22-5500

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES R. LAPOINT – PETITIONER

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and
ATTORNEY GENERAL, STATE OF FLORIDA – RESPONDENTS

On Petition for Writ of Certiorari to
The United States Court of Appeals for the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

James R. LaPoint, Pro Se
D/C # Y53338
Marion Correctional Institution
P.O. Box 158
Lowell, FL 32663-0158
Tel. No. : None Available

QUESTIONS PRESENTED

1. **Do the State courts violate a defendant's 14th Amendment Right to due process and to a fair and complete direct appeal when they become aware of a materially incomplete record on appeal and do not supplement the record, contrary to this Court's holding in *Hardy v. United States*, 375 U.S. 277, 287 (1964) and *Mayer v. City of Chicago*, 440 U.S. 189, 194 (1971)?**

2. **Is Florida's practice of allowing sentencing of criminal defendants to the maximum allowable sentence without record reasons unconstitutional when such sentence varies materially from the defendant's scoresheet and State plea offers, and when such practice precludes a review court from determining if the sentence imposed is legally valid or based on incorrect presumptions in violation of the 6th, 8th, and 14th Amendment Rights under the U.S. Constitution?**

LIST OF PARTIES

____ All parties appear in the caption of the case on the cover page.

X 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:

Brown, Michael	Trial Prosecutor (Asst. State Atty)
Casey, Erin	Trial Defense Counsel (Pub Def Off)
Chappell, Hon. Sheri Polster	U.S. District Judge
Dimmig, Howard "Rex"	Direct Appeal Appellate Counsel
Domerich, John W.	Trial Prosecutor (Asst. State Atty)
Downey, Ryan	Trial Defense Counsel (Pub Def Off)
Dunlevy, Susan D.	Asst. Atty General (Direct Appeal)
Elvington, Brooke	Direct Appeal Appellate Counsel
Fuller, Hon. Joseph C.	Postconviction (3.850) Judge
LaPoint, James	Appellant/Petitioner/Defendant
Rook, Tonja Vickers	Asst. Atty General (Fed Habe Response)
Volz, Hon. Edward J.	Trial Judge

RELATED CASES

- *LaPoint v. State of Florida*, No. 13-CF-000254, 20th Judicial Circuit Court, in and for Lee County, Florida. Trial and sentence occurred November-December 2013.

- *LaPoint v. State of Florida*, 177 So.3d 259 (Fla. 2nd DCA 2015), Case No. 2D14-0136, Second District Court of Appeal, Lakeland, Florida (Direct Appeal). Per Curiam Affirmed Opinion entered June 5, 2015. Mandate issued July 22, 2015.

- *LaPoint v. State of Florida*, 229 So.3d 334 (Fla. 2nd DCA 2016), Case No. 2D16-3606, Second District Court of Appeal, Lakeland, Florida (Petition Alleging Ineffective Assistance of Appellate Counsel). Order Denying Petition on the merits issued November 18, 2016.

- *LaPoint v. State of Florida*, No. 13-CF-000254, 20th Judicial Circuit Court, in and for Lee County, Florida. (Rule 3.850 Motion for Postconviction Relief). Summary denial order on the merits entered September 5, 2017, with leave to amend two grounds. Final summary denial order on the merits entered July 25, 2018. Notice of Appeal of denial of 3.850 motion filed August 3, 2018.

- *LaPoint v. State of Florida*, 273 So.3d 977 (Fla. 2nd DCA 2019), Case No. 2D18-3284, Second District Court of Appeal, Lakeland, Florida (Rule 3.850 Motion Denial Appeal). Per Curiam Affirmed Opinion entered June 14, 2019. Mandate issued July 10, 2019.

- *LaPoint v. Secretary, Florida Department of Corrections, et al.*. No. 2:19-cv-858-FtM-38-MRM, U.S. District Court for the Middle District of Florida, Ft. Myers, FL Division. Petition for Writ of Federal Habeas Corpus filed September 11, 2019. Order denying the Petition and denying a Certificate of Appealability ("COA") on August 23, 2021. Notice of Appeal filed on September 15, 2021.

- *LaPoint v. Secretary, Florida Department of Corrections, et al.*, No. 21-13250-G, U.S. Court of Appeals for the Eleventh Circuit. Order denying the application for a COA issued on April 26, 2022.

- *LaPoint v. Secretary, Florida Department of Corrections, et al.*, Application No. 22A65, Supreme Court of the United States. Petition for Writ of Certiorari. Extension of time granted until August 24, 2022.

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RULES

OTHER

OPINIONS BELOW

[**X**] For cases from **Federal** courts:

The opinion of the 11th U.S. Circuit Court of Appeals appears at **Appendix A** to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[**X**] is unpublished.

The opinion of the United States District Court appears at **Appendix B** to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[**X**] is unpublished.

[ ] For cases from **State** courts:

The opinion of the highest State Court to review the merits appears at Appendix _____ to the petition and is:

[ ] reported _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished.

The opinion of the _____ court 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

[**X**] For cases from **Federal** courts:

The date on which the 11th U.S. Circuit Court of Appeals decided my case was April 26, 2022.

[**X**] No petition for rehearing was timely filed in my case.

[ ] A timely Petition for Rehearing was denied by the U.S. Circuit Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[**X**] An extension of time to file the petition for writ of certiorari was granted to and including August 24, 2022 on or about July 25, 2022 in Application No. **22A65**.

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

[ ] For cases from **State** courts:

The date on which the highest State Court decided my case was _____. A copy of that decision appears at Appendix ____.

[ ] A timely Petition for Rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[ ] An extension of time to file the petition for 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. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Issues Involved

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which will 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 the law; nor deny any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment of the U.S. Constitution provides as follows:

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

The Eighth Amendment of the U.S. Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

On July 16, 2013, the Lee County, Florida State Attorney filed a One Count Information charging the Petitioner with Sexual Activity with a Child, a Second-Degree Felony. After two months of discovery and plea negotiations, LaPoint refused an offer of fifteen years incarceration, followed by fifteen years of probation. At that point, the State filed an Amended Information involving one count of sexual battery of a child over 12 but under the age of 18 by a person in custodial authority – a First Degree Felony.

On November 10, 2013, the Petitioner refused a second plea offer of ten years prison followed by twenty years of probation. On November 11, 2013, the next day, the State filed a Second Amended Information that added Count II, Lewd and Lascivious Molestation, a Second-Degree Felony. The Petitioner contends that no new information was discovered to support either of the two amended Charging Informations, save for the fact that LaPoint rejected the two State plea offers and was exercising his constitutional right to a jury trial.

On November 13, 2013, a two-day trial began in front of Hon. Edward J. Volz, in the 20th Judicial Circuit Court, in and for Lee County, Florida. During the trial proceedings, a juror was in the elevator with an employee of the State Attorney's Office named "Hope" who was escorting a witness to the courtroom. The juror, Mr. Zinn, overheard a conversation between State witness Jodi Malone, and the State Attorney's Office employee. A hearing was conducted, during which Ms. Malone testified that what the prosecutor's employee said in the elevator was, "I can't believe it got this far" (**3.850 Appeal Initial Brief, Pages 7-8; Trial Transcript, Page 282, Lines 10-12**). At the conclusion of the trial, the jury found LaPoint guilty of both Counts as charged.

On December 16, 2013, a sentencing hearing was held in front of trial Judge Volz. The trial court was presented with a Florida Criminal Punishment Code Scoresheet reflecting a lowest permissible prison sentence of 159.7 months (i.e. 13.3 years). The sentencing court issued an order of a prison term of 30 years as to Count 1 followed by a consecutive 15-year prison term as to Count Two. Florida law does not require a judge to give any reasons for a "legal sentence" as long as it is within the lowest permissible prison sentence per scoresheet and the statutory maximum sentence. The Petitioner filed a timely notice of appeal.

The State moved to dismiss LaPoint's direct appeal because the Record on Appeal was incomplete (**see Appx. B, US Dist Ct Order, Page 12**). The missing records involved trial exhibits including nine letters written between the Petitioner and the alleged victim, the alleged victim's notebook, and the recording of a jail phone call (but not the transcript) (**Appx. B, Order, Page 12**). In his August 12, 2016 State Rule 9.141(d) Petition Alleging Ineffective Assistance of Appellate Counsel, LaPoint argued that Assistant Public Defender Brooke Elvington was constitutionally ineffective when she failed to supplement the record on appeal. The details of this error and the resulting prejudice are discussed later in this Petition. On November 18, 2016, the Second District Court of Appeal in Florida denied the Rule 9.141(d) Petition on the merits but without written opinion (see **Appendix C**, *LaPoint v. State*, 229 So.3d 334 (Fla. 2nd DCA 2016)).

On September 11, 2019, LaPoint raised this issue as Ground Four of his Federal Petition for Writ of Habeas Corpus. On August 23, 2021, U.S. District Court Judge Hon. Sheri Polster Chappell denied this ground (see **Appendix B**). LaPoint filed a timely notice of appeal.

On April 26, 2022, Hon. Britt C. Grant, U.S. Circuit Court of Appeals, 11th Circuit issued a Final Order denying a Certificate of Appealability (see **Appendix A**).

REASONS FOR GRANTING THE PETITION

Do the State courts violate a defendant's 14th Amendment Right to due process and to a fair and complete direct appeal when they become aware of a materially incomplete record on appeal and do not supplement the record, contrary to this Court's holding in *Hardy v. United States*, 375 U.S. 277, 287 (1964) and *Mayer v. City of Chicago*, 440 U.S. 189, 194 (1971)?

A. The State and Federal courts have decided this important federal question differently than the United States Supreme Court has on a set of materially indistinguishable facts.

After LaPoint's November 13, 2013 trial, the State moved to dismiss LaPoint's direct appeal because the Record on Appeal was incomplete (**see Appx. B, US Dist Ct Order, Page 12**). The missing records involved trial exhibits including nine letters written between the Petitioner and the alleged victim, the alleged victim's notebook, and the recording of a jail phone call (but not the transcript) (**Appx. B, Order, Page 12**).

In his August 12, 2016 State Rule 9.141(d) Petition Alleging Ineffective Assistance of Appellate Counsel, LaPoint argued that Assistant Public Defender Brooke Elvington was constitutionally ineffective when she failed to supplement the record on appeal with these missing and material records. In his 9.141(d) petition Statement of Facts, the Petitioner noted that he had two children with Georgia Lenhart that included a daughter, the alleged victim, "LL" (**9.141, Page 6**). In 1998, Ms. Lenhart moved away with the children and hid the whereabouts of the family from the Petitioner (**9.141, Page 6**). In 2012, Ms. Lenhart contacted the Petitioner because she was having significant problems with LL and requested his help (**9.141, Page 6**). After learning of the nature and severity of the problems, LaPoint moved from New York State to Florida and took custody of LL (**9.141, Page 7**). Over the following months, the Petitioner and LL moved several times and then settled in Naples, Florida (**9.141, Page 9**). On January 8, 2013,

the Petitioner was detained by Florida police involving a traffic violation and was extradited to Oswego County, New York because of an outstanding warrant (**9.141, Page 9**). While in New York, the Petitioner learned that LL had gotten someone to purchase a plane ticket for her, and that his daughter was in the Oswego County area (**9.141, Page 9**). The Petitioner expressed concern for LL's safety, who was now a homeless young girl and at the mercy of whoever was providing her housing (**9.141, Page 10**). In two letters LL sent to the Petitioner in the Oswego County Jail, she describes being raped and beaten (**9.141, Page 10**). The Petitioner alerted local police and Detective Rojak began an investigation (**9.141, Page 11**). Rojak's investigation led him to a suspect named Ronnie Hall (**9.141, Page 11**). However, Rojak testified at trial that by listening to jail phone calls and through conversations with Ronnie Hall, his investigation led back to the Petitioner as a suspect involving sexual assault on LL (**9.141, Page 11**). At trial, LL testified that she never discussed having a sexual relationship with LaPoint with Ronnie Hall but that maybe Hall snooped in her notebooks (**9.141, Page 12**). Despite the State's arguments that all his jail phone calls were inculpatory in nature, they contained no disclosure or admittance of any sexual relationship between LL and the Petitioner (**9.141, Page 11**). The State only played a heavily redacted excerpt from one jail phone call with LL but it never provided any evidence of a sexual relationship between the parties (**9.141, Page 11**). In regards to the alleged victim's notebooks, only one notebook was introduced as evidence by the State and it contained no disclosure or admittance of any sexual relationship between LL and the Petitioner (**9.141, Page 12**). At trial, the State used Florida's Rape Shield Law to exclude portions of one notebook whereby LL had listed the men in her life that had sexually abused her (**9.141, Page 29**). The list included 43 year-old Ronnie Hall and LL's brothers and someone named "Jarrell," but the list did not include the Petitioner (**9.141, Page 29**).

The documents and evidence missing from LaPoint's Record on Appeal included nine letters written between the Petitioner and the alleged victim, the alleged victim's notebook, and the recording of a jail phone call. In his 9.141(d) petition, LaPoint claimed that the State used redacted and heavily edited portions of these missing records as evidence at trial, and took them out of context when using them to support their theory of guilt with the jury. In the conclusion of his Rule 9.141(d) Petition, LaPoint argued that Appellate Counsel's error in not supplementing the record on appeal with full copies of this missing key evidence denied him his right to a full and fair direct appeal (**9.141, Page 42**). Additionally, Appellate Counsel's error hindered the Petitioner from being able to argue and support many of his issues for postconviction relief in his pro se filings with the trial court (**9.141, Page 42**). Instead of the State and Federal appellate courts being able to read the entire exculpatory evidence contained within the letters, notebook(s), and jail phone calls, the Record on Appeal contains only the unsupported and redacted portions of these missing records as presented to the jury in the trial transcripts with no way to verify their accuracy and completeness. LaPoint claimed but for Appellate Counsel's errors and omission, the result of his proceedings would have been different (**9.141, Page 42**).

Here, the State courts denial of this claim involving a set of materially indistinguishable facts is different than the U.S. Supreme Court has decided in prior rulings. In *Hardy v. United States*, 375 U.S. 277, 287 (1964) this Honorable Court held that an appellate attorney's duty cannot be properly discharged without reviewing the complete trial record. Additionally, U.S. Supreme Court precedent requires that the indigent defendant must be afforded a "record of sufficient completeness" to permit proper considerations of his claims on appeal (see *Mayer v. City of Chicago*, 440 U.S. 189, 194 (1971) (quoting *Draper v. Washington*, 372 U.S. 487 (1963)). In *Griffin v. Illinois*, 351 U.S. 12, 13, n.3, 76 S.Ct. 585, 100 L.Ed. 891 (1956), this

Second Circuit: *Ennis v. LeFevre* (2nd Cir. 1977): The court noted that although the Constitution does not require State provisions for appeals of criminal convictions, when a State does provide for appellate review, there is a duty to assure indigent defendants adequate opportunity for fair presentation of claims on appeal.... [A]sufficiently complete record "does not exist in the abstract; rather, it exists in order to ensure that the accused will have an adequate opportunity to present specific, individual claims." 560 F.2d at 1075.

Sixth Circuit: *Mason v. Mitchell*, 320 F.3d 604, 615 (6th Cir. 2003): "Indigent prisoners are constitutionally entitled to 'the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."

Seventh Circuit: *Burton v. Greer*, 643 F.2d 466, 470 (7th Cir. 1981): "[O]nce the State establishes appellate review as part of its justice system, it is required to ensure that all criminal defendants are afforded effective appellate review. *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). In order to fulfill this duty, the State must provide the indigent defendant with a report of that portion of the trial proceedings that is germane to consideration of his appeal."

Is Florida's practice of allowing sentencing of criminal defendants to the maximum allowable sentence without record reasons unconstitutional when such sentence varies materially from the defendant's scoresheet and State plea offer, and when such practice precludes a review court from determining if the sentence imposed is legally valid or based on incorrect presumptions in violation of the 6th, 8th, and 14th Amendment Rights under the U.S. Constitution?

> Since "[J]udges usually say little or nothing to explain their sentences, the possibility that they were moved by absurd or vicious considerations is not usually open to inquiry. The judges...know that an unexplained decision does not flaunt its possible fallacies. When they are not required to explain, many at least find this conclusive grounds for not explaining. There is no way of knowing, then, how many sentences, for how many thousands of years, have rested upon hidden premises that could not have survived scrutiny."
>
> See *Alfonso-Roche v. State*, 199 So. 3d 941, 954 (Fla. 4th DCA 2016) (quoting *Criminal Sentences: Law Without Order* (1973) by Judge Marvin Frankel at 40-42).

This claim was rasised as Ground 5 and Ground 6 of the Petitioner's September 11, 2019 Federal habeas petition. This claim was not raised on direct appeal or in LaPoint's December 15, 2017 Motion for Postconviction Relief filed in the State trial court. LaPoint argued that the "State court exhaustion" exception contained within *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) applied and allowed the U.S. District Court, Middle District of Florida to hear and consider this claim. In *Martinez, id.*, the U.S. Supreme Court determined that when a State court claim of "ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel" (see *Martinez*, 566 U.S. at 17). Accordingly, U.S. District Judge Hon. Sheri Polster Chappell ruled on the merits of these two claims, but denied them because she felt they were not of substantial merit warranting any relief (**Exh. B, Order, Pages 14-15**). Accordingly, these claims are ripe for this Honorable Court's review.

Unusual Punishment, and that a maximum statutory sentence should be reserved only for the most serious and heinous offenses committed by persons with significant prior records.

In *Miller v. Alabama,* 132 S. Ct. 2455, 2463 (2012), this Honorable Court wrote, "The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. That right, we have explained, flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.... [T]he concept of proportionality is central to the Eighth Amendment. And we view that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society."

LaPoint argues that the sentence in this case was based on the judge's personal disdain for the defendant and the charged offenses, and as punishment for the fact that LaPoint exercised his constitutional right to a jury trial instead of accepting the State's plea offer. The fact that the sentencing judge in this case was allowed to exceed the pre-trial plea offers and lowest permissible sentences by 300% for non-legal reasons shocks the conscience.

A "vindictive sentence" is unconstitutional. The principle is that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Due process forbids entry of a vindictive sentence that arises when a judge increases a defendant's sentence because the defendant exercises some constitutional right. *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

Florida's Constitution, Article I, Section §17 requires that the prohibition against cruel or unusual punishment shall be construed in conformity with decisions of the United States

to *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Adaway v. State*, 902 So. 2d 746 (Fla. 2005). An evolving concept of the type of punishment that is cruel or unusual compels the conclusion that the sentence in this case violates the Florida and United States Constitutions. Fairness, justice, and due process dictate that the sentence be reversed and the case remanded for resentencing...." *Alfonso-Roche, id.* at 946. Additionally, "The point . . . is that the parties (especially the loser) are, on deep principles, not merely entitled to a decision; they're entitled to an explanation . . . . The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies and finally to make him show that these necessities have been served. The requirement of reasons expressly stated is not a guarantee of fairness. The judge or other official may give good reasons while he acts upon outrageous ones. However, given decision-makers who are both tolerably honest and normally fallible, the requirement of stated reasons is a powerful safeguard against rash and arbitrary decisions" (quoting *United States v. Presley*, 790 F.3d 699 (7th Cir. 2015) at 703).... One legal scholar has argued that the due process clause requires judges to explain their sentencing decisions. Michael C. Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 Iowa L. Rev. 205 (1974); *see also* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 Wm. & Mary L. Rev. 2123, 2125 (2010). Whether the hour for Professor Berkowitz's modest proposal has come round at last will have to be decided by a Court higher than this one" *Alfonso-Roche, id.* at 954.

B. LaPoint argues that this Honorable Court should grant certiorari on this issue because without giving oral and written reasons for maximum sentences that far exceed plea offers and sentencing guidelines, review courts cannot determine if the sentence imposed is legally valid or based on incorrect presumptions.

The current basis for sentencing in Florida was discussed by the U.S. District Court, Southern District of Florida in *Knight v. Jones*, 2017 U.S. Dist. LEXIS 113291 * LEXIS 24-25 (S.D. (Fla.) 2017) ("In Florida, judicial participation in plea negotiations followed by a harsher sentence is one of the circumstances that, along with other factors, should be considered in determining whether there is a reasonable likelihood that the harsher sentence was imposed in retaliation for the defendant rejecting a plea offer and instead exercising his or her right to proceed to trial. *Wilson v. State*, 951 So. 2d 1039, 1040 (Fla. 3rd DCA2007). Other factors to be considered include: [W]hether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; the disparity between the plea offer and the ultimate sentence imposed; and the lack of any facts on the record that explains the reason for the increased sentence other than that the defendant exercised his or her right to a trial. *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003). To determine whether a defendant's constitutional right to due process of law was violated by the imposition of an increased sentence after the unsuccessful plea discussions in which the trial judge participated, the court must consider the totality of the circumstances. *Id.* If the totality of the circumstances gives rise to a presumption of vindictiveness, the burden shifts to the State "to produce affirmative evidence on the record to dispel the presumption." *Id.*").

However, because sentencing judges often stand mute when it comes to reasons for the issuance of sentences in Florida, this practice precludes a review court from determine if the sentence imposed is legally valid or based on incorrect presumptions in violation of the 6th, 8th, and 14th Amendment Rights under the U.S. Constitution.

It seems unfair and illogical that while Federal courts are required by law to place on the record their reasons for all sentences and sentencing departures, Florida once again finds itself immune from such national protocol and sense of constitutional fairness and decency. Federal law18 U.S.C. §3553(a) holds:

> "**(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider
>
> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2)** the need for the sentence imposed
>
> **(A)** to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
> **(B)** to afford adequate deterrence to criminal conduct;
> **(C)** to protect the public from further crimes of the defendant; and
> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> **(3)** the kinds of sentences available;
>
> **(4)** the kinds of sentence and the sentencing range established.

The State Courts in Florida should also prescribe to these Federal standards in sentencing with oral and written reasons for all of its sentences imposed.

CONCLUSION

This Court should grant the instant writ of certiorari for the reasons stated above.

OATH

Under penalty of perjury, I certify that all of the facts and statements contained in this document are true and correct and that on the 24th day of August 2022, I handed this document and exhibits to a prison official for mailing out to this Court and the appropriate Respondents for mailing out U.S. mail.

/s/ _____

James R. LaPoint, DC # Y53338
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