IN THE
UNITED STATES SUPREME COURT

CASE NO: to be assigned

BRANDON L. HAWKINS,
PETITIONER,
v.

THE STATE OF FLORIDA,
RESPONDENT.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
NO: 4D15-4876

PETITION FOR WRIT OF CERTIORARI

Brandon L. Hawkins
DC# K89456
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Fl. 32124

Petitioner, *Pro 'Se*

QUESTIONS PRESENTED

POINT ONE

WHETHER PETITIONER IS ENTITLED TO DISCHARGE, NEW TRIAL, AND/OR RESENTENCING BASED ON THE TRIAL COURT FAILING TO CONDUCT A COMPETENCY HEARING AFTER IT FOUND REASONABLE GROUNDS TO BELIEVE THAT PETITIONER WAS INCOMPETENT FOR SENTENCING

POINT TWO

WHETHER PETITIONER IS ENTITLED TO RESENTENCING BASED ON THE TRIAL COURT VINDICTIVELY RESENTENCE PETITIONER TO A GREATER TERM OF IMPRISONMENT AFTER GRANTING HIS MOTION TO CORRECT SENTENCING ERROR.

The question presented in this petition arose from the proceedings below.

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OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at APPENDIX A to the petition and is unpublished at *Hawkins v. State*, Case # 4D15-4876 (Fla. 4th DCA. 2018).

STATEMENT OF JURISDICTION

The date of which the highest State Court decided Petitioner's case was on May 17, 2018. A copy of that decision appears at APPENDIX A, from the Fourth District Court of Appeal of Florida.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PRELIMINARY STATEMENT

Petitioner Brandon L. Hawkins will be referred to as the Petitioner or by Name. The Respondent the State of Florida will be referred to as the Respondent or the State.

The following symbols will be used:

"R" – Record on Appeal (in the case below)

"T" – Trial Transcript of the proceeding below

Each will be followed by the respective page number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves violations of the Sixth and Fourteenth Amendment to the United States Constitution:

> U.S. Const. Amend. 6:
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

> U.S. Const. Amend. 14, Section 1:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

The Petitioner, who had no prior criminal record, was charged, in the Nineteenth Judicial Circuit Court in and for St. Lucie County, by grand jury indictment for first degree murder of Levi Williams with a firearm that he possessed and discharged, causing death or great bodily harm (Count 1), attempted first-degree murder of Jamie Young (Count 2), and E.Y. (Count 3) with a firearm that he possessed and discharged, causing great bodily harm; aggravated assault of T.Y. with a firearm (Count 4); burglary of a dwelling belonging to Levi Williams and committed an assault or battery or was harmed with a firearm that he possessed and discharged, causing great bodily harm (Count 5), and shot a deadly missile into a building (Count 6) (R. 3-4).

During Petitioner's trial, the trial court sustained the State's objection to Petitioner's attempt to introduce proof of Levi Williams' record in California of a conviction for attempted murder, which was known to Petitioner. (T. 679-82; 1132-33, 1136). At the close of the trial, the court denied Petitioner's motion for judgment of acquittal on Count 5, burglary (T. 1295-96). The jury thereafter returned its verdicts finding him guilty of first degree murder as charged (R. ^54), attempted second degree murder as included in Counts 2 and 3, aggravated assault as charged, burglary of a dwelling with an assault or battery on Levi Williams as charged, and shooting a deadly missile (R. 654-58). As to Counts 1, 3, and 5, the

jury further found that Petitioner possessed a firearm which he discharged causing either death or great bodily harm. As to Count 2, the jury found that Petitioner possessed a firearm which he discharged without causing great bodily harm. As to Count 4, the jury found that Petitioner possessed a firearm.

Prior to the sentencing hearing, defense counsel provided the trial court with a notice that Petitioner believed that he was incompetent to proceed. The trial court was advised that Petitioner was being housed in the psychiatric pod at the jail, had been having suicidal ideation, and had lost sixty pounds. He was receiving medication, and told counsel that he was "not thinking right." Defense counsel further expressed his concern that Petitioner might not have the ability to manifest appropriate courtroom behavior. Counsel therefore asked the court to consider appointing two or three experts to examine Petitioner to determine his competency. (T. 790-91). The trial court declined to take any action. (T 548-49).

On December 8, 2015, the trial court adjudged Petitioner guilty in accordance with the jury's verdicts (R 803-04) and sentenced Petitioner as follows:

> Count 1: life in prison without parole, with a twenty-five minimum mandatory 10-20-life sentence (R 805-06);
>
> Count 2: thirty years in prison, with a twenty year minimum mandatory 10-20-life sentence, consecutive to the sentence in Count 1 (R 807-08);

Count 3: life in prison with a twenty-five year minimum mandatory 10-20-life sentence, consecutive to the sentence in Count 2 (R 809-10);

Count 4: 18.84 years in prison with a three-year minimum mandatory 10-20-life sentence, consecutive to the sentence in Count 3 (R 811-12);

Count 5: life in prison with a twenty-five year minimum mandatory 10-20-life sentence, consecutive to the sentence in Count 4 (R 813-14);

Count 6: 18.84 years in prison with a three-year minimum mandatory 10-20-life sentence, consecutive to the sentence in Count 5 (R 815-16).

Petitioner's lowest permissible Criminal Punishment Code sentence was 226.05 months (18.84 years) in prison (R 800-01).

The Petitioner appealed to the Fourth District Court of Appeal of Florida the judgment of conviction and sentence. Simultaneously the Petitioner moved to correct his sentence pursuant to Fla.R.Crim.P. 3.800(b), challenging the life sentence imposed on Count 3, attempted second degree murder with a firearm, which is a first degree felony, punishable by imprisonment for a term of years not greater than thirty years. The trial court granted Petitioner's motion and, over his objection resentenced the Petitioner to a consecutive term of life in prison on Count 3 with a minimum mandatory 10-20-life term of life in prison.

On direct appeal the Petitioner through counsel raised the four grounds for relief:

POINT ONE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF BURGLARY WHERE THE APPELLANT HAD PERMISSION TO ENTER THE TRAILER.

POINT TWO

THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO ADDUCE TESTIMONY ABOUT LEVI WILLIAMS' CALIFORNIA CONVICTIONS FOR ATTEMPTED MURDER WHERE THAT EVIDENCE WAS RELEVANT TO THE REASONABLENESS APPELLANT'S BELIEF AND AS CORROBORATION.

POINT THREE

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A COMPETENCY HEARING AFTER IT FOUND REASONABLE GROUNDS TO BELIEVE THAT APPELLANT WAS INCOMPETENT FOR SENTENCING.

POINT FOUR

THE TRIAL COURT ERRED IN RESENTENCING APPELLANT TO A GREATER TERM OF IMPRISONMENT AFTER GRANTING HIS MOTION TO CORRECT SENTENCING ERROR.

The Fourth District Court of Appeal of Florida *per curiam* affirmed the judgment of conviction and sentence on May 17, 2018 without issuing a written opinion. (See Appendix "A").

The Petitioner submits that the appellate court, at the very least, should have reversed grounds three and four for relief, because fundamental constitutional guarantees to a fair trial and due process were violated. Those two grounds are being now presented to this court for certiorari review.

REASONS FOR GRANTING A WRIT OF CERTIORARI

POINT ONE

WHETHER PETITIONER IS ENTITLED TO DISCHARGE, NEW TRIAL, AND/OR RESENTENCING BASED ON THE TRIAL COURT FAILING TO CONDUCT A COMPETENCY HEARING AFTER IT FOUND REASONABLE GROUNDS TO BELIEVE THAT PETITIONER WAS INCOMPETENT FOR SENTENCING

The Petitioner asserts he should be entitled to a new trial as fundamental principles and constitutional guarantees were violated when the trial court failed to grant a competency evaluation and failed to conduct a competency hearing even though such hearing is procedurally mandated.

A commencement of appellant's sentencing hearing, defense counsel advised the trial court:

> Mr. O'Neil: And Your Honor, did you receive the notice that I filed last week?
>
> The Court: Uh-yes. That's- I don't know what I'm supposed to do with it.
>
> Mr. O'Neil: It's For-
>
> The Court: I have no intention of doing anything with it. I got your notice. I'm on notice. I mean you had- you had him evaluated, right?
>
> Mr. O'Neil: Yes sir.

The Court: And the evaluation came back, competent to proceed.

Mr. O'Neil: Correct.

The Court: So, he's the only one saying that he's not competent to proceed, but, that's without any support right?

Mr. O'Neil: I just wanted to bring your attention, subsequent to the evaluation. He has been placed in the psychiatric pod in the jail. And he has been placed on medication, and he has expressed suicidal ideation, your Honor. He has had substantial weight loss, as you can see. So I do want to bring to the Courts [sic] attention, and obviously the Court can do with the information what it deems appropriate.

The Court: Alright. Does the State have a position on this?

Mr. Hendriks [prosecutor]: No, Sir I take this (inaudible) in court. I was (inaudible) I can appreciate (inaudible) for the update on it. But certainly substantially (inaudible) I don't think it changes anything, sir.

The Court: I don't know what I could make any findings supported by the competent evidence that the defendant is not competent to proceed to sentencing. So at this time- how do you wish to proceed? Do you wish to call witnesses, make argument, what?

Mr. O'Neil: We are going to call a few witnesses, Your Honor. (T. 1548-49)

It was reversible error for the court to refuse to conduct any inquiry into Petitioner's competence to stand trial. In view of the jail's action in placing him in

a psychiatric pod and medication him, doubt as to Petitioner's competency was raised.

The applicable standard in the State of Florida is clear. The appropriate analysis for determining the threshold question of whether reasonable grounds exist to believe that the defendant may be incompetent is suggested in *Jones v. State*, 362 So.2d 1334, 1336 (Fla. 1978):

In deciding whether or not to order an examination, the trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination unnecessary, order an examination before beginning with or proceeding with trial. See also *Scott v. State*, 420 So.2d 595 (Fla. 1982). Evidence of a Defendant's irrational behavior, demeanor, and any prior medical opinion on competence are all relevant to determine whether further inquiry is required. Even one these factors, standing alone, may be sufficient to require a hearing. *Pridgen v. State*, 531 So.2d 951, 954 (Fla. 1988); *Drope v. Missouri*, 420 U.S. 162, 180-181, 95 S.Ct. 896 (1975). Thus, in *Boggs v. State*, 375 So.2d 604 (Fla. 2nd DCA 1979), jail psychiatrist's opinion that the defendant couldn't understand the charges or proceedings against him was enough to require the trial court to afford the defendant a mental examination, since it met the test that there were reasonable grounds to believe that the defendant was incompetent. This was the test to be met, not whether the trial court "reasonably believes" the

defendant is incompetent. Indeed, it is never the defendant's burden to establish to any degree of certainty that he is incompetent, but whether he might be incompetent. *Tingle v. State*, 536 So.2d 202 (Fla. 1988); *Scott v. State*, 420 So.2d 595.

In the present case, the concerns of the jails officials presented more than the bare or vague assertions of incompetency which have been held inadequate to trigger the mandatory requirement of Fla.R.Crim.P. 3.210. *Walker v. State*, 384 So.2d 730 (Fla. 4th DCA 1980); see also *Coney v. State*, 348 So.2d 672 (Fla. 3rd DCA 1977). "If the trial court has grounds to suggest that the defendant is not mentally competent to proceed, the court must conduct a competency hearing." *Kelly v. State*, 797 So.2d 1278, 1280 (Fla. 4th DCA 2001).

The failure to conduct a hearing into Petitioner's competency when the issue was properly brought to the trial court's attention denied him his constitutional right to a fair sentencing and to due process, *Tingle v. State*, 536 So.2d 202, as well as violating Fla.R.Crim.P. 3.210. The remedy for this abuse of the trial court's discretion is remand for a proper hearing and, if appellant is then found competent, resentencing. See *State v. W.S.L.*, 485 So.2d 421 (Fla. 1986); *Pridgen v. State*, 531 So.2d 951.

Most recently the courts in the State of Florida addressed the same issue in *Dortch v. State*, 2018 Fla. App. LEXIS 4658 (Fla. 4th DCA April 4, 2018), where

the "Trial court erred in failing to hold competency hearing for defendant who filed written request for hearing pursuant to Fla. R. Crim. P. 3.210(b) and failing to enter order on issue because court's failure to strictly adhere to Fla. R. Crim. P. 3.210-212 by holding hearing and issuing order constituted a fundamental error that required reversal." The Fourth District Court of Appeal held that:

> [1]-The trial court erred in failing to hold a competency hearing for defendant who filed a written request for a competency hearing pursuant to Fla. R. Crim. P. 3.210(b) and failing to enter an order on the issue prior to accepting defendant's nolo contendere plea because, although the trial court granted the motion for a competency hearing, the court's failure to strictly adhere to Fla. R. Crim. P. 3.210-212 by failing to hold a hearing or issue a written order on the issue of competency constituted a fundamental error that required reversal; [2]-Defendant was not required to first file a motion to withdraw his plea under Fla. R. App. P. 9.140(2)(A) prior to raising the issue of failure to comply with Fla. R. Crim. P. 3.210-212 on direct appeal because the court had reasonable grounds to believe defendant was incompetent and had ordered an examination.

The same or similar occurred in *Presley v. State*, 199 So.3d 1014 (Fla. 4th DCA 2016), where "The denial of defendant's motion to withdraw his plea and vacate his sentences was improper because the trial court fundamentally erred in holding a hearing on those motions without first holding a hearing to determine his competency." The Fourth District Court of Appeal in *Presley* held that:

> [1]-The denial of defendant's motion to withdraw his plea and vacate his sentences was improper because the

> trial court fundamentally erred in holding a hearing on those motions without first holding a hearing to determine his competency; [2]-The trial court did not hold the necessary competency hearing and make an independent determination of defendant's competency before conducting the hearing on his motion to withdraw plea, which was a material stage of the criminal proceeding; [3]-The trial court did not make a finding of competency following an evidentiary hearing or the parties' agreement for the court to decide the competency issue on the basis of a written report. Indeed, the competency determination was made after the hearing on defendant's motion to withdraw his plea and, thus, came too late.

The federal standard here is also well established. In *Dusky v. United States.* 362 U.S. 402, 80 S.Ct. 788 (1960), the United States Supreme Court held that:

> "Test of defendant's competency to stand trial is whether he has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of proceeding against him and it is not enough that he is oriented to time and place and has some recollection of events."

See also Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975).

In the present case there is no dispute as to the evidence possibly relevant to the Petitioner's mental condition that was before the trial court at the time of the trial and sentencing hearing.

The conviction of a legally competent defendant, or the failure of a trial court to provide an adequate competency determination, violates due process

principles by depriving a defendant of his constitutional right to a fair trial. *Drope, supra*, see also *Pate v. Robinson* 383 U.S. 375, 385-86 (1966).

Because this court failed conduct a competency hearing prior to sentencing and to make a finding and to issue an order regarding the Petitioner being competent, a structural error occurred, as the error here undermines the reliability and fairness of the proceedings.

Based on the foregoing the sentences in this case should be vacated and a proper finding on the Petitioner's competency should be made before any new judgment is being entered in this case.

POINT TWO

WHETHER PETITIONER IS ENTITLED TO RESENTENCING BASED ON THE TRIAL COURT VINDICTIVELY RESENTENCE PETITIONER TO A GREATER TERM OF IMPRISONMENT AFTER GRANTING HIS MOTION TO CORRECT SENTENCING ERROR.

Petitioner's original life sentence on his conviction for a first degree felony was illegal.

Petitioner was convicted after trial of, *inter alia*, attempted second degree murder with a firearm which he discharged, causing great bodily harm (Count 3). Petitioner was adjudged guilty of that offense and sentenced to serve life in prison with a mandatory twenty-five year minimum pursuant to the 10-20-Life statute. Attempted second degree murder with a firearm is, however, a first degree felony,

punishable by imprisonment for a term years not greater than thirty years. Section 775.082(3)(b), Fla. Stat.

Where the mandatory minimum 10-20-life sentence is greater than the statutory maximum sentence of thirty years, the maximum sentence which can be imposed is extended beyond the statutory maximum term. *Mendenhall v. State*, 999 So.2d 665 (Fla. 5th DCA 2008), approved *Mendenhall v. State*, 48 So.3d 740 (Fla. 2010) (defendant sentenced to a thirty-five year prison sentence with a mandatory thirty-five year 10-20-life term on his sentence).

However, where the mandatory minimum 10-20-life sentence is less than the statutory maximum term, the maximum sentence which can be imposed is not extended beyond the statutory maximum. *McLeod v. State*, 52 So.3d 784 (Fla. 5th DCA 2010); *Wooden v. State*, 42 So.3d 837 (Fla. 5th DCA 2010). Because this mandatory minimum 10-20-life sentence imposed in those cases was less than the thirty-year maximum sentence, it did not extend the possible sentence which could be imposed beyond the statutory maximum term. See also *Antoine v. State*, 138 So.3d 1063, 1078 (Fla. 4th DCA 2014).

In the instant case, the mandatory minimum term of twenty-five years imposed likewise did not exceed the thirty-year statutory maximum sentence. Therefore, the maximum sentence which could be imposed was not extended beyond the statutory maximum term of thirty years. As in *Mcleod*, *Wooden*, and

Antoine, Petitioner's sentence to life imprisonment in excess of the statutory was illegal.

Petitioner raised his objection to his life sentence on Count 3 in a motion to correct sentencing error filed pursuant to Fla.R.Crim.P 3.800(b)(2), in which he requested that his sentence on Count 3 be corrected to legal term of thirty years in prison with a twenty-five year mandatory minimum term. The trial court granted Petitioner's motion but, over his objection, the trial court resentenced Petitioner to a consecutive term of life in prison on Count 3 with a mandatory minimum 10-20-life term of life in prison. The trial court agreed that no new evidence had been presented at the resentencing hearing which could support an increase in Appellant's sentence.

> *On resentencing, the trial court could not increase Petitioner's sentence unless it could affirmatively establish that vindictiveness played no part in the resentencing decision.*

It was error for the trial court to increase Petitioner's sentence by imposing a mandatory minimum 10-20-life sentence of life imprisonment when it "corrected" his life sentence. The trial court's sentencing alternatives on resentencing were limited by the United States Supreme Court's decision in *North Carolina v Pearce*, 395 U.S. 711 (1969), which held that due process requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Id. at 726. This holding has

been applied where a defendant has successfully challenged only his sentence and not his conviction. *Wemett v. State*, 567 So.2d 882,884 (Fla. 1990); *Richardson v. State*, 821 So.2d 428, 430 (Fla. 5th DCA 2002).

In order to ensure that vindictiveness plays no role in a resentencing, *Pearce* requires a trial court imposing a more severe sentence at resentencing to make the reasons for the more severe sentence affirmatively appear on the record. 395 U.S. at 726. "*Pearce* and its progeny established 'a presumption of vindictiveness, which may be overcome only be objective information in the record justifying the increased sentence.' *Wemett*, 567 So.2d 882, 884 (Fla. 1990) (quoting *United States v. Goodwin*, 457 U.S. 368, 374 (1982).

The Trial judge's statement of his original sentencing intent was not consistent with its actions when it imposed the original sentence.

The sole reason given by trial court below for its increase of the mandatory minimum term from the originally-imposed twenty-five years to a mandatory minimum term of life imprisonment was that it wished to give effect to its original sentencing intention to impose the maximum possible sentence for that count: "My intention has always been to sentence him to life in prison, for what happened to that child, with respect to the third count of the indictment".

But this pronouncement belies the court's actual actions when it originally sentenced Petitioner. At that time, when presenting his recommended sentencing alternatives for Count 3, defense counsel urged the Court:

> As to the count three, with E.Y., we have a 25 year minimum mandatory sentence. I would ask again that the Court not impose a sentence in excess of that. I would concede in this case, *because there was bodily injury that the Court could impose a 25 years to Life mandatory sentence.* I would ask the Court to impose a 25 year mandatory sentence, for the same reasons I articulated as to count two. (T. 1571).

And the trial court did ultimately impose the twenty-five year mandatory minimum term on Count 3 – not the mandatory minimum life term which it knew was available to it – albeit in tandem with a life sentence. Thus the trial court's proffered reason for increasing Petitioner's sentence is inconsistent with the record of its own actions at the original sentencing.

Kelly v. State

The instant case is on all fours with *Kelly v. State*, 137 So.3d 2 (Fla. 1st DCA 2014) *quashed on other grounds Hatten v. State*, 203 So.3d 142 (Fla. 2016). In *Kelly*, defendant was originally sentenced on his convictions for two counts of aggravated battery to forty years in prison with a twenty-five-year mandatory minimum 10-20-life term based on his discharge of a firearm which caused injury. He subsequently challenged the classification of the aggravated batteries as first

degree felonies, since the use of a firearm was alleged as an element of those offenses. The trial court agreed and reduced the aggravated battery to second degree felonies rather than first degree felonies. 137 So.3d at 3. It resentenced him to a mandatory minimum term of 37.7 years in prison, which the court deemed would effectuate its original sentencing intent that the defendant would serve a twenty-five year mandatory term to be followed by fifteen years in prison with eligibility for gain time. Id. at 4.

On appeal, the appellate court recognized that "it is well established that once a defendant has begin serving a lawfully-imposed sentence, the defendant may not thereafter be resentenced for an increased term of incarceration." *Id.* at 4 (quoting *Rizzo v. State,* 430 So.2d 488 (Fla 1st DCA 1983). It is further noted that this principle applies to any increase to a mandatory minimum sentence once the court entered a written sentence which the defendant had begun serving. 137 So.3d at 4.

a. The trial court's original intent was shown by its actions

The appellate court observed that the trial court could have imposed a mandatory minimum term greater than twenty-five-years- up to life in prison- when it imposed its original sentence. Had it intended originally that the defendant serve forty years in prison, it could have effected that goal by imposing a forty-year mandatory minimum term. *Id.* But "Here, the trial court did not do so in its

original sentence; thus, its new sentence increasing the mandatory minimum portion of Petitioner's sentence from 25 years to 37.55 years was illegally impermissible." *Id.* at 4-5.

b. The increase of the mandatory minimum term was an increase in the sentence

Nor did the appellate court have any question that the increase of the mandatory minimum term amounted to an increase in the defendant's sentence:

> Also, contrary to the trial court's finding, this new sentence was not...a mere restructuring to comport with its intent while also ensuring that the overall length of appellant's sentence was not increased. Rather, **the trial court upwardly modified Petitioner's sentence by making the entire sentence a mandatory minimum, thus impermissibly increasing the previously imposed mandatory minimum sentence.** *Id.* at 5, emphasis added.

Parker v. State

The trial court's resentencing in the instant case is for similar reasons like that which was deemed impermissible by this court in *Parker v. State,* 977 So. 2d 671 (Fla. 4th DCA 2008). There, the defendant was originally sentenced to twenty-five mandatory minimum 10-20-life sentence. 977 So. 2d at 672. The prison sentence was to be followed by a fourteen-year term of probation. The defendant successfully challenged the mandatory minimum term in a postconviction motion, which alleged that the mandatory minimum term was illegal because the jury had

not found that he discharged the firearm. The trial court then resentence him to twenty-eight years in prison, on the grounds that the greater sentence equaled the original sentence after taking into consideration the gain time the defendant would receive. *Id.*

On appeal, the Fourth District Court of Appeal held that the trial judge, who had also imposed the original sentence, had not overcome the presumption of vindictiveness:

> In this case, the same judge that previously sentenced appellant increased the length of the sentence by three years, with no independent legal basis or identifiable conduct by appellant as a basis for the increase. We hold that the trial court erred in resentencing appellant, despite its attempt to achieve a sentence equivalent to appellant previous sentence by taking possible gain-time reductions into consideration. *Id.* at 673.

The Fourth District Court of Appeal stressed "that our holding is not that there was actual vindictiveness on the part of the trial judge, but rather that the presumption of vindictiveness was not overcome. *Id.*

The same result is required in the instant case, where the same judge who imposed the original sentence increased Petitioner's sentence by changing the minimum mandatory term from twenty-five years to life in prison after it was made clear that his original sentence was illegal, despite the fact that no new evidence was introduced which could justify such an increase in the sentence.

The Petitioner was punished for exercising his right to challenge the sentence that the court originally imposed, making the ultimately imposed life-sentences the result of judicial vindictiveness.

A vindictive sentencing claim rests on the principle that an accused should not be subject to a more severe punishment for exercising his right to stand trial. See *Wilson v. State,* 845 So.2d 142, 150 (Fla. 2003); citing *Mitchell v. State,* 521 So.2d 185, 187 (Fla. 4th DCA 1988). The same principle must be applied in the instant situation. It is not necessary for the Petitioner to establish that the court harbored personal animosity for the defendant as the term "vindictive" in the vindictive sentencing context, "has lost its dictionary definitions" and has become "a 'term of art' describing the legal effect of a given objective course of action, generally not implying any personal or subjective animosity on the part of the trial judge." *Nairn v. State,* 837 So.2d 519, 520 (Fla. 3rd DCA 2003).

The issue in question is well established in the State of Florida as it is also shown from a very recent ruling by the Fourth District Court of Appeal in *Austin v. State*, 2018 Fla. App. LEXIS 2933 (Fla. 4th DCA Feb. 28, 2018), where "The denial of defendant's motion to correct sentence and an amended motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(2)(B) was improper because the new sentence of a consecutive life term was a more severe sentence than the original sentence of a concurrent life term for his conviction for burglary with a

battery. The Fourth District Court of Appeal reversed and remanded for resentencing in *Austin* holding that:

> [1]-The denial of defendant's motion to correct sentence and an amended motion to correct sentencing error under Fla. R. Crim. P. 3.800(b)(2)(B) was improper because the new sentence of a consecutive life term was a more severe sentence than the original sentence of a concurrent life term for his conviction for burglary with a battery; [2]-The Pearce presumption of vindictiveness applied because the judge imposed a harsher sentence after defendant had successfully attacked his original sentence; [3]-The judge failed to give any reason for the more severe sentence and nothing justified the increased sentence; [4]-A consecutive life sentence was not necessary to achieve the original court's intent. Because the sentence was not subject to parole, a concurrent life sentence would have achieved the original intent of ensuring that defendant was never released from prison.

In the case at bar, the presumption of judicial vindictiveness is clearly applicable when the trial court ultimately imposed a life-sentence, thus the Petitioner should be entitled to resentencing.

CONCLUSION

WHEREFORE, based the foregoing facts, argument, and cited authorities, the Petitioner prays that this court will grant certiorari or any other relief as this Honorable Court deems appropriate.

Respectfully submitted,

Date: 8-4-18

Brandon L. Hawkins, DC# K89456
Tomoka Correctional Institution
3950 Tiger Bay Road
Daytona Beach, Fl. 32124