No.

IN THE SUPREME COURT OF THE UNITED STATES

---

JOSEPH PATRICK KEEL, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

---

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

---

**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

---

CAREY HAUGHWOUT
*Public Defender*

Logan T. Mohs
*Assistant Public Defender*
*Counsel of Record*

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

## TABLE OF CONTENTS (APPENDIX)

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

**JOSEPH PATRICK KEEL,**
Appellant,

v.

**STATE OF FLORIDA,**
Appellee.

No. 4D18-1415

[December 9, 2021]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Bernard I. Bober, Judge; L.T. Case No. 14010926CF10A.

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

Ashley Moody, Attorney General, Tallahassee, and Lindsey A. Warner, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

*Affirmed.*

MAY, KLINGENSMITH and ARTAU, JJ., concur.

* * *

***Not final until disposition of timely filed motion for rehearing.***

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

| | |
|---|---|
| STATE OF FLORIDA, | Case No. 14-10926CF10A |
| Plaintiff, | Judge: Bernard Bober |
| v. | Appellate Case No. 4D18-1415 |
| JOSEPH KEEL, | |
| Defendant. | |

**ORDER GRANTING IN PART AND DENYING IN PART**
**DEFENDANT'S THIRD MOTION TO CORRECT SENTENCING ERRORS**

**THIS CAUSE** came before the Court upon Defendant's Third Motion to Correct Sentencing Errors, pursuant to Rule 3.800(b)(2), Florida Rules of Criminal Procedure, filed through appellate counsel on August 9, 2021. Pursuant to Court Order, the State filed a Response thereto that was received by the Court on August 27, 2021. The Court, having examined the instant motion, the State's Response, the court file, and applicable law, finds as follows:

On March 16, 2018, Defendant was convicted by jury of the following offenses:

- Count 1—Attempted First-Degree Murder with a Firearm
- Count 2—Attempted Robbery by Actually Possessing and Discharging a Firearm and Inflicting Great Bodily Harm
- Count 3—Possession of a Firearm by a Convicted Felon

On June 17, 2021, at his most recent resentencing hearing (his *third* resentencing hearing), Defendant was again declared to be a habitual felony offender and resentenced as follows:

- Count 1—Life in prison, with a minimum-mandatory term of 25 years
- Count 2—30 years in prison, with a minimum-mandatory term of 25 years
- Count 3—30 years in prison, with a minimum-mandatory term of three years.

Defendant was also ordered, *inter alia*, to pay $3,150 in restitution to the victim.

Defendant has a pending appeal with the Fourth District Court of Appeal, Case No. 4D18-1415.

In the instant motion, Defendant raises the following claims:

Claim 1

Defendant claims that the scoresheet used at his most recent resentencing hearing—totaling 249 points—had three errors totaling 19.2 points, and if corrected, would and should total 229.8 points.

Claim 2

Defendant claims that there was a mathematical error in determining the amount of restitution, and if corrected, would and should total $3,000 rather than $3,150.

Claim 3

Defendant renews his constitutional challenge to his designation as a habitual felony offender (previously raised unsuccessfully in his second rule 3.800(b)(2) motion).

Defendant requests a *de novo* resentencing hearing based on the above claims.

The Court decides as follows:

Claim 1

The Court adopts and incorporates herein the legal and factual reasoning that is set forth in the State's Response (which is limited to claim 1) and finds that 18.4 points—*not* 19.2 points—on Defendant's scoresheet were erroneous. The Court hereby accepts the amended scoresheet attached as Exhibit "F" to the State's Response and finds the total points of Defendant's scoresheet should be 230.6. This amended scoresheet shall supersede the scoresheet submitted at the previous resentencing hearing held on June 17, 2021. Accordingly, this claim is granted in part and denied in part.

Claim 2

The Court accepts the factual reasoning that is set forth in the instant motion and reduces the amount of restitution from $3,150 to $3,000. The Court shall correct and amend the sentencing documents to reflect restitution in the amount of $3,000. Accordingly, this claim is granted.

Claim 3

For the reasons that were set forth on the record in Defendant's previous resentencing hearings, the Court reiterates its declaration that Defendant *is* a habitual felony offender. Accordingly, this claim is denied.

Request for De Novo Resentencing Hearing

After re-reviewing the record, the Court finds that even with the change in the scoresheet from 249 points to 230.6 points (or even a change to 229.8 points, as claimed and requested by Defendant), it would nonetheless still have imposed the same sentences for counts 1, 2 and 3 that it imposed at the resentencing hearing of June 17, 2021. Accordingly, Defendant's request for a *de novo* resentencing hearing is denied.

Based on the foregoing, it is

**ORDERED AND ADJUDGED** that claim 1 of the instant motion is hereby **GRANTED IN PART AND DENIED IN PART**, to wit: The Court finds the scoresheet used at the resentencing hearing on June 17, 2021, should have totaled 230.6 points, rather than 249 points, and accepts the amended scoresheet attached as Exhibit "F" to the State's Response, which shall supersede the previous scoresheet (that totaled 249 points); and it is further

**ORDERED AND ADJUDGED** that claim 2 of the instant motion is hereby **GRANTED**, to wit: The Court shall forthwith correct the sentencing documents to reflect that the amount of restitution shall be $3,000, rather than $3,150. In all other respects, the sentencing documents shall remain unchanged; and it is further

**ORDERED AND ADJUDGED** that claim 3 of the instant motion is hereby **DENIED**, to wit: Defendant's designation as a habitual felony offender shall remain unchanged; and it is further

**ORDERED AND ADJUDGED** that Defendant's request for a *de novo* resentencing based on the change of points in his scoresheet is hereby **DENIED**, to wit: Even had Defendant's scoresheet reflected 230.6 points (or even 229.8 points, as claimed and requested by Defendant) at the resentencing hearing on June 17, 2021, the Court nonetheless would still have imposed the *same* sentences for counts 1, 2 and 3.

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Broward County, Florida, this 30 day of August, 2021.

BERNARD BOBER
CIRCUIT COURT JUDGE

Copies furnished to:

Susan Odzer Hugentugler, Esq.
Assistant State Attorney

Logan Mohs, Esq.
Assistant Public Defender (Appellate Counsel)
Office of the Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, FL 33401
Email: lmohs@pd15.state.fl.us

Lonn Weissblum, Clerk
Fourth District Court of Appeal
1525 Palm Beach Lakes Boulevard
West Palm Beach, FL 33401
Appellate Court Case No. 4D18-1415

**775.084. Violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms**

[The omitted subsections relate to additional sentencing enhancements not imposed in this case. Their omission changes nothing about the effect of the provisions listed.]

(1) As used in this act:
(a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in paragraph (4)(a), if it finds that:
1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.
2. The felony for which the defendant is to be sentenced was committed:
a. While the defendant was serving a prison sentence or other sentence, or court-ordered or lawfully imposed supervision that is imposed as a result of a prior conviction for a felony or other qualified offense; or
b. Within 5 years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within 5 years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.
3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance.
4. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this paragraph.
5. A conviction of a felony or other qualified offense necessary to the operation of this paragraph has not been set aside in any postconviction proceeding.

[subsections (1)(b) – (1)(d) omitted]

(e) "Qualified offense" means any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

(2) For the purposes of this section, the placing of a person on probation or community control without an adjudication of guilt shall be treated as a prior conviction.

(3)(a) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender. The procedure shall be as follows:

1. The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender or a habitual violent felony offender.
2. Written notice shall be served on the defendant and the defendant's attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence in order to allow the preparation of a submission on behalf of the defendant.
3. Except as provided in subparagraph 1., all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.
4. Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.
5. For the purpose of identification of a habitual felony offender or a habitual violent felony offender, the court shall fingerprint the defendant pursuant to s. 921.241.
6. For an offense committed on or after October 1, 1995, if the state attorney pursues a habitual felony offender sanction or a habitual violent felony offender sanction against the defendant and the court, in a separate proceeding pursuant to this paragraph, determines that the defendant meets the criteria under subsection (1) for imposing such sanction, the court must sentence the defendant as a habitual felony offender or a habitual violent felony offender, subject to imprisonment pursuant to this section unless the court finds that such sentence is not necessary for the protection of the public. If the court finds that it is not necessary for the protection of the public to sentence the defendant as a habitual felony offender or a habitual violent felony offender, the court shall provide written reasons; a written transcript of orally stated reasons is permissible, if filed by the court within 7 days after the date of sentencing. Each month, the court shall submit to the Office of Economic and Demographic Research of the Legislature the written reasons or transcripts in each case in which the court determines not to sentence a defendant as a habitual felony offender or a habitual violent felony offender as provided in this subparagraph.

[subsections (3)(b) – (3)(d) omitted]

(4)(a) The court, in conformity with the procedure established in paragraph (3)(a), may sentence the habitual felony offender as follows:
1. In the case of a life felony or a felony of the first degree, for life.
2. In the case of a felony of the second degree, for a term of years not exceeding 30.
3. In the case of a felony of the third degree, for a term of years not exceeding 10.

[subsections (4)(b) – (4)(d) omitted]

(e) If the court finds, pursuant to paragraph (3)(a) or paragraph (3)(c), that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony

offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.
(f) At any time when it appears to the court that the defendant is eligible for sentencing under this section, the court shall make that determination as provided in paragraph (3)(a), paragraph (3)(b), or paragraph (3)(c).
(g) A sentence imposed under this section shall not be increased after such imposition.
(h) A sentence imposed under this section is not subject to s. 921.002.
(i) The provisions of this section do not apply to capital felonies, and a sentence authorized under this section does not preclude the imposition of the death penalty for a capital felony.
(j) The provisions of s. 947.1405 shall apply to persons sentenced as habitual felony offenders and persons sentenced as habitual violent felony offenders.
(k) 1. A defendant sentenced under this section as a habitual felony offender, a habitual violent felony offender, or a violent career criminal is eligible for gain-time granted by the Department of Corrections as provided in s. 944.275(4)(b).
2. For an offense committed on or after October 1, 1995, a defendant sentenced under this section as a violent career criminal is not eligible for any form of discretionary early release, other than pardon or executive clemency, or conditional medical release granted pursuant to s. 947.149.
3. For an offense committed on or after July 1, 1999, a defendant sentenced under this section as a three-time violent felony offender shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release.

(5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

(6) The purpose of this section is to provide uniform punishment for those crimes made punishable under this section, and to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

A9

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

| | |
|---|---|
| **THE STATE OF FLORIDA** | **INFORMATION FOR** |
| **vs.** | **I. ATTEMPT MURDER IN THE FIRST DEGREE** |
| **JOSEPH PATRICK KEEL,** | **II. ATTEMPT ROBBERY (FIREARM)** |
| **Defendant** | **III. POSSESSION OF A FIREARM BY A CONVICTED FELON** |

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

MICHAEL J. SATZ, State Attorney of 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 **JOSEPH PATRICK KEEL, on the 2nd day of August, A.D. 2014**, in the County and State aforesaid, did unlawfully attempt to commit murder in the first degree in that Joseph Patrick Neel did unlawfully, from a premeditated design to effect the death of **Joseph Nare**, a human being, attempt to kill **Joseph Nare** by shooting **Joseph Nare** with a firearm, and during the commission of this felony, Joseph Patrick Neel did actually possess said firearm, and discharge said firearm, and as a result of the discharge, inflicted great bodily harm upon **Joseph Nare**, contrary to F.S. 777.04(1), F.S. 777.04(4), F.S.782.04(1)(a)1., F.S. 775.087(1), F.S. 775.087(2)(a)1., F.S. 775.087(2)(a)2. and F.S. 775.087(2)(a)3., (L10)

**COUNT II**

MICHAEL J. SATZ, State Attorney of 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 **JOSEPH PATRICK KEEL, on the 2nd day of August, A.D. 2014**, in the County and State aforesaid, did unlawfully attempt to commit Robbery, by attempting to take from the person or custody of **Joseph Nare**, certain property of value, to-wit: money, being good and lawful money of the United States of America, with the intent to permanently or temporarily deprive **Joseph Nare** of a right to the property or a benefit thereof, by force, violence, assault or putting the said **Joseph Nare** in fear, and in furtherance of said attempt, Joseph Patrick Keel did point a firearm at **Joseph Nare** and did demand money, and in the course thereof, did actually possess said firearm, and discharge said firearm, and as a result of the discharge, inflicted great bodily harm upon Joesph Nare, with the intent to commit Robbery, contrary to F.S. 777.04(1), F.S. 777.04(4), F.S. 812.13(1), F.S. 812.13(2)(a) and F.S. 775.087, (L8)

**STATE OF FLORIDA vs. JOSEPH PATRICK KEEL** **Information 2**

**COUNT III**

MICHAEL J. SATZ, State Attorney of 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 **JOSEPH PATRICK KEEL, on the 2nd day of August, A.D. 2014**, in the County and State aforesaid, having previously been convicted on February 28th , 2007 of the Felony crime of Possession of Cocaine in the Seventeenth Judicial Circuit, did then and there have in his care, custody, possession or control a firearm, to-wit: a handgun, and during the commission thereof, Joseph Patrick Keel actually possessed or carried that firearm on his person, contrary to F.S. 790.23(1) and F.S. 775.087(2)(a)1.r., (L5)

**STATE OF FLORIDA vs. JOSEPH PATRICK KEEL** **Information 3**

**IDENTIFYING DATA:**
**B/M, D.O.B.: 4/17/1983**

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me MARK A. HORN, 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 offense(s), and the allegations as set forth in the foregoing Information would constitute the offense(s) charged, and that this prosecution is instituted in good faith.

M. C. Horn
Assistant State Attorney, 17th Judicial Circuit of Florida

SWORN TO AND SUBSCRIBED before me this 4 day of Sept, A.D., 2014.

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

A12

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

| | | |
|---|---|---|
| **STATE OF FLORIDA,** | : | **CASE NO.:** 14-10926CF10A |
| **Plaintiff,** | : | **JUDGE:** Bidwill |
| **v.** | : | |
| Joseph Keel | : | **NOTICE OF THE STATE'S INTENT TO HAVE THE COURT DECLARE THE DEFENDANT A HABITUAL FELONY OFFENDER** |
| **Defendant.** | : | |

Filed In Open Court,
CLERK OF THE CIRCUIT COURT
ON SEP 15 2014

**COMES NOW** the State of Florida, by and through its undersigned Assistant State Attorney, and hereby requests this Honorable Court to find the above-named Defendant, in this qualifying case, to be a **Habitual Felony Offender** pursuant to Section 775.084(1)(a), Florida Statutes.

In support of its request, the State relies on the following:

> The Defendant has previously been convicted of any combination of two (2) or more felonies in this state or other qualified offenses; and the felony for which the defendant is to be sentenced was committed within five years of the date of the conviction of the defendant's last prior felony or other qualified offense, or within five years of the defendant's release from a prison sentence, probation, community control, control release, conditional release, parole or court-ordered or lawfully imposed supervision or other sentence that is imposed as result of a prior conviction for a felony or other qualified offense, whichever is later.

**I HEREBY CERTIFY** that a true copy hereof was served on the Defendant and the Attorney for the Defendant, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, this 15 day of September, A. D. 2014.

MICHAEL J. SATZ
State Attorney

By: _____
Sasha Shulman
FLBar# 15720
Assistant State Attorney
Broward County Courthouse
201 Southeast Sixth Street
Fort Lauderdale, FL 33301-3306

BK# _____



rev. 3/14 WAL

#129A

A13

**** FILED: BROWARD COUNTY, FL Brenda D. Forman, CLERK 3/20/2018 2:55:00 PM.****

**17th JUDICIAL CIRCUIT**
**IN AND FOR BROWARD COUNTY**

**DIVISION:**
**CRIMINAL**

**DIVISION:** FLO

# JUDGMENT

THE STATE OF FLORIDA VS.

CASE NUMBER

DEFENDANT Joseph Patrick Keel 14-109260 CF 10A
Probation Violator

State Attorney C. Lane

Court Reporter L. Chinn

The Defendant, Joseph Patrick Keel being personally before this Court represented by A. Sapp, his attorney of record, and having:

*(Check applicable provision)*

- [X] Been tried and found guilty of the following crime(s)
- [ ] Entered a plea of guilty to the following crime(s)
- [ ] Entered a plea of nolo contendre to the following crime(s)

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE OF CRIME | ADD'L MONIES IMPOSED |
|---|---|---|---|---|
| 3. | Possession of A Firearm by A Convicted Felon | 790.23(1) 775.087(2)(a)1. | 2F. | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

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

The Defendant is hereby ordered to pay the sum of Fifty dollars ($50.00) pursuant to F.S. 938.03 (Crimes Comp. Trust Fund). The Defendant is further ordered to pay the sum of Five Dollars ($5.00) as court costs pursuant to F.S. 938.03(1) and 938.15 Fines imposed as part of a sentence pursuant to F.S. 777.083(1) are to be recorded on the Sentence page(s).

*(Check if applicable)*

Stayed & Withheld Imposition of Sentence
( ) The court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order)

Sentence Deferred Until Later Date
[X] The court hereby defers imposition of sentence until 4-27-18 @ 11am (Date)

( ) Pay $225.00 Trust Fund pursuant to F.S. 938.05(1)(a)

Count(s) _____: _____ DAYS/MONTHS BROWARD COUNTY JAIL W/CREDIT _____ DAYS TIME SERVED.

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

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 _____ day of _____ 20_____.

Deputy Clerk

ICC 112-65 JUDGMENT

Revised 7-2-08

A14

JOSEPH KEEL

| DIVISION: FW | [ ] ADJUDICATION WITHHELD | CASE NUMBER |
|---|---|---|
| CRIMINAL | [X] ADJUDICATED GUILTY | 14-10926CF 10A |

# FINGERPRINTS OF DEFENDANT

Fingerprints taken by:

MICHAEL SNOW #15616
Court Deputy

Name & Title

DONE AND ORDERED in Open Court at Broward County, Florida this MAR 20 2018 day of _____ 2-____.
I HEREBY CERTIFY that the above and foregoing fingerprints are of the Defendant

Joseph Patrick Keel, and that they were placed thereon by said defendant in my presence

in Open court this date.

JUDGE

ICC 112-57 FINGERPRINTS OF DEFENDANT

A15

**17th JUDICIAL CIRCUIT** SCNO: 062014CF010926A88810
**IN AND FOR BROWARD COUNTY**

**DIVISION: CRIMINAL** * corrected as to provision **DIVISION:** FW

# JUDGMENT and degree of Felony Count 2

THE STATE OF FLORIDA VS. CASE NUMBER

DEFENDANT Joseph Patrick Keel 14109261 CF 10A
Probation Violator

State Attorney S. Hugentugler

Court Reporter R. Widsor

The Defendant, Joseph Patrick Keel being personally before this Court represented by A. Sapp, his attorney of record, and having:

*(Check applicable provision)*

- ✓ Been tried and found guilty of the following crime(s)
- O Entered a plea of guilty to the following crime(s)
- O Entered a plea of nolo contendre to the following crime(s)

| COUNT | CRIME | OFFENSE STATUTE NUMBER(S) | DEGREE OF CRIME | ADD'L MONIES IMPOSED |
|---|---|---|---|---|
| 1) | Attempt murder 1°F 775.087(1) 775.087(2)(a)1 775.087(2)(a)2 775.087(2)(a)3 | 777.04(1) 777.04(4) 782.04(1)(a)1 | 1°F | |
| 2) | Attempt Robbery (firearm) | 777.04(1) 812.13(2)(a) 777.04(4) 812.13(1) 775.087 | 2°F | |
| 3) | ~~Poss. of a firearm by a conv. felon~~ | ~~790.23(1)~~ ~~790.23(1)(a)1~~ | ~~3F~~ | |

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

The Defendant is hereby ordered to pay the sum of Fifty dollars ($50.00) pursuant to F.S. 938.03 (Crimes Comp. Trust Fund). The Defendant is further ordered to pay the sum of Five Dollars ($5.00) as court costs pursuant to F.S. 938.03(1) and 938.15 Fines imposed as part of a sentence pursuant to F.S. 777.083(1) are to be recorded on the Sentence page(s).

*(Check if applicable)*

Stayed & Withheld Imposition of Sentence ( ) The court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in a separate order)

Sentence Deferred Until Later Date ( ) The court hereby defers imposition of sentence until _____ (Date)

(✓) Pay $225.00 Trust Fund pursuant to F.S. 938.05(1)(a)

Count(s) _____: _____ DAYS/MONTHS BROWARD COUNTY JAIL W/CREDIT _____ DAYS TIME SERVED.

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

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 22 day of July 20 21.

Deputy Clerk

nunc pro tunc 5/7/18

ICC 112-65 JUDGMENT Revised 7-2-08

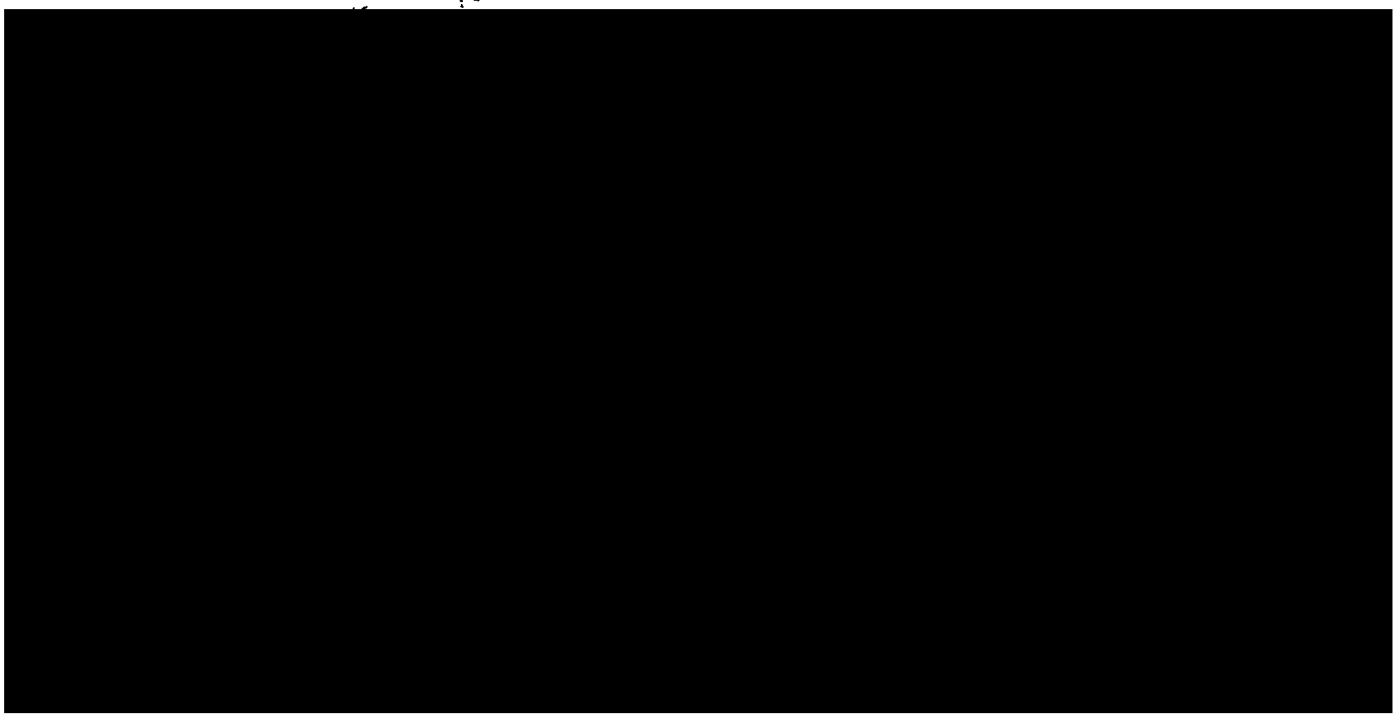
1315

3/16/2018

JOSEPH KEEL

| DIVISION: FWD | [ ] ADJUDICATION WITHHELD | CASE NUMBER |
|---|---|---|
| CRIMINAL | [X] ADJUDICATED GUILTY | 14-10926 CF 10A |

# FINGERPRINTS OF DEFENDANT



MICHAEL SNOW #15616
Court Deputy

Name & Title

DONE AND ORDERED in Open Court at Broward County, Florida this MAR 16 2018 day of _____ 2-____.
I HEREBY CERTIFY that the above and foregoing fingerprints are of the Defendant

Joseph Patrick Keel, and that they were placed thereon by said defendant in my presence

in Open court this date.

JUDGE

ICC 112-57 FINGERPRINTS OF DEFENDANT

A17



IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CRIMINAL DIVISION
JUDGE: BERNARD BOBER

CASE NO. 14-010926CF10A

STATE OF FLORIDA,

Plaintiff,

Vs.

JOSEPH PATRICK KEEL,

Defendant.
_____/

ORIGINAL

APPEAL SENTENCING

The above-entitled cause came on for hearing before the Honorable Judge Bernard I. Bober, Circuit Court Judge, Broward County Courthouse, Fort Lauderdale, Florida 33301, held on May 7th, 2018.

Rule 1.310 ( g ) Florida Rules of Civil Procedure requires transcript copies to be obtained from the court reporter unless so authorized by the Court.

APPEARANCES:

BY: MS. CANDACE LANE, ESQUIRE
BY: MS. TABITHA BLACKMON, ESQUIRE
ASSISTANT STATE ATTORNEYS
201 SE 6th Street
Fort Lauderdale, Florida 33301
On behalf of the State.

BY: MS. ANNMARIE SAPP, ESQUIRE
ASSISTANT PUBLIC DEFENDER
201 SE 6th Street
Fort Lauderdale, Florida 33301
On behalf of the Defendant.

* * * INDEX * * *



* * * EXHIBITS * * *

(Thereupon, the following proceedings are held.)

MS. SAPP: Annmarie Sapp on behalf of Mr. Keel. Judge, the first thing we need to do is address the motion for new trial that I filed.

THE COURT: Okay.

MS. SAPP: And that was filed within ten days of the verdict on March 20th, 2018. It's been reset a couple of times. Most recently for today's date for purposes of -- well to argue before the sentencing.

Judge, I stand on the motion. There are eight and then of course any other grounds that I can think of right now. I don't have anything additional to add. I'm requesting on behalf of Mr. Keel I am moving the Court for a new trial indicating the Court erred in denying several motions that the defense put before the Court.

The first motion was a motion in limine to exclude the firearm. Also, there was admissions of hearsay testimony, and I listed the witnesses that the hearsay testimony that I objected to came in through: Ms. Howell; Detective Figone; Mr. Fontanes; and the 911 recording. And any and all other hearsay objections that made during the course of the trial and the Court overruled. Excuse me.

Also admitting into evidence a bullet, the

phone, and the firearm. I argued chain-of-custody. That there was a lack of chain-of-custody or violation of chain-of-custody on the admittance of those items.

The -- I objected to the State's recall of Detective Franco and Joseph Nare. And then the limitations on my ability to cross examine Detective Franco. The admission of photographs from what is alleged to be the defendant's phone without proper predicate. The defendant's --

Obviously the denial of the defendant's motion for judgment of acquittal and renewed motion and admitting into evidence disposition and sentencing paperwork regarding the fingerprint form.

So those are all laid out in the motion, Judge, and I stand by the motion.

THE COURT: All right. And I believe the Court has already ruled on all of these different motions or objections that were made by the Defense. My ruling remains the same. Your motion for new trial is denied.

MS. LANE: And, Your Honor, I know we are set for sentencing. Set to begin at 10:30. My victim has already been present. I would just like an opportunity to see why he is not here right now.

THE COURT: All right. I will give you a moment to reach out to him.

MS. SAPP: And while we are doing that let me just tell the Court that last Friday we were set -- this past Friday we were set for sentencing and the Court had to reset for today.

THE COURT: Right.

MS. SAPP: And on Friday his family, his three members of his family, his mother his stepdad and family friend or relative who were also present. All three were present in court. Judge, they traveled from out of county and they were financially unable to come back today. I asked them do you want this -- maybe I can ask for a longer reset so you can make it back, and they are -- really don't have the financial ability. They would have to get a hotel, the gas expense, et cetera, and transportation. Completely unable to even think about a new date they would be able to put together those funds and make it back down to Broward County. I think they are up in the Tampa area. They are.

So I gave the option to his mom Sharon Jones. I said perhaps we can have the Court, if we reset it for today, have the Court reach out by telephone so she can at least be on the phone, number one, to

hear. And, number two, just brief testimony from her or anything that she wants to say on behalf of her son if the Court would indulge us with a phone call when we get to that point this morning. Okay.

THE COURT: All right.

MS. SAPP: I have her phone number. But that's when we get there.

THE COURT: I mean, I'm inclined to grant your request to allow her to testimony telephonically. I don't know in terms of keeping her on the phone the entire time.

MS. SAPP: Okay.

THE COURT: Whether I'm going to do that.

MS. SAPP: Definitely testify. She is -- We have a relationship so I will share with her anything that you told me.

THE COURT: In light of the hearing being moved, you know, if they had wanted a delay I would have been willing to do that.

MS. SAPP: Right. Right. The only thing, you know.

THE COURT: But --

MS. SAPP: But ultimately she said that she can appear by phone for the purposes of her testifying.

THE COURT: All right.

MS. SAPP: Okay. So that's that.

THE COURT: And the State --

MS. LANE: I just want to see what his issue is. Why he's not here today and how to proceed once I hear from him.

THE COURT: All right. Again, the same offer I made to the defense applies to you as well Ms. Lane in light of the fact that I recognize some people were inconvenienced by the resetting of the hearing the other day.

MS. LANE: Thank you, Your Honor. I am just going to step out.

THE COURT: All right. Regarding if Mr. Keel is able to proceed.

MS. LANE: Yes. Mr. Nare is present, the victim in this case. And also Mr. Florian, the fingerprint analyst is also here.

THE COURT: All right. Is there any evidence the defense would like to present?

MS. SAPP: Yes. Well, first, Judge, as I told the Court earlier, Annmarie Sapp on his behalf, Ms. Jones, his mom, yes, the mother, she wants to appear by phone. So I have her numbers. I think it's this one: (813) 531-0681.

(Thereupon, Ms. Jones appeared telephonically.)

THE COURT: Hello.
CALLER: Hello.
THE COURT: Hi.
MS. SAPP: I am looking for Ms. Jones.
THE COURT: We are looking for Ms. Jones.
CALLER: Yeah, she right here but she on another line right now. Hold on.
MS. JONES: Hello.
THE COURT: Ms. Jones, you're the mother of Joseph Keel?
MS. JONES: Yes, I am.
THE COURT: Yes. This is Judge Bober. You are on speakerphone in open Court. And your son's attorney, Ms. Sapp, is present and Ms. Lane, assistant state attorney representing the State is present as well. We are having a sentencing hearing today. I was informed by your son's attorney that you'd like to provide testimony by phone regarding the hearing today.
MS. JONES: Yes.
THE COURT: All right. Ms. Sapp you may go ahead.
MS. SAPP: Do you think she can hear me, Judge?
THE COURT: Go ahead. Speak up, Ms. Sapp. You can stand right there. And Ms. Lane you are welcome

to stand there too.

MS. LANE: I am fine.

THE COURT: Okay.

MS. SAPP: Hi, good morning, Ms. Jones.

MS. JONES: Hi, Annmarie.

THE COURT: How are you?

MS. JONES: Fine.

MS. SAPP: Okay. So let me ask you a couple of questions Ms. Jones. Your relationship to Joseph is? What is your relationship to --

MS. JONES: My son.

MS. SAPP: Okay. He is your son. Were you in court on Friday? Last --

MS. JONES: Yes, I was.

MS. SAPP: And I told the judge is it correct that you were unable to come back today, right?

MS. JONES: Correct.

MS. SAPP: Okay. Let's talk a little bit about Joseph. I have some records here, but I want the judge to hear from you. So, Ms. Jones, when Joseph was growing up did he have some issues in school?

MS. JONES: Yes, he did.

MS. SAPP: And did the school evaluate him and send some doctors? Did he have to go see some doctors?

MS. JONES: Yes, he did. He was slow learning.

MS. SAPP: Did you say slow learning?

MS. JONES: Yes.

MS. SAPP: Okay. And Ms. Jones is there a point when -- Was he in special classes for slow learners?

MS. JONES: Yes, he was.

MS. SAPP: And was he -- And did he eventually have to go to special schools?

MS. JONES: Correct.

MS. SAPP: Okay. And so we talked about this. What areas was he slow in if you remember?

MS. JONES: He was in reading, math and --

MS. SAPP: Did he have some problems with writing and with speaking overall?

MS. JONES: Yes.

MS. SAPP: Okay. And as his mom did you have other children as well?

MS. JONES: Yes, I do.

MS. SAPP: Okay. Are the other kids older or younger than Joseph?

MS. JONES: Joseph is the oldest.

MS. SAPP: Okay. And so did he go to high school in Broward County?

MS. JONES: Yes, he did. He went to Dillard High School.

MS. SAPP: Okay. And we talked about him going to different schools and different classes. Did he get in trouble a little bit in school?

MS. JONES: The kids were bullying him.

MS. SAPP: Okay. They bullied him. And Sharon -- Ms. Jones, so why would -- what was your thought and what was the school's thought about why they were bullying him if you know?

MS. JONES: Repeat that please.

MS. SAPP: Why did you think -- As his mom why do you think they bullied him?

MS. JONES: Just picking at him.

MS. SAPP: Did you hear? I couldn't here.

THE COURT: Just picking at him.

MS. SAPP: Just picking at him. Okay. And do you think that has something to do with his disabilities?

MS. JONES: Yes.

MS. SAPP: All right. Now let's talk about what those disabilities were. Did the school give him some sort of a diagnosis Ms. Jones?

MS. JONES: Yes.

MS. SAPP: What was that diagnosis?

MS. JONES: Mental.

MS. SAPP: Back then -- And that was a long time

ago, right?

MS. JONES: Right.

MS. SAPP: Right. So did they say he was mentally retarded?

MS. JONES: Yes.

MS. SAPP: Okay. Are any other members of your family -- Do any of the other members of your family have that same disability or diagnosis?

MS. JONES: His sister.

MS. SAPP: His sister and who else?

MS. JONES: And his baby brother Marcus.

MS. SAPP: Okay. So both of his siblings also had the same diagnosis, or were given the same diagnosis of mental retardation; correct?

MS. JONES: Correct.

MS. SAPP: Okay. How about you. Now Ms. Jones I don't want to put you on the spot, but we talked about you said it was okay for me to bring this to the Court's attention. Do you have any disabilities yourself?

MS. JONES: Yes, I do.

MS. SAPP: And what -- Tell the judge what that disability is.

MS. JONES: I was in Special Ed also.

MS. SAPP: Okay. So you have learning --

MS. JONES: And I don't catch on fast like regular peoples.

MS. SAPP: So you have learning disabilities as well; correct?

MS. JONES: Correct.

MS. SAPP: Okay. Now, those years actually starting from I think it was 2002 did -- did Joseph eventually get services from the Agency for Persons with Disabilities?

MS. JONES: Yes, he was but not now.

MS. SAPP: Right. Because he is in jail now, right?

MS. JONES: Right.

MS. SAPP: Right. And not only did they give him some services and make him a client, but they -- he used to get a check before he got arrested, right?

MS. JONES: Correct.

MS. SAPP: Okay. So Joseph got a disability check?

MS. JONES: It's SSD.

MS. SAPP: Okay. And do you get disability check as well?

MS. JONES: Yes, I do. I get SSI.

MS. SAPP: Okay. Now, in addition to Joseph having a diagnosis of mental retardation, which now

they call intellectual disability, any other diagnoses that you remember them giving him with mental illness as well?

MS. JONES: I don't remember.

MS. SAPP: Okay. All right. That's fair. But ultimately he was a client of the Agency for Persons with Disabilities and got a check, right?

MS. JONES: Right.

MS. SAPP: Okay. And actually I made one mistake Ms. Jones. Sorry. I think it was as far back as 1995 when he was eleven years old that they started doing -- and even younger -- when they started doing evaluations with him; is that right?

MS. JONES: Correct.

MS. SAPP: Okay. We talked about the different things that the judge could do in this case. Is there anything before we let you go that you want to tell Judge Bober about Joseph and what you think the Court should do today at the sentencing?

MS. JONES: Yes, I do.

MS. SAPP: Go ahead Ms. Jones.

MS. JONES: Your Honor. You hear me?

THE COURT: Yes, I hear you Ms. Jones.

MS. JONES: My child has a disability like I said, but the way I feel I think he need help, not

prison.

THE COURT: Okay.

MS. JONES: And I rather for him to get in like a -- what you call it -- do his time in work release.

MS. SAPP: And some sort of program or assistance. Is that what you are asking the judge to do?

MS. JONES: Yes.

MS. SAPP: Okay. All right.

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

MS. LANE: No questions from the State, Your Honor.

MS. SAPP: Okay. Ms. Jones is there anything else you want to tell the judge or are you done, are you okay for now?

MS. JONES: I'm okay for now.

MS. SAPP: Okay. I believe that the judge is going to let you off the phone right now, and then I will call you after the hearing. Okay.

MS. JONES: Okay.

MS. SAPP: Thank you, Ms. Jones.

THE COURT: All right. Have a good day Ms. Jones.

MS. JONES: You too.

THE COURT: All right. Thank you. Bye.

(Thereupon, telephonic appearance is concluded.)

MS. SAPP: And in continuing, Judge, I did review, and the Court can see I have a file in my hand. It's rather thick. It's actually what I have compiled going through Mr. Keel's file, which a tremendous portion of his file was attributable to mental health concerns, court evaluations, and different evaluations from the Broward County School Board dating back to 1995.

From 1995 going forward when we started there, Judge, they said he at the very beginning was educatable and trainable and mentally handicapped functioning at the age of eleven on the kindergarten level.

He has cognitive impairment and basically his cognitive development is one quarter of what an average -- or then what the average students were evaluated at.

As you heard from his mom -- And if the Court takes judicial notice, because there's court ordered evaluations that all make -- and there's like close to twenty of them or more that I can get my hands on and -- all making reference to the special classes and the special therapies that he was to be engaged in. They also make reference to him being bullied

and beaten in school because of his deficits.

From two thousand -- And that's 1995. If you fast forward about seven years, go to 2002, that was one of the first evaluations that I can get my hands on that was a court ordered evaluation.

From that time to 2015 when he got arrested he was evaluated a minimum of fifteen times -- actually sixteen. I'm sorry. Only three of those evaluations came back as competent.

I'm telling the Court this because -- Now, I am not arguing he is incompetent, Judge. I am just trying to bring to the Court's attention the severity of Joseph's deficits. Mom calls it -- and back then they did -- calls it that he was mentally retarded, but as the Court knows that definition has since changed. Joseph said he suffers from intellectual disability. I don't think there is any dispute about that.

Of those three evaluations that were competent, one was very, very early on, and one was very -- two were very recent right before -- Shortly before the Court took over this division there was a hearing, a competency hearing, wherein there were three evaluators. Two saying he was competent. One saying he was incompetent. It was ultimately the decision

of the Court, the Court's predecessor Judge Bidwill, that he was competent to proceed.

In addition to mental -- to being intellectually disabled, those evaluations also say that he has varying different disorders. Psychotic disorders. Schizophrenia. Schizoaffective disorder. Bipolar disorder. Major depressive disorder. And of course intellectual disability. There's also varying opinions regarding his restorability including a likely unrestorable.

So he's found competent, and after some time we eventually proceed to trial. Doesn't change the fact, Judge, that Joseph Keel is intellectually disabled. He's been a client of Henderson Mental Health. He was a client, until being arrested, of the Agency for Persons with Disabilities. And as a matter of fact he just handed me this morning a letter that he received -- Did you get this in jail? That he received in the jail. It's something about, you know, just being careful about your private information, et cetera. But it shows, you know, it says dear APD customer, parent or guardian. So he has clearly -- And I can share this with the Court and the State as well. So he is clearly a client. And not for no reason, Judge, because of

disabilities.

And just to follow-up. He, you know, he's got perceptual disturbances according to the doctor. Cognitive and emotional and behavioral difficulties. He is taking psychotropic medications including Haldol. And as the Court knows there is no medication for intellectual disability. He's received SSI -- excuse me -- SSD benefits from what I could see. He's been Baker Acted in excessive of over nine times. And he has attempted suicide.

Most recently I alerted the jail, having gone to see him or attempted to go see him, we learned he was on suicide watch right before we went to go see him. He comes down in the garb, suicide garb. I have alerted legal department at the jail. I have alerted the medical staff at the jail. And based on my concerns and my conversations with him they placed him back on suicide watch as recently as last week.

These are -- These are real and problematic conditions and concerns for my client. I'm not trying to make excuses for anything that's happened. I just want the Court to be fully aware, because there was nothing I can do by way of a motion for downward departure. And utilizing this voluminous information that I had at my disposal.

Because what I believe to be the law about what's going -- the sentencing that the Court needs to impose, and my reading and my understanding is, Judge, that because there is a 10/20/Life that the minimum the Court could impose would be a twenty-five year sentence of course as an habitual offender. I also believe the Court can go up to life, put State can discuss the rest with the Court.

If I am wrong, Judge, then I am asking the Court to give him from where he scores, you know, the bottom of the guidelines and sentence him to prison. But if on the chance that the Court has no other alternative, I'm certainly asking the Court -- I think twenty-five is an incredibly long period of time. He will be in his mid fifties. He will have missed the lives -- you know -- a good portion of the lives of his children certainly during their child years. And miss -- the possibility of his mom not being here is great. So I think that twenty-five years is just a very, very long time. It is a sufficient amount of time. It's also the amount of time that the officer -- Ms. Jackson recommends, I believe, in the pre-sentence investigation. So let me make this clear. If the Court must then that is the only reason I am asking for that twenty-five as

opposed to sentencing my client to life.

THE COURT: All right. Anything the State would like to present?

MS. LANE: Yes, Your Honor. I do have Mr. Nare, the victim in this case, present.

THE COURT: He can come forward.

MS. LANE: Thank you, Your Honor.

THE COURT: All right. Right there, sir.

MS. LANE: And defense is correct we are seeking that the defendant is sentenced as habitual felony offender. In addition pursuant to Florida Statute 775.087 we are asking -- our recommendation will be life with a minimum mandatory of twenty-five years. But I'd like to present some evidence and make some argument as to why.

THE COURT: All right. Let's swear in Mr. Nare, please.

THE CLERK: Raise your right hand.

THEREUPON:

JOSEPH NARE

a witness, having been duly sworn to testify in the above-entitled cause, testified under oath as follows:

THE WITNESS: Yes.

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

THE WITNESS: Joseph Nare. N-A-R-E.

MS. LANE: Your Honor, may I proceed.

THE COURT: Yes.

MS. LANE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. LANE:

Q Mr. Nare, how has the actions, being shot in the back of the head, and the contact you had with the defendant affected your everyday life?

A Very scared and sadness.

Q Very scared and sadness?

A Yes.

Q And what to you currently do for a living?

A Driving a taxi.

Q So you are still driving a taxi even after this incident; correct?

A Yeah, for a while, but now I'm doing Uber now.

Q Okay. And since you are basically doing essentially the same thing you did during this incident, how does -- how did this incident affect your ability to drive the taxi, or how does it affect you while you are in your career?

A When I drive I was very scared. And first three or four months I was in a lot of pain to drive. But I have to drive because I have to make a living.

Q And I know you discussed being in pain. Can you describe to the judge specifically how you've been affected physically by this incident in being shot?

A Yeah. I had a lot of pain because that bullet, that was the one that hit me and give me a lot of pain. It was -- And by that time, you know, my family was on vacation. I was by myself. And I was feeling so sad and that pain. And the pain was very bad.

Q And did you have to stop working at any point because of it?

A For one month.

Q So you weren't working for one month?

A Yeah.

Q Okay. And did you incur any medical bills?

A Yes.

Q And do you remember approximately how much it was that you incurred?

A Um, like one for ambulance it was about seven hundred something.

Q And are you sill trying to collect those medical bills?

A Yes.

Q Okay. And what is it that you would like to see happen? What do you think the judge should sentence the defendant to?

A Life.
Q Life?
A Yes.
MS. LANE: No further questions from the State.
MS. SAPP: I don't have any questions, Judge.
THE COURT: All right. Thank you, sir.
MS. LANE: Thank you.
(Thereupon, the witness is excused.)
MS. LANE: And I just have argument as well now. And I have Mr. Florian, the fingerprint analyst, for HOQ.
THE COURT: Well, let's discuss what designation the State is asserting the defendant qualifies for.
MS. LANE: The State is asserting the defendant qualifies for habitual felony offender.
THE COURT: Okay. And what prior convictions is the State relying on?
MS. LANE: And, Your Honor, the State would be relying on -- The State would be relying on case number 2008-560CF10A. It's a possession of cannabis with intent to deliver or sell. And the defendant was sentenced to -- In that case he was sentenced on April 28th, 2010 to one hundred eighty days Broward County Jail. Credit for only six days.
Another felony case the State would be relying

on would be case number 2002-15262CF10A. False reporting of a bomb. Second degree felony. And he was sentenced to nine months custody on November 25th, 2002. And just for the record in case there is any issue with that one there is a two thousand -- Nevermind. I am not going to use that case. It's a cocaine case.

THE COURT: All right. Well, the date of offense on this -- on the incident that he is being sentenced on today what is that?

MS. LANE: Oh, sorry. It was August 2nd, 2014.

THE COURT: Okay. So that would be within five years of the sentencing date on the possession of cannabis with the intent?

MS. LANE: That is correct, Your Honor.

THE COURT: Okay. Is the defense admitting that these convictions are in fact Mr. Keels?

MS. SAPP: No.

THE COURT: Okay. All right. Then since that is being disputed do you have any witnesses to prove that these are his?

MS. LANE: I do, Your Honor. Mr. James Florian.

THE COURT: All right.

MS. LANE: And Your Honor before we begin if Your Honor could take judicial notice of court file

14-10926CF10A and everything therein. There is some of the evidence, the fingerprints that were admitted into evidence for this case.

THE COURT: All right. The Court takes judicial notice of the court file and everything in it including the fingerprints of the defendant.

MS. LANE: Thank you, Your Honor.

THE COURT: All right. Let's swear in the witness, please.

THE CLERK: Raise your right hand.

THEREUPON:

JAMES FLORIAN

a witness, having been duly sworn to testify in the above-entitled cause, testified under oath as follows:

THE WITNESS: Yes.

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

THE WITNESS: James Florian. F-L-O-R-I-A-N.

THE COURT: All right. You may proceed.

DIRECT EXAMINATION

BY MS. LANE:

Q Mr. Florian where do you work?

A At the Broward Sheriff's Office.

Q And how long have you worked there?

A Thirteen years.

Q And what is your job title?
A Fingerprint analyst.
Q And what are your duties?
A I analyze fingerprints that come from the jail mainly through booking, but we also do comparisons for the State Attorneys' Office and ATF and other agencies.
Q And what training did you undergo to become a fingerprint analyst?
A Forty hour basic fingerprint course, and a forty hour advance fingerprint course. And we take sixteen hours every year of mandatory training to refresh.
Q So is that like a continuing education requirement that you are fulfilling.
A Yes.
Q And what is a ten print fingerprint comparison?
A It's basically when you put two sets of ten print fingerprints together and see if they belong to each other.
Q I am now showing you what has been marked State's 18 for trial for this particular case. And do you know what this is?
A It's a set of fingerprints that I took.
Q And whose fingerprints are those?
A Of the subject I had in front of me Joseph Keel.
Q And what date did you take those fingerprints?

A January 19th of this year.

Q Okay. And I'm now showing you, just for record purposes for this particular hearing, what has been marked State's A for Identification purposes only. Do you know what this is?

A Yes. It's a packet I received with the fingerprints attached.

Q Okay. And did you have an opportunity to compare those fingerprints to State's A as to the evidence that was received, the fingerprint card?

A Yes, I did.

Q Okay. And what is it that you determined upon your analyzation of the fingerprints?

A Both set of prints came from the same person.

Q And what person did that print come from?

A Joseph Keel.

MS. LANE: And, Your Honor, for the record I would like to admit into this hearing State's evidence the certified convictions self-authenticating with a seal.

THE COURT: All right.

MS. LANE: And for the record that is State's A as for Identification purposes only. Case number 02-152662CF10.

THE COURT: All right. That will be admitted

into evidence as State's Exhibit 1 for the purposes of the sentencing hearing.

(Thereupon, State's Exhibit A, marked for Identification, becomes State's Exhibit Number 1 entered into evidence.)

MS. LANE: Okay.

THE COURT: Give that to the clerk, please.

MS. LANE: Yes.

BY MS. LANE:

Q Mr. Florian I am now showing you, which is a self-authenticating document which is the certified conviction for case number 2008-560CF10A. I have marked it State's Exhibit B for Identification purposes only. Do you know what this is?

A Yes.

Q Okay. And did you have an opportunity to review it?

A Yes, I did.

Q Okay. And what portion of this conviction did you review?

A The fingerprints.

Q And did you have an opportunity to compare that to State's 18 which has previously been entered which is the fingerprint card?

A Yes, I did.

Q And what determination did you make?

A The prints were one in the same. Came from the same source.

Q And what source did those prints come from?

A Joseph Keel.

MS. LANE: Your Honor, at this time the State would like to admit what has been previously marked State's B for Identification purposes only for the sentencing hearing as State's Two.

THE COURT: All right. That will be admitted as State's Exhibit Number 2 for purposes of sentencing hearing.

(Thereupon, State's Exhibit B, marked for Identification, becomes State's Exhibit Number 2 entered into evidence.)

MS. LANE: Thank you, Your Honor. No further questions from the State.

THE COURT: Any questions from the Defense?

MS. SAPP: No, Judge.

THE COURT: Okay. Thank you, sir.

MS. LANE: Thank you.

(Thereupon, the witness is excused.)

THE COURT: All right. Anything else from the State?

MS. LANE: Just argument, Your Honor, as to why

we are asking for life.

THE COURT: Okay. Any evidence or any reason to believe that any of these convictions -- either of these convictions were set aside in any post-conviction proceedings or any appeal or that the governor pardoned Mr. Keel on these cases?

MS. SAPP: I'm not aware, Judge.

MS. LANE: Not that I am aware from the State.

THE COURT: Okay. All right. Before we proceed to argument anything else the defense wants to present?

MS. SAPP: No, Judge.

THE COURT: Does Mr. Keel wish to say anything?

MS. SAPP: I thought he did but he did -- I believe he gave a brief statement to the officer conducting the PSI. And he is saying that he will just stand on that, Judge.

THE COURT: All right. I mean, because he does have the right to say something today before being sentenced if he wants to. Do you understand that Mr. Keel?

MR. KEEL: (No audible response.)

THE COURT: And he is nodding his head yes. Do you want to say anything?

MR. KEEL: (No audible response.)

THE COURT: He is shaking his head no.

MS. SAPP: Right.

THE COURT: All right.

MS. SAPP: He just wants to rely on the --

THE COURT: Okay. Let's proceed to argument. Ms. Lane.

MS. LANE: Yes, Your Honor. The State is requesting life with a minimum mandatory of twenty-five years. I know that the defense attorney argued -- majority of her argument was the mental health and the intellectual disability of the defendant. Albeit, I don't have any other evidence other than the history that he had through mental health; however, on day of trial on March 16th, 2018 he was deemed competent to proceed. He understood the trial. There was an evaluation prior to that, and that's why Your Honor proceeded to trial. And he was found guilty.

The defendant, if you look at his prior criminal history, albeit he has a misdemeanor battery; he has felony bomb false report; a few misdemeanors; trespass; possession of cannabis; resisting without violence; possession of cocaine. Theft. Several misdemeanor violations. And then at some point he begins -- he picks up a shooting and throwing a

deadly missile. Aggravated battery with a deadly weapon. Improper exhibition of a weapon. And then he after that picks up the case that he went to trial on, which was the Attempted Murder in the First Degree. His acts of violence has continued to progress and get more violent.

On this particular day, on August 2014, his actions were very cold, very calculated, very planned.

If Your Honor remembers the evidence that was presented in trial, he opened the door to the taxicab driver using a towel. After he set up a ride via text message or via telephone with that taxi cab company, he preyed on the victim, Mr. Nare in this case. He directed him to several different locations. He decided at some point that he was going to rob him using the firearm. And not only did he just threaten him with the firearm, he actually aimed it at the back of his head. And but for the actions of Mr. Nare in this particular case, the bullet grazed Mr. Nare in the back of the head, and also shot him in the shoulder. The defendant didn't shoot at the victim in this case once, he shot at him three times. Two of which the bullets actually hit the victim in this case.

He did not show any remorse when getting arrested for this particular case. It is only when he was interviewed by the probation officers the first time you hear him say that he was remorseful for his actions that day.

I know on the PSI he alleged that he was using drugs, or he was under the affects of flakka. Like I said, there was no evidence of that in this particular case. Even if that was the case that doesn't excuse his actions for what he did to this particular victim.

Mr. Nare is still a taxicab driver. He said that he lives in fear. He has to -- The only reason why he continues to do taxicab driving is because he needs to make a livelihood. So everyday he is reminded of the actions of Mr. Keel.

He sustained permanent injury. Your Honor saw the scarring. Thankfully the shoulder injury has healed some and he doesn't have as much pain anymore. The victim in this case said that he did want life for the actions of Mr. Nare. For the affects that he's had. For the fear that he's been going through. There is restitution, so the State would also be requesting restitution.

And, Your Honor, the State is requesting life in

order to protect the community from the actions of the defendant. I don't think that he needs anything or any sentence short of life. And those are the reasons why the State would be requesting life in this case.

THE COURT: All right. Ms. Sapp anything else you want to say?

MS. SAPP: I think I've said a lot initially on the front end, Judge, but let me just follow-up just a couple brief things that the State made reference to or items.

Interesting to note in the report about his drug usage and started at thirteen years old, and escalated, no doubt, to the use of flakka in 2014.

2014 are the years that those three crimes most serious, I would submit to the Court, on the score sheet are. And those are the three crimes that were before the Court.

He pled right before the trial to two of those cases, and this was the remaining case of which the State made twenty-five year offer at that time. I don't think anything's changed now. I don't know why twenty-five would not be still suitable because it's certainly a substantial sentence. And Joseph did admit to the officer who did the investigation that

he was certainly under the influence on that particular day of this offense.

His -- When you look, I mean, yes, there are crimes on the score sheet, and it looks like a substantial amount, but the vast majority of them are not violent in nature and or a combination of misdemeanor crimes again going back to the fact that the most serious of crimes and the last three that happened in 2014.

And I'm just standing by my recommendation to the Court the minimum for Mr. Keel, which if the Court is bound to give him, would be twenty-five years. And if for whatever reason I am mistaken, the lowest permissible sentence would be one hundred and seventy-one point one five months Florida state prison.

MS. LANE: And just so the record is clear, the State did revoke that offer before trial.

THE COURT: Well, in any event, it wasn't the Court's offer.

MS. LANE: Okay.

THE COURT: So. All right. Anything else before the Court imposes sentence?

MS. LANE: Nothing from the State, Your Honor.

MS. SAPP: No. Nothing further, Judge.

THE COURT: All right. The Court has reviewed the PSI and weighed all of the testimony. And of course the Court does recall very vividly the testimony that was presented during the course of the trial.

The Court considering the argument of the Defense, the Court is aware and does agree that the defendant does have a mental health history. And there is evidence to suggest that drugs may have been involved. But the flip side of that is the offense that the defendant is before the Court for sentencing was done in a manner that suggested a good deal of planning. This wasn't a spur of the moment crime of opportunity. He called up a taxi. He carefully entered the taxi to try to not leave evidence behind. Really only by the grace of God is the victim still alive after he was shot in the head.

I do find that the defendant does qualify to be sentenced as a habitual felony offender. The Court does note that the jury on both Count One and Count Two did find that in the course of the crime committed that the defendant did actually inflict great bodily harm upon the victim as a result of discharging a firearm in his possession. Therefore the twenty-five year mandatory minimum does apply in

Counts One and Two.

And I do find after weighing the facts of the case and the defendant's history that the defendant does present himself as a danger to the community. And as such considering the facts of the case and his history, I do find that a life sentence is appropriate.

On Counts One and Two the defendant is sentenced to life in prison as a habitual felony offender with a twenty-five year mandatory minimum on each -- on those two counts. There was --

MS. LANE: And there is a three year min/man on Count Three.

THE COURT: Count Three that is punishable by up to thirty years in prison. Sentence is to run concurrent thirty years in prison on that count with a three year mandatory minimum of prison because of possession of a firearm by convicted felon. All three counts are to run concurrent with each other.

MS. LANE: Your Honor, if we could order restitution. Order and reserve. The victim in this case is still trying to get an amount.

THE COURT: All right. I will order restitution, reserve as to the amount. And, again, the defendant is a habitual offender on all three

counts.

MS. SAPP: Judge, just note my objection to the sentence that the Court imposed. I have been -- We have some other cases pending. There seems to be -- there's a lot out there about the sentencing and the structure when you have all these different designations. Habitual offender. The 10/20/Life. This and that. I'm just going to object to the Court also in addition to sentencing him to life imposed the twenty-five year minimum mandatory and the three year minimum mandatory.

THE COURT: All right. Your objection is noted for the record. Credit for time served. Do we have that calculated?

THE CLERK: Thirteen seventy-one.

THE COURT: Thirteen hundred and seventy-one days credit for time served awarded to the defendant on each count. Restitution is ordered and reserved. Assessing mandatory court costs, public defender fee, and one hundred dollars cost of prosecution. That will be converted to civil lien.

MS. SAPP: Yes, Your Honor.

THE COURT: Anything else the Court failed to address?

MS. LANE: No victim contact.

THE COURT: The defendant is to have no contact with the victim as a condition of his sentence.

MS. SAPP: And, Judge, I don't think I need to ask you to appoint the public defender for appeal. I think that is automatic now.

THE COURT: Yes. Public Defender's Office --

MS. SAPP: Okay.

THE COURT: -- is appointed for appeal. I don't know if you need to present an order on that.

MS. SAPP: I thought I did and I am not --

THE COURT: They are telling you you don't?

MS. SAPP: Right. So I will come in later on.

THE COURT: If you need it just bring it to me and I will sign it.

MS. SAPP: Thank you, Judge.

THE COURT: Anything else the Court failed to address?

MS. LANE: No, Your Honor.

THE COURT: Mr. Keel you have thirty days to appeal. Good luck, sir.

MS. LANE: Thank you, Your Honor.

(Thereupon, the following proceedings are concluded.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA )

SS:

COUNTY OF BROWARD )

I, LaQueeta Chinn, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings. And that this transcript is a true and complete record of my stenographic notes.

Dated this 5th day of October 2018.

LAQUEETA T. CHINN, COURT REPORTER
Commission#FF213733
Expires March 25th, 2019

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

STATE OF FLORIDA, CASE NO. 14-010926-CF10A

v. APPEAL NO. 4D18-1415

JOSEPH PATRICK KEEL,
Defendant
_____/

**SECOND MOTION TO CORRECT SENTENCING ERRORS**

The Defendant, through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), moves this Court to correct his sentence.

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

## Statement of the Case

Defendant was found guilty of attempted first-degree murder, attempted robbery with a firearm, and possession of a firearm by a convicted felon. [Exhibit A]. This Court sentenced him as a Habitual Felony Offender ("HFO") to life on the first two counts, and to 30 years in prison on the third count. [Ex. B]. After a previous 3.800(b)(2) motion arguing that the attempted robbery count was a second-degree felony rather than a first-degree felony, this Court amended the sentence for that count from life to 30 years. [Ex. C]. The relief sought in this motion is a de novo resentencing hearing on all counts, as well as various related corrections to sentencing-related documents.

## First Error — This Court Failed to Hold a De Novo Resentencing Hearing After Defendant's First 3.800(b)(2) Motion

A claim that a resentencing hearing was not conducted de novo is cognizable in a 3.800(b)(2) motion. *See Heatley v. State*, 279 So. 3d 850, 852 (Fla. 2d DCA 2019) ("[After a resentencing hearing,] Heatley then filed a second rule 3.800(b)(2) motion, arguing that he was entitled to a full de novo resentencing hearing at which his PSI would be considered. The court erroneously denied this motion.").

"Where the court has discretion to impose a new sentence and is not merely performing a ministerial act, a defendant is entitled to a full de novo resentencing hearing. Resentencing must proceed as an entirely new proceeding where all issues bearing on the proper sentence must be considered de novo and the

defendant is entitled to the full array of due process rights. Resentencing is not just a reweighing of evidence; rather, both sides may present additional evidence. Indeed, '[i]n Florida, the State is required to produce evidence during the new sentencing proceeding to establish facts even if those facts were established during the original sentencing proceeding.'" *Heatley*, 279 So. 3d at 852 (citations omitted) (alteration in original) (quoting *Lebron v. State*, 982 So. 2d 649, 659 (Fla. 2008).

Defendant's first 3.800(b)(2) motion requested a de novo resentencing hearing on all three counts. The State conceded that a de novo resentencing on all three counts was the appropriate remedy. However, the proceedings that occurred related to that motion were not a de novo resentencing. Defendant therefore respectfully requests that this Court vacate his existing sentences and conduct, for the first time, a true de novo resentencing on all three counts.

The fact that the proceeding that occurred following Defendant's first 3.800(b)(2) motion was not a de novo resentencing is clear based on multiple facts. First, despite the Defendant and victim being present at the hearing, neither was given the opportunity to testify. [Ex. D]. In fact, no evidence of any sort was presented. [Ex. D]. Defendant was not given the opportunity to offer an allocution. [Ex. D]. This Court did not consider any evidence regarding Defendant's status as a Habitual Felony Offender, instead saying that "we've

already done [the HFO determination]" and that the State had "already proffered and presented what [it] needed to proffer." [Ex. D]. This Court did not consider a scoresheet for Defendant until after it already pronounced sentence. [Ex. D]. This Court did not consider Defendant's PSI. [Ex. D]. Although this Court entered written orders on Counts 1 and 3 following the hearing, it did not make any oral pronouncement of those sentences. [Exs. C, D]. Finally, this Court did not enter a new cost order after the hearing, which would have been required had the sentencing been conducted de novo. Overall, the transcript of the hearing—which is shorter than five full pages—shows that this Court believed "All [it was] doing is correcting the sentence." [Ex. D]. In fact, what should have been happening was a full de novo resentencing hearing.

In addition to each of the factors listed in the preceding paragraph serving to show that the hearing was not a de novo resentencing, each of them are also errors if the hearing is viewed as the de novo proceeding it should have been. That is, the failure to consider the PSI (for example) shows that this was not a de novo proceeding; but if the proceeding did occur in the form required, then the failure to consider the PSI would be grounds for resentencing just as if the PSI had not been considered at the original hearing (which of course would necessarily be de novo). Defendant also specifically notes the failure of the State to provide evidence of his

HFO status, which means the HFO sentences imposed as a result of the hearing were illegal. *See Heatley*, 279 So. 3d at 852.

Therefore, because the hearing was not a de novo resentencing, and because even if it technically was sufficient there were multiple errors with how that hearing was conducted, Defendant moves this Court to conduct a true de novo resentencing hearing on all counts, ignoring all argument, evidence, and decisions made at the original sentencing hearing and at the hearing following the first 3.800(b)(2) motion.

**Second Error — Defendant's Judgment and Scoresheet Have Technical Errors**

As described in Defendant's first 3.800(b)(2) motion, his judgment incorrectly lists Count II as being a first-degree felony, and incorrectly states that he pleaded guilty when in fact he went to trial. [Ex. A]. The State conceded error on these points and agreed the judgment should be fixed. But no change was made as part of the first 3.800(b)(2) process. Defendant therefore again respectfully requests that this Court amend his judgment to list Count II as a second-degree felony, and to correct the scrivener's error indicating that Defendant pleaded rather than went to trial.

Additionally, also as described in his first 3.800(b)(2) motion, Defendant's scoresheet incorrectly lists Count II as being a first-degree felony when it was in fact a second-degree felony. [Ex. E]. Although the State prepared a new

scoresheet for the hearing, this error persists on the new scoresheet. [Ex. E]. Defendant respectfully requests that this Court order the State to prepare another scoresheet for the de novo resentencing hearing that should occur because of the First and Third Errors described in this motion, and that this new scoresheet list Defendant's crimes at their correct degrees.

**Third Error — Defendant's HFO Sentences Violate the Sixth and Fourteenth Amendments**[1,2]

*Preliminary Statement*

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

---

[1] Although this motion focuses on Defendant's HFO sentences, the argument raised also applies to the inclusion of his alleged prior record on his scoresheet. At a resentencing hearing where the State should be precluded from seeking an HFO sentence without a jury finding, it also should be precluded from including these alleged prior offenses on the scoresheet without jury findings as to each individual offense. The prior record section of the scoresheet violates the Sixth and Fourteenth Amendments.

[2] In response to Defendant's first 3.800(b)(2) motion, the State suggested that Defendant was not challenging his HFO designation. However, Defendant clearly stated that he was not conceding anything involving HFO for purposes of the requested de novo hearing. To avoid any confusion this time around, undersigned counsel is including this full argument regarding Defendant's HFO status.

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

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

That said, Defendant notes that there does not appear to be any explicitly binding precedent with regard to the second argument raised below ("The 'Prior

Record Exception' Does Not Apply When There Is a Question of Identity").[3] This Court therefore can, and should, grant this motion based on that argument.

*Argument — General Background*

Florida's HFO statute violates the Sixth and Fourteenth Amendments in that it allows a judge to find facts that increase a defendant's maximum sentence by a preponderance of the evidence. *See* § 775.084(3)(a), (4)(a), Fla. Stat.[4] The constitutional deficiency is twofold: first, the Constitution requires that the fact-finder be a jury rather than the judge; and second, the standard of proof under the Constitution must be "beyond a reasonable doubt" rather than "preponderance of the evidence."[5]

The general principle applicable to heightened maximum sentences is clear: a jury must make the factual findings beyond a reasonable doubt. This rule was first made explicit in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which states 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,

[3] If undersigned counsel has missed such a case in his research, he would simply restate his obligation to raise this argument along with the others. However, at most it seems this issue has been glossed over by courts generally holding that the prior record exception to *Apprendi* applies to recidivist statutes. None appear to have explicitly considered the identity issue in the way presented here.

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

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

and proved beyond a reasonable doubt." *Id.* at 490. Generally speaking, under the HFO statute, a person found to be a HFO has their potential maximum sentence increased. *Compare* § 775.084(4)(a) *with* § 7753082(3). There is therefore no doubt that the HFO statute implicates the *Apprendi* rule by increasing the maximum punishment for offenses. To the extent any applicable statute affects the minimum sentence that may be imposed (by mandating a certain sentence, by increasing the scoresheet, or by any other means), that statute also implicates *Alleyne v. United States*, 570 U.S. 99 (2013), which applies *Apprendi* to the lower bound as well as the upper bound of the sentence

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

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

*The "Prior Record Exception" Should Be Overturned*

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

Legal Background

The earliest case necessary to understand the exception's current troublesome position is *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). There, the Supreme Court held that possession of a firearm during an offense was, under the statute at issue, properly characterized as a "sentencing consideration" rather than as an element of an offense. *Id.* at 91. In a brief final paragraph, the Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[6] *Id.* at 93. Although *McMillan* did not deal with a prior record, this final paragraph is the important first step in what led to that exception today.

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

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

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

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

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

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

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

exceptional departure from the historic practice [of connecting a sentencing range to the elements of a crime]." *Id.* at 487. Further discussion revealed that "Almendarez-Torres had *admitted* the three earlier convictions," meaning that "the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488.[7]

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

---

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

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

Nearly two years to-the-day after *Apprendi*, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002).[8] *Ring* dealt with a challenge to an Arizona death-penalty scheme previously upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 588-89. This time around, the Court invalidated the Arizona structure, which allowed a judge to make aggravation findings, because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602. In other words, the Court further eroded any distinction between an "element of a crime" and a "sentencing factor," at least insofar as the Sixth Amendment is concerned. *See id.* at 604-05. Notably, as was the case in *Apprendi*, Ring "[did] not challenge *Almendarez-Torres*" because his case did not involve past-conviction aggravating circumstances. *Id.* at 597 n.4.

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

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

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

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

*Id.* at 103. The bottom line of *Alleyne* was that *Harris*, in which the Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment," was overruled.[9] *Id.* Notably for present purposes, just as in *Apprendi* itself, the defendant in *Alleyne* did not challenge the *Almendarez-Torres* prior record exception, so the majority "[did] not revisit it for purposes of [its] decision." *Id.* at 111 n.1.

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

Of course, the United States Supreme Court was not the only court acting during the time period between *McMillan* in 1986 and the present day. The first Florida cases of note are the simultaneously-issued, nearly identical cases of *Robinson v. State*, 793 So. 2d 891 (Fla. 2001), and *McGregor v. State*, 789 So. 2d 976 (Fla. 2001).[10] There, the defendants argued that the PRR statute violates the Sixth and Fourteenth Amendments as interpreted by *Apprendi*. *Robinson*, 793 So. 2d at 892. The Florida Supreme Court rejected that argument because of

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

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

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

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

Argument

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

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

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

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

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

The Florida courts that consider this case should therefore recognize that nothing about *Apprendi*, *Alleyne*, or the related United States Supreme Court cases require the prior record exception be applied. Instead, it is only Florida precedent that commands it. Because the Florida Supreme Court applied the prior record exception as an alternative holding in *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004), both this Court and the Fourth DCA are bound. *See Parsons v. Fed. Realty Corp.*, 143 So. 912 , 920 (Fla. 1931) (stating that alternative holdings are binding, not dicta).[11] The Florida Supreme Court, however, should consider this issue on its merits and not feel compelled to apply the prior record exception out of a misplaced belief that it is commanded by the United States Supreme Court.

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

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

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

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

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

the way by which a fact enters the sentence." *Id.* at 520-21. If the fact merely influences a court's discretion, it is a sentencing factor and need not be tried by a jury. *Id.* at 521. If, on the other hand, it sets or increases the punishment as a matter of law, then it is an element and must have a jury determination. *Id.*

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

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

concurring). And the overall trend in modern case law has been to undo the distinction *McMillan* created and repair the case's grave constitutional error. The final remnant of the distinction appears to be the prior record exception. It is time for that too to be put to rest. The Sixth Amendment and historical tradition require it to be overturned.

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

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

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

Sixth Amendment requires that the alike treatment should be to require a jury determination of a prior record in all cases.[12]

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

---

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

*The 'Prior Record Exception' Does Not Apply When There Is a Question of Identity.*

This section of this motion proceeds under the assumption that this Court has rejected the above argument against the prior record exception as a whole. However, even if the prior record exception does have a place in Florida and United States jurisprudence, its application has expanded beyond its justification. This case presents a way in which the prior record exception should be found unconstitutional with respect to a certain aspect of a prior record: it should not apply to the question of identity, because that does not inhere in the prior record.

Although the concept of proving someone's prior record may seem straightforward, there are a number of elements that must actually be established. First, there must have been a judgment against a person. Second, that judgment must be for a specific crime. And third, the person the judgment is entered against must actually be the person who is now being sentenced. The first two steps prove that there is *a* prior record. The third step is what proves that the record proven to exist is in fact *the defendant's* prior record. It cannot be enough to prove that *someone* was convicted, it must be proved that *the defendant* is that person.

The distinction drawn above is not revelatory. In fact, Florida courts around the state have been applying it since before *Apprendi* was decided. *See, e.g.*, *Hargrove v. State*, 987 So. 2d 679, 680 (Fla. 2d DCA 2007); *Wilson v. State*, 830 So. 2d 244, 245 (Fla. 4th DCA 2002); *Rivera v. State*, 825 So. 2d 500, 501 (Fla. 2d

DCA 2002); *Hemmy v. State*, 835 So. 2d 272 (Fla. 2d DCA 2001); *Wencel v. State*, 768 So. 2d 494, 495 (Fla. 4th DCA 2000); *Brown v. State*, 701 So. 2d 410, 410 (Fla. 1st DCA 1997); *Louis v. State*, 647 So. 2d 324, 325 (Fla. 2d DCA 1994); *Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st DCA 1991). In all of those cases, the issue was whether the State introduced sufficient evidence to meet its burden of proof to show that the defendant had a prior conviction. The judgments were fine on their faces, but the State failed to adequately connect the judgments to the defendants. The cases were therefore all reversed.

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

Although the prior record exception has its roots in *Almendarez-Torres*, *Jones* is where the justification for treating a prior record different from any other

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

*Apprendi* continued to apply this reasoning. Recognizing that *Almendarez-Torres* was "at best an exceptional departure from . . . historic practice," the Court relied on the fact that "Almendarez-Torres had *admitted* the three earlier convictions" and noted that those convictions "had been entered pursuant to proceedings with substantial procedural safeguards of their own." *Apprendi*, 530 U.S. at 487-88. Said slightly differently shortly thereafter, "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case,

mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488. This sentiment was repeated one more time at the close of the opinion when the Court rejected the prosecution's argument: "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496.

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

What these cases[13] show is that the prior record exception makes logical and legal sense only when it is applied to those things for which constitutional procedural safeguards have already been applied. When the question is "did the person on the judgment commit this previous crime?" the answer can be found by a judge because the person on the judgment has already had the benefit of a jury to make that determination. But when the question is "was the crime committed of type X or type Y," that question can be answered by a judge only if the objective judicial records are beyond dispute. A judge cannot answer that question through reliance on such things as police reports, which the defendant would have had no meaningful constitutional method to challenge. *See generally Shepard.*

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

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

who was previously convicted is in fact the person in front of the court for sentencing on a subsequent crime, because the sentencing hearing on the subsequent crime would be the first time this question would naturally arise.

This case presents a clear instance of where this distinction matters. Unlike Almendarez-Torres, who admitted that the prior record was accurate and was in fact his own, the Defendant in this case objects to the conclusion that the records introduced are his at all. Defendant does not concede the accuracy of the prior records (those things that may be able to be found by a judge), but the more important challenge, at least for this section of this motion, is to the prior records' applicability to him as an individual. Simply put, the court records may establish that *someone* was convicted of certain crimes, but they do not establish that that same person was in fact Defendant himself.

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

to a jury trial. The prior record exception cannot constitutionally apply to the question of whether a defendant was the same person as someone previously convicted, it can only apply to the questions of whether a previous conviction exists and what that conviction was for.

Because there is a question as to whether the prior record information introduced at sentencing is in any way related to Defendant, a jury determination beyond a reasonable doubt of that fact was required. Assuming the prior record exception is not overturned in its entirety, it still should only be applied to those aspects of a prior record that can be conclusively established by indisputable court records that reflect facts already found by a jury in accordance with the Sixth Amendment. Those aspects do not include the disputed question in this case of whether the person sitting before the court for sentencing was the same individual as the person who was the subject of the introduced prior records.[14]

The Sixth Amendment as interpreted by *Apprendi* and *Alleyne* requires a jury to make the finding beyond a reasonable doubt that the person being sentenced was in fact the same person who was the subject of the prior judgments. Because the HFO statute allowed the trial judge to make that determination by a preponderance of the evidence, it is unconstitutional.

---

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

*Issue Conclusion*

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

## Conclusion

For the reasons described above, Defendant respectfully moves this Court to conduct a de novo resentencing hearing on all counts, and to correct his judgment and scoresheet.

Respectfully submitted,

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that copy hereof has been furnished to Asst. Attorney General Lindsay Warner, crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401; Hon. Bernard Bober, Assistant State Attorneys Candace Lane, Tabitha Blackmon, and Tali Fish, and Assistant Public Defender Annmarie Sapp, all at Broward County Courthouse, 201 S.E. 6th Str., Ft. Lauderdale, FL 33301, and Joseph Keel L64474, Lake CI, 19225 U.S. Highway 27, Clermont, FL 34715-9025, this 9th day of March, 2020.

/s/ Logan T. Mohs
Of Counsel

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 14-010926CF10A

STATE OF FLORIDA,

Plaintiff,

-vs-

JOSEPH PATRICK KEEL,

Defendant.
_____/

- - -

HEARING BEFORE THE HONORABLE
BERNARD I. BOBER

Thursday, June 17th, 2021
Broward County Courthouse
201 Southeast 6th Street, Room 5900
Fort Lauderdale, Florida 33301
9:57 a.m. - 10:49 a.m.

Reported By:
Radiah Windsor, Court Reporter
Notary Public, State of Florida

Bailey Entin Reporting
Fort Lauderdale Office
Phone - 954.745.9511

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
201 Southeast 6th Street
Fort Lauderdale, Florida 33301
BY: TALLY FISH, ESQUIRE
Assistant State Attorney
Appearing on behalf of the Plaintiff

OFFICE OF THE PUBLIC DEFENDER
201 Southeast 6th Street, Suite 3872
Fort Lauderdale, Florida 33301
BY: ANNMARIE SAPP, ESQUIRE
Assistant Public Defender
Appearing on behalf of the Defendant

ALSO PRESENT:

Joseph Patrick Keel, Defendant

- - -

I N D E X



\- - -

E X H I B I T S

\- - -



(Exhibits were retained by the Clerk.)

(The following proceedings were had):

MS. SAPP: Judge, the other issue, obviously, we have and probably the last issue, the last case, it would be Mr. Keel, the resentencing. Just a couple of housekeeping matters before I proceed.

First of all, Judge, you have the FW link on. It's saying that the host needs to let someone in. He's got a family member that wanted to --

THE COURT: All right. I will try to see if I can get that up and running.

MS. SAPP: Okay. If not, I do also have someone in person as well.

THE COURT: Is that something you're going to be able to put up on the screen or are we going to be doing this via are laptops?

MS. SAPP: I was told to bring my laptop.

THE COURT: Okay. Well, I guess that -- that was preferably our fallback position, but I guess there's no way of --

MS. SAPP: Oh, do you want me to call someone because that's not my thing?

THE COURT: I know the other courtroom we were going to do this had it --

MS. SAPP: Correct.

THE COURT: -- wired for this. But I will say

that I have had video testimony using the court system pre-pandemic, so I assume it still works. The lawyers have to do whatever they do to hook it up.

(Pausing.)

MS. SAPP: So, Judge, let me just clarify. So the person wants to see and hear what's happening, not testify, right. So if I could set up my --

THE COURT: Well, that may be a problem. I mean, technically speaking the rules haven't changed. There's no right -- and as a matter fact, arguably, for security reasons, a lot of people don't like the idea of people being able to spy via Zoom as far as what's going on in the courtroom.

So, you know, for testimony, no problem; but as far as someone monitoring everything we do via Zoom, I'm not necessarily comfortable with that.

MS. SAPP: Okay. So hang on, I have a family member of his here as well.

(Pausing.)

MS. SAPP: Okay. We're ready to proceed, Judge.

THE COURT: All right. Are we going to end up doing the Zoom or not?

MS. SAPP: Not.

THE COURT: Okay.

All right. Just to be clear and make sure we're all on the same page, there was the initial Motion to Correct Sentence and that was as to the attempted armed robbery count, which I granted that and entered an amended or modified sentence to comply with the defect, to eliminate the defect, which was reducing the life sentence on the attempted armed robbery to a 30-year sentence.

The Defense filed a second Motion to Correct Sentence alleging that the Defendant, because of the defect on the attempted armed robbery count, was entitled to a new sentencing hearing. Has the Court ruled on that issue? I know the Defense is prepared to go forward. Did I actually rule on that or is that --

MS. SAPP: I believe so, that you granted that request, and that's why we kept extending, extending every 60 days trying to get him here. I told the Court that I did not want to do it via Zoom.

THE COURT: In light of where we are, I kind of think that I did. I'm not sure that's why I'm asking.

MS. SAPP: I'm going to go with a solid yes

because we kept resetting it for the purposes is it going to be Voir Dire.

THE COURT: Does State have a position on that?

MS. FISH: As to --

THE COURT: Whether the Defense is correct in their assertion that they're entitled to a de novo sentencing hearing.

MS. FISH: No, I believe they are, Judge.

THE COURT: Okay.

MS. FISH: And we're here, ready to do it. Mr. Nare is here too, the victim on the case.

THE COURT: Okay. We'll proceed with the new sentencing hearing.

MS. FISH: May I call witnesses, Judge?

THE COURT: Yes.

MS. FISH: Okay. Your Honor, the State calls Deputy Manuel Castro to the stand.

(The witness takes the stand.)

MS. FISH: And Judge, I premarked several items. I showed Ms. Sapp before.

MS. SAPP: I reviewed them.

THE COURT: We need to swear him in. I also need to make sure -- you know what, I don't think our system is working here. Let me see.

(Pausing.)

THE COURT: Okay. Let's swear him in.

THE CLERK: Can you raise your right hand.

Do you solemnly swear or affirm the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Can you please state your full name for the record and the spelling of both your first and last name.

THE WITNESS: Deputy Manuel Castro, M-A-N-U-E-L, C-A-S-T-R-O.

THE CLERK: Thank you.

THE COURT: All right, you made proceed.

Thereupon,

DEPUTY MANUEL CASTRO,

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

DIRECT EXAMINATION

BY MS. FISH:

Q. Deputy Castro, can you tell the Court who your employer is?

A. I work for the Broward Sheriff's Office, Department of Detention.

Q. Okay. So you work in the jails?

A. That is correct.

Q. Okay. And on May 28th, 2021, did you come into contact with someone later known to you as a Joseph Keel?

A. Yes.

Q. Do you see him in the courtroom today?

A. Yes.

Q. Can you identify him by an article of clothing that he's wearing?

A. He's wearing a red jumpsuit.

MS. FISH: Your Honor, let the record reflect that the witness identified the Defendant.

THE COURT: So noted.

MS. FISH: Your Honor, may I approach the witness?

THE COURT: Yes.

MS. FISH: Okay. Let the record reflect that I'm showing defense counsel State's A.

BY MS. FISH:

Q. Deputy Castro, what is this?

A. Those are fingerprints.

Q. Okay. And how do you know that they are?

A. I was the one that rolled those prints on that sheet.

Q. Okay. And whose prints do these belong to?

A. Joseph Keel.
Q. Okay. Did you personally roll his prints --
A. Yes.
Q. -- onto this sheet?
A. Yes.
Q. Okay. Has anything been changed or added?
A. No.

MS. FISH: Your Honor, at this time the State would move into evidence what is previously marked as State's A as State's 1.

MS. SAPP: No objection, no Voir Dire.

THE COURT: All right. That will be admitted into evidence as State's Exhibit Number 1.

(State's No. 1, Fingerprint Sheet, was received in evidence.)

MS. FISH: I don't have anything further from this witness.

MS. SAPP: Just a question or two, Judge.

THE COURT: All right, go ahead.

CROSS-EXAMINATION

BY MS. SAPP:

Q. Deputy, let me ask you a question: Prior to that May 28th, 2021 date, did you know Mr. Keel?
A. Yes, because of the jail.
Q. The involvement in the jail?

A. Correct.

Q. So which is leading me to my next question: So as far as the actual case for what we're here for today, the resentencing from the 2014 case, you had no involvement in that, correct?

A. Nothing at all.

MS. SAPP: Okay. I don't have any further questions, Judge.

THE COURT: All right, you're excused. Thank you, sir.

Next witness.

MS. FISH: State calls James Florian.

(The witness takes the witness stand.)

THE COURT: Please remain standing to be sworn in.

THE CLERK: Can you please raise your hand.

Do you solemnly swear or affirm the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: Can you please state your full name for the record and the spelling of both your first and last name.

THE WITNESS: James Florian, J-A-M-E-S, F-L-O-R-I-A-N.

THE COURT: You may proceed.

MS. FISH: Thank you, Judge.

Prior to Mr. Florian testifying, I'm going to move into evidence what was previously marked State's B and C as 2 and 3 as public record.

MS. SAPP: I reviewed those, Judge. I'm familiar with them from the last time as well.

THE COURT: All right. That will be admitted into evidence as State's Exhibits 2 and 3.

MS. FISH: Thank you Judge.

(State's No. 2, Standard Prints, was received in evidence.)

(State's No. 3, Prior Certified Convictions, was received in evidence.)

Thereupon,

JAMES FLORIAN,

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

DIRECT EXAMINATION

BY MS. FISH:

Q. Mr. Florian, can you tell the Court who your employer is?

A. The Broward County Sheriff's Office.

Q. Okay. And how long have you been employed by them?

A. About 16 years.
Q. And what is your actual job title?
A. Fingerprint Analyst.
Q. And how long have you been an analyst for?
A. Around 14 years.
Q. Okay. And can you tell the Court, just briefly, what your background is prior to becoming an analyst?
A. I worked two years in dispatch, and then I transferred over to fingerprints where I did six months of training under a supervisor and then two classes, two 40-hour classes.
Q. Okay. And in order to keep your analyst title do you have to take continuing education classes?
A. That's correct. We take 16 hours a year.
Q. And are you up to date on those?
A. Yes, ma'am.
Q. Okay. Can you tell the Court how many fingerprint comparisons you do in a given week?
A. Hundreds. I don't have a specific number.
Q. Okay. And how many would you say you do over a course of a month?
A. Thousands.
Q. All right. And have you ever testified in court before regarding fingerprint comparisons?

A. Yes.
Q. How many times?
A. Around 15 times.
MS. FISH: Okay. Your Honor, may I approach the clerk?
THE COURT: You may.
MS. FISH: May I approach the witness?
THE COURT: Yes, you may.
MS. FISH: Mr. Florian, I'm approaching with two pieces of State's evidence, State's 1 and 2 [sic].
Do you want to take a moment to review them?
(The witness is reviewing the State's 2 and 3.)
MS. FISH: Thank you.
BY MS. FISH:
Q. Okay. Did you have an opportunity to review State's 1 [sic], the standard prints?
A. Yes, I did.
Q. And did you have an opportunity to review State's 2 [sic], the prior certified convictions of Mr. Keel?
A. Yes.
Q. And did you do a comparison with those prints?
A. I did.

Q. Okay. And can you just tell the Court how you did your analysis and what your conclusion was?

A. I examined both sets of fingerprints side by side, and I found points of identification on both set of prints.

Q. Okay. Would you be able to elaborate a little more in terms of how you came to the conclusions?

A. We put the fingerprint under a glass, under a magnifying glass. And we compared all 10 fingers from each set to each other, and we look for points of identification.

Q. And after doing your whole analysis, what was your conclusion?

A. The fingers that I looked at were from the same source.

Q. Was there a match?

A. Yes.

Q. Okay. So you did comparisons with case number 08-560CF10A, 05-19972CF10a, 02-15262CF10A, 14-010716CF10A, and 14-12027CF10A?

A. I did look at those tests.

Q. Okay. And after making your comparison, what was the conclusion on all five of those certified convictions?

A. I believe -- without having my report in front

of me, I believe I had four, if I'm not mistaken, four --

MS. FISH: May I approach the witness, Judge?

THE COURT: You may.

MS. FISH: Let the record reflect I'm approaching with Mr. Florian's fingerprint comparison report.

Judge, for the record, Mr. Florian did not do the fingerprints on 14-10716. Ms. Sapp just brought that to my attention.

THE COURT: All right.

MS. FISH: May I approach with his report?

THE COURT: Go ahead.

THE WITNESS: Yes. On those four cases that I received, I made a match on four of those fingerprints.

BY MS. FISH:

Q. Okay. In order to make a comparison, does this have to be peer reviewed?

A. Yes, it does.

Q. Okay. And on your report did someone from your office, who's also an analyst, do a peer review of this?

A. Yes.

Q. What was that person's conclusion?

A. She had the same conclusion.

MS. FISH: I don't have anything further from this witness.

Thank you.

THE COURT: Cross-examination.

MS. SAPP: Sure.

CROSS-EXAMINATION

BY MS. SAPP:

Q. So Mr. Florian, couple of the same questions. Prior to getting involved in this case, did you know Mr. Keel?

A. No.

Q. Okay. And you didn't have any involvement with the original case which brings us back to the resentencing before Judge Bober, correct?

A. I believe I had a comparison a few years ago. I don't remember what year or what case number that was.

Q. Right. But I'm speaking about the actual events that occurred during the time of the alleged crime?

A. Right, I did not.

Q. Okay, thank you.

The State showed his standards, that was State's evidence 1 [sic] and the State's 2 in evidence, prior certified convictions. Those prior certified

convictions where his prints were rolled, you were not involved in the rolling of those prints, correct?

A. I was not.

Q. Okay. So the 02, 05, 08, and the 14 case, so that we're clear, you did not roll his prints, the ones that you used for comparison?

A. That's correct. I did not roll his prints.

Q. Okay. And it was this extra case now that we know, an extra 14 case, that you were not asked to compare the prints to, correct?

A. Correct.

Q. And you testified on Direct Examination that you came to the conclusion, it's an opinion -- it's your opinion that the prints match, correct?

A. Correct.

MS. SAPP: I don't have any further questions, Judge.

THE COURT: Any redirect?

MS. FISH: No, sir.

THE COURT: All right, sir, you're excused.

MS. SAPP: And Judge, before we go further, the State has another witness, I just wanted to makes sure -- yesterday I sent courtesy copies of the appeal sentencing, the packet, to the Court. Did you receive that?

THE COURT: Yes, I did.

MS. SAPP: Okay.

THE COURT: And I did review the transcripts that was attached to the email that you sent.

MS. SAPP: Thank you.

THE COURT: All right, next witness.

MS. FISH: I have Mr. Nare, Judge.

THE COURT: All right, sir, you want to approach and take the witness stand please.

He's going to give testimony, correct?

MS. FISH: Yes, just briefly, Judge.

(The witness takes the witness stand.)

THE COURT: Please remain standing and raise your right hand to be sworn in.

THE CLERK: Do you solemnly swear or affirm that the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Can you please state your full name for the record and the spelling of both your first and last name.

THE WITNESS: Joseph Nare, J-O-S-E-P-H, N-A-R-E.

THE COURT: All right. Please be seated.

MS. FISH: You can have a seat, sir.

Thank you.

THE COURT: You may proceed.

MS. FISH: Thank you, Judge.

Thereupon,

JOSEPH NARE,

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

DIRECT EXAMINATION

BY MS. FISH:

Q. Good afternoon or good morning, Mr. Nare. How are you dong today?

A. I'm fine.

Q. Okay. Mr. Nare, we are here on the sentencing with Mr. Keel on an incident that happened August 2nd, 2014. Do you remember what happened that day?

A. Yes.

Q. Just very briefly if you can tell the judge what happened to you.

A. I was driving a cab, and I received a call at the Winn Dixie plaza in the Lauderhill Mall. When I get there, I pick him up. And he asked me to drive him somewhere, and he direct me.

And when I get to, like -- I think it's 14th Avenue, 600 block, he told me to stop here. And when I

look in the back to get paid, he pull a gun, and he said give me your fucking money.

And I raised my hand up. And I tried to run, and he shot, like, twice. And I received the first one right here (indicating) and the second one right here (indicating).

Q. You said this guy here, can you describe what the person is wearing that did this to you, his clothing today?

A. Yes.

Q. What is he wearing?

A. Red.

Q. Okay. Can you point to where he's sitting?

A. Right there (indicating).

MS. FISH: Okay. Your Honor, let the record reflect that the witness has identified the Defendant.

THE COURT: Noted.

BY MS. FISH:

Q. Mr. Nare, can you tell the Court how this has affected you?

A. Yes, it affected me because when that happened, I was hurting for, like, almost a month, not working. I had a lot of pain. I had lot of pain here, you know.

By that time my family was on vacation to Haiti. I was by myself at the house. That affected me a lot.

Q. Do you have any trauma from this incident?

A. Only have mild here.

Q. Okay. And do you have any injuries that still hurt you today?

A. No.

Q. Okay. Is there anything else that you would like to tell the judge that you think is important?

A. I don't want to tell the judge because this is my third trial for that case. I think Mr. -- he need to be sentenced for a long period of time because he's dangerous guy.

Q. Let me ask you something, Mr. Nare: On August 2nd, 2014, were you scared for your life?

A. Yes.

MS. FISH: I don't have anything else.

MS. SAPP: No questions, Judge.

THE COURT: All right. You may step down. Thank you, sir.

MS. FISH: Thank you, sir.

THE COURT: All right, next witness.

MS. FISH: I don't have anyone else, Judge.

THE COURT: All right. Does the Defense have

any witnesses?

MS. SAPP: Judge, Mr. Keel, last time when he and I spoke, he wanted to briefly address the Court and perhaps Mr. Nare very briefly, if the court would allow that.

THE COURT: All right. I'll allow him to speak.

MS. SAPP: If he still wants to, Judge.

THE COURT: If he still wants to.

MS. SAPP: You know, things change day to day. Yes, Joseph?

THE DEFENDANT: I do want to apologize.

MS. SAPP: Do you want to swear him in, Judge?

THE COURT: Let's swear him in.

THE CLERK: Can you raise your right hand. Do you solemnly swear or affirm that the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth?

THE DEFENDANT: Yes.

THE COURT: Can you please state your full name for the record.

THE DEFENDANT: Joseph Patrick Keel.

THE CLERK: And can you spell it, first and last.

THE DEFENDANT: J-O-S-E-P-H, K-E-E-L.

THE CLERK: Thank you.

Thereupon,

JOSEPH PATRICK KEEL,

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

DIRECT EXAMINATION

BY MS. SAPP:

Q. So Mr. Keel, you know the reason why we're here today for the resentencing, right?

A. Yes.

Q. And you and I have had some discussions about that?

A. Yes.

Q. I asked you if you wanted to address the Court because when you were sentenced originally, you didn't address the Court.

Do you want to address the Court now --

A. Yeah, I do.

Q. -- or have something to say?

I guess at this point you can say what you have to say.

A. I just want to apologize. Joseph, I just want to apologize and say I'm sorry. I understand what you went through, but I wasn't in my right mind at the time of the crime. I was on drugs. So that's about it.

Q. And you've been incarcerated for quite some time now, right?

A. Yes.

Q. It's been years, yes?

A. Yes.

Q. And you know we have -- the Judge has an option -- we'll get to that later -- on this resentencing as to what he can sentence you to or resentence you to, I should say. And if you did by chance receive a lesser sentence or a sentence, would you be able to come back out into society? Do you have plans or thoughts of how you'd like to continue on your life?

A. Yes.

Q. And how is that? Do you want to work?

A. Yeah, work, go back to school, finish school, yes.

Q. Okay. Do you think that desire or craving for drugs is gone?

A. Yes.

Q. Okay. And would you like the opportunity to reunite with your family, your friends, and your children?

A. Yes.

MS. SAPP: Thank you.

I don't have any further questions, Judge.

THE COURT: All right. Anything else the Defense would like to present?

MS. SAPP: No, Judge.

I just want the Court to be aware that we had that brief conversation before we started the resentencing regarding whether or not there would be an extra witness.

So, again, when he was sentenced originally, his mom testified on the phone, via the telephone. This time he -- I was contacted and reached -- his aunt, Sally Tillman, reached out to me, who had a significant impact on raising Joseph. I'll get into that later.

She was unable to make it, but her son, Lenny Tillman, is here. He's not going to testify, but he's present in the back of the courtroom to the Court's right. And he's here on behalf of the family.

THE COURT: Okay.

MS. SAPP: He was the only one that was able to physically make it to the courtroom. So I'm happy he's here and so is Joseph.

No witnesses, Judge.

THE COURT: All right. Before we proceed to

argument, does the State have any rebuttal witnesses?

MS. FISH: Any rebuttal witnesses, no, sir.

THE COURT: Okay. Then let's proceed to argument.

What is the State seeking?

MS. FISH: Judge, I wasn't at the first sentencing. I wasn't the trial prosecutor.

You sentenced him to life at the second sentencing. On Count I, I know it's 30 and 30. On Counts II and III, the State is seeking the same thing.

He shot the victim in the head. The victim is just basically lucky that he had to turn his head at a certain angle not to die.

But it's a pretty serious case. And he is an habitual offender qualified.

THE COURT: Do you have a score sheet?

MS. FISH: I do. May I approach?

THE COURT: Yes.

MS. SAPP: Is it the correct one, Count II?

THE COURT: Show it to Ms. Sapp.

(Pausing.)

THE COURT: All right. Ms. Sapp, argument.

MS. SAPP: Yes, Judge.

I'm going to start out by renewing all previous motions and arguments made, including the Motion for New Trial. I know that we're not here for that purpose; but because we're on the resentencing and I started that with the original sentencing, I'm going to start there.

I'm also going to renew any and all arguments made in the 3800 Motion that was filed by the Appellate Court specifically regarding his habitual felony offender sentencing and the arguments that they made. I need to renew based on the grounds that the HFO sentencing was or is unconstitutional via the 6th and 14th Amendment.

Those are arguments that were made in the Appellate Court, and they're going to continue. They still are going to be an issue, I believe. So I'm renewing all of those arguments that were made.

So as far as --

THE COURT: Before you go forward, my previous rulings stand and those motions continue to be denied.

MS. SAPP: Now, as far as Joseph is concerned, Judge -- and, you know, I'm not going to go through this whole 60-something pages or so of the original sentencing. So what I did is I chose to highlight

some things. I've been representing Joseph for many years, years prior to the original sentencing on this 2014 case at bar.

Just background a little bit. Joseph has been in and out of foster care. His dad died when he was a young man. His mother struggled to raise him. She has issues of her own, many like Joseph as well.

You know, Joseph was diagnosed early on, as early as 1995, when he was 11 years old. He had issues in school, slow learning. He was evaluated top to bottom continuously and continuously was put in and out of different schools because of issues he had, issues with bullying by other students and specifically picked on because of his disabilities. At 11 years old he was functioning at a Kindergarten level.

Ultimately he was diagnosed with intellectual disability. And I apologize for the verbiage, but back then, like his mom testified, he was diagnosed as having mental retardation, which is now intellectual disability. His mom, sister, and brother also have the same disabilities as he does.

And his were significant enough that he was a client of Agency for Person with Disabilities, was

on SSD, Social Security Disability income. In addition, he has the further diagnosis of -- he's got varying disorders, psychotic disorders, schizophrenia, schizophrenic disorder, bipolar disorder, major depressive disorder, takes medication.

He's had an excess of 20 evaluations that corroborate the above. And some evaluations conclude that he was perhaps at some point likely nonrestorable. He's had numerous evaluations by the Court. He's had perceptual disturbances, cognitive and emotional behavioral difficulties, been Baker Acted on suicide watch, suicide attempts.

He told the Court he's sorry. He shows remorse. I'm asking the Court, this last chance, to give him the 25 years, which is a substantial and lengthy sentence.

THE COURT: All right. Anything else from either side before the Court rules?

MS. FISH: No, sir.

MS. SAPP: And Judge, if you look at his prior criminal history, except for recent events, is mostly drugs and misdemeanor type offenses.

THE COURT: All right. In addition to the

testimony that was presented today, I also reviewed the court file, reviewed the transcript of the last sentencing hearing. And the difficulty for the Court is -- while the Court does appreciate the mental health history of Mr. Keel, what caused the Court to initially sentence Mr. Keel to life was the egregiousness of the incident itself.

This wasn't a spur-of-the-moment thing that Mr. Keel, because of his issues, did something stupid. This was a well thought-out, planned robbery by Mr. Keel. And when the victim did not fully cooperate by trying to escape the vehicle, Mr. Keel did not hesitate in trying to kill the victim. And fortuitously the victim managed to move enough to not get killed.

I find the acts egregious. Mr. Keel, albeit a lot of it are more minor offenses, has a long criminal history. I'm not confident that he will put himself on the right path.

And based upon the seriousness of the actions and the nature of what occurred, I do find that on Count I, he should be sentenced to life in prison as a habitual felony offender. I do find that the Defendant does continue to qualify for that.

Counts II and III will be 30 years Florida

State Prison as a habitual offender. Counts I, II, and II will run concurrent to each other.

Do we have a time served figure as far as how much county time Mr. Keel has?

MS. FISH: I have it, Judge.

It's 1,511 days.

MS. SAPP: That's what I kept, the 1,300 plus what he's doing --

MS. FISH: Correct.

THE COURT: It's the previous time plus what he's got this time around.

MS. SAPP: Right. Right.

MS. FISH: Correct.

And I emailed this to Ms. Sapp. If you want, you can take a look.

THE COURT: So he will get 1,511 days credit for county time served plus whatever time he has served in the Florida Department of Corrections.

MS. SAPP: Sure.

MS. FISH: And Judge, if I may say, because it was an actual possession on Count III, there's a three-year min/man and there's a 25-year min/man on Counts I and II.

THE COURT: Okay.

MS. FISH: Not that it would affect anything

but --

THE COURT: Well, it has to be imposed; it's mandatory. So it's 25 mandatory/minimum because of the firearm on Count I and Count II to run concurrent and a three-year mandatory/minimum because of the firearm on Count III to run concurrent.

MS. FISH: It's 25 with the discharge and the great bodily harm.

THE COURT: Okay.

MS. FISH: I don't know if the dispo has to reflect that.

THE COURT: I think the dispo -- the box that you check is firearm.

MS. FISH: Okay, no problem.

THE COURT: I mean, it's still a firearm man/minimum. The number is affected by what the nature of the facts are.

MS. SAPP: When the Court corrected the sentence as to Count II, when we did that pre-pandemic, was that 25-year?

MS. FISH: It was 30 with a 25-year min/man.

MS. SAPP: With the 25?

THE COURT: Yes.

MS. SAPP: Okay.

THE COURT: The Court reimposes the mandatory court cost, $100 public defender fee, $100 cost of prosecution, plus, you know, whatever mandatory court costs there are.

Is there any restitution that was previously ordered?

MS. FISH: Yes. I spoke to Mr. Nare this morning. I think there was an ambulance bill of 700-something. I don't know if there were any additional things.

Mr. Nare stated on the stand that he also missed time from work. It's a life sentence. I'm not confident the restitution will come back.

THE COURT: Well, whatever I order odds are it's never going to get paid. But if you want a restitution order, he is entitled to it.

MS. FISH: May I ask him, Judge.

THE COURT: Sure.

(Pausing.)

MS. FISH: Judge, so he informed me that the ambulance bill was about 700-something and the loss of work was about 25 days, $150 a day. And I'm doing the math in my head. So I believe that's $2,250. All together it's a little less than $3,000.

MS. SAPP: Judge, when he was originally sentenced and there was a question as to the restitution, the victim was uncertain and the Court reserved, right. And then all those years passed, and the State didn't bring any documentation, no notification to the Defense with any sums of money or seeking a restitution amount.

So I'm going to argue to the Court that time has come and gone. Despite the fact that we're here for resentencing as to the actual sentence itself, I don't know that you could reopen the door as to every issue.

THE COURT: Well, I don't know necessarily -- I do recall having litigation on other cases where well after the fact restitution was sought, and I think that's one of the areas where the Court has continuing jurisdiction.

MS. SAPP: The practicality of it. I mean, again, with a life sentence --

THE COURT: You're right.

I'm going to impose --

MS. SAPP: I'm objecting --

THE COURT: You're objecting.

MS. SAPP: -- to the imposition, yes.

THE COURT: Let me take testimony. Because

rather -- I want to make sure that it's based on facts and not guess work.

MS. FISH: Sure.

Mr. Nare, can you come forward please.

THE COURT: Please retake the stand, sir, and you're still under oath.

(Mr. Nare retakes the witness stand.)

THE COURT: You may inquire, Ms. Fish.

Thereupon,

JOSEPH NARE,

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

FURTHER DIRECT EXAMINATION

BY MS. FISH:

Q. Mr. Nare, on August 2nd, 2014, did Fire Rescue take you in an ambulance?

A. Yes.

Q. Okay. Can you tell the Court about how much was that ambulance bill?

A. About, like, $718.

THE COURT: How much?

THE WITNESS: $718.

THE COURT: $718, okay.

BY MS. FISH:

Q. Okay. And you mentioned prior in your

testimony today that you also missed work for about a month?

A. Yeah.

Q. Okay. Can you tell the Court how much you make on average a day?

A. $150.

Q. Okay. And about how many actual days of work did you miss?

A. I think -- that happened August 2nd. I think I go back to work on August 27th. That's when the doctor say I can go back, yeah.

Q. Mr. Nare, do you work every single day?

A. No, six days.

Q. Six days.

So from August 2nd to August 27th is 25 days. You said you work six days a week?

A. Six days a week, yeah, Monday through Saturday.

Q. Okay. So it would be about 21 days.

So it would be 21 days of not making $150?

A. Yes.

MS. FISH: Okay. And I could be doing this wrong because I'm doing it in my head, but I think that's around $3,150.

THE COURT: That's what I come up with, $150 a

day.

MS. SAPP: 3-1-5-0.

THE COURT: Yes.

BY MS. FISH:

Q. And did you have any other bills besides the lost work and the ambulance bill?

A. No.

I never received a bill.

MS. FISH: Okay. I don't have anything else.

THE COURT: Any cross-examination on that issue?

MS. SAPP: Yes, please.

FURTHER CROSS-EXAMINATION

BY MS. SAPP:

Q. So, sir, as far as the ambulance bill is concerned, my first question is: Do you have a copy of the actual bill?

A. I don't know. I cannot I find it.

Q. So then you never provided the State with a copy of that, correct, is that right?

A. Uh-uh.

Q. You did not?

A. I seen it, but I never paid it. And I don't know where it is now. It get lost somewhere in the house. I don't know.

Q. Okay. So let's back up.

Did you pay it?

A. No.

Q. Okay. So you did not pay the ambulance bill.

The miss work on those 21 -- those days, you said that you make about $150. Did you ever make less than $150 in a day?

A. $150.

Q. Okay. Back when we had the sentencing, the original -- do you remember the original sentencing hearings several years back?

A. Uh-huh.

Q. Okay. Did you tell the State about all that missed work?

A. They didn't ask me for that.

Q. They didn't ask you about that.

Okay. And did you provide any proof or receipts of any of your paycheck stubs showing what you made on a daily or weekly basis to the State?

A. It's a taxi job. I don't have no receipts from taxi.

Q. I'm sorry?

A. It's taxi. I have no receipts.

Q. Okay. So here's my question: Did you provide -- so you did not, right, you did not give them any

proof of what you made on those days, right?

A. Who?

Q. The State Attorney.

THE COURT: It was a different state attorney back then.

MS. SAPP: Yeah, that's right. I just realized that.

BY MS. FISH:

Q. Not this woman, the woman from the state attorney. Remember Ms. Candace Lane, the one who tried the case with us? Did you give her any of those receipts?

A. She didn't ask me that question.

Q. She didn't ask.

So then the answer is no, right, you did not?

A. She didn't ask me for that.

MS. SAPP: Okay. I don't have any further questions, Judge.

So number one, he's not entitled to the -- can I make argument?

THE COURT: That's it as to that issue?

MS. FISH: Yes, sir.

THE COURT: Sir, you can return to your seat in the audience please.

Okay. You may make your argument, Ms. Sapp.

MS. SAPP: I'm starting with the initial argument. I'm objecting to the imposition or the Court ordering any restitution.

THE COURT: Okay.

MS. SAPP: I think that that time has gone. The State has waived it on behalf of the victim in the case, number one.

Number two, the ambulance bill, the $718, he didn't pay it. So he's not entitled to $718.

Number three, the miss work, no receipts or -- excuse me -- pay stubs or anything corroborating the amount of money he makes on any daily basis. There was nothing provided to the State. I understand they didn't ask, but it wasn't provided either. So I'm objecting to that.

So I'm objecting to all the restitution and on the basis that the State is too late to be asking for that restitution amount, those restitution amounts.

THE COURT: All right. Ms. Fish, argument.

MS. FISH: Just briefly.

On the ambulance bill, the fact that Mr. Nare didn't pay it, my argument would be it doesn't mean he's not entitled to it.

And two, Judge, this is a resentencing. I

mean, we're basically starting fresh. So I think that goes to restitution as well. I mean, I know it's the Court's discretion.

THE COURT: Well, this is the thing, as I see it, this incident was back in 2014. I'm assuming that if the bill hasn't been paid by now, the time to collect by the ambulance company is long gone.

So the whole purpose of restitution is to reimburse for out-of-pocket lost. If the ambulance bill wasn't ever paid and is no longer in existence, there's no out-of-pocket lost there.

I do view the work loss of wages issue as being different. That was an actual impact on the victim. So I am inclined to grant loss wages in the amount of $3,150 in restitution. And I will enter an order for that.

MS. SAPP: Just to continue to note my objection for the record, Judge.

THE COURT: So noted.

Anything else the Court failed to address?

MS. FISH: No.

And, Judge, may we review the dispositions?

THE COURT: And just to be clear, because this is a resentencing, the Court is vacating the corrected sentence that was entered on September

the 9th of 2019.

MS. SAPP: Okay.

THE COURT: So that sentence is no longer in effect. And we have just resentenced Mr. Keel.

MS. SAPP: I agree.

THE COURT: And Mr. Keel does have 30 days from today to appeal.

Anything else?

MS. SAPP: No.

We're just going to wait and review -- we just want to make sure --

THE COURT: Definitely make sure that everything is correct so we can avoid future hearings that we don't need.

(Thereupon, the hearing was concluded at 10:49 a.m.)

- - -

C E R T I F I C A T E

- - -

I, RADIAH WINDSOR, Court 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 21st day of July, 2021.

Radiah Windsor

RADIAH WINDSOR, Court Reporter

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

STATE OF FLORIDA, CASE NO. 14-010926-CF10A

v. APPEAL NO. 4D18-1415

JOSEPH PATRICK KEEL,
Defendant
_____/

**THIRD MOTION TO CORRECT SENTENCING ERRORS**

The Defendant, through undersigned counsel and pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), moves this Court to correct his sentence.

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

## Statement of the Case

Defendant was found guilty of attempted first-degree murder, attempted robbery with a firearm, and possession of a firearm by a convicted felon. This Court sentenced him as a Habitual Felony Offender to life on the first count and to 30 years in prison on the second and third counts. The relief sought in this motion is a de novo resentencing hearing on all counts.

## First Error — The Scoresheet Contains Three Errors

Improper points on a scoresheet may be corrected in a 3.800(b) motion. *Jones v. State*, 901 So. 2d 255, 257-58 (Fla. 4th DCA 2005). This is true even if they are raised for the first time in such a motion. *Lyons v. State*, 823 So. 2d 250, 250-51 (Fla. 4th DCA 2002). The State has the burden of proof to show that a challenged prior conviction exists. *Id.* at 251; *Dresch v. State*, 150 So. 3d 1199, 1200 (Fla. 4th DCA 2014).

First Scoresheet Error

Based on an examination of available records by undersigned counsel, Defendant challenges the existence of the third, fourth, fifth, sixth, and seventh prior offenses listed on his scoresheet. These are listed as "Trespass General," "Poss of Cannabis," "Resisting w/o Violence," "Trespass (Gen)," and "Poss of Cannabis < 20 Grams," and are further identified by case numbers 02020116MM10A, 04003004MM10A, 04019358MM10A, 05000223MM30A,

and 05001145MM30A. Undersigned counsel has been unable to locate those case numbers in the Broward Clerk's online docket or in CCIS. Defendant therefore challenges their existence, and the burden is now on the State to prove those five prior convictions. *Dresch*, 150 So. 3d at 1200.

Second Scoresheet Error

On the additional prior record page of the scoresheet (page 3 of 4), the scoresheet lists case number 09011520MM10A twice, on both the eighth and ninth lines. The first of these identifies the crime as "Expose Sexual Organs," and the second indicates a "Violation of Probation." A review of the records of that case number shows there was only one offense, which later resulted in a violation of probation. As demonstrated elsewhere on the scoresheet with respect to other crimes, violations of probation are not new crimes and therefore should not be scored with any points (for example, case 08000560CF10A, immediately above the case being discussed, contains an entry for the underlying crime that is scored and then two entries for violation of probation which are not). For case number 09011520MM10A, however, the scoresheet imposes .2 points for both the underlying crime *and* for the violation of probation. The latter is incorrect; the violation of probation line should not have added any points to Defendant's score.

Third Scoresheet Error

Section VII of the scoresheet (on page 2 of 4) is titled "Firearm/Semi-Automatic or Machine Gun = 18 or 25 points." In this case, 18 points were added under this section.[1]

Although this may seem correct on first glance, as the jury found the use of a firearm in this case, this section was actually inapplicable to this case. Section 921.0024(1)(b), Florida Statutes, is the "Worksheet Key" for the scoresheet. That section states under the heading "Possession of a firearm, semiautomatic firearm, or machine gun," that 18 points should be assessed "[if]f the offender is convicted of committing or attempting to commit any felony *other than those enumerated in s.775.087(2)*" and has a firearm. § 921.0024(1)(b) (emphasis added); *see also* Fla. R. Crim. P. 3.704(17) (same). Section 775.087(2) is the statute that requires mandatory minimums for certain crimes when firearms are involved. The crimes listed include murder, robbery, and possession of a firearm by a felon. § 775.087(2)(a), (c), (q). Those are the three crimes of which Defendant was convicted, and the mandatory minimums from section 775.087(2) were applied to his sentences.

---

[1] The version of the scoresheet in the record was not scanned clearly, so these points are not actually visible. However, they were imposed on previous versions of the scoresheet and are necessary for the math to result in the final score used. Either this section imposed 18 points, or somehow 18 points appeared elsewhere. Occam's razor suggests the former is true. Regardless, if the 18 points came from some other source, Defendant still challenges them as having no basis.

The 18 points for Section VII were therefore improper in this case because Defendants convictions were all for crimes enumerated in section 775.087(2). *See Chambers v. State*, 217 So. 3d 210, 213 & n.1 (Fla. 4th DCA 2017) (reversing for resentencing because these points were improperly assessed).

Requested Remedy

All together, the scoresheet errors in this case total to 19.2 points.[2] Removal of those points would reduce the total sentence points from 249 to 229.8, and the lowest permissible sentence from 165.75 months to 151.35. In other words, the improper inclusion of the points raised Defendant's lowest permissible sentence by nearly 10% from what it should have been.[3] Additionally, the prior record section of the scoresheet lists 21 entries referring to 17 substantive crimes (not probation violations). If the 5 challenged offenses were not present, there would be only 12 substantive crimes listed. That means the addition of those offenses increased the total amount of substantive prior record crimes by over 40%.

When this Court sentenced Defendant, it referenced not only the cases being sentenced but also Defendant's "long criminal history." [6/17/21 Hearing Transcript, page 31]. Based on this history, this Court stated that it was "not confident that [Defendant] will put himself on the right path." *Id.*

---

[2] .2 x 5 for the challenged prior record offenses; .2 for the violation of probation; and 18 for the firearm points.

[3] The difference in lowest permissible sentence from what was to what should have been is 14.4 months. 14.4 months is about 9.51 percent of 151.35 months.

Because the scoresheet, and in particular the prior record section of the scoresheet, explicitly played a role in this Court's sentencing decision, the errors identified in this motion require resentencing. Defendant respectfully moves this Court both to correct his scoresheet and to conduct a de novo resentencing hearing.

**Second Error — There Was a Mathematical Error in Determining Restitution**

When this Court was determining the amount of restitution to impose, trial counsel for Defendant objected both to the hearing occurring at all and to the evidentiary sufficiency for the amount requested. This motion does not restate those arguments, as they are both already preserved and are improper to raise in a 3.800(b)(2) motion. *See Pilon v. State*, 20 So. 3d 992, 993 (Fla. 4th DCA 2009). However, errors in a restitution order unrelated to the evidentiary sufficiency may be preserved through a 3.800(b)(2) motion. *Id.* The argument in this motion is therefore limited, but is not intended as a concession or withdrawal of the arguments made by trial counsel at the hearing.

The evidence introduced at the restitution hearing was that the victim was unable to work from the time of the incident until he went "back to work on August 27th." [6/17/21 Hearing Transcript, page 37]. The victim testified that he worked "Six days a week . . . Monday through Saturday." *Id.* He also testified that he made on average $150 per day. *Id.* At trial, the evidence was that the incident was on August 2, 2014, and that it happened at the end of the victim's shift. Based

on this testimony, the State and this Court calculated the victim's loss as 21 days at $150 per day, totaling $3,150. *Id.*

However, a review of the calendar for the month of August, 2014, shows that 21 days was the wrong amount based on the victim's testimony.[4] August 2, 2014, the date of the incident, was a Saturday. Because the victim was at the end of his shift, he had no lost wages for that day (no money was given to the would-be robber). Therefore, the victim lost wages only for 20 days rather than 21.[5] Performing the same calculation of $150 x (days), the proper amount of restitution would have been exactly $3,000.

This Court made a mathematical and calendrical error in totaling the amount of restitution testified to at the hearing. This was an error with the order itself rather than an error with the evidentiary sufficiency. Defendant therefore respectfully requests that this Court enter a corrected restitution order of $3000.[6]

---

[4] Again, this motion is not challenging the testimony itself; that was already done at the hearing. This motion assumes the truth of the testimony and is simply arguing the technical mathematical error.

[5] August 2: no, because shift complete. August 3: no, because Sunday. August 4-9: yes. August 10: no, because Sunday. August 11-16: yes. August 17: no, because Sunday. August 18-23: yes. August 24: no, because Sunday. August 25-26: yes. August 27: no, because he was back to work. There are 20 "yes" days listed.

[6] Once again, this request should not be viewed as a concession of the restitution amount or process, or as a withdrawal or waiver of previously made objections.

**Third Error — Defendant's HFO Sentences Violate the Sixth and Fourteenth Amendments (Renewed for Preservation Purposes)**

Defendant raised a constitutional challenge to his Habitual Felony Offender sentences in his second 3.800(b)(2) motion. At the sentencing hearing following that motion, trial counsel renewed those objections. This Court overruled the objections and sentenced Defendant as an HFO.

To ensure there is no doubt this issue is preserved for future courts and has not been abandoned, Defendant respectfully renews his previous HFO-related objections and incorporates them by reference here. At the new sentencing hearing required because of the scoresheet issues discussed above, this Court should impose a sentence without an HFO enhancement because no jury has made the requisite findings.

## Conclusion

For the reasons described above, Defendant respectfully moves this Court to conduct a de novo resentencing hearing on all counts using a corrected scoresheet. Defendant also requests correction of his restitution order.

Respectfully submitted,

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that copy hereof has been furnished to Asst. Attorney General Lindsay Warner, crimappwpb@myfloridalegal.com, 1515 N. Flagler Dr., West Palm Beach, FL 33401; Hon. Bernard Bober, Assistant State Attorney Tali Fish, and Assistant Public Defender Annmarie Sapp, all at Broward County Courthouse, 201 S.E. 6th Str., Ft. Lauderdale, FL 33301, and Joseph Keel L64474, Lake CI, 19225 U.S. Highway 27, Clermont, FL 34715-9025, this 9th day of August, 2021.

/s/ Logan T. Mohs
Of Counsel

A146

UCN: 062014CF010926A88810

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

**DIVISION: Criminal**

# SENTENCE

as to Count 1

**THE STATE OF FLORIDA VS.**

**CASE NUMBER**

**DEFENDANT** Joseph Patrick Keel 14010926CF10A

The Defendant, being personally before this court, accompanied by his attorney, A. Sapp 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 _____ 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 Life.
- ☐ 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 23 day of July, 2021. nunc pro tunc

A147

| DIVISION: CRIMINAL | SENTENCE (AS TO COUNT 1) UCN: 062014CF010926A88810 | CASE NUMBER 14010926CF10A |
|---|---|---|

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 1)**

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 _____ 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 23 day of July, 2021

112-83 SENTENCE BATTERY

1318

nunc pro tunc 5/7/18

A148

UCN: 062014CF010926A88810

| DIVISION: CRIMINAL | SENTENCE ( AS TO COUNT 1 ) | CASE NUMBER 14010926 CF 10A |
|---|---|---|

**OTHER PROVISIONS**

| | | |
|---|---|---|
| FIREARM/DESTRUCTIVE DEVICE | ☑ | It is further ordered that the 25 year mandatory minimum imprisonment provision of Florida Statute 775.087(2) and (3) is hereby imposed for the sentence 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 790.221 (2) are hereby imposed for the sentence specified in this court. |
| 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 court. |
| 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 1371 days as credit for the 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. |
| DANGEROUS SEXUAL FELONY OFFENDER | ☐ | The Defendant is sentenced as a dangerous sexual felony offender and must serve a mandatory minimum term of 25 years imprisonment in accordance with the provisions of Florida Statute 794.0115(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 23 day of July, 2021.

ICC 112-78 B Criminal Sentence

nunc pro tunc 5/7/18

1319

A140

UCN: 062014CF010926A88A10

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

DIVISION: Criminal

# SENTENCE

as to Count 2

THE STATE OF FLORIDA VS.

CASE NUMBER

DEFENDANT Joseph Patrick Keel 14010926CF10A

The Defendant, being personally before this court, accompanied by his attorney, A. Sapp 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 _____ 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 30 years FSP.
- [ ] 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 23 day of July, 20 21. nunc pro tunc

1320

5/1 7/12

| DIVISION: CRIMINAL | SENTENCE (AS TO COUNT 2) UCN: 062014CF010926A8810 | CASE NUMBER A150 14010926 CF 10A |
|---|---|---|

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 2)**

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 _____ 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 23 day of July, 2021

112-83 SENTENCE BATTERY

1321 nunc pro tunc 5.1.7/18

UCN: 062014CF010926A88810

| DIVISION: CRIMINAL | SENTENCE ( AS TO COUNT 2 ) | CASE NUMBER 14010926CF10A |
|---|---|---|

**OTHER PROVISIONS**

| | | |
|---|---|---|
| FIREARM/DESTRUCTIVE DEVICE | ☑ | It is further ordered that the 25 year mandatory minimum imprisonment provision of Florida Statute 775.087(2) and (3) is hereby imposed for the sentence 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 790.221 (2) are hereby imposed for the sentence specified in this court. |
| 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 court. |
| 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 1371 days as credit for the 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 1 of this case. |
| DANGEROUS SEXUAL FELONY OFFENDER | ☐ | The Defendant is sentenced as a dangerous sexual felony offender and must serve a mandatory minimum term of 25 years imprisonment in accordance with the provisions of Florida Statute 794.0115(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 23 day of July, 2021.

ICC 112-78 B Criminal Sentence

nunc pro tunc
1322
5/7/18

A152

UCN: 062014CF010926A[illegible]

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

**DIVISION: Criminal**

# SENTENCE

as to Count 3

**THE STATE OF FLORIDA VS.**

**CASE NUMBER**

**DEFENDANT** Joseph Patrick Keel 14010926CF10A

The Defendant, being personally before this court, accompanied by his attorney, A. Sapp 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 _____ 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 30 years FSP.
- [ ] 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 23 day of July, 20 21. nunc pro tunc

112-82 SENTENCE PG 1 REVISED 9/23/10

1323

5 1 7 18

| DIVISION: CRIMINAL | SENTENCE (AS TO COUNT 3) UCN: 062014CF010926A8821 | CASE NUMBER A152 14010926CF10A |
|---|---|---|

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 3)

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 _____ 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 23 day of July, 2021

112-83 SENTENCE BATTERY

nunc pro tunc 1324
5/7/18

A154

UCN: 062014CF010926A88810

| DIVISION: CRIMINAL | SENTENCE ( AS TO COUNT 3 ) | CASE NUMBER 14010926CF 10A |
|---|---|---|

**OTHER PROVISIONS**

| | | |
|---|---|---|
| FIREARM/DESTRUCTIVE DEVICE | [✓] | It is further ordered that the 3 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 1371 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 1 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 23 day of July, 20 21.

**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 23 day of July, 20 21.

ICC 112-78 Criminal Sentence

nunc pro tunc 5/7/18

1325

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

JOSEPH PATRICK KEEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 4D18-1415



# INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit
In and For Broward County

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

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

Attorney for Appellant

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions, Statutes, Rules, and Other**

## STATEMENT OF THE CASE AND FACTS

### The Allegations and Trial

The victim in this case, a cab driver, received a call to pick up a fare. [T. 239-40, 281-82].[1] He picked up the fare and drove him to various locations before being told a final destination. [T. 241-42, 285-88]. Upon reaching the final destination, the victim began to turn around to say goodbye to the fare. [T. 242-43, 288]. The fare, however, had drawn a firearm and demanded money from the victim. [T. 243, 288-89]. The fare then fired, hitting the victim in the head and shoulder. [T. 243, 289-90, 327]. After firing, the fare fled. [T. 244, 290]. People living nearby rushed out to help the victim and called 911. [T. 252-71]. However, no one but the driver could provide a description of the fare. [*See* T. 252-55 (heard shots), 256-71 (911 caller), 272-78 (responding officer)].

Four days later, the State arrested and charged Appellant Joseph Keel with various crimes related to the cab driver shooting: attempted first-degree murder with a firearm, attempted robbery with a firearm, and

---

[1] The October 17, 2018 record is denoted by [R. XX]. The October 17, 2018 transcript document is denoted by [T. XX]. The July 28, 2021 non-confidential supplemental record and the September 2, 2021 supplemental record are also denoted by [R. XX]; the pagination is continuous starting from the October 17, 2018 record and moving through all record documents. The other record documents not specifically referenced here are not cited in this brief.

possession of a firearm by a convicted felon. [R. 19-21 (charges); T. 235 (timeline)]. The State filed a notice indicating its intent to pursue a Habitual Felony Offender sentence against Keel. [R. 34].

The trial proceeded in two stages, with the possession of a firearm by a convicted felon charge being bifurcated from the other two charges. [T. 60-61]. The murder and robbery charges were tried first. [T. 61].

At trial, Keel's primary defense was misidentification—he was not the victim's fare, and someone else had committed the attempted murder and attempted robbery. [*See* T. 248-51, 656]. Keel focused on the holes and inconsistencies in the State's case, as well as the circumstantial nature of the evidence. [*See* T. 248-51, 657-82].

The evidence purporting to establish identity as the shooter can be categorized into four broad groups: (1) the victim's identification, (2) DNA and fingerprint evidence from the scene, (3) a firearm found on Keel at the time of his arrest, and (4) evidence from a phone found on Keel at the time of his arrest. Importantly, no video evidence of the shooter was introduced, meaning other than the victim's identification, all evidence against Keel was circumstantial.

The victim identified Keel as his shooter in a photo lineup. [T. 296-300]. He also testified that he had seen Keel before and knew him from the

area the fare was picked up at. [T. 282-83]. Defense counsel impeached the credibility of the victim's identification, in part by pointing out inconsistencies between the victim's description of his shooter and Keel's actual appearance. [T. 308-12 (cross-examination), 317 (same), 568-69 (photographs of Keel introduced), 671-73 (defense closing); R. 321-31 (the photos)].

The DNA and fingerprint evidence at trial was useless for the State. No match could be made to Keel for either category. [*See* T. 351-52 (only fingerprints recovered from vehicle did not match Keel), 361 (DNA not tested), 369-70 (same as 351-52), 371 (no fingerprints able to be recovered from firearm)].

Next, the State introduced a firearm that was found on Keel's person at the time of his arrest. [T. 456-57]. A forensic witness testified that test-shot bullets fired from that gun matched bullets related to the crime. [T. 528-29, 532-34].

Law enforcement also recovered a cell phone from Keel at the time of his arrest. [T. 470]. Pursuant to a warrant, the police performed an extraction of the phone's data. [T. 485-86]. The extraction report contained incoming text messages from the date of the crime referring to a cab

arriving. [R. 511; T. 493-95]. The report also included photographs of Keel holding a firearm. [R. 515-21].

The most notable piece of evidence the State did *not* have in this case was a video from the cab, despite the cab having a recording device. [T. 305]. One officer testified that he did not attempt to collect a device in the cab with a red light. [T. 399-400]. Another officer later tried to recover the video from the cab company but was not able to do so. [T. 410]. Defense counsel objected on hearsay grounds to questions about why recovery was not possible—whether it was because the recording was never made, was unrecoverable, was destroyed, etc. [T. 411-12]. The trial court overruled the objection and allowed the witness to testify for purposes of establishing why she did not make further attempts to obtain the video. [T. 412]. The questions that were asked and answered in front of the jury over objection were "Did you attempt to get video from the Yellow taxi cab?" "Yes." "Did they have a video to give you?" "No." [T. 413]. The lack of a video in evidence was highlighted during the defense closing, with the suggestion that a recording had been made but was for some unknown reason not provided to the jury. [T. 661-62, 667, 681].

The jury found Keel guilty as charged of attempted murder in the first degree and guilty of attempted robbery with a firearm. [R. 289-92]. For both

crimes, the jury also specifically found that Keel actually possessed and discharged a firearm during the course of the crimes committed, and that Keel actually inflicted great bodily harm upon the alleged victim as a result of discharging a firearm in his possession during the course of the crimes. [R. 289-92].

After the second part of the trial, the substance of which is not relevant on appeal, the jury found Keel guilty of possession of a firearm by a convicted felon. [R. 564].

The trial court adjudicated Keel guilty of all three counts as found by the jury. [R. 565-66, 1315-16].[2]

Sentencing as a Habitual Felony Offender

The State introduced evidence that Keel qualified as a Habitual Felony Offender. [R. 1279-80]. However, Keel repeatedly challenged the imposition of a Habitual Felony Offender sentence. At the first sentencing hearing, Keel disputed the accuracy of the prior convictions relied upon by the State. [R. 631]. In Keel's second 3.800(b)(2) motion, he argued in detail about the unconstitutionality of the HFO statute. [R. 1150-76]. This

[2] Because of errors identified in motions filed by appellate counsel under Florida Rule of Criminal Procedure 3.800(b)(2), Keel has had multiple sentencing hearings. The post-verdict facts discussed above are limited to those necessary for the issues on appeal and a general understanding of the case; some filing and hearings that have been rendered irrelevant are either not discussed or are only discussed in part.

argument is made as Issue II below, but in a nutshell the claim was that the supposed prior record exception to *Apprendi* and *Alleyne*[3] does not exist or at least is inapplicable here. At the third sentencing hearing conducted because of the second 3.800(b)(2) motion, trial counsel renewed the HFO arguments from the motion. [R. 1292]. Finally, in Keel's third 3.800(b)(2) motion, he again renewed his objections. [R. 1419].

On the attempted murder count, the trial court sentenced Keel to life in prison with a 25-year mandatory minimum. [R. 1317-19]. On the attempted robbery count, the court sentenced Keel to 30 years with a 25-year mandatory minimum. [R. 1320-22]. On the possession of a firearm by a convicted felon count, the court sentenced Keel to 30 years in prison with a 3-year mandatory minimum. [R. 1323-25]. All sentences imposed were pursuant to a Habitual Felony Offender designation and all were ordered to run concurrently. [R. 1318, 1321-22, 1324-25].

Keel timely appealed. [R. 573].[4]

---

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 U.S. 99 (2013).

[4] The trial court sentenced Keel on May 7, 2018. [R. 607]. Keel's notice of appeal was filed the same day. [R.573]. This Court has jurisdiction. Fla. R. App. P. 9.030(b)(1)(A) (jurisdiction over final orders), 9.140(b)(1) (permitting appeals by criminal defendants), 9.140(b)(3) (allowing 30 days for a notice of appeal).

## SUMMARY OF THE ARGUMENT

The detective's testimony regarding why she did not obtain the video from inside the cab was hearsay. It created an inescapable inference that the cab company had told her certain information which was then being presented to the jury as fact. This falls squarely into the definition of hearsay and its admission was improper.

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

## ARGUMENT

**I. The trial court reversibly erred by permitting the State to introduce hearsay testimony regarding the non-existence of a video from inside the cab.**

### Standard of Review

Issues regarding the definition of hearsay are reviewed de novo. *Browne v. State*, 132 So. 3d 312 (Fla. 4th DCA 2014).

### Argument

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. The "declarant" is the "person who makes a statement," not necessarily the person testifying at trial. *Id.* at (1)(b). As a general rule, "hearsay evidence is inadmissible." § 90.802, Fla. Stat.

Exact quotes are not the only form of a statement that is considered hearsay. "A party may not evade the hearsay rules by having the witness summarize the statement rather than relay the statement verbatim." *Tolbert v. State*, 114 So. 3d 291, 294 (Fla. 4th DCA 2013). Additionally, Florida recognizes an "inescapable inference" rule that deems a statement hearsay when "the inescapable inference from the testimony is that a nontestifying

witness has furnished the police with evidence of the defendant's guilt." *Lebron v. State*, 232 So. 3d 942, 952 (Fla. 2017).

Here, the State began to ask a detective why she was unable to recover a recorded video from the taxi cab. [T. 410]. Keel objected based on hearsay, arguing that any information about "why or what happened with the video" would have originated with the cab company and therefore would be an out-of-court statement introduced for the truth of the matter asserted. [T. 411]. The trial court overruled the objection and allowed the State to ask the officer about the video for the purpose of "testify[ing] that she attempted to get video and that they indicated they didn't have it." [T. 411]. Keel continued to object, arguing that the questioning had to "end at did she attempt to find [the video]." [T. 412]. The court again overruled the objection. [T. 412]. The State then asked the officer two questions with the following answers: "Did you attempt to get video from the Yellow taxi cab?" "Yes." "Did they have a video to give you?" "No." [T. 413].

The first question was perfectly legal and is mentioned here only for context and to show how the second question diverted into hearsay. The question "Did you attempt to get video from the Yellow taxi cab?" did not require the officer to provide any information about any statement ever made by herself or the company. It was simply a factual question about

what occurred, no different than a question/answer such as "what happened when you saw the broken taillight?" "I initiated a traffic stop." The "did you attempt" question was about the detective's actions, not a statement.

The second question, however, contained within it a hearsay statement. The question "Did they have a video to give you?" is really two questions in one—"Did they give you a video?" and "Did they have a video?" The first of these is like the question in the previous paragraph; it is a statement about actions that the detective in this case could respond to without any hearsay concerns. But the second one, "Did they have a video?," asked the detective to tell the jury information that could only be known by the officer if the cab company had told it to her. The answer of "No" to this question was therefore inferential hearsay.

The easiest way to see this issue is simply to imagine being in the detective's shoes and determine where her knowledge came from. When investigating, she at some point made a demand or asked a question like "Please give me the video from this recorder." That statement is in the imperative mood and contains no truth value; it is therefore not hearsay to tell the jury that it was said. Similarly, the reason the detective knew at trial that she was not given a video was simply because she was not given a

video; no person or entity's statement was necessary to establish that fact. But how did the detective know that the cab company did not have a video? The fact that she was not given one does not show that—the company could have simply not complied with the demand. The only way the detective could come to believe the company did not have the video was if the company told her "Sorry, we don't have one to give to you." That statement in the indicative mood contains a truth value, just like the statements "it's raining outside," "I was eating a turkey sandwich," or "I saw OJ Simpson running from the house holding a knife." The statement made by the cab company was believed by the detective and was relayed to the jury through her response of "No" to the question "Did they have a video to give you?" It was therefore hearsay and was inadmissible.

The common trend in "inescapable inference" cases is that the un-repeated statement is one of direct guilt or identification, like the OJ Simpson example above. That is why the quote from *Lebron* and many others refers to "evidence of the defendant's guilt." But nothing about the definition of hearsay requires the inference to be limited in this way. In fact, as recognized in *Lebron*, the main exception to the "inescapable inference" doctrine is when "a police officer testifies regarding steps taken during an investigation *without identifying anyone the police spoke to or alluding to*

*the conversations that took place*." *Lebron*, 232 So. 3d at 952 (emphasis added). Important to that sentence is the fact that the people spoken to and the conversations that took place do not necessarily need to be ones of direct identification. In this case, the police investigation had multiple steps including speaking to the cab company and having a conversation in which the company told the detective they did not have the video. By testifying as she did, the detective both identified who she spoke to and alluded to the content of those conversations. A "statement" under the hearsay rule is "An oral or written assertion," not just "an oral or written assertion specifically identifying a defendant as guilty." § 90.801(1)(a)1., Fla. Stat. The question of whether testimony is hearsay based on it creating an inescapable inference should depend only on the inescapability of the inference, not on the content of the statement. With that understanding of the rule, supported by *Lebron*, the detective's statement in this case was hearsay.

One case the State may use to argue that the inescapable inference doctrine should be limited to statements of identification is *Butler v. State*, 306 So. 3d 1047 (Fla. 3d DCA 2020). However, this would be a misreading of that case. Butler made the argument that an officer's testimony contained inferential hearsay because it referred to statements made by non-testifying witnesses. *Id.* at 1049. The Third DCA distinguished Butler's

cases by recognizing those cases involved statements tying the defendants to the crimes and leading to the defendants' arrests. *Id.* But this was not the end of the analysis. The court's main focus was on how the testimony was used at trial. The testimony Butler complained of "was introduced *in rebuttal* solely to *impeach* Butler's direct testimony." *Id.* at 1050 (emphasis added). The court held that hearsay can be admissible if used for impeachment. *Id.* Therefore, *even though the testimony was hearsay*, it was not required to be excluded because it was used for the purpose of impeachment. *Id.*

Turning back to this case, the detective's testimony was hearsay in the same way the *Butler* officer's testimony was hearsay. But in contrast to *Butler*, the testimony here was not used to impeach or rebut any witness (no one, for example, testified that video had been turned over but subsequently lost). The testimony in this case therefore does not fall under the *Butler* holding allowing inferential hearsay to be admitted for another purpose because there was no other purpose. The statement in this case was introduced for the truth of the matter asserted—that the video did not exist.

Finally, the hearsay testimony was important to this case. Keel's primary defense was misidentification, and his argument focused on holes in the State's case. [T. 248-51, 656-82]. Part of that argument was that the

State had not presented the jury with the video from the cab because of its own investigative failures. [T. 661-62, 667]. Keel argued that the lack of evidence presented by the State—including the lack of a video—should cause the jury to have a reasonable doubt as to the identity of the person who was actually in the cab and committed the crimes. [T. 681]. This argument was weakened by the hearsay testimony that told the jury the State had not performed a shoddy investigation because there was no video to be obtained. Had the jury not heard this information, they would have been more likely to believe Keel's misidentification argument.[5] The inclusion of the improper hearsay testimony was therefore harmful, and the State will not be able to meet its burden in this appeal of showing otherwise. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).

The trial court improperly allowed the State's witness to "testify that . . . [the cab company] indicated they didn't have [a video]." [T. 411]. This testimony was hearsay. Keel therefore respectfully requests that this Court reverse his conviction and remand for a new trial.

---

[5] Similar evidence may have been admissible if the State had called a cab company representative to testify the video was unavailable at the time. But then Keel would have been able to impeach that witness and perform other cross-examination challenging them on that claim. Such impeachment and cross-examination was impossible with only the detective, because she only knew what she had been told. Therein lies the heart of the issue and the reason hearsay is prohibited in the first place.

## II. The trial court reversibly erred by imposing a Habitual Felony Offender sentence without a jury finding.

### Standard of Review

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

### Argument

The trial court erred by denying Keel's 3.800(b)(2) motion that raised the argument reproduced with only minor alterations below. [*See* R. 1150-76]. The overall argument is that Keel's Habitual Felony Offender ("HFO") sentences violate the Sixth and Fourteenth Amendments.[6]

*Preliminary Statement*

Before beginning this argument, undersigned counsel recognizes that this Court must, under the current case law, deny the first argument raised below after the general background ("The 'Prior Record Exception' Should Be Overturned"). The Florida Supreme Court case *Gudinas v. State*, 879 So. 2d 616 (2004), applies the prior record exception as an alternative holding for affirming. *Id.* at 618. Although Keel believes this is wrongly decided, at least in part because the primary case cited is now no longer good law because it relies on yet another now-overruled case, he

[6] Although this brief focuses on Keel's HFO sentences, the argument raised also applies to the inclusion of his alleged prior record on his scoresheet.

recognizes it remains binding on this Court at this time. This Court therefore cannot legally grant relief on the first argument.

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

That said, Keel notes that there does not appear to be any explicitly binding precedent with regard to the second argument raised below ("The 'Prior Record Exception' Does Not Apply When There Is a Question of

Identity").[7] This Court therefore can, and should, grant relief based on that argument.

*Argument — General Background*

Florida's Habitual Felony Offender statute violates the Sixth and Fourteenth Amendments in that it allows a judge to find facts that increase a defendant's maximum sentence by a preponderance of the evidence. *See* § 775.084(3)(a), (4)(a), Fla. Stat.[8] The constitutional deficiency is twofold: first, the Constitution requires that the fact-finder be a jury rather than the judge; and second, the standard of proof under the Constitution must be "beyond a reasonable doubt" rather than "preponderance of the evidence."[9]

The general principle applicable to heightened maximum sentences is clear: a jury must make the factual findings beyond a reasonable doubt. This rule was first made explicit in *Apprendi v. New Jersey*, 530 U.S. 466

[7] If undersigned counsel has missed such a case in his research, he would simply restate his obligation to raise this argument along with the others. However, at most it seems this issue has been glossed over by courts generally holding that the prior record exception to *Apprendi* applies to recidivist statutes. None appear to have explicitly considered the identity issue in the way presented here.

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

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

(2000), which states 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. Generally speaking, under the HFO statute, a person found to be a HFO has their potential maximum sentence increased. *Compare* § 775.084(4)(a), Fla. Stat., *with* § 775.082(3). There is therefore no doubt that the HFO statute implicates the *Apprendi* rule by increasing the maximum punishment for offenses. To the extent any applicable statute affects the minimum sentence that may be imposed (by mandating a certain sentence, by increasing the scoresheet, or by any other means), that statute also implicates *Alleyne v. United States*, 570 U.S. 99 (2013), which applies *Apprendi* to the lower bound as well as the upper bound of the sentence

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

The determinative question is therefore whether the "prior record exception" to *Apprendi* is constitutionally valid. As described below, it originated only as dicta in the United States Supreme Court, and the arguments against it are based on both historical precedent and on the

Supreme Court's more recent focus on the effect of statutes rather than the legislative labels given to various provisions. The exception should therefore be overturned and abolished altogether. Alternatively, even if the exception survives, it should not apply to the specific sorts of facts at issue in this case.

*The "Prior Record Exception" Should Be Overturned*

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

Legal Background

The earliest case necessary to understand the exception's current troublesome position is *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). There, the Supreme Court held that possession of a firearm during an offense was, under the statute at issue, properly characterized as a "sentencing consideration" rather than as an element of an offense. *Id.* at 91. In a brief final paragraph, the Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on

specific findings of fact."[10] *Id.* at 93. Although *McMillan* did not deal with a prior record, this final paragraph is the important first step in what led to that exception today.

The next case in this development is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Like *McMillan*, *Almendarez-Torres* is not directly on point because, although it did deal with a prior record, it dealt with it in the context of an indictment rather than in the context of sentencing. *Id.* at 226. Because only elements, not sentencing considerations, must be included in an indictment, the question before the Court was which of these two groups a prior record was part of. *Id.* at 228. Based in large part on the fact that recidivism "is as typical a sentencing factor as one might imagine," phrased later as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" the Court held that a prior record is a sentencing factor rather than an element of the offense. *Id.* at 230, 243, 247. However, it is important to remember that this holding was intended to determine what must be charged in an indictment; it in fact explicitly left open the question about

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

what standard of proof might be required for a sentencing factor that raised the maximum permissible sentence. *Id.* at 247-48.

*Jones v. United States*, 526 U.S. 227 (1999), is next on the legal journey. As with the previous two cases, the Court recognized that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Id.* at 232. Left unsaid, but implied as an essential part of that sentence, is the fact that, at the time, sentencing considerations had none of those three requirements. After determining that the relevant statute (not involving prior records) specified elements rather than sentencing factors, *id.* at 239, the Court moved on to discuss counter-arguments to its holding. Relevant here is its discussion of *Almendarez-Torres*, where the Court recognized that its prior case did not deal with the question of jury findings, and instead was limited to what must be charged in an indictment. *Id.* at 248-49. The Court did recognize that a prior record was "potentially distinguishable" from other sentencing factors, based on the fact that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249. But it did not have to dive into that question further.

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

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

mitigated the due process and Sixth Amendment concerns otherwise implicated." *Id.* at 488.[11]

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

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

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

was, instead, a recognition of a prior precedent that was questionable but had gone unquestioned.

Nearly two years to the day after *Apprendi*, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002).[12] *Ring* dealt with a challenge to an Arizona death-penalty scheme previously upheld in *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 588-89. This time around, the Court invalidated the Arizona structure, which allowed a judge to make aggravation findings, because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602. In other words, the Court further eroded any distinction between an "element of a crime" and a "sentencing factor," at least insofar as the Sixth Amendment is concerned. *See id.* at 604-05. Notably, as was the case in *Apprendi*, Ring "[did] not challenge *Almendarez-Torres*" because his case did not involve past-conviction aggravating circumstances. *Id.* at 597 n.4.

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

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

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

In 2013, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013), the second of the two seminal cases (*Apprendi* being the first). There, the Court undid the distinction between maximum and minimum sentences. *Id.* at 103. The bottom line of *Alleyne* was that *Harris*, in which the Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment," was overruled.[13] *Id.* Notably for present purposes, just as in *Apprendi* itself, the defendant in *Alleyne* did not challenge the *Almendarez-Torres* prior record exception, so the majority "[did] not revisit it for purposes of [its] decision." *Id.* at 111 n.1.

Finally, the Court's most recent substantive foray into *Apprendi* jurisprudence—*United States v. Haymond*, 139 S. Ct. 2369 (2019)—also did not involve any argument or challenge to the prior record exception. *See id.* at 2377 n.3. It simply applied *Alleyne* to a federal statute mandating a heightened sentence when supervised release is revoked for certain reasons. *See id.* at 2373-74.[14]

---

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

[14] *Apprendi* has been cited by the Supreme Court four times since *Haymond*. Only one, the most recent, is worthy of note. In *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), the Court used *Apprendi* as an example about how to apply the "categorical approach" to statutory construction in an immigration case. Tellingly, the Court referred to the prior record

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

Around the same time, however, this Court decided *Gordon v. State*, 787 So. 2d 892 (Fla. 4th DCA 2001). There, this Court held that "the findings required under the habitual felony offender statute fall within

---

exception as "unusual" and "arguable." *Id.* at 765. These are hardly words showing an adherence to the doctrine, and again suggest an invitation from the Court for both briefs and opinions challenging the common belief.

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

*Apprendi's* 'recidivism' exception." *Id.* at 893-94. This holding was reaffirmed in *McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004). Similar holdings over the years, applying the prior record exception to HFO and PRR sentences, have issued from the various District Courts of Appeal around the state. *E.g.*, *Chapa v. State*, 159 So. 3d 361, 362 (Fla. 4th DCA 2015); *Lopez v. State*, 135 So. 3d 539, 540 (Fla. 2d DCA 2014); *Calloway v. State*, 914 So. 2d 12, 14 (Fla. 2d DCA 2005); *Frumenti v. State*, 885 So. 2d 924 (Fla. 5th DCA 2004). Finally, the Florida Supreme Court did adopt the prior record exception as an alternative holding in its affirmance in *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004), which raised an *Apprendi* challenge to a habitualization statute.

## Argument

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

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

proved beyond a reasonable doubt"—the exception is dicta. *Apprendi*, 530 U.S. at 490.

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

And in fact, the same is true of all post-*Apprendi* cases in the United States Supreme Court. As described above, no case would have turned out differently had the exception not been present. The exception is therefore best viewed not as something mandatorily required by the supremacy clause, but rather as a "we'll decide this later" exception put to the side by a Court hesitant to wade into unnecessary and treacherous waters. *See Apprendi*, 530 U.S. at 489 (dodging the question of whether the *Almendarez-Torres* exception was correct); *Pereida*, 141 S. Ct. at 765 (calling the exception only "arguable").

The Florida courts that consider this case should therefore recognize that nothing about *Apprendi*, *Alleyne*, or the related United States Supreme Court cases require the prior record exception be applied. Instead, it is only Florida precedent that commands it. Because the Florida Supreme Court applied the prior record exception as an alternative holding in *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004), this Court is bound. *See Parsons v. Fed. Realty Corp.*, 143 So. 912, 920 (Fla. 1931) (stating that alternative holdings are binding, not dicta).[16] The Florida Supreme Court, however, should consider this issue on its merits and not feel compelled to apply the prior record exception out of a misplaced belief that it is commanded by the United States Supreme Court. This Court should also write on this issue so that it may be addressed in the Florida Supreme Court.

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

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

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

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

This historical analysis, however, is not the end of the story. As Justice Thomas recognizes toward the end of his concurrence, the Sixth Amendment question is not "whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence,"

but rather "[w]hat matters is the way by which a fact enters the sentence." *Id.* at 520-21. If the fact merely influences a court's discretion, it is a sentencing factor and need not be tried by a jury. *Id.* at 521. If, on the other hand, it sets or increases the punishment as a matter of law, then it is an element and must have a jury determination. *Id.*

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

The prior record exception is therefore without any justifiable legal foundation. The historical practice was to have all elements, including recidivist elements, found by a jury. *McMillan* created a new distinction

between sentencing factors and elements, and that distinction persisted through various cases. But *McMillan* is no longer good law. *See Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). And the overall trend in modern case law has been to undo the distinction *McMillan* created and repair the case's grave constitutional error. The final remnant of the distinction appears to be the prior record exception. It is time for that too to be put to rest. The Sixth Amendment and historical tradition require it to be overturned.

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

an element turning innocent conduct criminal (felon in possession). *See Harbaugh*, 754 So. 2d at 694 (DUI); *Smith*, 771 So. 2d at 1191 (theft); *Rodriguez v. State*, 174 So. 3d 457, 458 (Fla. 4th DCA 2015) (describing the instructions to be given, although focusing on the non-felon elements).

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

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

Because the prior record exception is not mandated by the United States Supreme Court, Florida may do away with it. And regardless of whether Florida may, or if the United States Supreme Court is the only body that can, the prior record exception should be overturned. This should be done first because the Sixth Amendment should not have exceptions, as shown by its history and argued by various Justices since the prior record exception began to take form. And second, because in its current form, the prior record exception invites the very inconsistency and legally myopic focus on labels that *Apprendi* and company reject. A prior record is a prior record. Whether the crime is "repeated DUI" or the crime is "DUI" and an

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

enhancement is "prior DUI," the end result is the same. A court that can should reject the distinction, overturn the prior record exception, and hold that *all* factors that raise the legal minimum or maximum penalty faced by a defendant must be proven by the State to a jury beyond a reasonable doubt.

*The 'Prior Record Exception' Does Not Apply When There Is a Question of Identity.*

The remainder of this Issue proceeds under the assumption that this Court has rejected the above argument against the prior record exception as a whole. However, even if the prior record exception does have a place in Florida and United States jurisprudence, its application has expanded beyond its justification. This case presents a way in which the prior record exception should be found unconstitutional with respect to a certain aspect of a prior record: it should not apply to the question of identity, because that does not inhere in the prior record.

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

third step is what proves that the record proven to exist is in fact *the defendant's* prior record. It cannot be enough to prove that *someone* was convicted, it must be proved that *the defendant* is that person.

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

This case also involves the distinction between *someone* having a prior record and the defendant *being that someone*. The only difference with the cases string-cited above is that Keel is not challenging the sufficiency of the State's evidence, but rather the fact-finder to whom that

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

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

have not yet been afforded that the Sixth Amendment requires a jury finding before the sentencing range can be changed.

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

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

What these cases[18] show is that the prior record exception makes logical and legal sense only when it is applied to those things for which constitutional procedural safeguards have already been applied. When the question is "did the person on the judgment commit this previous crime?" the answer can be found by a judge because the person on the judgment has already had the benefit of a jury to make that determination. But when the question is "was the crime committed of type X or type Y," that question can be answered by a judge only if the objective judicial records are beyond dispute. A judge cannot answer that question through reliance on

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

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

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

This case presents a clear instance of where this distinction matters. Unlike Almendarez-Torres, who admitted that the prior record was accurate and was in fact his own, Keel objects to the conclusion that the records introduced are his at all. Keel does not concede the accuracy of the prior records (those things that may be able to be found by a judge), but the

more important challenge, at least for this section of this Issue, is to the prior records' applicability to him as an individual. Simply put, the court records may establish that *someone* was convicted of certain crimes, but they do not establish that that same person was in fact Keel himself.

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

Because there is a question as to whether the prior record information introduced at sentencing is in any way related to Keel, a jury determination beyond a reasonable doubt of that fact was required.

Assuming the prior record exception is not overturned in its entirety, it still should only be applied to those aspects of a prior record that can be conclusively established by indisputable court records that reflect facts already found by a jury in accordance with the Sixth Amendment. Those aspects do not include the disputed question in this case of whether the person sitting before the court for sentencing was the same individual as the person who was the subject of the introduced prior records.[19]

The Sixth Amendment as interpreted by *Apprendi* and *Alleyne* requires a jury to make the finding beyond a reasonable doubt that the person being sentenced was in fact the same person who was the subject of the prior judgments. Because the HFO statute allowed the trial judge to make that determination by a preponderance of the evidence, it is unconstitutional.

*Issue Conclusion*

For the reasons described above (especially the identity argument that is not precluded by binding case law), Keel respectfully requests that this Court reverse his sentences and remand for a de novo resentencing hearing at which *Apprendi* and *Alleyne* will preclude a non-jury-found HFO

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

designation. Alternatively, Keel requests that this Court at least write on this issue so that he can appeal this case further.

## CONCLUSION

Keel respectfully requests that this Court reverse his convictions and remand for a new trial. Alternatively, Keel requests that this Court reverse his sentences and remand for de novo resentencing. Finally, even if this Court affirms on all issues, Keel would respectfully request a written opinion, particularly on the second issue, so that further proceedings may be had in higher courts.

Respectfully submitted,

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

## CERTIFICATE OF SERVICE

I certify that this brief was electronically filed with the Court and a copy of it was served to Lindsay Warner, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 10th day of September, 2021.

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

## CERTIFICATE OF COMPLIANCE

I certify this brief has been prepared and filed in Arial 14-point font, in compliance with Florida Rule of Appellate Procedure 9.045(b). I further certify that this brief is in compliance with the word count limit contained in Florida Rule of Appellate Procedure 9.210(a)(2).

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