

No. 26-5506

IN THE SUPREME COURT OF THE UNITED STATES

DAVID JONES, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

DANIEL EISINGER
Public Defender

Paul Edward Petillo
*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

ppetillo@pd15.state.fl.us
appeals@pd15.org

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. PETITIONER AGREES THAT THIS COURT SHOULD HOLD THIS PETITION PENDING DISPOSITION OF <i>KIAN</i>	1
II. FLORIDA’S PRISON RELEASEE REOFFENDER AND HABITUAL FELONY OFFENDER STATUTES ARE UNCONSTITUTIONAL.....	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	3
<i>Erlinger v. United States</i> , 602 U.S. 821 (2024)	3
<i>Flournoy v. State</i> , 415 So. 3d 806 (Fla. 2d DCA 2025).....	3, 4
<i>Hayes v. State</i> , 750 So. 2d 1 (Fla. 1999)	4
<i>Hollingsworth v. State</i> , 293 So. 3d 1049 (Fla. 4th DCA 2020).....	4
<i>Jackson v. State</i> , 410 So. 3d 4 (Fla. 4th DCA 2025)	3
<i>Kian v. Florida</i> , No. 25-6623	1
<i>Klick v. State</i> , 393 So. 3d 820 (Fla. 6th DCA 2024)	4
<i>Luton v. State</i> , 934 So. 2d 7 (Fla. 3d DCA 2006)	4
<i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986).....	2
<i>Rosado v. State</i> , 308 So. 3d 1065 (Fla. 5th DCA 2020)	4
<i>Shinault v. State</i> , 51 Fla. L. Weekly D1390, 2026 WL 1968382 (Fla. 1st DCA July 8, 2026)	4
<i>Westphal v. City of St. Petersburg</i> , 194 So. 3d 311 (Fla. 2016).....	4

Statutes

§ 775.082(9)(a)1.&2., Fla. Stat.	2
§ 775.082(9)(a)3.b., Fla. Stat.	2
§ 775.084(1)(a)&(5), Fla. Stat.	2
§ 775.084(4)(a)1., Fla. Stat.	2
§ 775.087(1)(b), Fla. Stat.	1
§ 777.04(4)(c), Fla. Stat.	1
§ 782.04(2), Fla. Stat.	1
§ 944.275(4)(f), Fla. Stat.	1

Rules

Fla. R. Crim. P. 3.800(b)(2)	3, 4
------------------------------------	------

Constitutional Provisions

U.S. Const. amend VI	1
----------------------------	---

U.S. Const. amend. XIV	1
------------------------------	---

ARGUMENT

I. PETITIONER AGREES THAT THIS COURT SHOULD HOLD THIS PETITION PENDING DISPOSITION OF *KIAN*

Petitioner agrees that this Court should hold the petition in abeyance pending the decision in *Kian v. Florida*, No. 25-6623.

II. FLORIDA'S PRISON RELEASEE REOFFENDER AND HABITUAL FELONY OFFENDER STATUTES ARE UNCONSTITUTIONAL

Regardless of the outcome of *Kian*, Petitioner asserts that his sentence violates the Sixth and Fourteenth Amendments. The jury's verdict of attempted second-degree murder with a weapon authorized a maximum sentence of 30 years in prison, and with a possible 15% reduction due to gain time. §§ 775.087(1)(b), 777.04(4)(c), 782.04(2), 944.275(4)(f), Fla. Stat. But the Habitual

Felony Offender elements found by the judge¹ boosted the maximum sentence to life imprisonment without the possibility of release, § 775.084(4)(a)1., Fla. Stat., and the Prison Releasee Reoffender elements² mandated a minimum sentence of 30 years in prison with no gain time. § 775.082(9)(a)3.b., Fla. Stat. These elements—not found by the jury—acted as the “tail which wag[ged] the dog of the substantive offense.” *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986).

The State has previously conceded that these elements must be made by the jury. *Flournoy v. State*, 415 So. 3d 806, 808 (Fla. 2d

¹ The elements of the Habitual Felony Offender statute are: 1) the defendant was previously convicted of two or more felonies; 2) the felony for which the defendant is to be sentenced was committed while the defendant was serving a prison or supervisory sentence or within five years of the defendant’s conviction or release from sentence for one of the prior felonies; 3) the felony for which the defendant is to be sentenced, and one of the two prior felonies, is not an offense relating to the purchase or possession of a controlled substance; 4) the prior felonies have not been pardoned or set aside by a postconviction proceeding; and 5) the prior felony convictions must be sequential, i.e., one committed after being sentenced for another § 775.084(1)(a)&(5), Fla. Stat.

² The Prison Releasee Reoffender statute requires proof that the defendant committed his or her offense within three years from release from prison for a felony, or committed his or her offense while serving a sentence for a felony or after having escaped from prison for a felony. § 775.082(9)(a)1.&2., Fla. Stat.

DCA 2025) (“The State concedes that HFO and PRR findings must, at a defendant’s request, be made by the jury.”); *Maye v. State*, SC23-1184, 2024 WL 4432603, at *43 (State’s Answer Brief) (“*Erlinger* requires that the PRR release-date finding be made by a jury, not a judge.”). This is as it should be: the State cannot disagree with, nor can there be a circuit split over, this Court’s decision in *Erlinger v. United States*, 602 U.S. 821 (2024).³

This issue was preserved for appellate review by Petitioner’s motion to correct sentencing error filed under Florida Rule of Criminal Procedure 3.800(b)(2). Florida has six district courts of appeal. At least three of them, including the Fourth District Court of Appeal—the court that reviewed Petitioner’s judgment and sentence—hold that *Apprendi*⁴ and *Erlinger* errors may be preserved

³ *E.g.*, *Jackson v. State*, 410 So. 3d 4, 11 (Fla. 4th DCA 2025) (holding that under *Erlinger*, judge may find prior convictions, but “[a]ll other facts which would be necessary to an enhanced sentence must be submitted to a jury. With respect to an HFO sentence, those issues would include the timing of the offense with respect to the past qualifying felonies or the defendant’s release from prison or supervision; whether the defendant has been pardoned for any of the qualifying felonies; or whether any of the convictions for qualifying felonies have been set aside in postconviction proceedings.”).

⁴ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

by a motion filed under Florida Rule of Criminal Procedure 3.800(b)(2). *Flournoy v. State*, 415 So. 3d 806, 808 n.1 (Fla. 2d DCA 2025); *Hollingsworth v. State*, 293 So. 3d 1049, 1051 (Fla. 4th DCA 2020); *Rosado v. State*, 308 So. 3d 1065, 1067 n.2 (Fla. 5th DCA 2020); *see also Klick v. State*, 393 So. 3d 820, 823 (Fla. 6th DCA 2024) (while not addressing preservation, the court granted relief after the issue was raised by rule 3.800(b)(2) motion). Two district courts rule otherwise. *Shinault v. State*, 51 Fla. L. Weekly D1390, 2026 WL 1968382 (Fla. 1st DCA July 8, 2026); *Luton v. State*, 934 So. 2d 7, 10 (Fla. 3d DCA 2006). Under the authority that controlled Petitioner’s appeal, his motion to correct sentencing error preserved this issue for review in the State court.

Finally, the Habitual Felony Offender and Prison Releasee Reoffender statutes are unconstitutional and unenforceable because Florida courts are “without power to rewrite a plainly written statute, even if it is to avoid an unconstitutional result.” *Westphal v. City of St. Petersburg*, 194 So. 3d 311, 313-14 (Fla. 2016); *see also Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999) (courts are “not at liberty to add words . . . that were not placed there by the Legislature.”).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL EISINGER

Public Defender

Paul Edward Petillo

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

ppetillo@pd15.state.fl.us

appeals@pd15.org

October 22, 2026