

No. 25-7413

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STAFF INITIALS

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NELSON VIERA – PETITIONER  
(Your Name)

vs.

STATE OF FLORIDA – RESPONDENT(S)  
ON PETITION FOR A WRIT OF CERTIORARI TO  
THIRD DISTRICT COURT OF APPEAL  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)  
PETITION FOR WRIT OF CERTIORARI

NELSON VIERA  
(Your Name)

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## QUESTION(S) PRESENTED

1. Given the United States Supreme Court's now long standing and clear 5<sup>th</sup> Amendment jurisprudence, do Florida Courts have authority to expand, or otherwise invent, an exception to the rule announced in *Apprendi*?
2. Consistent with the strict and secure separation of powers, do Florida Courts have the authority to add words to statutes that were not placed there by the Legislature?  
Can Florida Courts modify a statute express terms?

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

*Viera v. State*, 35 So. 3d 1005 (Fla. 3<sup>rd</sup> DCA 2010)

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix D to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ appears at Appendix     to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

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

For cases from **state courts**:

The date on which the Third District Court of Appeal decided my case was **8-27-2025**. A copy of that decision appears at Appendix A.

A timely petition rehearing was thereafter denied on the following date: 10-3-2025, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Fifth, Sixth and Fourteenth Amendment rights to due process.

The Court Judge sentenced the Defendant to 25 years minimum mandatory on prison, assume the jury fact finding for himself in violation of the Defendant's 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution rights.

## STATEMENT OF THE CASE AND FACTS

Appellant was arrested on September 22, 2005, charged by Information on October 14, 2005 with Count One – Drugs Trafficking in violation of F.S. § 893.135(1)(c)(1) and Count Two – Cont. subs/poss., in violation of F.S. 893.135(6)(a). See case information Court Docket Sheet case number F05-30218B. See No. 30 and 31. On August 17, 2006 the State of Florida filed an Amended Information on with two counts of Trafficking (one new) and as to Count 2 - Conspire to Traffic/Armed. Life felony. On August 6, 2007 (during jury trial) the State of Florida filed an Amended Information with one count of Trafficking and Count Two Conspiracy to Traffic. See Court Docket Sheet face page. Appellant was found guilty of Trafficking and sentenced to 40 years State prison. On October 4, 2010, a sentence of 25 years minimum mandatory imprisonment was imposed after the Third District Court of Appeal affirmed in part and vacated in part the trial Court's "in legal parlance" vindictive sentence of 40 years State prison. See *Viera v. State*, 35 So. 3d 1005 (Fla. 3<sup>rd</sup> DCA 2010).

In other words, on December 12, 2007, Appellant Viera was sentenced to 40 years as a Habitual Felony Offender under F.S. § 775.084(4) and on October 4, 2010 such a sentence was vacated and Appellant was resentenced to 25 years minimum mandatory and again as a Habitual Felony Offender. (Trial Court's Order at 2).

On or about September 10, 2024, Appellant filed a 3.800(a) Motion to Correct Illegal Sentence in the Circuit Court. The Motion alleged (between other things) that the habitual offender enhancement of his sentence is illegal in light of the recent decision in *Erlinger v. U.S.*, 144 S. Ct. 1840 (2024), wherein the Court held that any finding that enhances a sentence has to be found by a jury. *Id.* (Defendant's 3.800(a) Motion at 2).

The Defendant, Viera filed a timely Motion for Rehearing which the trial Court denied. The Defendant filed a Notice of Appeal to the Third DCA. Initial Brief was filed which the District Court of Appeal denied. Petitioner filed a Motion for Rehearing showing the District Court of Appeal the direct conflict with the decision with the Fifth District Court of Appeal in the same question of law. In *Brown v. State*, decided on May 30<sup>th</sup>, 2025, case number 5D2025-3233 WL 1534992 (Fla. 5<sup>th</sup> DCA 2025). Motion was denied. Petitioner filed a Motion to Invoke Jurisdiction in DCA, plus Initial Brief seeking jurisdiction in the Florida Supreme Court and was denied. Now Petitioner seeking review of the final Order of the Third District Court of Appeal in this Honorable Court of United States Supreme Court.

## SUMMARY OF THE ARGUMENT

Appellant also alleged that the Habitual Felony Offender Statute is unconstitutional on its face and as applied to Appellant Viera (Appellant's Motion for Rehearing at Exhibit "A").

The United States Supreme Court's recent decision in *Erlinger v. U.S.* 144 S. Ct. 1840 (2024) confirms that Section 775.084(4) (The HFO Statute) is unconstitutional on its face. It has been unconstitutional on its face since this Nation's founding, or at the very least, since the Supreme Court rendered its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002).

The HFO Statute permits a Judge rather than a jury to make a factual determination increasing a defendant's sentencing range. The HFO Statute requires that those findings be made by a preponderance of the evidence instead of beyond a reasonable doubt. (Trial Court's Order at 3 and 4). Therefore, the Statute is unconstitutional on its face because there are no set of circumstances under which it complies with the requirements of the Fifth and Sixth Amendments to the United States Constitution or with Article 1, Section 22 of the Florida Constitution.

Appellant continues to rely on the arguments he made in his 3.800(a) that *Apprendi* and its progeny apply to his case and that he is entitled to a resentencing hearing.

Appellant also alleged that in his sentencing hearing the trial Court used an invalid, improper, miscalculated and fraudulent scoresheet. On resentencing hearing, the trial Court, Honorable Judge Fernandez did not even mention that Mr. Viera could be resentenced within the presumptive guidelines sentence or under the Criminal Punishment Code scoresheet. (Appellant's Motion for Rehearing, Exhibit "A" at 8-11) and Exhibit "C" at 7, 8).

The trial Court erred in its summary denial of the Appellant's 3.800(a) Motion to Correct Illegal Sentence. The trial Court applied inapplicable cases of law and at the same time misplaced, overlooked or ignored Appellant's point of laws, Florida State constitutional rules and his constitutional rights.

This Honorable Court should find that reversal is required and that the Appellant is entitled to relief.

## ARGUMENT

WHETHER THE RESENTENCE IMPOSED AS A HABITUAL OFFENDER IS ILLEGAL PURSUANT TO U.S. SUPREME COURT CASE OF LAW BECAUSE A JUDGE, NOT A JURY MADE THE REQUISITE FACTUAL FINDINGS

### STANDARD OF REVIEW

When a trial Court summarily denies a Motion for Post Conviction Relief under Florida Rules of Criminal Procedure 3.800(a), 3.850 or 3.853, this Court's standard of review is as follows: On appeal from the denial of relief, unless the record shows conclusively that the Appellant is entitled to no relief, the Order shall be reversed and the case remanded for an evidentiary hearing or other appropriate relief. Fla. R. App. 9.141(b)(2)(D); *Gonzalez v. State*, 905 So. 2d 990 (Fla. 3<sup>rd</sup> DCA 2005); *Miller v. State*, 905 So. 2d 981 (Fla. 3<sup>rd</sup> DCA 2005); *Spinosa v. State*, 916 So. 2d 47 (Fla. 3<sup>rd</sup> DCA 2005); *Melton v. State*, 908 So. 2d 1136 (Fla. 3<sup>rd</sup> DCA 2004).

On the other hand where the defendant alleges a facially sufficient claim for relief under Rule 3.800(a), it is not the defendant's burden to attach portions of the record showing entitlement to relief. Instead, it is the responsibility of the trial Court to attach portions of the record while conclusively refuting the defendant's claim. See *Friss v. State*, 881 So. 2d 38 (Fla. 5<sup>th</sup> DCA 2004); See also *Brown v.*

*State*, 5D24-3233, 50 Fla. L. Weekly D 1191, 2025 WL1534992, 2025 Fla. App. LEXIS 4131 (Fla. 5<sup>th</sup> DCA 2025).

The Circuit Court summarily denied the Appellant Viera's 3.800(a) Motion based on the following reasons:

1. The *Erlinger* decision is not dispositive here (although the Court recognizes that the Florida Supreme Court held oral arguments in the case of *Maye*, SC2023-1184 based on *Erlinger's* decision). (Trial Court's Order at 5), as it dealt with a distinguishable Federal Statute. Trial Court Order at 2.

The lower Court overlooked or ignored that the U.S. Supreme Court's recent decision in *Erlinger v. U.S.*, 144 S. Ct. 1840 (2024) is a new constitutional rule that "will apply not only to Federal cases, but to State cases." 219 L. Ed. 2d 451, 2024 U.S. LEXIS 2715. Post at 2 (opinion of Kavanaugh. J.) {2024 U.S. LEXIS 51}. Therefore, the *Erlinger* decision is dispositive here without a doubt. See *Marcus Roland Maye v. State*, Supreme Court 2023-1184.

2. "Moreover, this Court is bound to follow the standing precedents of the Florida Appellate Courts, which have upheld the HO Statute as constitutional (Trial Court Order at 2)."

Even the Florida Supreme Court is not bound to follow its previous decisions when that decision has been overruled by a subsequent decision of United States Supreme Court. The Court as every other Court in Florida is required

to follow the decision of the United States Supreme Court. See *Hernandez v. State*, 979 So. 2d 1013, 1016 (Fla. 2008) (abandoning previous precedent in light of Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

3. Even if the Defendant is correct about the unconstitutionality of the Habitual Offender Statute in Mr. Viera's case, this would constitute harmless error. (Trial Court Order at 2).

Harmless error review is not appropriate to apply in this case, because the HO Statute is unconstitutional on its face. As a result, it is void in entirety and cannot be applied constitutionally in any circumstance. Harmless error is also not appropriate in this case based on the plain language of *Erlinger*. The United States Supreme Court reasoned as follows:

“There is no efficiency exception to the Fifth and Sixth Amendments. In a free society respectful of the individual, a defendant enjoys the right to hold the government to providing its case beyond a reasonable doubt to a unanimous jury of his peers regardless of how overwhelming the evidence may seem to a Judge.”

144 S. Ct. at 1856

The jury trial may have “never been efficient.” *Apprendi*, 530 U.S. at 498, 120 S. Ct. 2348 (Scalia, J., concurring). It may require assembling a group of defendant's peers to resolve unanimously even seemingly straight forward factual questions under a daunting reasonable doubt standard.

144 S. Ct. at 1860

The aforementioned reasoning indicates that the Harmless Error Doctrine should not be applied to errors committed in reliance on an unconstitutional statute. See *New Jersey v. Carlton*, 2024 WL 4896871 \*2, \*7-13 (N.J. App. Ct. Nov. 27, 2024).

Additionally, the Court in *Brown v. State*, supra held “given the postconviction Court did not attach any records to its Order (which is one of the exact points of law here) our record is insufficient for us to conduct a harmless error analysis. *Galindez v. State*, 955 So. 2d 517, 522-23 (Fla.2007)

4. Defendant’s 25 year sentence is the minimum mandatory sentence required under the crime he was convicted of. (Trial Court Order at 2)

The lowest permissible sentence is the minimum sentence that may be imposed by the trial Court, absent a valid reason for departure. Fla. Stat. § 921.0024(2), Fla. R. Crim. P. 3.704(d)(25). With regard to felony offenses, except capital felonies, committed on or after October 1, 1998 (Fla. Stat. § 921.00265(1) the lowest permissible sentence provided by calculations from the total sentence points pursuant to the applicable provision (Fla. Stat. 921.0024(2) is assumed to be the lowest appropriate sentence for the offender being sentence. Fla. Stat. § 92100265(1). These Statutes were violated in Appellant’s sentence and resentence.

Under the Criminal Punishment Code, “the permissible range for sentencing shall be the lowest permissible sentence [as determined by the number of total

sentencing points] up to and including the statutory maximum.” See § 9210024(2), Fla. Stat. (2004). The Court notes that the Criminal Punishment Code replaced the sentencing guidelines in 1998. See *Moore v. State*, 887 So. 2d 977-984 (Fla. 2004).

Florida Sentencing 2012-2013 Edition, Volume 16, William H. Burges, III;  
West’s Florida Practice Series:

§ 6:46 – Examples of other types of enhancements are found in the recidivist minimum mandatory sentencing provisions that accompany designation of the defendant as a Prison Releasee Reoffender, Habitual Felony Offender...pursuant to Section 775.084, Fla. Stat.

§ 6:69 – Enhancement of Penalty and reclassification of offense – minimum mandatory sentencing.

An increasingly common sentence enhancement is found in minimum mandatory sentence. For those offenses having a mandatory minimum sentence, a scoresheet must be completed and the lowest permissible sentence under the Criminal Punishment Code calculated. Mandatory minimum sentenced must be recorded on the scoresheet. <sup>1</sup>

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<sup>1</sup> Florida Rules of Criminal Procedure 3.704(d)(25).

Sentencing under Habitual Felony Offender and Habitual Violent Felony Offender Statutes is permissible, not mandatory. West's F.S.A. §§ 775.084(4)(a)1,(4)(b)(1). See *Burdick v. State*, 594 So. 2d 267, \* 268 (Fla. 1992).

It is undisputed that the minimum or the lowest permissible sentence is provided by calculations from the total sentence points pursuant to the applicable provision; Fla. Stat. 921.0024(2) and that is assumed to be the lowest appropriate sentence for the offender being sentenced, Fla. Stat. § 921.00265(1).

It is also undisputed that the minimum mandatory sentence is an "enhancements, and for those offenses having a mandatory minimum sentence, a scoresheet must be completed and the lowest permissible sentence under the Criminal Punishment Code calculated. Mandatory minimum sentence must be recorded on the scoresheet."<sup>2</sup>

At sentencing, the Court asked about the Defendant Viera's guidelines. The State responded that Defendant scored 106.7 months to life as a Habitual Felony Offender. See Motion to Supplement Exhibits in support, Exhibit "E," page 15, line 17-25.

Appellant Viera contends that the alleged 106.7 months that he scored are incorrectly calculated. According to an improperly miscalculated, invalid and fraudulent scoresheet. Viera scores to 158 months as the lowest permissible prison

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<sup>2</sup> Fla. Crim. P. 3.704(d)(26).

sentence in months which equal 13 years and 2 months. See a Criminal Punishment Code scoresheet at Exhibit “D” of the Motion to Supplement and also attached to the Reply to State’s Response filed on or about October 31, 2024. As we can see, both the State Attorney allegation and the scoresheet supposedly used at sentencing hearing reflect different scores. His incompleted and miscalculated scoresheet does not even have a Jude’s signature.

Florida Rules of Criminal Procedure 3.704(d) states: “At the bottom of the last page of the scoresheet, below all else, is the place where the Judge places his or her signature. The Judge must sign the scoresheet before it can validity be placed in the record. An invalid scoresheet was used at the time Mr. Viera was sentenced.

Florida Rules of Criminal Procedure 3.701(d)(1) mandates that a sentence be imposed based on a sentencing guidelines scoresheet that has been reviewed by the trial Judge. See also *Holton v. State*, 573 So. 2d 284, 290-91 (Fla. 1990).

Appellant contends that trial Court committed fundamental errors, sentencing and resentencing Appellant Viera as a Habitual Offender without preparing a properly and valid scoresheet. One guideline scoresheet should be completed for each defendant covering all offenses pending before the Court for sentencing Florida Rules of Criminal Procedure 3.70(d)(1). Failure to utilize a scoresheet is reversible error. *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988).

Appellant Viera's primary offense is drug trafficking, level 9 offense which equals 92 points. There is not additional offenses, because the other two cases (Conspiracy to Traffic and the other count of traffic) were dropped during jury trial. Appellant was convicted of one count of drug trafficking. Miscalculated prior record based in this scoresheet is 64.4 points, plus 92 points as a primary offense equal to 156.4 points as a total sentence points, minus 28=128.4 x 75= 96.3 as the lowest permissible prison sentence in months. 96.3 months equals 8 years and 3 days.

In *Thornton v. State*, 767 So. 2d 1286 (Fla. 5<sup>th</sup> DCA 2000) the Court held: "Preparation of a sentence scoresheet was required. The Court then vacated *Thornton's* sentence and remanded for resentencing because the parties were unable to supplement the record with a copy of the scoresheet used in sentencing. *Id.* at 1287.

In *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986) the Court held that: "The Habitual Offender Statute could not operate as an alternative to the sentencing guidelines."

In *Prince v. State*, 98 So. 3d 768 (Fla. 4<sup>th</sup> DCA 2012) the Court reiterated the holding in *Whitehead*, supra, which held the Habitual Offender Statute could not operate as an alternative to the sentencing guidelines. Habitual Offender Statute

was not an adequate reason to depart from the recommended sentencing guidelines.

In any event, sentencing alternatives should not be used to thwart the guidelines or Criminal Punishment Code.<sup>3</sup>

Enhancement offenses cannot be scored as either the primary offense or as an additional offense on a scoresheet, because enhancement removes these offenses from sentencing under the Criminal Punishment Code or the earlier guidelines. See *Ricardo v. State*, 608 So. 2d 93 (Fla. Dist. Ct. App. 2d Dist. 1992).

In resentencing the trial Court erroneously believed (with a due respect that Judge Fernandez deserves) that the 25 year minimum mandatory sentence is the minimum punishment for a crime Mr. Viera was convicted of. This Court was the second tribunal that ignored Appellant Viera's right to be resentenced, pursuant his guidelines or his Criminal Punishment Code scoresheet.

At this time Viera is again, sentenced to an enhanced sentence as a Habitual Felony Offender. Minimum mandatory sentence is an enhancement. In *McMillian v. State*, 258 So. 3d 1002, 2018 Fla. App. LEXIS 126652018(Fla. 4<sup>th</sup> DCA 2018) the Court held: "We find it clear from the record that the trial Court erroneously believed it was required to impose on resentencing a 25 year minimum mandatory sentence under the HFO Statute, and we conclude that this is one of the very rare

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<sup>3</sup> See *Disbrow v. State*, 142 So. 2d 740 (Fla. 1984).

cases where it would be a manifest injustice not to grant habeas corpus relief. See *Prince v. State*, 98 So. 3d 768 (Fla. 4th DCA 2012)(granting habeas relief where the trial Court erroneously believed it was required to impose a life sentence and the Appellate Court had failed to recognize the error in previous cases); *Johnson v. State*, 9 So. 3d 640 (Fla. 4<sup>th</sup> DCA 2009)(same).

Accordingly, we grant the petition and direct the trial Court to hold a new sentencing hearing. *McMillian* is entitled to be present and represented by counsel at resentencing.

This Court should be agree that would be a manifest injustice to deny Mr. Viera the same relief afforded other defendants identically situated.” See *McMillian*, supra.

The District Court of Appeal had granted similar relief for the same grounds in other cases. *Id.*

5. Thus, even without the enhancement, his sentence would have been the same. (Trial Court Order at 2).

When the lower tribunal stated that “even without the enhancement, his sentence would have been the same”, the Court’s statement ignores *Plott*. More importantly, the Court’s argument ignores the fact that the HO actually increases both the minimum and maximum sentence a defendant faces. The minimum sentence is increased from the lowest permissible sentence on the Criminal

Punishment Code scoresheet to the statutory maximum that in the case of Appellant is 25 year minimum mandatory. This sentence prescribed by the Criminal Punishment Code scoresheet is the maximum, not the minimum Appellant Viera faces. As we know minimum mandatory sentence is an enhancement.

An increase in either a defendant's minimum or maximum sentence based on facts found by a trial Judge by a preponderance of the evidence violates the Sixth Amendment.

He also alleged that the trial Judge increased the minimum sentence from the lowest permissible prison sentence of 96 months prescribed by the Criminal Punishment Code scoresheet to 25 years minimum mandatory in prison.

Mr. Viera was sentenced upon resentencing to 25 years minimum mandatory that triple the minimum sentence of 8 years that could have been imposed without the enhancement. See Motion for Rehearing, Exhibit "C" sentencing hearing at page 26, lines 18-24.

In resentencing hearing the Honorable Judge Fernandez imposed an enhanced sentence of 25 years minimum mandatory and one more time under the Habitual Offender Statute without any written findings other than Habitual Offender Statute. Judge Fernandez erroneously believed he was required to impose on resentencing such a sentence under the HFO Statute. As in *Erlinger*, the Court

emphasized that it had no power to Order anything less. The Judge Fernandez recognized that 25 year minimum mandatory sentence was too high. Appellant prays that this Honorable District Court be able to review the Appellant's resentencing hearing held on October 4, 2010.

Improper Habitual Offender sentencing contrary to specific statutory requirements constitute fundamental error. *Maddox v. State*, 760 So. 2d 89, 102 (Fla. 2000).

Viera contends from the face of the record that his resentence as a Habitual Felony Offender is illegal. Where it was imposed without a properly valid sentencing scoresheet and is therefore contrary to statutory requirement constituting a fundamental error. *Maddox*, supra, citing *Mapp v. State*, 71 So. 3d 776 (Fla. 2011).

Harmless error analysis is not applied in connection with fundamental errors, which are always harmful errors. <sup>4</sup> Fundamental error is also not subject to the harmless error analysis discussed in § 20:6 because "all fundamental error is harmful error. *Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002).

The failure to file a written reason for an upward departure sentence is a fundamental sentencing error, which can be raised on appeal. *Collins v. State*, 766 So. 2d 1009 (Fla. 2d DCA 2000); *Thogode v. State*, 763 So. 2d 281 (Fla. 2000);

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<sup>4</sup> *Reed v. State*, 837 So. 2d 366 (Fla. 2002)

*Maddox v. State*, 760 So. 2d 89 (Fla. 2000), since there are no written reasons for the upward departure we reverse and remand for resentencing within the guideline. *Pope v. State*, 561 So. 2d 554 (Fla. 1990).

Herein, Viera contends Habitual Offender 25 year minimum mandatory sentence was not properly imposed as there was no prepared scoresheet and was no written reason was given such as Habitual Offender to justify departure from his guidelines or Criminal Punishment Code scoresheet, in violation of Viera's right to due process of law and (as by now is familiar) in violation of the Fifth and Sixth Amendments. See *Erlinger*.

Also, upon review, it is clear that the sentence imposed on Appellant Viera under the Habitual Offender Statute is longer (by over sixteen years) that it would have been had he been resented pursuant to his guideline scoresheet.

When an Appellate Court reverses a departure sentence because there were no written reasons, the Court must remand for resentencing with no possibility of departure from the applicable guidelines or Criminal Punishment Code. See *Pope v. State*, 661 So. 2d 288 (Fla. 1995).

When a departure sentence is reversed because the reasons tendered for the departure are invalid or unsupported, the Court must impose a guidelines sentence on resentencing. *State v. Betancour*, 552 So. 2d 1107 (Fla. 1989); *Shull v. Duggar*, 515 So. 2d 11107 (Fla. 1989).

The Florida Supreme Court has also ruled that generally when all of the reasons stated by the trial Court in support of departure are found invalid, resentencing following remand must be within the presumptive guidelines sentence. See *Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987). See also *Owen v. State*, 598 So. 2d 64 (Fla. 1992); *Gibeon v. State*, 661 So. 2d 288 (Fla. 1995). At Defendant Viera's resentencing hearing, the guidelines of him were not even mentioned and much less the State supplemented the record with a copy of the invalid scoresheet used in sentencing.

Viera is entitled to be resentenced again, but this time pursuant to his Criminal Punishment Code scoresheet. This Court should remand that Viera be granted a de novo resentencing hearing.

Mr. Viera's defense counsel should've argued before the sentence was imposed, that the trial Court should not enter the Habitual Offender sentence because the jury had not made the necessary factual findings. According to *Apprendi* and its progeny, its something that should be in front of the jury that was never presented to the jury. (Sentencing hearings).

Mr. Viera was sentenced upon resentencing to 25 year minimum mandatory (that triple the minimum sentence that could've been imposed without the enhancement) where the Judge not the jury made the requisite factual findings.

## ARGUMENT

### THE RESENTENCE IMPOSED AS A HABITUAL OFFENDER IS ILLEGAL PURSUANT TO U.S. SUPREME COURT CASE OF LAW BECAUSE A JUDGE, NOT A JURY MADE THE REQUISITE FACTUAL FINDINGS

The imposition of a mandatory minimum sentence is illegal, absent some other statutory authorization. The purported statutory authorization for this otherwise illegal sentence is Florida's Habitual Offender law (Fla. Stat. § 775.084(1)(a), 4(a)), which in relevant part permits an enhanced sentence for first degree felonies if the Defendant has previously been convicted of two felonies and the instant felony was committed within 5 years of the commission or release of a prior felony. This designation plainly requires fact finding as to the date of the commission or release regarding prior offenses.

In this case, that fact finding was not done by the jury that heard Mr. Viera's case, but rather by the Judge that sentenced him. This was constitutionally impermissible because the Supreme Court in *Apprendi*, and its progeny held that fact finding that increases a sentence beyond an otherwise applicable statutory minimum or maximum, or imposes an otherwise inapplicable mandatory minimum must be done by a jury, not a Judge.

Appellant was right, as the Supreme Court has recently and clearly reiterated, this area of Supreme Court jurisprudence stretches back at least to *Jones*

*v. United States*, 526 U.S. 227, 243 n.6 (1999), where the Court found that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an Indictment, submitted to a jury and proven beyond a reasonable doubt.” In *Apprendi v. New Jersey*, 530 US. 466 (2000) the Court made clear that this is an inheritance from common law and is older than our country. To guard against a spirit of oppression and tyranny on the part of rulers...as the great bulwark of [our] civil and political liberties...trial by jury has been understood to require that the truth of every accusation, whether preferred in the shape of Indictment, in universal suffrage of twelve of the defendants equals and neighbors...” *Apprendi* at 477 quoting A. J. Story, Commentaries on the Constitution of the United States 540-541 (4<sup>th</sup> Ed. 1873).

4. W. Blackstone Commentaries on the Laws of England 343 (1769) (internal quotations omitted). Thus, “[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.” *Apprendi* at 490.

In *Alleyne v. United States*, 570 U.S. 99 (2013) the Court made clear this reasoning applied to mandatory minimum sentences as well as increases in maximum sentence. *Id.* at 111-12. Among other reasons this “preserves the historic

role of the jury as an intermediary between the State and criminal defendants.” *Id.* at 114. The Court discarded a distinction lower Courts had relied on between “sentencing factors” that could supposedly be found by a Judge and elements that had to be found by a jury, saying that any fact which aggravated the legally prescribed range of allowable sentences must be found by a jury.

Most recently, the United States Supreme Court decided *Erlinger v. United States*, 602 U.S. 821 (2024). *Erlinger* specifically found the sentencing Judge determining that prior convictions occurred on separate occasions to be a Fifth and Sixth Amendment violation. Those amendments animated by the central concern the founders of our republic held for protecting citizens from government power by placing the “jury at the heart of our criminal justice system,” require that such factual findings must be made by a jury, not a Judge. *Id.* at 1849. The *Erlinger* Court cited its own precedent in *Apprendi v. New Jersey*, 530 US. 466, 477 (2000) as requiring the truth of every accusation be confirmed by the unanimous suffrage of twelve jurors. It cited its own precedent in *Blakely v. Washington*, 542 U.S. 296 306 (2004) as ensuring that a Judge’s power to punish would derive wholly from and always remain controlled by the jury and its verdict. *Erlinger*, at 1849. It cited its own precedent in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), as requiring that a Judge’s sentencing discretion be limited by the facts found by a jury. These principles operate as an “essential” “check [ ] on governmental power”

and an “anchor essential to prevent a slide back towards regimes like the vice admiralty Courts [the founders] so despised. *Erlinger* at 1850, reprinted in 15 papers of Thomas Jefferson 266, 269 (J. Boyd Ed. 1958).

A Judge may do **no more**, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.” *Erlinger* at 1854, quoting *Mathis v. United States*, 579 U.S. 500 (2016)(emphasis added).

The sentencing Judge can find two facts: 1) That the defendant was previously convicted of a particular offense, and 2) the then existing statutory elements of that offense. *Erlinger* at 1854, citing *Descamps v. United States*, 50 U.S. 254, 269 9201) “**No more is allowed.**” *Erlinger* at 1854. Quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016) (emphasis added).

The Fifth and Sixth Amendment contemplate that a jury, not a sentencing Court, will find facts (such as whether a defendant’s past offenses differed enough in time, location, character, and purpose to have transpired on different occasions) unanimously and beyond a reasonable doubt. Because those facts were not found by a jury, the law as pronounced by United States Supreme Court in *Jones*, *Apprendi*, *Blakely*, *Alleyne* and *Erlinger* was violated.

The defense position should be that the HO enhancements could not be imposed absent jury findings as to the requisite factual predicates.

Therefore, the current 25 year minimum mandatory sentence as a Habitual Offender is illegal. The Judge, not the jury made the necessary factual findings for imposition of this sentence.

This issue is correctable via a Rule 3.800(a) Motion. That was the recent holding of *Brown v. State*, there the trial Court denied a 3.800(a) Motion claiming an *Apprendi* issue with a Habitual Felony Offender sentence, and the appeals Court stated that such a Motion is cognizable on a 3.800(a) Motion and reversed and remanded for further proceedings. The *Brown* Court cited *Plott v. State*, 148 So. 3d 90, 95 (Fla. 2014) where the Florida Supreme Court found that sentences that are unconstitutionally enhanced in violation of *Apprendi* and *Blakely* patently fail to comport with constitutional limitations, and consequently the sentences are illegal under Rule 3.800(a).” *Brown* also makes clear that there is no retroactivity issue with this type of Motion. Even if *Erlinger* is not retroactive, a decision that higher Court have not made, it would not matter for this appeal because the claim is appealed under *Apprendi* and its progeny including *Erlinger* (though counsel defense at the time of sentencing did not argued any of those cases) and some of those cases existed at the time of sentencing.

A related issue is currently pending before the Florida Supreme Court in *Marcus Roland Maye v. State*, SC2023-1184. Oral argument has been held in that case but a decision has not been issued. The defense in that case argues that the

PRR Statute is unconstitutional, which is not the exact issue raised here (whether a HO sentencing imposed based solely on judicial findings is illegal) but is also related to interpretation of *Erlinger*, *Alleyne*, *Apprendi*, *Blakely*, *Jones* and that general line of cases. Thus, the Appellant brings *Maye* to the Court's attention, although the Appellant does not believe the result in this case will be dependent on the ultimate result in *Maye* and does not believe that this Court needs to wait until *Maye* is decided to decide this case.

#### THE SIXTH AMENDMENT AND APPRENDI

The Sixth Amendment to the United States Constitution provides that “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury [.]” Amendment VI, U.S. Constitution.

In *Apprendi*, the United States Supreme Court interpreted this right to mean that, except for 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 doubt.” 530 U.S. at 490. Stated another way, “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increased the prescribed range of penalties to which a criminal defendant is exposed.” *Id.* (citation omitted).

Notably, even in this early decision, the *Apprendi* Court openly questioned the propriety of an exception for the fact of a prior conviction. On that point, the

Court conceded that its precedent establishing the exception was arguably “incorrectly decided.” *Id.* at 489.

While *Apprendi*'s holding, at first blush, might seem simple enough, the Court was forced to revisit the issue four years later in *Blakely v. Washington*, 542 U.S. 296 (2004). In that case, the Court clarified that the “statutory maximum for *Apprendi* purposes is the maximum sentence a Judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Id.* at 304.

The *Blakely* Court also openly acknowledged that the Sixth Amendment's jury guarantee is, at least comparatively, inefficient. But the Court declined any invitation to use efficiency as an excuse to redraw the constitutional lines. Instead, the Court honored the “Framers’ paradigm.” Concluding that the “decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.” *Id.* at 313.

Then, in *Alleyne v. United States*, 570 U.S. 99 (2013), the issue reared its head again. In that case, the Court overruled prior precedent and held that *Apprendi*'s rule requiring a jury to find any facts increasing the statutory maximum also applies to facts increasing the minimum sentence. *Id.* at 103.

Just last year, in *Erlinger v. United States*, 602 U.S. 821 (2024) the Court was once more called upon to interpret *Apprendi*'s reach. This time, the Court

considered whether the already criticized exception for the fact of a prior conviction allowed a Judge to determine if “a defendant’s past offenses were committed on separate occasions.” *Id.* at 825. The Court’s answer, unsurprisingly, was decidedly “no.” *Id.* at 836-40, 849.

In fact, *Erlinger* did not just seek to limit *Apprendi*’s sole exception, it doubled down on the criticism voiced in *Apprendi* itself. This time, however, instead of simply saying that the exception is “arguably incorrect,” the Court described its precedent establishing the exception as “expressly delimited,” *Id.* at 838, and went out of its way to recount that Justice Thomas has “called for it to be overruled.” *Id.* at 837.<sup>5</sup>

In case there remained any doubt, the Court emphasized, in an unmistakable tone of protest, that “[W]e have reiterated this limit on the scope of [the exception] ‘over and over,’ to the point of ‘downright tedium.’” *Id.* at 838 (citation omitted).

When a Judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the Judge exceeds his or her proper authority.<sup>6</sup>

In Appellant Viera’s case, his increased sentence upon resentencing under Habitual Offender Statute (no other written reason nor scoresheet presented at that

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<sup>5</sup> Justice Thomas, in his concurring opinion in *Erlinger*, classified the exception as “dubious.” *Id.* at 850 (Thomas, J., concurring).

<sup>6</sup> *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), see *Behl v. State*, 898 So. 2d 217 (Fla. Dist. Ct. App. 2d Dist 2005).

time) violated United States Constitution Amendment Fifth and Sixth, requiring that Mr. Viera be (one more time) resentenced because *Erlinger's* Court held:

“Any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt. Judges may not assume the jury’s fact finding function for themselves let alone purport to perform it using a mere preponderance-of-the-evidence standard.”

Consequently, the Habitual Offender enhanced portion of Appellant’s sentence is illegal because the Judge, not the jury, made the requisite factual finding and is properly raised in the instant proceeding as the error is apparent on the face of the record.

### REASONS FOR GRANTING THE PETITION

Moreover, the **Florida District Court decisions are wrongly decided**. To date, the unanimous District Court decisions on this issue adopt two overreaching themes to justify their expansion of *Apprendi's* only exception. First, three of Florida District Courts (the First, Second and Fourth) reason that the date of release is “related” to the fact of a prior conviction. The Second District’s *Calloway* decision,<sup>7</sup> however, is the only one directly acknowledging that the date of release “is not the same as the bare fact of a prior conviction.” *Calloway*, 914 So. 2d at 14.

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<sup>7</sup> *Calloway v. State*, 914 So. 2d 12 (Fla. 2d DCA 2005).

But *Erlinger* now makes plain that *Apprendi* signaled years ago the exception for the fact of a prior conviction is questionable to begin with, and as a result, it must be applied narrowly. In short, the Sixth Amendment will not tolerate an expansion of the exception – even if the bench might view it as logical or slight.

Second, the other three District Courts (The Third, Fifth and Sixth) lean heavily on the purported “ministerial nature” of the finding. Presumably, these Courts conclude that proving the date of release is so “straightforward that sending it to a jury would be pointlessly ineffective.” *Erlinger*, 602 U.S. at 839 (citation omitted).

We should question whether “ministerial” is an accurate label. The Petitioner, in the case at bar, avers that the “ministerial” label does not seem fit because the date of release finding involves the evaluation of evidence. See e.g. *Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4<sup>th</sup> DCA 1996)(explaining that, in the context of Mandamus, a duty or act is defined as ministerial when there is no room for the exercise of discretion and the performance being required is directed by law). Specifically, to establish that the PRR Statute applies, the State must offer proof, which generally includes records from the Florida Department of Corrections. Notably, *Simmons*, *Maye* and *Ryland*<sup>8</sup> do not establish these records are somehow beyond challenge. *Erlinger* itself recognized that even judicial

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<sup>8</sup> *Simmons v. State*, 332 So. 3d 1129 (Fla. 5<sup>th</sup> DCA 2022); *Maye v. State*, 368 So. 3d 531 (Fla. 6<sup>th</sup> DCA 2023); *Ryland v. State*, 360 So. 3d 784, 786 (Fla. 3<sup>rd</sup> DCA 2023).

records, specifically Shepard documents, can be prone to errors. *Erlinger* 602 U.S. at 839 (citation omitted). *Blakely* and *Erlinger* leave no room for an efficiency exception to the Sixth Amendment. To be sure, “[T]he jury trial may have ‘never been efficient,’” *Erlinger*, 602 U.S. at 849 (quoting *Apprendi*, 530 U.S. at 498) (Scala, J., concurring), but it is required by the Sixth Amendment even when the evidence might be “overwhelming.” *Id.* at 847. Thus, regardless of the label *Simmons*, *Maye*, and *Ryland* give the finding, the State must put its proof to a jury, not a Judge. Therefore, given the United States Supreme Court’s Sixth Amendment jurisprudence, the Court in Florida under no authority to expand, or otherwise invent, an exception to the rule announced in *Apprendi*.

In furtherance, this Honorable Court should reverse Petitioner’s sentence because this Court should be bound by its own interpretation of *Apprendi*, as set forth in *Erlinger*, by the United States Supreme Court.

### **FLORIDA’S CONSTITUTION CONTAINS EXPRESS SEPARATION OF POWERS PROVISION**

Article II, Section 3 states as follows:

The powers of the State government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Art. III, § 3, Fla. Constitution.

The separation of powers is no technicality. As Justice Scalia observed, “[W]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bill of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.” *Morrison v. Olson*, 487 U.S. 654, 697, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988)(Scalia, J., dissenting). Consistent with this strict separation of powers, Florida Courts are without authority “to add words to statutes that were not placed there by the Legislature.” *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). Nor can it modify a statute’s express terms. *Koster v. Sullivan*, 160 So. 3d 385, 390 (Fla. 2015); *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953). “To do so would be an abrogation of legislative power.” *Koster*, 160 So. 3d at 390 (citation omitted). The Legislature alone must wield the legislative power, and this Court should find no exception to Florida’s separation of powers applicable in this case.

#### UNITED STATES SUPREME COURT STANDARD ON RETROACTIVITY ANALYSIS

The Court went on to find that the principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that they have now overruled several decisions inconsistent with them, including multiple Florida decisions. See, e.g., *Hurst v. Florida*, 577 U.S. 92, 101-102 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), and *Spaziano v. Florida*, 468 U.S. 447 (1984)); *Alleyne*, 570 U.S., at 107 (overruling *Harris v. United States*, 536 U.S. 545 (2002)); *Ring v.*

*Arizona*, 536 U.S. 584, 609 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). *Id.*

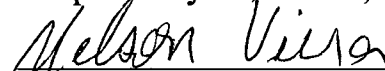
In sum, the recent decision in *Erlinger* leaves no doubt what the Constitution requires in these circumstances: Virtually “any fact” that “increase[s] the prescribed range of penalties to which a criminal defendant is exposed” must be resolved by a unanimous jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Judges may not assume the jury’s factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the-evidence standard. *Id.*

Based on the foregoing, Petitioner ask this Honorable Supreme Court of the United States to find the Third DCA failed to comply with the constitutional requirements of this Court, and order the Third DCA to correct Petitioner’s illegal sentence under review by striking his 25 years minimum mandatory sentence and grant other appropriate relief to include resentencing Petitioner by Florida guideline scoresheet without any enhancement reclassification status.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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