22-5448
Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, *Anno Domini* 2021

ROGER C. CASSIDY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOR THE FIFTH DISTRICT

PETITION FOR WRIT OF *CERTIORARI*

ROGER C. CASSIDY #978936
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Florida 32124

Petitioner in proper person

QUESTIONS PRESENTED

Question 1: May a state legislature require a state court to increase a criminal defendant's sentencing exposure based on judicial fact-finding by preponderance of the evidence when those facts are beyond "the fact of a prior conviction" but determined by that state's appellate courts to be "derivative of" or "related to" the fact of a prior conviction?

Question 2: Is judicial fact-finding by a preponderance of the evidence that a defendant qualifies for an increased and mandatory sentence of life without parole pursuant to section 775.082(9), *Florida Statutes,* the state's Prison Releasee Reoffender Punishment Act, based on facts not admitted to by the defendant or proven beyond a reason doubt subject to harmless error?

LIST OF PARTIES

In accordance with Sup. Ct. Rule 12(1)(b), the following is a list of all parties to the proceeding in the state appellate court sought to be reviewed:

- Cassidy, Roger C.,
  Petitioner

- Chase, Melanie,
  Circuit Judge (postconviction judge)

- Eaton, Jr., O.H.,
  Circuit Judge (previous postconviction judge)

- Gorton, Christopher,
  Assistant Public Defender, Seminole County, Florida

- Hastings, Thomas, W.,
  Assistant State Attorney, Seminole County, Florida

- Lester, Jr., Kenneth R.,
  Circuit Judge

- Moody, Ashley
  Attorney General of Florida

- Parrish, Bonnie Jean,
  Assistant Attorney General

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, *Anno Domini* 2021

ROGER C. CASSIDY,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF *CERTIORARI*

The Petitioner, Roger C. Cassidy, in proper person, respectfully petitions this Court for the issuance of a writ of *certiorari* to review the recent decision of the District Court of Appeal of Florida for the Fifth District in *Roger C. Cassidy v. State of Florida,* No. 5D22-914, *slip op.* (Fla. Ct. App. 5th Dist. May 24, 2022), in which the Fifth District *per curiam* affirmed the state trial court's March 21, 2022 Order Denying Defendant's Motion to Correct Illegal Sentence in *State of Florida v. Roger C. Cassidy,* No. 01-CF-002666-A (18th Jud. Cir. Ct. March 21, 2022).

OPINIONS BELOW

The Eighteenth Judicial Circuit in and for Seminole County, Florida ("state trial court"), on March 11, 2022, entered an Order Denying Defendant's Motion to Correct Illegal Sentence ("March 21, 2022, Order") in *State of Florida v. Roger C. Cassidy,* No. 01-CF-002666-A (18th Jud. Cir. Ct. March 21, 2022) The state trial court's March 11, 2022 Order appears at Appendix E, at 29-32.

The Fifth District Court of Appeal of Florida ("state appellate court"), on April 8, 2022, entered *per curiam* affirmance of the March 11, 2022 Order ("May 24, 2022 PCA") in *Roger C. Cassidy v. State of Florida,* No. 5D22-914, *slip op.* (Fla. Ct. App. 5th Dist. May 24, 2022). The state appellate court's May 24, 2022 PCA and mandate appears at Appendix A at 1-2.

THE BASIS FOR JURISDICTION IN THIS COURT

The state appellate court, on May 24, 2022, entered an order in *Roger C. Cassidy v. State of Florida,* No. 5D22-914, *slip op.* (Fla. Ct. App. 5th Dist. May 24, 2022), *per curiam* affirming Petitioner Cassidy's timely filed *pro se* appeal. *See* Appendix A at 2.

Petitioner Cassidy timely files this *pro se* petition for writ of *certiorari* and respectfully invokes the jurisdiction of the Court under 28 U.S.C. § 1254 and S.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. 5

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. 6

STATEMENT OF THE CASE

1. The federal questions presented in this petition were fairly presented to the state courts. Specifically, Petitioner Cassidy brought to the state trial court's attention in his Post-Conviction Motion, in the summary of the argument, that:

> Section 775.082(9), [Florida Statutes], contains an unconstitutional requirement of judicial fact-finding that reaches beyond the exception of "the fact of a prior conviction" contemplated by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 47 L.Ed.2d 435 (2000). Based solely on judicial fact-finding, the sentencing floor is increased from a minimum Criminal Punishment Code sentence to a mandatory minimum sentence—in this case, to mandatory life imprisonment. Florida courts have not squarely addressed in any case the issue presented in the instant claim: Exactly *what facts* are required to be proved (and what facts were proved in the instant case) to qualify a defendant for Prison Releasee Reoffender designation pursuant to section 775.082(9), in the first instance, and the propriety of a judge, rather than a jury, determining those facts from substantive evidence thereby mandating increased sentencing.

Post-Conviction Motion, at Appendix F, at 33 (parenthetical omitted)

2. The state trial court, in its Order, determined that based on existing Florida case law *Apprendi* does not require a jury to determine such facts. (March 21, 2022 Order, at Appendix E, at 29-32)

3. Thereafter, Petitioner Cassidy timely appealed to the state appellate court, the instant federal constitutional claim as follows:

> The [state trial court] was in error when it cited to District Court decisions that do not address appellant's specific claim and relied on those decisions to deny relief on Claim 1 of his Motion. (Order, at 2) The District Court decisions cited by the [state trial court] only considered the propriety of trial judges determining *the single fact* of a defendant's "date of release" from a prior commitment for purposes of applying a PRR designation and sentence. Appellant can find no reported case that addresses the claim raised in his Motion in the [state trial court] and here on appeal: That section 775.082(9) requires the finding of *multiple facts* that are beyond "the fact of a prior conviction"—the only exception carved out by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 47 L.Ed.2d 435 (2000) and *Alleyne v. United States,* 570 U.S. 108, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)—and those requisite facts demand a higher burden of proof than a preponderance of the evidence standard because they mandate an increased sentence. Because of the District Courts' analytical incompleteness of the issue of *Apprendi*'s and the Fifth and Sixth Amendment's application to section 775.082(9), the [state trial court] was not bound by those District Court decisions. The [state trial court] should have found that section 775.082(9) is unconstitutional as written and applied in this case, that the error was not harmless in this case, and thereafter entered an order setting a new sentencing hearing.

Initial Brief on Appeal, at Appendix C, at 12-13.

4. The state appellate court entered a PCA of the state trial court's March 21, 2022 Order. (PCA, at Appendix A, at 1-2)

5. This Court should accept this case for review because in every case in which Florida court's have addressed *Apprendi*'s application to section 775.082(9)

they have determined *only* that the *single fact* of a defendant's "date of release" from a previous incarceration fits "the fact of a prior conviction" exception in *Apprendi* and, therefore, the *Apprendi* holding does not apply to section 775.082(9). However, this is an incorrect reading and application of *Apprendi* since "the fact of a prior conviction" is "a narrow exception to the general rule"—one that does not extend to facts outside the bare fact of a prior conviction. *Id.* 530 U.S. 488, 490, 120 S.Ct. 2348.

6. Moreover, section 775.082(9) requires judicial findings of *multiple facts* to prove a PRR offense and subsequently qualify a defendant for PRR designation and increased sentencing exposure—as Petitioner Cassidy fairly brought to the state courts' attention—and absolutely implicates *Apprendi.*

7. The state courts' incomplete and incorrect analysis of *Apprendi* and its application to section 775.082(9) conflicts with the holdings of *Apprendi,* and has resulted in the state trial court and the state appellate court violating the Petitioner's Fifth and Sixth Amendment rights. This Court's guidance is required.[1]

8. Finally, this Court should accept review of this case because Florida courts are relying on state appellate courts' mistaken and/or incomplete analyses of

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1 The Florida supreme court has not addressed this issue, likely due to the claims arising from post-conviction challenges; there is no constitutional or statutory right to state supreme court review of post-conviction challenges.

these claims to deny defendants relief in a multitude of cases and, just as important, state prosecutors continue to violate defendants' rights to trial by jury and to proof beyond a reasonable doubt when seeking PRR designation and increased sentences. There are over 7,000 people incarcerated in Florida under the PRR law and this Court's guidance is required to preserve their constitutional rights to trial by jury and to proof beyond a reasonable doubt.

ARGUMENT

I.

THIS COURT SHOULD GRANT *CERTIORARI* IN THIS CASE TO DETERMINE WHETHER A STATE COURT VIOLATES A CRIMINAL DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT, AND THE HOLDING OF *APPRENDI V. NEW JERSEY,* 530 U.S. 466, 120 S.CT. 2348, 47 L.ED.2D 435 (2000), BY INCREASING A DEFENDANT'S SENTENCING EXPOSURE BASED ON JUDICIAL FACT-FINDING BY A PREPONDERANCE OF THE EVIDENCE WHEN THOSE FACTS ARE BEYOND THE FACT OF A PRIOR CONVICTION BUT ARE DETERMINED BY STATE APPELLATE COURTS TO BE "DERIVATIVE OF" OR "RELATED TO" THE FACT OF A PRIOR CONVICTION?

The Florida's appellate court erred when it *per curiam* affirmed the state trial court's denial of Petitioner's claim that section 775.082(9), *Florida Statutes,* the state's Prison Releasee Reoffender Punishment Act, contains an unconstitutional requirement of judicial fact-finding that reaches beyond the exception of "the fact of a prior conviction" contemplated by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 47 L.Ed.2d 435 (2000) and, therefore, the state trial court violated the Petitioner's Fifth and Sixth Amendment rights and the holding of *Apprendi* when the sentencing judge found by a preponderance of the evidence that the Petitioner qualified for an increased and mandatory sentence of life without parole based on

facts not admitted to by the Petitioner or proven beyond a reason doubt.

The Fifth Amendment of the United States Constitution entitles criminal defendants to certain rights. One of those rights is not to be deprived of life, liberty, or property, without due process of law. (U.S.C.A. 5) The Sixth Amendment of the United States Constitution also applies to criminal defendants. One of the rights afforded therein is the right to a speedy and public trial by an impartial jury. (U.S.C.A. 6) Taken together, these rights entitle criminal defendants to proof beyond a reasonable doubt by a jury of peers of "any particular fact which the law makes essential to the punishment." *1 J. Bishop, Criminal Procedure* § 87, at 55; *Apprendi,* 530 U.S. 465, at 477, 120 S.Ct. 2348.

Section 775.082(9),F.S., contains an *explicit* requirement of judicial fact-finding "by a preponderance of the evidence" to prove a PRR offense. Those findings aggravate the legally prescribed range of allowable sentences by raising the sentencing floor *from* a lowest permissible sentence, pursuant to Florida's Criminal Punishment Code ("CPC") under section 921.0024, *Florida Statutes,*[2] based upon a points calculation in a standardized sentencing scoresheet pursuant to Rule 3.992, *Florida Rules of Criminal Procedure, to* a mandatory minimum

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2 *See* 921.002, F.S. The Criminal Punishment Code. ("The Criminal Punishment Code *shall apply to all felonies, except capital felonies,* committed on or after October 1, 1998.")(emphasis added)

sentence under section 775.082(9)(a)3., that is the statutory maximum for a PRR offense.

Petitioner Cassidy's lowest permissible sentence, pursuant to the CPC sentencing scoresheet, was 65.7 months incarceration. (See Post-Conviction Motion, at Appendix F, at 75-76) However, Petitioner Cassidy's sentencing exposure became fixed, pursuant to the judicial fact-finding required by section 775.082(9)(a)3., to a mandatory minimum of life without parole.

The trial court violated Petitioner Cassidy's Constitutional rights under the Fifth and the Sixth Amendments and this Court's ruling in *Apprendi* when it found, by a preponderance of the evidence, facts necessary to increase Petitioner Cassidy's sentencing exposure. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490 (citing to the opinion in *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)). Moreover, section 775.082(9), is unconstitutional since, by its language and intent, provides for an increased sentencing exposure by judicially determined facts. "'It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties.'" *United States v. Haymond,* 588 U.S. ___, 139 S.Ct. 2369, 2378, 204 L.Ed.2d 897,

905, 2019 U.S. LEXIS 4398 (quoting *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435). The result is that the state trial court entered an illegal sentence in this case.

FLORIDA SENTENCING

Sentencing Guidelines and the Florida Criminal Punishment Code

Before October 1, 1998, Florida courts utilized Sentencing Guidelines to determine a criminal defendant's sentencing exposure. (Section 921.001, *Florida Statutes*) Under the Sentencing Guidelines, a sentencing judge utilized a Sentencing Guidelines scoresheet[3] to provide the recommended sentencing range between a floor and ceiling. If a court wanted to depart below the scoresheet lowest recommended sentence, it had to provide valid written reasons. The 1997 Florida Legislature repealed the Sentencing Guidelines (Ch. 97-194, 5.1), and replaced it with the CPC (Ch. 97-194, §.2), becoming Ch. 97-194, Laws of Florida, effective October 1, 1998.[4] The CPC also contains a sentencing scoresheet.[5] The primary purpose of the CPC sentencing scoresheet is to calculate the lowest permissible

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3 Rules 3.988(a), 3.990(a), 3.991, *Florida Rules of Criminal Procedure*

4 See *In re Adoption of Fla. Rules of Crim. Proc. 3.704 and 3.992 to Implement the Fla. Crim. Punishment Code,* 721 So.2d 265 (Fla. 1998); Ch. 98-204, Laws of Florida.

5 Section 921.0024, *Florida Statutes*

sentence that may be imposed. The CPC thus provides a "sentencing floor," which is the minimum sentence that a judge may impose. The CPC governs all non-capital felony offenses committed on or after October l, 1998.[6]

In *Bryant v. State,* 148 So.3d 1251 (Fla. 2014), our state supreme court observed that

> As with the sentencing guidelines, a single scoresheet for all offenses is used for CPC sentencing. However, a single sentencing range is not established under the CPC as occurred under the prior guidelines."The permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum . . . for the primary offense and any additional offenses before the court for sentencing. The sentencing court may impose such sentences concurrently or consecutively."

Bryant, 148 So.3d at 1257 (quoting *Moore v. State,* 882 So.2d 977, 985 (Fla. 2004))(quoting s. 921.0024(2), *Florida Statutes* (1999)).

Pursuant to the CPC, it is within the sentencing judge's discretion to impose on a guilty defendant any sentence between the lowest permissible sentence, as calculated in the CPC sentencing scoresheet, up to and including the statutory maximum for the offense. *Bryant;* section 921.0024(2).

Section 775.082(9), Florida Statutes - *the Prison Releasee Reoffender Punishment Act*

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6 See section 921.002, *Florida Statutes.* The Criminal Punishment Code. ("The Criminal Punishment Code *shall apply to all felonies, except capital felonies,* committed on or after October 1, 1998.")(emphasis added)

The 1997 Florida Legislature also passed Ch. 97-239, the Prison Releasee Reoffender Punishment Act, becoming Ch. 97-239, Laws of Florida, effective May 30, 1997.[7] Florida's Prison Releasee Reoffender Punishment Act ("PRR") found at section 775.082(9), *Florida Statutes,* mandates a mandatory minimum sentence to be imposed if certain facts are established. The PRR statute specifically requires state prosecutors seeking to prove PRR offenses to "establish[] by a preponderance of the evidence that a defendant is a prison releasee reoffender" 775.082(9)(a)1. Once a state attorney establishes that a defendant meets the requirements of the PRR statute, the trial court is obligated to designate the criminal defendant a PRR and thereafter "the defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced" to the statutory maximum sentence for the offense. *Id.* Section 775.082(9), specifically requires that

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

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7 *See* Post-Conviction Motion, attachment: Chapter 97-239, Laws of Florida (Overview/Summary of Committee Substitute for Committee Substitute for House Bill No. 1371), at Appendix G, at 136-140.

> a. For a felony punishable by life, for a term of imprisonment for life;
> b. For a felony of the first degree, by a term of imprisonment of 30 years;
> c. For a felony of the second degree, by a term of imprisonment of 15 years;
> d. For a felony of the third degree, by a term of 5 years.
>
> (b) A person sentenced under paragraph (a) shall be released only by expiration of sentence and shall not be eligible for parole, control release, or any form of early release. Any person sentenced under paragraph (a) must serve 100 percent of the court-imposed sentence.

Section 775.082(9)(a)3. (emphasis added)(See full text of section 775.082(9), *Florida Statutes,* at Appendix G, at 136-140. Thus, once a state attorney puts forth evidence that establishes by a preponderance of the evidence that a criminal defendant is a PRR, the court must sentence the defendant to an increased sentence.

Florida Court's Application of Apprendi *to Section 775.082(9)*

The Florida supreme court has addressed the application of *Apprendi* to section 775.082(9). In *Robinson v. State,* 793 So.2d 891 (Fla. 2001), our state supreme court determined that *Apprendi* does not require a jury to determine whether a defendant committed the charged offense(s) within three years of being released from prison. The court in *Robinson* held that

It is our opinion that the Act does not increase the maximum

> statutory penalty. Here, the sentencing court's discretion in selecting a penalty within the statutory range is limited. Accordingly, proof to the jury of a defendant's release which subjects a defendant to a sentence under the Act is not required. We agree with the reasoning of the Fourth District in *Kijewski v. State,* 773 So.2d 124 (Fla. 4th DCA 2000), *review denied,* No. SC01-181, 790 So.2d 1105 (Fla. Apr. 30, 2001). We hold that *Apprendi* does not require the petitioner's release to be proved to a jury beyond a reasonable doubt.

793 So.2d at 893.

This case was decided long before *Apprendi*'s progeny, which includes *Alleyne v. United States,* 570 U.S. 108, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). This Court in *Alleyne held* that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum" as it does to facts increasing the statutory maximum penalty. *United States v. Haymond,* 139 S.Ct., at 2378 (quoting *Alleyne,* 570 U.S. at 112, 133 S.Ct. 2151).

From the time of *Robinson* to now, our state appellate courts have adjusted their reasoning for *Apprendi* being inapplicable to 775.082(9) *from* (a) a PRR offense not increasing the maximum statutory penalty, *Robinson,* 793 So.2d at 893, *to* (b) the date of a defendant's previous release from a state correctional facility fitting *Apprendi*'s "fact of a prior conviction" exception. For example, in *Williams v. State,* 143 So.3d 423 (Fla. 1st DCA 2014), the First District opined that "[t]he key fact pertinent to PRR sentencing—whether the defendant committed the

charged offense within three years of release of prison—is not an ingredient of the charged offense," 143 So.3d at 424. In *Lopez v. State,* 135 So.3d 539 (Fla. 2d DCA 2014), the Second District considered the date of a defendant's release, relying on its prior opinion in *Calloway v. State,* 914 So.2d 12, 14 (Fla. 2d DCA 2005), that held "[w]hile we recognize that the fact of [the defendant's] date of release from his previous prison sentence is not the same as a bare fact of a prior conviction, we conclude that it is directly derivative of a prior conviction," and the decision in *Gurley v. State,* 906 So.2d 1264, 1265 (Fla. 4th DCA 2005), wherein the Fourth District determined that such a finding is a "ministerial act." *Lopez,* 135 So.3d at 540.

The cases cited above are the only cases to offer reasoned opinions on *Apprendi*'s application to section 775.082(9) and set the precedent for a string of state appellate court decisions following these to deny relief on these claims. Both of these rationales the Florida courts have utilized to conclude that *Apprendi* does not apply to section 775.082(9) are incorrect.

Reasons Why Florida Appellate Courts are Incorrect in their Application of Apprendi *to Section 775.082(9)*

Every reasoned state court opinion addressing *Apprendi*'s application to section 775.082(9) has *either* addressed *only* the propriety of a judge finding the single fact of defendant's release date *or* relied on other state appellate court

opinions without considering *what specific facts* section 775.082(9) requires. Not only does *Apprendi*'s requirement of proof beyond a reasonable doubt apply to the specific finding of the date of a criminal defendant's previous release from a state correctional facility (775.082(9)(a)1.), but also to other requisite elements to prove a PRR offense. Together, those elements are: (1) identity, (2) qualifying offense, and (3) date. (*See* Initial Brief on Appeal, at Appendix B, at 6-26 These elements are explained below.

Identity. One of the requisite elements of a PRR offense is previous prison identity: that the defendant in the courtroom is the same person released from "a state correctional facility operated by the Department of Corrections or a private vendor, a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence, or a correctional institution of another state, the District of Columbia, the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state." 775.082(9)(a)1. In order to prove this element, state attorneys produce evidence either of an admission by the defendant of the previous release or fingerprints for comparison purposes and sworn testimony by an expert witness.

The practice of fingerprint comparison consists of a bailiff rolling new

fingerprints of the defendant while in the courtroom. The state attorney then utilizes a certified fingerprint analyst to compare fingerprints. The state attorney calls the certified fingerprint analyst as an expert witness who is sworn under oath and testifies on stand as to the statistical probability that fingerprints rolled in the courtroom and fingerprints taken from a person previously released from a state correctional facility are from the same person. New fingerprint evidence is thus created in the courtroom and used along with expert witness testimony of statistical probability and opinion regarding whether they believe the fingerprints are from the same person in order to prove previous prison identity.

Evidence that establishes that a defendant on trial is the same person previously released from prison, such as fingerprint evidence, is absolutely necessary to impose a PRR designation and enhanced sentence and therefore, previous prison identity is an element of a PRR offense and requires proof beyond a reasonable doubt.

Qualifying Offense. Another requisite element of a PRR offense is that it is a qualifying offense. 775.082(9)(a)1.a-r. This becomes an issue of fact to be determined by a jury for offenses involving the use or threat of violence that fall within the "catch-all" subparagraph 775.082(9)(a)1.o. ("Any felony that involves the use or threat of physical force or violence against an individual."). In some

instances, proof of threat or use of violence increases the sentencing exposure a criminal defendant faces and may require a special jury verdict form.

Date of release. The element of the date of a defendant's previous release from a state correctional facility is also required to prove a PRR offense. 775.082(9)(a)1. This element can only be proved if new evidence is presented by the state. The state utilizes documentary evidence in the form of certified Release-Date Letters and FDC Crime and Time Reports, which are created specifically for the purpose of proving this element. Established Florida law requires a state attorney attempting to prove the element of a defendant's previous date of release from a state correctional institution to utilize both a certified Release-Date Letter *and* a FDC Crime and Time Report to authenticate the letter, *Yisrael v. State,* 993 So.2d 952 (Fla. 2008), which are subject to the hearsay evidence rules under section 90.801-803, *Florida Rules of Evidence.* Thus, new evidence is created for the specific purpose of proving the date of a defendant's previous release from a state correctional facility and is, thus, more than the "fact of a prior conviction" contemplated by *Apprendi.* The element of previous prison identity requires proof beyond a reasonable doubt.

As laid out above, the requisite elements of a PRR offense involve the presentation of new extra-record evidence that goes well beyond the simple "fact

of a prior conviction"—the only exception carved out in *Apprendi*.[8] These elements are absolutely necessary in order to prove a PRR offense. The need for extra-record evidence to establish these facts unequivocally prove that these facts are, indeed, elements of a PRR offense. As such, they must be submitted to a jury and proved beyond a reasonable doubt.

In *Barge v. Secretary Dep't of Corr.*, 2021 U.S. Dist. LEXIS 71054 (N.D. Fla. Feb. 4, 2021), the Northern District of Florida noted that it had previously "recognized in *Myles* [*v. Sec'y, Dep't of Corr.*, No. 4:17cv326/RH/GRJ, 2019 WL 968880 (N.D. Fla. Feb. 28, 2019)] that Florida's PRR statute requires a determination of 'both the date of the new offense of conviction and the date on which the defendant was released from custody on a prior conviction,'" *Barge*, 2021 U.S. Dist. LEXIS 71054, at 58-59 (*quoting Myles*, WL 968880 at *2), and that "[t]he court in *Myles* found it 'unlikely' that either issue comes within *Apprendi*'s narrow prior-conviction exception, because that exception, by its plain

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8 Compare *Brown v. State*, 260 So.3d 147 (Fla. 2018), wherein the Florida Supreme Court determined *Apprendi*'s application to section 775.082(10) and "quash[ed] the Fifth District's express declaration of subsection (10)'s validity in *Brown* [*v. State*, 233 So.3d 1262 (Fla. 5th DCA 2017)] and disapprove[d] the Fourth District's decision in *Porter* [*v. State*, 110 So.3d 962 (Fla. 4th DCA 2013)] rejecting a similar Sixth Amendment challenge to subsection (10)" and held that "[i]n order for a court to impose any sentence above a nonstate prison sanction when 775.082(10) applies, a jury must make the dangerousness finding." *Brown*, 260 So.3d at 151. The issue of section 775.082(9) presented herein is legally indistinguishable from that in *Brown* (2018).

terms, applies only to 'the fact of a prior conviction.'" *Barge,* 2021 U.S. Dist. LEXIS 71054, at 59 (quoting *Myles,* 2019 WL 968880 at *1-2)(quoting *Apprendi,* 530 U.S. at 490). The *Barge* and *Myles* courts, while not considering all requisite facts to prove a PRR offense, offer the closest consideration of the argument presented herein. Existing Florida court precedent is analytically incomplete concerning the issue of *Apprendi* and the Fifth and Sixth Amendments as they apply to section 775.082(9).

Section 775.082(9) is Unconstitutional Under the Fifth and Sixth Amendments and Apprendi

In *U.S. v. Haymond,* 139 S.Ct. 2369 (2019), this Court found that

> In *Apprendi*, this Court recognized that "'[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties.'" 530 U.S.[466], at 490. But by definition, a range of punishments includes not only a maximum but a minimum. And logically it would seem to follow that any facts necessary to increase a person's minimum punishment (the "floor") should be found by the jury no less than facts necessary to increase his maximum punishment (the "ceiling"). Before *Apprendi*, however, this Court had held that facts elevating the minimum punishment need not be proven to a jury beyond a reasonable doubt. *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); see also *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (adhering to *McMillan*).
>
> Eventually, the Court confronted this anomaly in *Alleyne*. There, a jury convicted the defendant of a crime that

> ordinarily carried a sentence of five years to life in prison. But a separate statutory "sentencing enhancement" increased the mandatory minimum to seven years if the defendant "brandished" the gun. At sentencing, a judge found by a preponderance of the evidence that the defendant had indeed brandished a gun and imposed the mandatory minimum 7-year prison term.
>
> This Court reversed. Finding no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris*, the Court expressly overruled those decisions and held that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum" as it does to facts increasing the statutory maximum penalty. *Alleyne*, 570 U.S. [108], 112, 133 S.Ct. 2151, 186 L.Ed.2d 314. 570 [(2013)]. Nor did it matter to *Alleyne*'s analysis that, even without the mandatory minimum, the trial judge would have been free to impose a 7-year sentence because it fell within the statutory sentencing range authorized by the jury's findings. Both the "floor" and "ceiling" of a sentencing range "define the legally prescribed penalty." *Ibid.* And under our Constitution, when "a finding of fact alters the legally prescribed punishment so as to aggravate it" that finding must be made by a jury of the defendant's peers beyond a reasonable doubt. *Id.*, at 114, 133 S.Ct. 2151, 186 L.Ed.2d 314. Along the way, the Court observed that there can be little doubt that "[e]levating the low end of a sentencing range heightens the loss of liberty associated with the crime: The defendant's expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Id.*, at 113, 133 S.Ct. 2151, 186 L.Ed.2d 314 (internal quotation marks omitted)

Haymond, 139 S.Ct. at 2377-78

This Court has determined, as articulated above, that the very thing that Florida's legislature created in section 775.082(9)—a statute requiring a court to find additional facts by a preponderance of the evidence in order to increase a person's minimum punishment (the "floor")—is unlawful. As such, *Apprendi* and the Constitution dictate that section 775.082(9) is unconstitutional due to its explicit requirement of proof by a preponderance of the evidence.

II.

WHETHER THE ERROR OF THE SENTENCING JUDGE FINDING BY A PREPONDERANCE OF THE EVIDENCE THAT PETITIONER QUALIFIED FOR AN INCREASED AND MANDATORY SENTENCE OF LIFE WITHOUT PAROLE PURSUANT TO SECTION 775.082(9), *FLORIDA STATUTES,* THE STATE'S PRISON RELEASEE REOFFENDER PUNISHMENT ACT, BASED ON FACTS NOT ADMITTED TO BY THE PETITIONER OR PROVEN BEYOND A REASON DOUBT, WAS HARMLESS?

Error is Not Harmless in this Case

Petitioner Cassidy also apprised the state courts in his Post-Conviction motion and in his Initial Brief on Appeal that, "In the instant case, the constitutional error and *Apprendi* violation cannot be said to be harmless, as no jury could have found beyond a reasonable doubt that Petitioner Cassidy qualified for PRR designation based solely on the evidence presented and no PRR sentence could have been imposed based on the evidence presented." (Post-Conviction

Motion, at Appendix F, at 33-135; Initial Brief on Appeal, at Appendix D, at 6-26) In this case, at trial, the state did not produce a "Crime and Time Report" to authenticate the "Release Date Letter" provided by the Florida Department of Corrections ("FDC") custodian of records. There is no disputing that, pursuant to Florida law, Release Date Letters ("Letter") are hearsay evidence and, alone, are insufficient to prove a criminal defendant's previous date of release from a state correctional facility. (*See Yisrael v. State,* 993 So.2d 952 (Fla. 2008).

In the instant case, no FDC representative testified at trial and the Letter was the sole piece of evidence presented as to the appellant's date of release from a correctional facility. Both the state trial court and the state appellate court failed to address this assertion.

CONCLUSION

In sum, establishing the facts to prove the elements of a PRR offense under section 775.082(9), *Florida Statutes,* demands a higher burden of proof than a preponderance of the evidence; those facts require proof beyond a reasonable doubt. As such, section 775.082(9) is unconstitutional. Moreover, there was insufficient evidence presented to prove that Petitioner Cassidy qualified for PRR designation and subsequent increased sentence by any standard of proof—by a preponderance of the evidence or beyond a reasonable doubt. The record facts to support this claim were contained in the case record, were supplied to the state trial court in Petitioner Cassidy's Post-Conviction Motion, at Appendix F, at 33-135, were brought to the state appellate court's attention in Petitioner Cassidy's Initial Brief on Appeal, at Appendix C, at 6-26, and are now brought before this Court, as Appendices attached hereto. The state courts should have found that section 775.082(9) is unconstitutional to the extent that it requires a judge rather than a jury to determine the requisite facts to impose a PRR designation and increased sentence for a PRR offense, that the error was not harmless in this case, that the sentence in this case is illegal, and set this case for resentencing.

This Court should issue a writ of *certiorari* to review the constitutionality of section 775.082(9) and the Florida courts' decision in this case. Amen. So be it.