

Q. How so?

A. I don't like to speak about Sarah this way, but Sarah had a very bad temper. She had a very bad temper. She was like, on and off. I'm not no doctor, but I have a nephew that he's bipolar, and she strikes me as a bipolar person. Because one minute she can be the sweet --

MS. ACHILLE: Objection, Judge, as to relevance and also outside the scope of this witness's knowledge.

THE COURT: Overruled.

Go ahead.

MR. WHEELER: Go ahead and finish your answer.

THE WITNESS: She could be sweet as anybody could be. And then the next minute, she's like a madwoman. She just fussin', cussin', and just irate with no, to me, no reason.

She just wake up at night and just start waking up the whole house, yelling and screaming about something.

BY MR. WHEELER:

Q. Did you ever see her abusing any substance: alcohol, drugs, anything like that?

A. She used to drink.

Q. Okay. Would these personality changes kind of coincide with the drinking?

A. Sometimes.

Q. Was she ever violent towards you?

A. Yes.

Q. Can you tell the Court about that, please?

A. It was Thanksgiving, and we all had certain things to bring to Thanksgiving for the meal. And her and Reginald had to buy a turkey. Excuse me. He bought the turkey, and she got mad for some reason and she snatched the turkey from me. She said, you know -- and just, like I said, I don't know why, but she just go off on me on her little temper tantrum. And Kindle came in and he said, "Sarah, come on, leave it alone." And she

said, "No, no, no." And she went to calling me names. For what reason? I don't know. And then he pulled her to the side, and she calmed down.

Q. In your 25 years that you've known Reggie, have you ever seen him be violent?

A. No.

Q. How would you describe his personality?

A. He's a good guy. He was a good guy.

Q. Okay.

A. Good guy.

Q. Did you ever see him raise his voice towards anyone?

A. One time. At Sarah. This was another incident. She said that she was gonna hit me. And she drew her arm back, and Kindle grabbed her and he said -- he yelled at her, and he said, "Sarah, let's go." And they left and went outside.

Q. And just so the Court's aware, your current medicalized state, I see that you're in a motorized chair?

A. Wheelchair.

Q. The record can't take that down. Can you explain to the Court what your diagnosis is?

A. I have a muscle disorder. It's called...

Wait, let me think. Limb-girdle. And it got

me in a wheelchair. Confined to a wheelchair.

Q. Okay. And this time that she offered violence towards you, you were still wheelchair-bound?

A. Yes.

Q. And Reggie had to be called in and kind of calm things down?

A. Reggie was always in the area where Sarah was. So when she'll come -- come to my room sometime, and we sit down and talk like two civil women, no problem. And, like I said, in the flip of a script she just start fussing about something. I don't know why.

Q. And how would you describe their relationship? I mean, you said it was bittersweet but?

A. They had good days. They was having good days and bad days.

Q. They were romantically involved?

A. Yes.

Q. Did Reggie seem like he cared for Sarah?

A. He loved her.

Q. When you eventually asked them to leave, can you tell the Court what happened? Was it the Thanksgiving incident?

A. No. I had put them out, and I let them came back, this was during Christmas. It was cold and they had nowhere to go. So I let them come back. And Sarah

had another scene one night and she threatened to call someone over to burn my house down. And that was my last, you know, it was pretty much my last straw. So I told Kindle that he could stay, but I can't put up with Sarah temper. And I just couldn't do it no more. So Kindle said, No, if Sarah go, he's got to go too because he was in love with her. So they left.

Q. Is there anything that you want the Court to know about what you think of Reggie's character at this time?

A. He's not a bad person. He's really not. I think he just got caught up in love, to the point that he didn't see it wasn't really love.

Q. Did Sarah seem to care about Reggie?

A. Yeah, sometimes she did. Yeah.

Q. And when she was having these good moments?

A. Yeah, when they -- when she was in her good moment, they was the ideal couple. You know, she -- they hug, kiss. You know, just like an ideal couple.

MR. WHEELER: Thank you for coming this morning. The State may have some questions.

THE COURT: Okay, Ms. Achille?

MS. ACHILLE: Thank you, Judge.

CROSS-EXAMINATION

BY MS. ACHILLE:

Q. Good morning, Ms. Bennett?

A. Good morning.

Q. You recall, this is not the first time that we spoke; correct?

A. No. Right.

Q. You remember you were deposed at the State Attorney's office?

A. Deposed?

Q. Where you gave a statement prior to trial at the State Attorney's office?

A. Yes.

Q. And myself and Mr. Wheeler were there?

A. Yes.

Q. Okay. And do you recall, at that time, you said that you weren't afraid of Sarah?

A. No.

Q. Okay. So these incidents that you're referring to when you said that there was an incident at Thanksgiving. I think I referred to it as the "turkey incident"?

A. Yes.

Q. Because there were a couple of incidents that you describe?

A. Yes.

Q. You weren't afraid of her at that time?

A. No.

Q. And you actually indicated that you have your own weapon, a firearm. And that's part of the reason why you weren't scared of her?

A. Correct.

Q. Okay, so you can handle yourself?

A. Yes.

Q. Okay. And you didn't call the police?

A. No.

Q. You didn't call the police when the turkey incident happened?

A. No.

Q. You didn't call the police when you said that she threatened to burn your house down?

A. No.

Q. You actually didn't take her seriously?

A. No.

Q. Okay. And you weren't in fear of her at any time that she was at your house?

A. No, I'm just -- I was just tired of the up and downs.

Q. Right. The bickering?

A. Yeah.

Q. Okay. And that's what you would describe it as, bickering between a couple?

A. No. It wasn't between a couple, it was between the whole house.

Q. Okay.

A. She would jump on -- she would argue at my nieces, my nephews, saying that they did something which they didn't do. You know, it was just the overall of Sarah picking on certain people for no reason.

Q. Right. And the other incidents that you're referring to, just so that we're clear, cause we talked about this in -- when you gave your prior statement to me.

A. Okay.

Q. You didn't witness those incidents; correct?

A. Some of them I did.

Q. All right. None of them involved violence. We're talking about verbal argument; correct?

A. Yes. Yes.

Q. Okay. Now, I know that you've known Mr. Kindle for about 25 years?

A. Correct.

Q. And as part of that time, you said he stayed with you for four months?

A. Yes.

Q. And in that time, the four months, there were at least up to 10, 11 people in your house?

A. Yeah, about that much.

Q. Okay. In addition to your opinion of Mr. Kindle, you said that, "He got caught up in love," I think is what you said to Mr. Wheeler just now? That you believe that the situation is because, "He got caught up in love?"

A. Okay, yes.

Q. I'm just asking. That's what you said; correct?

A. Yeah, caught up in love.

Q. Okay. Do you know about Mr. Kindle's 1986 arrest for which he spent, I think like, 17 years in prison for?

A. I heard about it.

Q. Heard about it.

A. I knew about it, but I didn't know what the charge was.

Q. Right. Who did you hear about it from?

A. My brother.

Q. Your brother, okay. So do you know the circumstances regarding that? The violence that the defendant was convicted for against that victim?

A. No.

Q. You don't know that he beat that victim to the point where the victim lost hearing in his ear?

A. No.

Q. You don't know that he had conspired with his codefendant to rob that victim?

A. No.

Q. You also don't know that he knocked out that victim's teeth?

A. No.

Q. Okay, And there was no sexual or romantic relationship with that victim, that was just what he was -- plead guilty and got convicted of. Were you aware of that?

A. No.

Q. And, so, you'd agree with me that you don't know all about his past in terms of the violence in his past?

A. No, I don't.

MS. ACHILLE: No further questions.

THE COURT: Thank you.

Mr. Wheeler, re-direct?

MR. WHEELER: Quick follow-up, Judge.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. WHEELER:

Q. Denise, Ms. Achille asked you if you were aware of any type of or any violence that Sarah had towards you, and you answered, "No." Have you ever seen Sarah get violent with Reggie?

A. Yes.

Q. Can you please explain to the Court what happened?

A. It was an incident, and she was in one of her little moods, and she slapped him. And she was cussin' at him. And he just turned around, walked away, and sat back down. And I'm like wow. Most man's if a woman slapped him, they're gonna slap 'em back, but he didn't. He just turned, and walked away, and sat down.

Q. And, in your opinion, did that fit with his type of character?

A. That I knew, yes.

Q. Not the 23-year-old, drug-addicted Reggie that was over in Sarasota?

A. No.

Q. Okay. Reggie's got some burglary priors on his record, I'm not sure if you were aware of that or not. When he was staying with you, did you ever notice anything missing or anything stolen?

A. No.

Q. You trusted him to be in your house?

A. Yes.

Q. In fact, you invited him back, but without Sarah?

A. Yes.

MR. WHEELER: Nothing further, Judge.

THE COURT: Thank you, Mr. Wheeler.

All right, thank you very much Ms. Bennett.

(Witness is excused.)

THE COURT: Okay, Mr. Wheeler, do you have any other witnesses that you would like to call?

MR. WHEELER: Judge, just my client before sentencing. If the Court wants to hear from him now, you can, or if you prefer hearing later.

THE COURT: I mean, it's your hearing. So we can do it any way you want. I can hear from all of the witnesses, and then I'll give you as much time as you need to make legal argument.

MR. WHEELER: Judge, I'm ready to argue. I know that my client would like to make a statement to the Court before sentencing.

THE COURT: Okay.

MR. WHEELER: Judge, do you want him up on the witness stand?

THE COURT: Wherever is more comfortable for him. Either way is fine with me.

MR. WHEELER: Okay. I'd like him to be able to.

THE COURT: Okay, that's fine.

MS. ACHILLE: Are you able to move the camera so she can see the witness stand?

IT: I have all the cables here so I have to clean up.

MR. WHEELER: That's fine, we'll just do it here.

IT: I didn't know that.

THE COURT: Okay. All right, so Mr. Wheeler said that Mr. Kindle can stand at the podium so that's fine.

MR. KINDLE: Good morning.

THE CLERK: Please raise your right hand.

Thereupon,

REGINALD KINDLE,

having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please state your name, spell your first and last name for the record.

THE WITNESS: My name is Reginald Dwayne

Kindle. R-e-g-i-n-a-l-d, Kindle, K-i-n-d-l-e.

First off, I'd like to apologize to the Court, to my victim's daughter, to everyone for being here this morning. Ever since trial, I've asked myself: Did I overreact in this situation? I can't say that I did because of the information that I had.

DIRECT EXAMINATION

BY MR. WHEELER:

Q. And just so that we're clear, Reggie, what information did you -- were you going on at the time?

A. Well, from everything Sarah told me about her background, the fact that she had been in the Army, and that she was trained to kill with her bare hands. When she went on the attack, the only thing I could do was defend myself. And, that's what I did. I mean, I didn't hit her or anything, I just choked her until I thought she passed out. But, unfortunately, she didn't pass out, she died.

My actions after that was all over the place. Yes, I've done some wrong in my past. The 1986 incident that the State referred to, I allowed somebody to draw me into a situation where I wasn't aware of everything that was planned, or you know, I went along as lookout. Things got out of hand, and I wound up getting charged the same as my codefendant was. Far as the beating and

the stabbing, and all that, I was there. I'm not saying that I did it, but I was there. So, that's why I got charged the same as everyone else, as Ramus.

Yes, I have a drug problem. It allowed me to -- well, to supplement my income -- because I always worked -- to supplement my income, I committed burglaries to support my drug habit.

When I got out in 2011, it was a new start for me because I was free and clear from all of that. And, actually, I was just tired of doing time. So from there, I looked for love. I looked for love in all the wrong places. I was looking for acceptance. I just wanted to have a life. Because I had spent so much of my life -- I threw away so much of my life: in prison, on the drugs, homeless shelters, on the streets. You know, I was -- I was looking for love. I got in a few relationships that just didn't work out because the people that I was involved with, they saw that I was -- I was willing to give them whatever I could. Anything. And they used it. They used me.

When I met Sarah, I was just coming out of a bad relationship. I had been used for like, three-and-a-half years, and then dumped. So, when me and Sarah got together and, you know, she told me she loved Jesus. And we started talking. We used to go on

picnics together. We would go to second-hand shops and just shop for -- because she liked the little trinkets, you know. I stop and discover a new one -- what you call it -- a second-hand shop. And we plan our weekend, go back there, and just walk around and look. And go over here to Riverwalk, go to Publix, get something to eat, have a picnic. And all that was beautiful until the alcohol came in.

When the alcohol came in, you know, Sarah would get argumentative and jealousy would kick in. And I find myself on the receiving end, being arguing at for no reason as all. Some girl look at me in church or wherever, and that turns out to be another one of my bitches. And I don't even know this female. But, yet, I'm being accused because of something that happened to her, back in her past, you know. So she had distrust issues.

The night that this happened, had I been there to -- had I not been working that day, none of this would even have taken place because I would have been there to pay the rent. But my boss asked me to cover for somebody else that was off. So I covered. I gave her the money to go pay the rent. And this turned into something that just, wow.

And here, I stand now. I never meant to take

anybody's life. I never meant to hurt anybody, you know. I wasn't looking for that. I just wanted to have a life. And I thought I could make it with Sarah. Unfortunately, things turned so wrong. You know, I can't bring her back. All I can do is apologize and try to go on, you know. See, it wasn't one life that was taken that night, it was two. Because I lost my life too, at that same point in time. I'll never have the life that I desire. And that's all I got to say.

Q. Reggie, since you were arrested, what have you been doing incarcerated?

A. I've gotten back into the Bible. I've been teaching. I've been studying. I've completed two course -- two correspondence courses of biblical studies. I'm currently enrolled in two others right now. And, I've just been trying to help people. I'm working in the cellblock as a houseman. And, I just try to make myself available wherever I can, doing whatever I can.

I'm not an irresponsible person. I had some problems, yes, I admit that but...

Q. Is this the only charge that you've ever been arrest for that was not drug related?

A. Yes.

MR. WHEELER: And, Judge, I have a packet to

show the Court.

THE COURT: Yes.

MR. WHEELER: Judge, I'm not sure if you want to accept this into evidence or not, or?

THE COURT: Okay, well, are you moving it into evidence?

MR. WHEELER: Judge, I --

MS. ACHILLE: There's something else that Mr. Wheeler gave me, and I'm objecting to relevance of this. I don't know what this has to do with it.

MR. WHEELER: Judge, I guess, Defense 1 for sentencing purposes, if we can call a packet of diplomas from correspondence courses. If the State has no objection?

MS. ACHILLE: I have no objection, for the record.

THE COURT: Okay, so what's been premarked as Defense A --

MR. WHEELER: It's not premarked.

THE COURT: Or, what will be premarked as Defense A will be entered in as Defense 1 without objection. And it's a composite of several different diplomas.

(Defendant's Composite Exhibit No. A, Diplomas, was marked for identification.)

(Defendant's Composite Exhibit No. 1, Diplomas, previously marked as Defense A, was received in evidence.)

BY MR. WHEELER:

Q. Going back to the case from 1996, the case with your codefendant, Ramus Green. For that case, you received an incarcerated sentence for how long?

A. Seven years.

Q. And during the course of that case, did you accept a plea offer from the State, Mr. Denny?

A. Yes, I did.

Q. And a condition of that plea was that you testify against Mr. Green; is that correct?

A. Yes, it was.

Q. And did you?

A. Yes, I did.

Q. Are you aware of how long Mr. Green served in prison for his active role in that robbery?

MS. ACHILLE: I'm going to object to relevance, Judge.

THE WITNESS: I don't know.

THE COURT: Overruled.

THE WITNESS: I don't know, but it was longer than mine. It was longer than my sentence.

MR. WHEELER: Judge, I have no further

questions.

THE COURT: Okay.

Ms. Achille?

MS. ACHILLE: I actually have some very, just briefly, two questions, Judge, if I could ask?

THE COURT: Okay.

CROSS-EXAMINATION

BY MS. ACHILLE:

Q. Mr. Kindle, you agree that the certified priors that the State has entered into evidence, you agree that those are your priors?

A. Yes, they're mine.

MS. ACHILLE: Really, that's my only question.

THE COURT: Okay.

Mr. Wheeler?

MR. WHEELER: Nothing further. Thank you, your Honor.

THE COURT: Okay.

(Witness is excused.)

MS. ACHILLE: Is this what you guys are looking for?

THE COURT: No. Ms. Cassandra is out today so we're looking for Defense evidence stickers.

MS. ACHILLE: Oh, okay.

THE COURT: Okay. Mr. Wheeler, do you have any

other witnesses you'd like to call?

MR. WHEELER: I do not.

THE COURT: Okay. So then I will hear any argument that anyone has.

MR. WHEELER: Judge, respectfully the Defense has asked the Court to deny the State's Motion to Declare him a Violent Career Felon. From a very young age Mr. Kindle, if it pleases the Court, has a propensity for PSI.

Reggie has had a tough time. He had a person, that he thought was his biological father, deny him at an early age. He turned to substance abuse at a very early age. He was the right age when the crack cocaine epidemic came to Sarasota. It was, in fact, crack cocaine that led his entire criminal career, up to the point that the Court sees him now.

For the record, Judge, since he's been incarcerated, he's not been idle. But he's completed a multitude of correspondence Bible courses, gaspel echoes -- sorry -- Gospel Echoes. I can't talk this morning, sorry. Separate courses from the American Bible Academy. Separate lessons from Mount Zion. And, as the Court can see in the packet, each instructor has been praising him for his wisdom and his insight. And come to think of it, I think it's

really amazing what he might have accomplished had he not had this addiction.

His PSI lists nine prior felonies. And we've agreed to 6 or 7 of these felonies. The exact number, I can't remember. But, of course, of these, the most glaring one is the attempted felony murder from 1986. And, again, it's no dispute that crack cocaine was rampid in that part of Sarasota. The victim was struck in the head with a 2 by 4, and then stabbed. Again, Mr. Kindle turned State's witness, testified against his codefendant who had perpetrated the crime. He received a short prison sentence of seven years. But, unfortunately, the sentence never really addressed his addiction.

In 1991, he was sentenced to 17 years Florida State Prison for burglary. He went back because of the probation violation, which, again, was no doubt drug related.

After getting out in 2011, didn't have a lot of prospects as a convicted felon. He was homeless, uneducated, and it wasn't until he met a local philanthropist that he was given a scholarship to a food preparing program to be certified to work in restaurants. During his course at the Broward Outreach Center is when he met Ms. Robinson. And he

loved her. I think that much is undisputed. He helped provide for her. And they led a very simple, yet unstable life.

You know, it's -- on a Friday night, I might go and take my wife to a hockey game. I might take her out to dinner or to see a movie. Well, Reggie's idea, and Ms. Robinson's idea, of a good Friday night was him bringing home food from the restaurant, cracking open a couple tallboys, and just spending time with each other. And this is, I think, when I hear the words "functional addict" that I think of Reginald Kindle. But, again, they were content with this very simple life.

When he becomes stressed out, Mr. Kindle turns, again, to crack cocaine, as he did the night this incident happened. The jury in this case found that what he did, he did without a depraved heart and depraved mind. Manslaughter requires a no mens rea, but it requires a reckless conduct. And it's not, in fact, violent.

We're asking the Court to find Mr. Kindle is not a danger to the community, to deny the State's motion for a VCC designation. The designation of a VCC would include the possibility of a 30 year minimum mandatory sentence, the Court has discretion

to impose. We filed for a Motion for Downward Departure, Judge. Stating that Ms. Robinson was the initial aggressor of this incident that ultimately led to her demise.

Looking at the federal mortality rates for black men who are incarcerated, it gives him a lifespan of approximately 72 years. He's currently 57 years old this June. As the Court's aware, recidivism rates drop drastically with age. So what we're asking the Court to consider is a sentence of 8 years up to 12 years in Florida State Prison. And we're asking the Court to see this case for the tragedy that it is, and sentence Mr. Kindle appropriately. Thank you.

THE COURT: Thank you, Mr. Wheeler.

Ms. Achille?

MS. ACHILLE: Yes, your Honor, may I -- I'll stand, but may I argue from here just so I have everything laid out?

THE COURT: Sure.

MS. ACHILLE: Judge, the way that Florida Statute 775.084 subsection, I believe it's (3)(d), which is the violent career criminal section of the sentencing is written and reads it enumerates the things that the State must present as evidence for --

to qualify the defendant as a violent career criminal.

1. That the State shall obtain -- or excuse me -- the Court shall consider a presentencing investigation, which I know the Court has.

2. Written notice shall be served, which I argued and I presented evidence that it was served on August 10, 2015. And that's in the court record.

3. All evidence presented in open court, which it was. There were two certified convictions from 1991 and I believe 1989, which were presented by fingerprint analyst James Florian. And also the pen pack, which was also presented in that State's Exhibit Composite 2. And, then, also the live testimony from Detective William Spitler, who identified the defendant for purposes of the third conviction, which is from 1986.

Additionally, the burden that the State has to meet is preponderance of the evidence. And I would argue that the State has met that burden for this evidence. Twice now, in addition to the evidence that the State has presented, the defendant, under oath, has admitted that these are his priors. So, I argue to the Court that there's no question that these are his priors and that burden, by

preponderance of the evidence, has been met.

Additionally, it -- all of the priors satisfy the fact that they are violent priors, pursuant to the statute. And that the defendant was released within five years before committing the current offense, which he is to be sentenced for.

And subsection (6), I think is the most important because it states that if the court determines that the defendant meets the criteria under the subsection that I have discussed, the Court must, and it's not a discretionary, that the Court must sentence the defendant as a habitual violent felony offender. And the only thing that I would argue is discretionary is the minimum mandatory, as your Honor already knows.

The State is arguing that the minimum mandatory and the maximum sentence be imposed because one of the things that I know that your Honor can look at -- and I just want to add, if the Court declines to find that the defendant shouldn't be in prison under the habitual -- habitual violent career criminal statute, then the Court would have to submit written reasons as to why, within seven days of the hearing. I would argue, Judge, that he meets -- not only does he meet the criteria, but he also should be sentenced and

designated to have the minimum mandatory because his crimes have escalated.

One of the things that's interesting about the ways the statute is written is that either he meets the criteria or the Court finds that he's not a danger to the community. He is absolutely a danger to the community. Since 1986, he has done violent priors. There's at least three priors in his past that are violent, the two burglaries, and the attempted murder and armed robbery.

And one of the things that struck me that Mr. Kindle said this morning, nothing is his fault. Nothing. And, I know that your Honor somewhat will do a balancing act, as far as is there any redeemable qualities and can this person be rehabilitated. I don't know how someone can be rehabilitated that doesn't even see anything wrong with what they did in the first place. None of his priors are his fault. Even going back to 1986 priors, blames it all on his codefendant, even though he plead guilty to it and served time in prison for it. In addition, what I've heard, and the things that have been presented at sentencing on behalf of, I guess mitigating factors, are victim-blaming. These are all things that the jury, hearing all the facts, categorically denied and

found that it was not a justified killing. And that he was responsible for the killing. And so because members of the community sat and heard the testimony, weighed the arguments, and found him guilty of the things that categorically denied any defense that it was Ms. Robinson's fault, then I think that should hold great weight at sentencing, your Honor.

Additionally, you've heard from the victim's daughter in terms of the impact this has had. She has been, the victim's daughter has been, a productive member of community.

And I think that we all were clear that Ms. Robinson, the victim in this case, her vice and one of the things that she struggled with was alcoholism. But that does not mean that anything regarding how she lived her life made her responsible for how she was killed by the defendant in this case. Those actions lie solely and rest solely with the defendant, which he basically denies all liability for. And blames everybody else, but himself.

And, based on that, and the fact that he hasn't taken the responsibility that would be necessary to then, go to the next step, which would be rehabilitate, the State's asking for that maximum sentence. Because the public is at danger still.

His crimes are escalating. It is very clear just from the black letter of the law, and seeing what -- how his priors have gotten more serious. And based on that, your Honor, I would ask that you grant the State's Motion for a Violent Career Criminal.

And it's worth noting, he's already been designated and sentenced as a habitual felony offender. So, really, the next step, the next logical step, based on his crime's escalating, would be as a violent career criminal, and to sentence him to 40 years in Florida State Prison with a 30 year minimum mandatory. And that's in accordance with what the victim's daughter has also asked for, your Honor.

THE COURT: Thank you, Ms. Achille.

Anything further from anybody, from the State or from the Defense?

MS. ACHILLE: Nothing further from the State, Judge.

MR. WHEELER: Judge, I could probably list a litany of things, but I'm just going to go with the Defense respectfully disagrees with Ms. Achille.

And what the jurors saw as evidence in this case, the testimony that Mr. Kindle has provided to the Court this morning, I think he does own all of

his own past prior conduct. I believe that the violent career criminal is discretionary, while the prisoner re-offender is the only one that is not. The Court would have to make a written finding that he is not a danger.

Thank you.

THE COURT: Okay, thank you Mr. Wheeler. Anything further from anyone?

MS. ACHILLE: No, your Honor.

THE COURT: All right.

Okay, the Court having had an opportunity to hear from witnesses starting on February 21, 2020, when we began the sentencing, and today. The Court having heard from James Florian, fingerprint examiner that was the State's witness; as well as Deputy William Spitler. The Court also having considered the testimony of Pastor Terry Blunt, as well as Ms. Denise Bennett. Based upon what has been entered into evidence as State's 1 and 2, along with the testimony of fingerprint examiner James Florian, and the defendant's acknowledgment, this Court does find that the defendant was the individual who was convicted of burglary of a dwelling in Case No. 912758F, in Sarasota County, Florida on November 6, 1991. The defendant was also the

individual who was convicted on a burglar of a dwelling in Case No. 89 0595CFA N1 in Sarasota County, on July 7, 1989.

Based upon what has been entered in as evidence as State's 3, along with the testimony of Deputy William Spitler, the Court finds that the defendant was the individual who's convicted of attempted felony murder, conspiracy to commit armed robbery, and robbery with a deadly weapon in Case No. 863666AF N1 in Sarasota County, Florida, on April 2, 1987.

Pursuant to the Florid Department of Correction's records, the defendant was last incarcerated in Florida State Prison on Case No. 9102758F for 17 years, and was released on April 12, 2011. The offense for which the defendant was convicted at trial occurred between June 26th and June 28th of 2015, which is within five years from the defendant's release from prison.

The Court further finds that the defendant was promptly noticed of the State's intention to have the defendant declared a violent career criminal on August 10, 2015.

The Court has recorded no evidence that any of the prior qualifying offenses were set aside at any post-conviction proceeding, appeal, or pardon from

the government. Therefore, based upon the record before the Court, the Court finds that the defendant does qualify as a violent career criminal under Florida Statute 775.084 subsection (1)(d), and that it is necessary to sentence him as such for the protection of the public. And, therefore, the Court is going to grant the State's Motion to Sentence the Defendant As a Violent Career Criminal.

The Court also having an opportunity to consider the Defense's Motion for Downward Departure, based upon 921.0026 subsection (f), where the victim was the initial initiator, or provoker, or willing participant, the Court having sat through the trial, as well as listening to the defendant's testimony today, although the Court finds that it can depart, the Court does not believe at this point that it is appropriate to depart. And, therefore, I am going to decline to exercise my discretion to depart.

Therefore, in Case No. 158439CF10A I'm going to adjudicate the defendant guilty. And I'm going to sentence him to 40 years in Florida State Prison as a violent career criminal with a 30 year minimum mandatory prison sentence. I'm going to impose court cost, cost of prosecution, cost of court-appointed counsel. He's going to have to submit to two samples

of his blood or less intrusive method for the purposes of the DNA bank.

You have 30 days to appeal the Court's judgment and sentence in this case.

MS. ACHILLE: If I may approach, your Honor, I have the score sheet?

THE COURT: Yes.

MS. ACHILLE: Thank you, Ms. Robinson. I'll call you when I get back to my office; okay? I'll call you in a little bit.

Thank you, Judge.

Judge, with regard to restitution, I don't think that -- I would just ask that it's ordered and reserved, your Honor. I know that Ms. Robinson, her daughter, eventually was made aware that -- when she was in service, and I don't know if the Victim Compensation Fund paid for any funeral arrangements. So any restitution would be made payable to them. And I think we can probably work that out without a hearing. So I would just ask that it's ordered and reserved.

I understand he's going to prison for 40 years, but in the event if he gets an inheritance or whatever, if there's anything then, at least that judgment is there for the victim -- the victim's next

of kin, rather.

THE COURT: Mr. Wheeler?

MR. WHEELER: Judge, if there's a restitution hearing in the future, I would ask that my client be present for it.

THE COURT: Okay. I will order restitution and reserve as for the amount.

MS. ACHILLE: Okay, thank you.

MR. WHEELER: Judge, thank you for your time this morning.

THE COURT: Thank you, Mr. Wheeler.

Thank you, Ms. Lafarge.

MR. WHEELER: He's been in since the date of arrest.

MS. ACHILLE: Are you blowing a kiss at me in open court, Mr. Kindle?

MR. WHEELER: No, he's not.

MS. ACHILLE: Cause I could have sworn that's what I just heard and saw you do. Very inappropriate. While the Judge is still on the bench, I at least want that to be known that's what you're doing. Very inappropriate.

MR. WHEELER: Judge, there's a family member in the gallery behind Ms. Achille.

MS. ACHILLE: Madam Court Reporter, I'm hoping

that you could please get that on the record, what I said in open court.

The only thing I'm missing is page 2 of the restitution order I have for the prison paperwork. I'll have to go track it down. I don't know what I did with my page 2, and that's actually the signature page for your Honor.

THE COURT: Okay. Madam Clerk indicated that she believes it's 1,710 days time served so far?

MS. ACHILLE: Will you guys be here, at least for 5, 10 minutes why I track down a page 2?

THE COURT: Yes, I'll stay.

MR. WHEELER: Judge, we agree with that.

THE COURT: Okay.

All right, so 1,710 days time served.

THE CLERK: Okay.

MS. ACHILLE: I'll be right back.

(Ms. Achille exits the courtroom.)

THE DEPUTY: The officer will be here shortly for fingerprints.

MS. LAFARGE: It's already been taken.

THE COURT: Okay.

(Ms. Achille reenters the courtroom.)

MS. ACHILLE: Judge, my colleague's going to print it out. We can't find a page 2. So he's going

to print it out.

THE COURT: That's fine.

MR. WHEELER: Judge, there's a problem with the disposition.

THE COURT: Okay.

MR. WHEELER: It shows manslaughter with a weapon. There's no weapon in this case.

MS. ACHILLE: No, there's no weapon.

THE COURT: Yes, okay.

So it should just be manslaughter.

Okay, we'll correct it.

MS. ACHILLE: May I just see the page that I did hand into the Court because I'm going to give it to him so he can type it?

THE COURT: Yes.

MS. ACHILLE: Thank you.

Madam clerk, how many copies do you need for prison paperwork, three? For a restitution order?

THE CLERK: Just to myself, no others.

They normally do three if the person is on probation.

MS. ACHILLE: Okay, thank you.

THE CLERK: Yes, ma'am.

MS. ACHILLE: Thank you, Judge.

THE COURT: Perfect.

THE CLERK: These are yours.

MS. ACHILLE: Okay. I'll take those back, but you still keep the victim impact sheet.

THE CLERK: I am.

MS. ACHILLE: But these are just my copies?

THE CLERK: Yes, ma'am.

MS. ACHILLE: Thank you.

Bye, everyone, have a good afternoon.

(Thereupon, the proceedings were concluded at 11:38 a.m.)

C E R T I F I C A T E

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I, Carol Singh,Florida Professional Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 2nd of April, 2020.

Carol Singh, FPR