IN THE SUPREME COURT OF FLORIDA

CARLOS J. ACEVEDO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1873
4th DCA Case No. 4D14-3124

****

RESPONDENT'S ANSWER BRIEF

****

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

MARK J. HAMEL
Assistant Attorney General
Florida Bar No. 0842621
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
CrimAppWPB@myfloridalegal.com
(561) 837-5016

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
PETITIONER QUALIFIED FOR SENTENCING AS A DANGEROUS SEXUAL OFFENDER.	
CONCLUSION	26
CERTIFICATE OF SERVICE	27
CERTIFICATE OF TYPEFACE COMPLIANCE	27

TABLE OF AUTHORITIES

FEDERAL CASES

Descamps v. United States, 133 S.Ct. 2276 (2013).....22

FLORIDA CASES

Acevedo v. State, 20 So. 3d 859 (Fla. 4th DCA 2009).....1

Acevedo v. State, 110 So. 3d 461 (Fla. 4th DCA 2013).....1

Acevedo v. State, 174 So. 3d 437 (Fla. 4th DCA 2015).....passim

Bracey v. State, 109 So. 3d 311 (Fla. 2d DCA 2013).....21

Brooks v. State, 969 So. 2d 238 (Fla. 2007).....24

Carter v. State, 786 So. 2d 1173 (Fla. 2001).....12

Cruz v. State, 189 So. 3d 822 (Fla. 2015).....23

Dautel v. State, 658 So. 2d 88 (Fla. 1995).....19, 20

Durant v. State, 94 So. 3d 669 (Fla. 5th DCA 2012).....3, 16

Felder v. State, 116 So. 3d 605 (Fla. 5th DCA 2013).....13

Kasischke v. State, 991 So. 2d 803 (Fla. 2008).....13

Knarich v. State, 866 So. 2d 165 (Fla. 2d DCA 2004).....21

Montgomery v. State, 183 So. 3d 1042 (Fla. 4th DCA 2015).....20

Paul v. State, 129 So. 3d 1058 (Fla. 2013).....14

Plott v. State, 1489 So. 3d 90 (Fla. 2014).....7

State v. J.M., 824 So. 2d 105 (Fla. 2002).....13

State v. Mason, 979 So. 2d 301 (Fla. 5th DCA 2008).....13

State v. McBride, 848 So. 2d 287 (Fla. 2003).....7

Weber v. Dobbins, 616 So. 2d 956 (Fla. 1993).....13

Wright v. State, 911 So. 2d 81 (Fla. 2005).....12

STATUTES

§ 775.21, Fla. Stat. (2012).....21

§ 794.0115, Fla. Stat. (2005).....8, 15, 17, 18, 19

§ 800.04, Fla. Stat. (2005).....11, 15, 16

§ 800.04, Fla. Stat. (1981).....12, 15, 17

§ 921.0024, Fla. Stat. (2008).....13

§ 944.275, Fla. Stat. (2015).....13

RULES

Fla. R. Crim. P. 3.720.....22

STATEMENT OF THE CASE

On January 18, 2008, a jury convicted Petitioner of the following offenses:

Count I, Lewd or Lascivious Battery
Count II, Lewd or Lascivious Molestation
Count III, Lewd or Lascivious Molestation
Count IV, Lewd or Lascivious Molestation
Count V, Lewd or Lascivious Conduct

(R 25-29). The trial court found Petitioner to be a sexual predator and sentenced Petitioner to life in prison on each count, to run concurrently (R 38, 40-54). On four of the five counts, the trial court sentenced Petitioner as a dangerous sexual felony offender and imposed a mandatory minimum term of twenty-five years imprisonment (R 42, 45, 48, 51).

On October 28, 2009, the Fourth District Court of Appeal affirmed Petitioner's conviction and sentence on direct appeal. Acevedo v. State, 20 So. 3d 859 (Fla. 4th DCA 2009) (unpublished table decision). On March 13, 2013, the Fourth District Court of Appeal affirmed the summary denial of a motion for postconviction relief. Acevedo v. State, 110 So. 3d 461 (Fla. 4th DCA 2013) (unpublished table decision).

On June 3, 2013, Petitioner submitted to the trial court a motion to correct illegal sentence (R 1-10). On June 25, 2014, the trial court issued an order denying the motion (R 83). Petitioner pursued an appeal (R 85). On July 29, 2015, the

Fourth District Court of Appeal issued a decision affirming the denial of Petitioner's motion. Acevedo v. State, 174 So. 3d 437 (Fla. 4th DCA 2015). Petitioner sought to obtain this Court's discretionary jurisdiction based on certified conflict. On March 16, 2016, this Court accepted jurisdiction and ordered briefs on the merits.

STATEMENT OF THE FACTS

In a prior case, Petitioner pled guilty to a 1981 offense of "LEWD ASSAULT/ACT," prohibited by section 800.04 of the Florida Statutes (R 71). The arrest affidavit included the following facts regarding the 1981 offense:

> During the course of a burglary investigation under MDPD case 171927 B this writer became aware of several incidents of sexual mis-conduct involving an eleven year old white male juvenile acquaintance of the subject. During the conduct [sic] of two separate interviews of the victim and in the mother's presence, the juvenile related that he had been coerced on four occasions into submitting to oral sex performed on him by the adult subject above. The first incident having occurred in January of 1981 at the home of the subject & the last time in May of 1981 at the victim[']s residence. The victim gave an emotional account of the homosexual acts revealing only that oral sex upon his person was committed by the subject.

(R 69).

In the rule 3.800(a) motion filed in the instant case,

Petitioner alleged that "the trial court erred in sentencing him to Life sentences for Counts I-IV, as a Dangerous Sexual Felony Offender (DSFO, §794.0115(2005)), as the predicate used by the trial court does not qualify for such sentencing" (R 3). Petitioner argued that his 1981 conviction for committing a lewd assault is not a qualifying predicate offense for Dangerous Sexual Felony Offender sentencing (R 4). Petitioner relied on the decision of the Fifth District Court of Appeal in Durant v. State, 94 So. 3d 669 (Fla. 5th DCA 2012) (R 5).

The State responded to Petitioner's motion with two arguments (R 14-19). First, the State argued that the motion was facially insufficient because the motion did not show where in the record the claim can be located and resolved (R 17). Second, the State argued that the claim was not cognizable because Petitioner's sentence was not illegal under rule 3.800(a) (R 17-18). The trial court denied the motion "for reasons set forth in the State's response" (R 83).

On appeal, the Fourth District Court of Appeal addressed Petitioner's claim on the merits, finding that Petitioner's 1981 conviction was a proper qualifying offense:

> The defendant argued in his motion that he did not qualify as a DSFO because his prior conviction under section 800.04, Florida Statutes (1981), did not contain elements similar to section 800.04(4), Florida

Statutes (2005) (lewd or lascivious battery), or section 800.04(5), Florida Statutes (2005) (lewd or lascivious molestation). We disagree.

The DSFO statute enumerates various qualifying prior offenses, including violations of sections 800.04(4) and (5), but also includes "any offense under a former statutory designation which is similar in elements to an offense described in this paragraph." § 794.0115(2)(e), Fla. Stat. (2005). The defendant's 1981 conviction was for a violation of a former version of section 800.04, which provided:

> Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit sexual battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

§ 800.04, Fla. Stat. (1981).

In 2005, section 800.04 provided, in relevant part:

> (4) LEWD OR LASCIVIOUS BATTERY.—A person who:
>
> ....
>
> (b) Encourages, forces, or entices any person less than 16 years of age to engage in ... any other act involving sexual activity commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083,

or s. 775.084.

§ 800.04(4), Fla. Stat. (2005).

The DSFO statute requires similar elements, not identical elements. To determine if the statutes are similar, we focus on their similarities and not their dissimilarities. And, there are similarities between the 1981 and 2005 statutes.

Both statutes proscribe the lewd or lascivious touching of a child. Section 800.04 (1981) prohibited "any person from making an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner ...." Section 800.04(4)(b) (2005) defines a lewd or lascivious battery as encouraging, forcing or enticing "any person less than 16 years of age to engage in ... any other act involving sexual activity." Both statutes require the victim to be under a certain similar age. Both statutes are second degree felonies.

In 1981, the defendant was charged with coercing an 11-year-old boy to allow the defendant to perform oral sex on him. That conduct is proscribed by subsection (4)(b) of the 2005 statute. Thus, had the same crime been committed in 2005, it would have satisfied the similar elements of section 800.04(4)(b).

We agree with the State, while not identical, the statutes are similar. The court did not err in finding the defendant to be a DSFO and imposing a twenty-five-year mandatory minimum sentence.

The defendant relies on Durant v. State, 94 So.3d 669 (Fla. 5th DCA 2012), to support his position that the statutes are not similar. We understand that by focusing on the dissimilarities of two statutes, a court

can conclude the statutes are dissimilar. But, we disagree that the focus should be on the dissimilarities between the two statutes.

In Durant, the defendant also challenged his classification as a DSFO and the imposition of a twenty-five-year mandatory minimum sentence on direct appeal. The defendant was convicted of violating section 794.011(8)(a), Florida Statutes (2012), for "committing an unnatural or lascivious act and solicitation of a child under eighteen years of age to engage in an act that constitutes sexual battery by a person who is in a position of familial or custodial authority." Id. at 670. In designating the defendant as a DSFO, the trial court relied upon a predicate conviction for a violation of section 800.04(1), Florida Statutes (1995). That section is nearly identical to the 1981 version of section 800.04.

Section 800.04(1) (1995) made it a second degree felony to "handle [], fondle[], or assault[] any child under the age of 16 years in a lewd, lascivious, or indecent manner ... without committing the crime of sexual battery." Id. at 671. The state argued that the elements of section 800.04(1) were similar to the elements of sections 800.04(4) and (5). Id. The court reviewed the two statutory provisions and did "not believe that the 1995 version of section 800.04(1) [was] similar in elements to sections 800.04(4) and (5)." Id. It focused on the dissimilarities between the two statutes, and reversed the mandatory minimum sentence. Id. at 672.

The purpose of the dangerous sexual felony offender statute was to provide an enhanced sentence to offenders who had previously been convicted of enumerated provisions of the Florida Statutes or statutes with

> similar elements. The serious nature of the crime, the defendant's recidivism, and the young age of the victim, begged for enhanced sentencing. Our legislature provided the enhanced sentencing. By our decision, we enforce the legislature's intent.
>
> To the extent our decision conflicts with the Fifth District's decision in Durant, we certify conflict.
>
> We affirm the order denying the defendant's rule 3.800(a) motion.

Acevedo v. State, 174 So. 3d 437, 437-39 (Fla. 4th DCA 2015).

SUMMARY OF THE ARGUMENT

The trial court properly denied Petitioner's motion because Petitioner's claim is not cognizable under rule 3.800(a). Furthermore, there was no error because the elements of Petitioner's 1981 conviction were similar to the elements of an enumerated qualifying offense.

ARGUMENT

PETITIONER QUALIFIED FOR SENTENCING AS A DANGEROUS SEXUAL OFFENDER.

A. STANDARD OF REVIEW

The standard of review is de novo. See State v. McBride, 848 So. 2d 287, 289 (Fla. 2003) (reviewing de novo the question of whether defendant was procedurally barred from seeking rule 3.800(a) relief); Plott v. State, 1489 So. 3d 90, 93 (Fla. 2014) ("Because this is a pure question of law, this Court's review is

de novo.").

B. PERTINENT STATUTES

Section 794.0115 of the Florida Statutes (2005) provides:

> (1) This section may be cited as the "Dangerous Sexual Felony Offender Act."
>
> (2) Any person who is convicted of a violation of s. 787.025; s. 794.011(2), (3), (4), (5), or (8); s. 800.04(4) or (5); s. 825.1025(2) or (3); s. 827.071(2), (3), or (4); or s. 847.0145; or of any similar offense under a former designation, which offense the person committed when he or she was 18 years of age or older, and the person:
>
> (a) Caused serious personal injury to the victim as a result of the commission of the offense;
>
> (b) Used or threatened to use a deadly weapon during the commission of the offense;
>
> (c) Victimized more than one person during the course of the criminal episode applicable to the offense;
>
> (d) Committed the offense while under the jurisdiction of a court for a felony offense under the laws of this state, for an offense that is a felony in another jurisdiction, or for an offense that would be a felony if that offense were committed in this state; or
>
> (e) Has previously been convicted of a violation of s. 787.025; s. 794.011(2), (3), (4), (5), or (8); s. 800.04(4) or (5); s. 825.1025(2) or (3); s. 827.071(2), (3), or (4); s. 847.0145; of any offense under a former statutory designation which is similar in elements to an offense described

in this paragraph; or of any offense that is a felony in another jurisdiction, or would be a felony if that offense were committed in this state, and which is similar in elements to an offense described in this paragraph,

is a dangerous sexual felony offender, who must be sentenced to a mandatory minimum term of 25 years imprisonment up to, and including, life imprisonment.

(3) "Serious personal injury" means great bodily harm or pain, permanent disability, or permanent disfigurement.

(4) The offense described in subsection (2) which is being charged must have been committed after the date of commission of the last prior conviction for an offense that is a prior conviction described in paragraph (2)(e).

(5) It is irrelevant that a factor listed in subsection (2) is an element of an offense described in that subsection. It is also irrelevant that such an offense was reclassified to a higher felony degree under s. 794.023 or any other law.

(6) Notwithstanding s. 775.082(3), chapter 958, any other law, or any interpretation or construction thereof, a person subject to sentencing under this section must be sentenced to the mandatory term of imprisonment provided under this section. If the mandatory minimum term of imprisonment imposed under this section exceeds the maximum sentence authorized under s. 775.082, s. 775.084, or chapter 921, the mandatory minimum term of imprisonment under this section must be imposed. If the mandatory minimum term of imprisonment under this section is less than the sentence that could be imposed under s.

775.082, s. 775.084, or chapter 921, the sentence imposed must include the mandatory minimum term of imprisonment under this section.

(7) A defendant sentenced to a mandatory minimum term of imprisonment under this section is not eligible for statutory gain-time under s. 944.275 or any form of discretionary early release, other than pardon or executive clemency, or conditional medical release under s. 947.149, before serving the minimum sentence.

In 2005, the offenses of lewd or lascivious battery and lewd or lascivious molestation were defined by section 800.04 as follows:

(4) Lewd or lascivious battery.—A person who:

(a) Engages in sexual activity with a person 12 years of age or older but less than 16 years of age; or

(b) Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity

commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Lewd or lascivious molestation.—

(a) A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the

> perpetrator, commits lewd or lascivious molestation.
>
> (b) An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c)1. An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age; or
>
> 2. An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age
>
> commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (d) An offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 800.04(4)-(5), Fla. Stat. (2005).

In 1981, the offense of lewd, lascivious, or indecent assault or act was defined by section 800.04 as follows:

> Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit sexual battery shall be guilty of a felony

> of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

§ 800.04, Fla. Stat. (1981).

C. DISCUSSION

The trial court properly denied Petitioner's rule 3.800(a) motion because Petitioner's claim is not cognizable under rule 3.800(a). Furthermore, the Fourth District Court of Appeal correctly concluded that Petitioner qualifies as a dangerous sexual offender because his 1981 conviction is similar in elements to a qualifying offense.

1. Petitioner's claim is not cognizable under rule 3.800(a).

"Rule 3.800(a) allows a trial court 'broad authority to correct an *illegal* sentence without imposing a time limitation on the ability of defendants to seek relief.'" Wright v. State, 911 So. 2d 81, 83 (Fla. 2005) (quoting Carter v. State, 786 So. 2d 1173, 1176 (Fla. 2001)). "[A]n illegal sentence subject to correction under the rule must be one that no judge under the entire body of sentencing laws could possibly impose." Wright, 911 So. 2d at 83 (citing Carter, 786 So. 2d at 1178). Since Petitioner's sentence is a sentence that a judge "under the entire body of sentencing laws could possibly impose," Petitioner's claim is not cognizable under rule 3.800(a). Therefore, the trial court properly denied Petitioner's motion.

2. Petitioner qualifies as a dangerous sexual offender.

The intent of the Legislature controls the application of the statute. Therefore, the Fourth District Court of Appeal correctly found that Petitioner's 1981 conviction was similar in elements to an enumerated offense. The Fourth District Court of Appeal also correctly considered the underlying facts of the prior conviction.

a. The intent of the Legislature controls.

"It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." State v. J.M., 824 So. 2d 105, 109 (Fla. 2002) (citations omitted). To determine legislative intent, courts look first to the statute's plain meaning. Id. at 110. Only when the statutory language is unclear or ambiguous do courts apply rules of statutory construction and explore legislative history to determine legislative intent. Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993); Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008) ("the rule of lenity is a canon of last resort"). "The obvious intent of [the Dangerous Sexual Felony Offender] Act is to provide enhanced sentences for repeat sex offenders." State v. Mason, 979 So. 2d 301, 303 (Fla. 5th DCA 2008); Felder v. State, 116 So. 3d 605, 606 (Fla. 5th DCA 2013) ("The purpose of the Dangerous Sexual Felony Offender Act is to provide enhanced

sentences for repeat sex offenders."). Thus, this purpose controls the application of the statute. See Paul v. State, 129 So. 3d 1058, 1064 (Fla. 2013) ("Our purpose in construing a statute is to give effect to the Legislature's intent.").

b. The elements are similar.

Section 800.04 of the Florida Statutes prohibits various sexual offenses committed against children. The 1981 version of the statue consisted of a single sentence:

> Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit sexual battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

§ 800.04, Fla. Stat. (1981).

By 2005, the statute exploded in size and separated the prohibited conduct into four distinct categories:

1. Lewd or Lascivious Battery [subsection 800.04(4)];
2. Lewd or Lascivious Molestation [subsection 800.04(5)];
3. Lewd or Lascivious Conduct [subsection 800.04(6)]; and
4. Lewd or Lascivious Exhibition [subsection 800.04(7)].

§ 800.04, Fla. Stat. (2005). Only the first two categories constitute qualifying offenses under the Dangerous Sexual Felony Offender Act. § 794.0115(2)(e), Fla. Stat. (2005).

The elements of the 1981 version of section 800.04 can be compared to the 2005 versions of subsections 800.04(4) and 800.04(5) as follows:

Elements of 800.04 (1981)
1. The victim was under fourteen years of age and 2. the defendant assaulted the victim in a lewd, lascivious, or indecent manner.
Elements of 800.04(4) (2005)
1. The victim was under sixteen years of age and 2. the defendant encouraged, forced, or enticed the victim to engage in sexual activity.

Elements of 800.04 (1981)
1. The victim was under fourteen years of age and 2. the defendant fondled the victim in a lewd, lascivious, or indecent manner.
Elements of 800.04(5) (2005)
1. The victim was under twelve years of age, 2. the defendant in a lewd or lascivious manner, intentionally touched the breasts, genitals, genital area, buttocks, or the clothing covering them, and 3. the defendant was eighteen years of age or older at the time of the offense.

As the Fourth District Court of Appeal correctly observed, the elements are similar. See Acevedo, 174 So. 3d at 438. "Both statutes proscribe the lewd or lascivious touching of a

child." Id. Additionally, both statutes also prohibit adults from engaging in sexual acts with a child. Compare § 800.04, Fla. Stat. (1981) (prohibiting indecent assault) with § 800.04(4) (2005) (prohibiting lewd or lascivious battery). The similarity between the statutes is unsurprising because it is the same statute that has evolved over time to more clearly and specifically prohibit the same core conduct.

Petitioner argues that the Fourth District Court of Appeal should have focused on the dissimilarities of the statutes. The Fourth District Court of Appeal specifically rejected such an approach, which was the approach followed by the Fifth District Court of Appeal in Durant v. State, 94 So. 3d 669 (Fla. 5th DCA 2012). Acevedo, 174 So. 3d at 438. The Fourth District Court of Appeal explained: "We understand that by focusing on the dissimilarities of two statutes, a court can conclude the statutes are dissimilar. But we disagree that the focus should be on the dissimilarities between the two statutes." Id. The reasoning of the Fourth District Court of Appeal is sound. The Dangerous Sexual Felony Offender Act requires the elements to be "similar" and not "the same." § 794.0115(2)(e), Fla. Stat. (2005). Therefore, the analysis must logically focus on whether the elements are similar. Furthermore, Petitioner's suggested approach frustrates the legislative intent of the statute. If

any difference rendered the statutes "not similar" in elements, no statutes would ever be found similar, thereby rendering the "similar in elements" provision meaningless.

c. The underlying facts can properly be considered to discern the pertinent elements to be compared.

In some circumstances, it is impossible to effectuate the intent of the Legislature under the Dangerous Sexual Felony Offender Act without reference to the facts of the prior offense. This case presents such a situation.

The Dangerous Sexual Felony Offender Act lists two violations of section 800.04 as qualifying offenses: Lewd or Lascivious Battery (800.04(4)) and Lewd or Lascivious Molestation (800.04(5)). § 794.0115(2)(e), Fla. Stat. (2005). However, two other violations of section 800.04 are not qualifying offenses: Lewd or Lascivious Conduct (800.04(6)) and Lewd or Lascivious Exhibition (800.04(7)). See § 794.0115(2)(e), Fla. Stat. (2005). In the Dangerous Sexual Felony Offender Act, the legislature included as qualifying offenses only the most serious sexual offenses committed against vulnerable victims. See id. (including Luring or Enticing a Child, Sexual Battery, Lewd or Lascivious Battery or Molestation of Child or Elderly or Disabled Person, Use of or Promoting a Child in a Sexual Performance, Possessing Photograph of Sexual

Conduct by Child with Intent to promote, and Selling or Buying of Minors).

Since the 1981 version of section 800.04 did not separate the crime into subsections, without information about the nature of the violation, it is not clear if Petitioner's 1981 conviction would constitute an offense similar in elements to a qualifying offense (R 7). Some violations of the 1981 statute would qualify and others would not. Thus, Petitioner's manner of violating section 800.04 is crucial in determining whether Petitioner committed an "offense under a former statutory designation which is similar in elements to an offense described" in the Dangerous Sexual Felony Offender Act.

According to the arrest affidavit contained in the record, Petitioner's 1981 violation of section 800.04 involved Petitioner coercing an eleven-year-old boy into submitting to oral sex performed by Petitioner (R 69). This type of violation of section 800.04 constitutes an offense that is similar in elements to a qualifying offense. See 794.0115(2)(e), Fla. Stat. (2005) (listing violations of section 800.04(4) or (5) as qualifying offenses). The facts of the 1981 offense were discussed in the decision of the Fourth District Court of Appeal:

> In 1981, the defendant was charged with coercing an 11-year-old boy to allow the defendant to perform oral sex on him. That conduct is proscribed by subsection (4)(b) of the 2005 statute. Thus, had the same crime been committed in 2005, it would have satisfied the similar elements of section 800.04(4)(b).

Acevedo, 174 So. 3d at 438.

It was proper for the Fourth District Court of Appeal to consider facts from Petitioner's 1981 conviction because it is necessary to examine some underlying facts to determine which statutory elements to compare, in order to enforce the legislative intent of the Dangerous Sexual Felony Offender Act. See id. ("By our decision, we enforce the legislature's intent."). Petitioner cites two cases that discuss this issue. However, neither case interprets the Dangerous Sexual Felony Offender Act and both cases are otherwise distinguishable.

Petitioner relies on Dautel v. State, 658 So. 2d 88 (Fla. 1995). In Dautel, this Court considered whether a trial court could consider the underlying facts in determining whether an out-of-state conviction is analogous to a Florida statute for the purpose of calculating points on a scoresheet. Id. at 89. This Court found that the rule of criminal procedure directs the scoring of "convictions" and the underlying facts are not properly considered in determining the conviction to be scored.

Id. at 90. The instant case is different because the statute focuses on similarity of elements, rather than "convictions." Furthermore, the instant case involves a Florida conviction, not an out-of-state crime. See Dautel, 658 So. 2d at 90 (noting that "various jurisdictions may choose to punish the same acts differently").

Petitioner also relies on Montgomery v. State, 183 So. 3d 1042 (Fla. 4th DCA 2015). In Montgomery, the Fourth District Court of Appeal examined whether the trial court could consider the underlying facts of a foreign conviction to establish similarity of laws for qualification for a sexual predator designation. Id. at 1043-44. A qualifying offense under the sexual predator statute includes "a violation of a similar law of another jurisdiction." § 775.21(4), Fla. Stat. (2012). Relying on the use of the word "law" in the statute, the Fourth District Court of Appeal concluded that the trial court could not consider the underlying facts of the foreign conviction. Montgomery, 183 So. 3d at 1045. Petitioner's case is different because the statute focuses on similarity of elements, rather than a "similar law." Furthermore, Petitioner's case involves a Florida conviction, not an out-of-state crime.

Although the cases cited by Petitioner are different, some related cases examining the scoring of foreign convictions

support the State's position. In Knarich v. State, 866 So. 2d 165, 168-69 (Fla. 2d DCA 2004), the Second District Court of Appeal held that it is proper to consider the charging document to determine which alternative elements were charged in a former conviction. More recently, the Second District Court of Appeal reached the same conclusion in Bracey v. State, 109 So. 3d 311, 314 (Fla. 2d DCA 2013). The court explained that "[w]hen necessary, a trial court may consider an out-of-state charging document to determine which Florida offense is most analogous to the out-of-state conviction, but this is true only when either the out-of-state statute under which the defendant was convicted or the potentially applicable Florida statutes contain multiple subsections." Id. These cases demonstrate that, when scoring foreign convictions, an exception to the general rule is recognized when the foreign conviction, on its face, does not show which Florida offense is the most analogous. A similar situation is presented in Petitioner's case because the prior conviction, on its face, does not show which Florida offense is the most analogous.

Federal courts take a similar approach when identifying qualifying prior convictions for purposes of the Armed Career Criminal Act. The general rule is that a federal sentencing court may "look only to the statutory definitions" of a

defendant's prior offenses. Descamps v. United States, 133 S.Ct. 2276, 2283 (2013). However, in a "narrow range of cases" where a statue is composed of multiple, alternative versions of a crime, federal sentencing courts may look beyond the statutory elements and examine "a limited class of documents". Id. at 2284. The purpose of looking beyond the statutory elements is "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the [qualifying offense]." Id. at 2285. This is not viewed as an exception to the rule, but a mechanism for making the statutory comparison. Id.

Given the circumstances of Petitioner's case, it was permissible for the State to present evidence regarding the facts of the 1981 conviction. The rules of criminal procedure provide that "[t]he court shall entertain submissions and evidence by the parties that are relevant to the sentence." Fla. R. Crim. P. 3.720(b). In Petitioner's case, the prior conviction involved a violation of Florida law, not a foreign conviction (R 7). The prior conviction also resulted from a plea of guilty, not a trial (R 7). The crucial issue for the sentencing court, if the issue was even disputed, was whether the violation of 800.04 in 1981 involved battery or molestation on a child. Thus, the factual issue could easily be resolved

with reference to the factual basis for the plea, which might have included reference to the arrest affidavit included in the appellate record (R 69). Since Petitioner's case involved a recidivism statute, the trial court was permitted to make findings regarding the prior conviction. See Cruz v. State, 189 So. 3d 822, 832 (Fla. 2015) ("the cases rejecting Apprendi/Alleyne challenges to recidivism statutes remain good law.").

It should be recognized that the record is not developed on this issue. In his motion, Petitioner did not complain that the trial court considered the underlying facts of his 1981 conviction (R 1-6). Petitioner first raised this issue in his motion for rehearing of the decision of the Fourth District Court of Appeal (Aug. 12, 2015 Motion for Rehearing). Since the record does not include the sentencing transcript, it is not clear what documents, if any, the trial court relied on in sentencing Petitioner. The only document in the appellate record containing facts regarding the 1981 conviction is the arrest affidavit (R 69).

Respondent agrees that the comparison of elements must be strictly limited to the statutory elements. However, it is necessary in some cases, such as Petitioner's case, to examine the facts to determine the elements to be used in the

comparison. The record does not reveal the sentencing court's consideration of evidence regarding the facts of Petitioner' s 1981 conviction. Therefore, Petitioner is not entitled to any relief on his rule 3.800(a) motion.

d. Any error was harmless.

In Brooks v. State, 969 So. 2d 238 (Fla. 2007), this Court discussed the harmless error test to be applied when a sentencing error is raised under rule 3.800(a). This Court noted that "applying the would-have-been-imposed standard to sentencing issues raised under rule 3.800(a) would defeat the purposes of preserving issues for review and would circumvent the appellate process." Id. at 243. Thus, for motions filed under rule 3.800(a), the sentencing error is harmless if the trial court could have imposed the same sentence absent the alleged error. See id. ("if the trial court could have imposed the same sentence using a correct scoresheet, any error was harmless").

The alleged error in Petitioner's case is harmless. Petitioner's total sentence points were 458 (R 37). "If the total sentence points are greater than or equal to 363, the court may sentence the offender to life imprisonment." § 921.0024(2), Fla. Stat. (2008). Therefore, the trial court could have imposed the same life sentence without any finding

that Petitioner was a dangerous sexual offender.

Petitioner's mandatory minimum sentence of twenty-five years imprisonment is of no consequence. Since Petitioner is serving a life sentence, the mandatory minimum sentence does not affect the length of Petitioner's sentence. See § 944.275(4)(b), Fla. Stat. (2015) ("State prisoners sentenced to life imprisonment shall be incarcerated for the rest of their natural lives, unless granted pardon or clemency."). Since the alleged error would be harmless pursuant to this Court's decision in Brooks, Petitioner is not entitled to any relief on his rule 3.800(a) motion.

CONCLUSION

Therefore, this Court should affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
Tallahassee, Florida

_____
/s/ CELIA TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

_____
/s/ MARK J. HAMEL
Assistant Attorney General
Florida Bar No. 0842621
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that this brief was prepared in Courier New font, 12 point, and double spaced and (2) that a true and accurate copy of the foregoing was served on Peter Webster, Christine Davis Graves, and James Parker-Flynn, 215 S. Monroe Street, Tallahassee, Florida at pwebster@carltonfields.com, cgraves@carltonfields.com, and jparker-flynn@carltonfields.com on June 27, 2016.

_____
/s/ MARK J. HAMEL
Counsel for Respondent

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

_____
/s/ MARK J. HAMEL
Counsel for Respondent