NO:

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM NEWKIRK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
Fourth District Court of Appeals
for the State of Florida

PETITION FOR WRIT OF CERTIORARI

RICHARD L. ROSENBAUM, ESQ.
315 SE 7th Street, Suite 300
Ft. Lauderdale, FL 33301
Telephone: 954-522-7007
Facsimile: 954-522-7003
Florida Bar No: 394688
Richard@RLRosenbaum.com
Pleadings@RLRosenbaum.com

QUESTION PRESENTED FOR REVIEW

I. WHETHER FUNDAMENTAL ERROR PERMEATED WILLIAM NEWKIRK'S PENALTY AND SENTENCING PROCEEDINGS RESULTING IN IMPOSITION OF UNLAWFUL SENTENCES?

II. WHETHER PETITIONER'S CONCURRENT NATURAL LIFE SENTENCES WERE UNLAWFUL AS BASED UPON FUNDAMENTAL ERRORS WHERE THE TRIAL COURT USED THE JURY'S PAROLABLE LIFE RECOMMENDATION TO SENTENCE PETITIONER TO NATURAL LIFE ON THE ROBBERY COUNTS?

III. WHETHER THE NATURAL LIFE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3 WERE ILLEGAL WHERE THE TRIAL COURT NEITHER ORDERED A MANDATORY PRESENTENCE INVESTIGATION REPORT, CONDUCTED A SENTENCING HEARING, OR PERMITTED PETITIONER TO ALLOCUTE?

IV. WHETHER THE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3 WERE BASED UPON UNLAWFUL APPLICATION OF FLORIDA STATUTES SECTION 775.087?

V. WHETHER THE NATURAL LIFE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3, AS SECONDARY OFFENSES, WERE ILLEGAL SENTENCES IMPOSED, BECAUSE THEY EXCEEDED THE SENTENCE IMPOSED FOR THE PRIMARY OFFENSE, CAPITAL MURDER, FOR WHICH A SENTENCE OF LIFE WITH A 25 YEAR MINIMUM MANDATORY WAS IMPOSED, SUCH THAT THE ROBBERY COUNTS WERE LIMITED TO THE STATUTORY MAXIMUM OF 30 YEARS?

VI. WHETHER NEWKIRK'S RIGHTS UNDER ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 921.231(1) (1980), RULE 3.720(B), FLA.R.CRIM.P. (1980) WERE VIOLATED RESULTING IN THE IMPOSITION OF UNLAWFUL NATURAL LIFE SENTENCES?

VII. WHETHER PETITIONER IS ENTITLED TO RESENTENCING BASED UPON A CONSTRUCTIVE OFF-THE-RECORD AMENDMENT TO THE CAPITAL MURDER INDICTMENT- CHANGING ROBBERY-FIREARM TO ROBBERY- DEADLY WEAPON TO UNLAWFULLY FOSTER APPLICATION OF 775.087 DURING PETITIONER'S PENALTY PHASE AND SENTENCING, WHERE THE STATE CONCEDED THAT THE TRIAL COURT IMPROPERLY IMPOSED A 775.087 MINIMUM MANDATORY SENTENCE THAT WAS NEITHER CHARGED NOR ADJUDICATED ON-THE-RECORD?

I. INTERESTED PARTIES

Counsel for the Petitioner, William Newkirk, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Honorable Burton C. Conner, Judge, Fourth District Court of Appeal – State of Florida
2. Bernard Daley, Esq. Defense Counsel
3. Honorable Hunter Davis, Circuit Judge, 17th Judicial Circuit in and for Broward County, FL
4. Scott T. Eber, Esq., Defense Counsel
5. Honorable Arthur Franza, Circuit Judge, 17th Judicial Circuit in and for Broward County, FL
6. Honorable Jeffery T. Kuntz, Judge, Fourth District Court of Appeal – State of Florida
7. Ashley Moore, Attorney General – State of Florida
8. William Newkirk, Defendant/Petitioner
9. Office of the Attorney General – State of Florida
10. Office of the State Attorney, 17th Judicial Circuit in and for Broward County, FL
11. Harold F. Pryor, State Attorney – 17th Judicial Circuit in and for

Broward County, FL

12. Richard L. Rosenbaum, Esq., Post Conviction and Appellate Counsel

13. Honorable Michael Rothschild, Circuit Judge, 17th Judicial Circuit in and for Broward County, FL

14. Joel Silvershein, Assistant State Attorney, 17th Judicial Circuit in and for Broward County, FL

15. Honorable Martha Warner, Judge, Fourth District Court of Appeal – State of Florida

16. Barry Witlin, Esq., Defense Counsel

17. Honorable Howard Zeidwig, Circuit Judge, 17th Judicial Circuit in and for Broward County, FL

18. Counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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PETITION FOR WRIT OF CERTIORARI

William Newkirk respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the Opinion of the Fourth District Court of Appeals for the State of Florida rendered and entered in Case No: 4D23-997 on September 14, 2023, in *William Newkirk v. State of Florida,* which affirmed the Order Denying in Part and Granting in Part Defendant's Motion to Correct

Illegal Sentence [or] Petition for Writ of Habeas Corpus entered on March 20, 2023.

OPINION BELOW

A copy of the decision of the Fourth District Court of Appeals for the State of Florida, which affirmed the Order Denying in Part and Granting in Part Defendant's Motion to Correct Illegal Sentence [or] Petition for Writ of Habeas Corpus entered on March 20, 2023, is contained in Appendix (A-5). Also included in the Appendix are the Indictment (A-1), Information (A-2) and the Judgment and Sentence (A-3).

STATEMENT OF JURISDICTION

The decision of the District Court of Appeals was entered on September 14, 2023. (A-6). This petition is timely filed pursuant to Sup. Ct. R. 13.1 and it's Order dated December 15, 2023.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), Sup. Ct. R. 10.1 and Part III of the Rules of the Supreme Court of the United States. The district court had jurisdiction because Petitioner was convicted of violating state criminal laws contrary to the United States Constitution.

STATUTORY AND OTHER PROVISIONS INVOLVED

Certiorari review is appropriate in this case. Petitioner relies upon the

following constitutional provisions, treaties, statutes, rules, ordinances, and regulations:

1) Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; not shall private property be taken for public use without just compensation

2) Sixth Amendment to the United States Constitution:

> 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.

3) Rule 52(b), Fed.R.Crim.P.; and

4) Other case law specified herein.

STATEMENT OF THE CASE

On April 4, 2022, Petitioner filed a "Motion To Correct Illegal Sentence, Pursuant To Rule 3.800 (a) & (b) Fla. R. Crim. P. (2019), Or In The Alternative,

Petition For Writ Of Habeas Corpus Based Upon Manifest Injustice, Request for an Evidentiary Hearing, and Incorporated Memorandum of Law" with the trial court together with an Appendix, comprising, *inter alia*, Petitioner's complete trial, penalty phase and sentencing transcripts. (See R 21-72 - pleading; 73-859 - Appendix)

On April 14, 2022, the State filed a "Response to Defendant's Motion To Correct Illegal Sentence Or In The Alternative Petition For Writ Of Habeas Corpus". While the State argued that eleven (11) of Petitioner's claims raised should be summarily denied the State conceded that Petitioner's *claim 10 was meritorious*, that Petitioner should not have received a three year minimum mandatory sentence in Case No.: 81-634 CF 10 B, as the "..indictment did not specifically charge the defendant with possession of a firearm.."

On December 21, 2022, Petitioner filed "William Newkirk's Reply To The State Of Florida's Response To Defendant's Motion To Correct Illegal Sentence Or In The Alternative Petition For Writ Of Habeas Corpus". On February 2, 2023, the State filed "Response To The Defendant's Reply".

On March 20, 2023, the Honorable Hunter Davis entered an Order Denying In Part And Granting In Part Defendant's Motion To Correct Illegal Sentence [Or] Petition For Writ Of Habeas Corpus". The trial court stated, inter alia: "The Court

adopts and incorporates herein the legal and factual reasoning that is contained in the State's Response and denies the instant pleading as to Claims One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Eleven, and Twelve, and grants Claim Ten such that the sentence in case 81-634CFB is corrected to strike the three year minimum mandatory sentence for possession of a firearm." A Notice of Appeal was timely filed.

Procedural History

i.) Direct Appeal

The only issue raised on direct appeal was whether the State could prosecute Defendant on a capital felony murder theory, where the State filed a Statement of Particulars only listing capital premeditated murder. (R 75-102) The Fourth District Court of Appeals for the State of Florida *Per Curiam* Affirmed Petitioner's judgment and sentence on July 7, 1982. (R 103-104)

ii.) Prior Rule 3.850 Fla. R. Crim. P. Motions

Petitioner filed three (3) prior motions for post-conviction relief, pursuant to Rule 3.850 Fla. R. Crim. P. (R 105-147), referenced #1-#3 here:

#1 On or about December 12, 1983, Petitioner filed a pro se "Motion For Post Conviction Relief" alleging 10 grounds for post-conviction relief, labeled grounds "A" through "J". (R 105-112) Defendant was not granted a hearing on this

motion. On February 22, 1984, the Honorable Arthur J. Franza denied Petitioner's motion by written Order. R (114-115)

#2 On or about December 23, 1986, Defendant filed a second motion for post-conviction relief titled "Motion For Post-Conviction Relief", pursuant to Rule 3.850 Fla. R. Crim. P., with counsel, Bernard F. Daley, citing two claims for relief, relative to immediately sentencing Defendant to natural Life after the capital murder penalty phase, without the benefit of reviewing a PSI ordered for Defendant, for the two robbery Counts, which should have remained a discretionary sentence with the Court at sentencing. (R 116-1320) The Court summarily Denied the Motion as successive, stating that these matters should have been raised on Defendant's direct appeal. (R 130-131) This Court *Per Curiam* Affirmed. (R 132)

#3 On or about May 22, 1995, Petitioner filed a third motion for post-conviction relief Pro Se titled "Fla. R. Crim. P. 3.850 Motion For Post Conviction Relief "claiming newly discovered evidence: "Affidavit Exonerating Defendant Of Murder". R 133-142 The Honorable Howard M. Zeidwig denied the Motion as legally insufficient to warrant relief. (R 143-145) This Court *per curiam* affirmed. R (146-147).

iii.) Previous Habeas Corpus Petitions

Petitioner previously filed four (4) habeas corpus petition, referenced below as #1-4, as follows:

#1 On or about June 15, 1989, Petitioner through counsel, Sharon Bradley, filed a "Petition For Writ Of Habeas Corpus" with this Court, regarding ineffective assistance of appellate counsel Scott Eber, who was Petitioner's trial counsel, pursuant to Rule 9.030(b)(3) and Rule 9.100 Fla. R. App. P. (R 148-164) Respondent filed a "Response: Motion To Dismiss" arguing that Rule 3.710 did not require a PSI ordered by the trial court in Petitioners case (R 165-170) Petitioner filed a Reply And Response. (R 171-175) This Court summarily Denied both the Petition and Respondent's Motion To Dismiss in the same order without further explanation. (R 105)

#2 On or about February 7, 2013, Petitioner filed a pro se "Petition For Writ Of Habeas Corpus" with the trial court. (R 178-187) The Petition was summarily denied, by the Honorable Michael J. Rothschild, relying upon the State's Response Brief alleging that the petition was successive and otherwise procedurally barred. (R 188-192) The Court affirmed *per curiam*. R 193-194

#3 On or about December 16, 2014, Petitioner through counsel Barry Witlin, filed a "Petition For Writ Of Habeas Corpus". (R 195-204) Again, the trial

court denied the Petition, relying upon the State's Response Brief alleging the motion was time barred, successive, and already addressed on direct appeal. (R 205-209)

#4 On or about March 3, 2020, Petitioner filed a pro se "Petition For Writ Of Habeas Corpus To Correct A Manifest Injustice" with the trial court. (R 214-231) Again the State responded that the petition was either time barred, procedurally barred, or successive. (R 232-237) The trial court summarily denied the petition and thereafter, issued a separate Order prohibiting Defendant from filing any more pro se pleadings. (R 238-242)

STATEMENT OF THE FACTS

William Newkirk, the Petitioner, was charged by Indictment with capital murder, F.S. 782.04, and robbery "firearm or other deadly weapon, to wit: a .32 caliber revolver", pursuant to F.S. 812.13(1)(2)(a) and F.S. 777.011, together with co-defendant Roland Anthony Sprint. ("Sprint") (R 243-244) The State subsequently filed an Information charging Petitioner and Sprint with robbery "firearm or other deadly weapon, to wit: a handgun, said firearm being in the possession of the Defendant Roland Anthony Sprint, contrary to F.S. 812.13(1)(2)(a)" (R 245-246) Petitioner was not charged under F.S. 775.087 and there were no references in the charging documents suggesting that Petitioner ever

possessed a firearm for any of the Counts charged. *Id.* All Counts were consolidated for trial as requested by defense counsel. (R 827-828) Petitioner's trial was conducted from March 30-April 2, 1981, for May 4, 1980 offense conduct charged in consolidated Counts 1-3. (R 243-246).

The defense rested (R 681) and moved for directed judgment of acquittal (R 682), which was denied.

All references refer to the associated page of the Record on Appeal or to the portion of the Appendix submitted below.

The Court conducted an off the record charge conference at some point during the lunch break, as noted with this record as follows:

"(Thereupon, an off-the-record discussion was had.)

> THE COURT: All right. We have had a jury charge conference, gentlemen. Are there any objections to the jury charges as I have stated that I would instruct the jury on?
>
> MR. CARNEY: I have none.
>
> MR. EBER: No, Judge.
>
> THE COURT: Call the jury in. (R 683)

Regarding the robbery-firearm charged in Counts 2-3, Petitioner's potential sentencing range was *between probation to natural life in prison*, as noted in the jury instructions read by the trial court: "The maximum penalty for murder in the

first degree is death. The minimum penalty is life imprisonment without eligibility for parole for twenty-five years. *The maximum penalty for robbery is life imprisonment. The minimum penalty is probation.*" (R 752-753)

Petitioner was convicted on all Counts, as charged in the Indictment and Information. (R 797-798; 827-828)

Following the verdicts, the trial court went directly into the penalty phase (R 770 et seq.,) where the State argued for death, while the defense contended that a Life sentence was more appropriate. Neither party called witnesses nor entered evidence, but rather utilized a procedure akin to shortened penalty phase closing arguments. (R 770-785) The jurors were sent back to deliberate on an Advisory Sentence of either death or life, based on a majority vote. (R 783-785; see also R 799)

This was the Advisory Form for life (that did not reference the possibility of parole after 25 years):

> "Advisory Sentence
>
> A majority of the Jury advise and recommend to the court that it impose a sentence of life imprisonment upon the defendant, WILLIAM J. NEWKIRK." (R 770; 784-785; 799)

The jury returned with a majority Advisory Sentence of Life and the jurors were polled. (R 786-789; 799) Immediately following jury polling, with no break

or intervening record exchange, the trial court sentenced Petitioner, without ordering a presentence investigation, conducting a sentencing hearing, or permitting Petitioner to exercise his right to allocution, as follows:

> "THE COURT: All right. Step forward, Mr. Newkirk, Based upon the jury's recommendation and **because I feel that the people ought to have the last say in cases of this kind, I am going to accept the advisory opinion of the jury**, even though they felt you committed a heinous crime, a terribly heinous crime. I mean, there should be another man standing next to you right there. You wasted him.
>
> The Court sentences you, sir, to life imprisonment, with a minimum mandatory imposition of twenty-five years before you are eligible for parole.
>
> **The Court further sentences you to life imprisonment on Count II** of the robbery to run concurrent with the sentence of Count I.
>
> **The Court further Sentences you to life imprisonment**, which means you will spend a lot more than twenty-five years in prison as your partner, Mr. Sprint will, to life imprisonment, **to run concurrent with the sentences in Count I and II.**
>
> You have thirty days from which to appeal this sentence. Is there anything you want to add or subtract?
>
> MR. EBER I would just request that you extend the time, making a motion for new trial to fifteen days.
>
> THE COURT: So ordered. Anything to add or subtract?
>
> MR. CARNEY: I have nothing.
>
> THE COURT: All right. Thank you. That is all." (R 789-790)

The trial court did not order a Presentence Investigation by the Florida Department of Corrections. *Id.* The trial court did not conduct a sentencing hearing. *Id.* The trial court did not permit Petitioner to make an allocution statement relative to the robbery-firearm Counts 2-3 that remained discretionary with the trial court at sentencing. *Id.*

Petitioner has now been in custody for approximately 42 years (R 857-858) serving concurrent natural life sentences imposed based upon the Jury's Advisory Sentence 'Life' recommendation, applied by the trial court as a 'natural Life' recommendation, for robbery-firearm Counts 2-3. The Petitioner would have otherwise been parole eligible on Count 1 some 17 years ago on capital murder Count 1, the primary offense at sentencing. (R 857-858) Petitioner alleged below that fundamental sentencing errors infected the sentencing process and that re-sentencing is warranted together with such further relief as deemed just and appropriate.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should issue in this to review the federal constitutional questions raised herein. Pursuant to Rule 10, S.Ct.R., compelling reasons support certiorari review at bar, specifically based on the following issues:

I. FUNDAMENTAL ERROR PERMEATED WILLIAM NEWKIRK'S PENALTY AND SENTENCING PROCEEDINGS RESULTING IN IMPOSITION OF UNLAWFUL SENTENCES

II. PETITIONER'S CONCURRENT NATURAL LIFE SENTENCES WERE UNLAWFUL AS BASED UPON FUNDAMENTAL ERRORS WHERE THE TRIAL COURT USED THE JURY'S PAROLABLE LIFE RECOMMENDATION TO SENTENCE PETITIONER TO NATURAL LIFE ON THE ROBBERY COUNTS

Certiorari should be granted in this case as to Claims I and II.

The two advisory sentence instructions and verdict forms provided to the Jury pertaining to Petitioner's capital murder count were: death, as the maximum sentence; or life, as the minimum sentence. (R 784-785) While the jury returned an advisory sentence of life for the capital murder count (R 799), the trial court improperly used the jury's advisory life sentence on the capital murder charge to impose a natural life sentence on both robbery-firearm Counts (R 789), without ordering a mandatory PSI. The trial court did so by imposing either a maximum sentence for the two robbery Counts, as first-degree felonies punishable by life, or as a minimum mandatory sentences, using firearm reclassification, pursuant to Section 775.087(1).

The Florida Legislature did not authorize the trial court to seek a natural life Advisory Sentence from the jurors at the time. While the State disputes that the trial court ever considered application of Section 775.087(1) to Petitioner's case,

Section 775.087 was considered by the trial court because Petitioner was illegally sentenced to a firearm possession minimum mandatory which was not charged. The State conceded that point. (R 867-868) The jury was never provided an instruction or form for "Life with a 25-year minimum mandatory before being eligible for parole", and the jury did not provide the court with a legal Advisory Sentence of natural life on the two robbery-firearm Counts. These issues represent fundamental errors of the trial court.

The Court clearly accepted the Jury's Advisory Life Sentence, however, the Juror's had no legislative or constitutional authority to recommend Life without the possibility of parole, and Petitioner argues that the Jurors were not even cognizant they were recommending Life without parole to the trial court, because the Jurors were not instructed as to the difference. (R 789) The Legislature did not confer authority to the Jurors to select natural Life as a sentence recommendation, or authority for the trial court to accept and follow a Jury advisory recommendation not authorized by law, *infra, Bates, Whitfield, Waterhouse, Williams.*

Further, the trial court's instructions and verdict forms provided to the Jurors represents a constitutional violation of Separation of Powers pursuant to Article 2, Section 3 of the Florida Constitution, as the trial court conferred authority upon the Jurors that the Florida Legislature did not.

In the case of *Bates v. State,* 750 So. 2d 6, 11 (Fla. 1999), a capital murder death penalty case, the Jurors had the following question during the penalty phase:

"[A]re we limited to the two recommendations of life with minimum 25 years or death penalty. Yes. No. Or can we recommend life without a possibility of parole. Yes. No." (*Id.* at 12)

Bates argued that the Jurors should have been permitted to have a third option to recommend an advisory sentence of life without the possibility of parole, presumably because Bates felt that would have made it more likely that the Jurors would not recommend death.

In *Bates,* the trial Court answered the Juror's question as follows:

> "The court has advised you what advisory sentences you may recommend. Please refer to your copy of the jury instructions."

The Florida Supreme Court found that the trial court's response to the Juror's question was "..appropriate and is in accordance with our decisions in *Whitfield v. State,* 706 So.2d 1, 5 (Fla. 1997), and *Waterhouse v. State,* 596 So.2d 1008, 1015 (Fla. 1992)."

Bates argued in the alternative that "that the jury should have been advised that appellant would agree to waive the possibility of parole..." for a

recommendation of natural life as a third option for advisory sentence recommendation. *Id.* at 11

In response to *Bates* alternative argument the Supreme Court stated:

> "Petitioner's alternate contention, that the jury should have been advised that appellant would agree to waive the possibility of parole, is also unavailing under Florida's capital sentencing scheme because, as the trial court ruled, "[a] defendant cannot by agreement confer on the court the authority to impose an illegal sentence." *Williams v. State,* 500 So.2d 501, 503 (Fla. 1986). At the time appellant committed this murder, the Legislature had not established life without the possibility of parole as punishment for this crime." *Id.* at 11

Similarly. in Petitioner's case, as of May 4, 1980, the Legislature had not established life without the possibility of parole as punishment for capital murder. Moreover, the Legislature has never established an Advisory Sentence recommendation for robbery-firearm.

It is axiomatic that the trial court cannot confer authority to the Jurors in a penalty phase to recommend an advisory sentence that the Florida Legislature did not authorize, while divesting the Florida Department of Corrections of statutory authority to make sentencing recommendations to be considered at sentencing. That would represent a violation of Article 2 Section 3 of the Florida Constitution, as a violation of separation of powers. However, that is what occurred in William Newkirk's case, without objection from defense counsel.

At bar, the Jurors were given penalty phase instructions, and a form, including "Life" that the trial court fully interpreted as natural Life, based upon statements made by the trial court adopting the Jurors advisory sentence and sentencing Newkirk to natural Life based thereon.

> "THE COURT: .. Based upon the jury's recommendation and because I feel that the people ought to have the last say in cases of this kind, I am going to accept the advisory opinion of the jury.." (R 789)

While the trial court used the jury's Life Advisory Sentence in Count 1, it also used the same Advisory Sentence to impose natural life on Counts 2-3[1], which the Petitioner argues represents fundamental error of the trial court during Petitioner's sentencing, as a denial of due process of law.

These matters were likely discussed in the off the record charge conference regarding jury instructions, penalty phase instructions, advisory sentence instructions and related forms that was conducted outside the presence of Petitioner, without consent. (R 769)

Relative to Defendant's penalty phase, the following possibilities constitute an illegal sentence for William Newkirk some forty (40) years ago:

1. The Jurors thought they were recommending an advisory sentence of life with the possibility of parole after 25 years;

---

[1] Newkirk argued below and maintains herein that because of penalty and sentencing phase errors, re-sentencing *de novo* is required on all Counts.

2. The Jurors thought they were recommending an advisory sentence of life without the possibility of parole;

3. The trial court, without defense objection, created an *ipsi dixit* situation with the wording of the Penalty Phase Advisory Sentence Instruction and Verdict Form;

4. The State and/or the trial court thought that the Jurors could recommend an advisory sentence on all three (3) Counts as opposed to just the capital murder count; or

5. This was all just an honest mistake.

Here, fundamental error occurred during the penalty phase of Newkirk's capital murder trial and sentencing, and the Circuit Court below reversibly erred in denying the Motion under review.

The State clearly advised the Jurors in voir dire:

> "..[T]his is the only case, incidentally, where a jury can make a recommendation to the Court, but that is what the advisory sentence is. It is a recommendation, and the Judge isn't bound by it at all." Moreover, the Jurors were instructed by the trial court that the minimum sentence for the robbery deadly weapon Counts was probation, and the maximum sentence was Life in prison. (R 784-785)

The fact that the trial court did not Order a presentence investigation report relative to the two discretionary robbery Counts, or even permit argument at

sentencing, lends serious credence to the proposition that the trial court thought it was sentencing Newkirk to mandatory life on the two robbery Counts, as opposed to discretionary probation up to life on the two robbery Counts, while instructing the Jurors, and then later accepting the illegal Penalty Phase Advisory Sentence Recommendation on the record.

The harm feared by Petitioner is the harm realized by Petitioner, that is, Newkirk was sentenced to natural life for the two armed robbery Counts without a proper sentencing hearing, which could have unearthed the fundamental error from Newkirk's penalty phase 43 years ago, because the Advisory Sentence Recommendation Instructions and Verdict Form, standing alone represent a violation of Article 2 Section 3 of the Florida Constitution, as a violation of Separation of Powers. The trial court gave the jurors more authority than the Florida Legislature gave the Jurors. Florida Statutes Section 775.082(1)(1979) only delineates life with a minimum mandatory of 25 years before becoming eligible for parole, as an Advisory Sentence option, not natural life.

In sum, because the trial court specifically accepted the Juror's Advisory Sentence to Life in this case, (R 789; 799), and further, because the Jurors were only constitutionally empowered by the Florida Legislature to recommend either Life with the possibility of parole after a 25-year minimum mandatory, or death,

Newkirk is entitled to *de novo* resentencing. See, *Bates, Whitfield, Whitehouse, Williams, supra.*

I. THE NATURAL LIFE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3 WERE ILLEGAL WHERE THE TRIAL COURT NEITHER ORDERED A MANDATORY PRESENTENCE INVESTIGATION REPORT, CONDUCTED A SENTENCING HEARING, OR PERMITTED PETITIONER TO ALLOCUTE

Sub judice, the trial court even instructed the Jurors that probation was the low-end discretionary sentence for the two armed robbery Counts during the initial trial Jury Instructions. (R 752-753). Subsequently, the jury was only given the option of death or life imprisonment without parole. Here, at that juncture, the Court committed plain error of situational magnitude in failing to order a PSI, conducting a sentencing hearing, or permitting Petitioner from making an allocution statement. The Petitioner suggests that only an erroneous application of Section 775.087(1)(1979) to Newkirk's case by trial court during an off-the-record charge conference) could explain the natural life sentence. (R 683) No other statutory enhancements, or reclassifications were even remotely relevant to Newkirk's case. Newkirk's two robbery Counts were never life minimum offenses, however, they were presented in Newkirk's Penalty Phases to the jury as such, which constituted fundamental error of the trial court.

Paragraph 8 of Newkirk's Motion for Post Conviction Relief (R 117) stated:

"8. That the court did not order a pre-sentence investigation report as required by law. The defendant had no prior felony convictions and the court imposed discretionary sentences with regard to the robbery convictions. In such a situation a pre-sentence investigation is mandatory." *Id.*

Counsel filed this claim as a Rule 3.850 Motion for Post Conviction Relief, as opposed to a Rule 3.800 Motion (Motion to Correct Illegal Sentence), which appears to be a procedural mistake by post-conviction counsel. Had this issue been filed as a Rule 3.800 Motion in 1986, perhaps the trial court would have decided this claim on the merits then, and it would have been unearthed in 1986 that Newkirk's robbery Counts which were sentenced as life felonies, constitutes fundamental error of the trial court.

The failure of the trial court to order a mandatory PSI was an issue raised in the Defendant's First Petition For Writ Of Habeas Corpus, filed directly with the 4th District Court Of Appeal by counsel on July 15, 1989; and denied without any explanation on October 31, 1989. That filing appears to be a *procedural faux pas*, because the trial court never ruled on that habeas corpus petition, and the District Court of Appeals did not remand that Petition to the trial court for consideration. The Petition was just denied by the Court. (R 176) The failure of the trial court to

Order a presentence investigation report in Petitioner's case was a symptom of other fundamental sentencing errors present in the record, as described below.

Had the trial court Ordered the presentence investigation report, with sentencing set off into the future, these errors could have become known in 1981, and defense counsel would have at least been afforded an opportunity to argue for a lesser sentence than the natural Life sentence imposed on the two robbery Counts. Probation was the minimum authorized sentence for both robbery firearm Counts, not a life minimum. (R 752-753) This was error, warranting reversal.

It is only now, from a complete and studied review of the entire record in this case that it is clear the trial court sentenced Newkirk in the two robbery Counts as life felonies, as opposed to first degree felonies, punishable by life, and portrayed these offenses in Newkirk's Penalty Phase and Advisory Sentence form as life felonies, in error. (R 799)

Newkirk claims that the probation department in 1981 would not have recommended natural Life in prison for the robbery deadly weapon Counts, because Newkirk was only 19 years old at the time of the offense conduct; had no prior adult felonies; never possessed a firearm; was not the shooter, and was never charged as such. (R 243-246) The probation department would have recommended something less than natural life, and the trial court, as mandated by F.S. 921.231

(1980) and Rule 3.710 Fla. R. Crim. P. (1980) and would have considered the probation department recommendation for sentencing, by law.

Petitioner also claims that F.S. 921.231 (1980) created a substantive right to a PSI ordered by the trial court in his case, as excerpted here, in pertinent part: 921.231(1) Any circuit court of the state, when the defendant in a criminal felony case has been found guilty shall refer the case to the Department of Corrections for investigation and recommendation.." *Id.* Thus, a PSI was required by state law and impacted Newkirk's rights under the United States Constitution.

Allocution Statement Not Permitted By The Trial Court

Newkirk was denied his right of allocution at sentencing. Although Newkirk desired to allocute to the Court at sentencing, he was denied that right and sentenced without allowing the Defendant to allocute.

In Hill v. State, 246 So.3d 392 (Fla. 4th DCA 2018), the Fourth District Court of Appeal reversed and remanded for re-sentencing when the Defendant was not permitted to allocute prior to sentencing.

Hill is important to this Court's consideration of whether to accept certiorari review. *Hill* addressed an issue as to whether rights to Due Process were violated by the Court prohibiting Hill from exercising his right allocution. In *Hill* the Court determined that the standard of review for such an issue is *de novo*. *Hill* at 396-

397; *Rudolph v. State*, 355 So.3d 442, 448 (Fla. 4th DCA 2023); *Goudreau v. State*, 263 So.3d 822, 823 (Fla. 2nd DCA 2019). The errors set forth herein are of constitutional magnitude and do not include all homicide/robbery cases, only those in the window of time where probation was the minimum sentence with the maximum being death. However, the crucial change was the time in which the alternative to death was Life imprisonment (with parole possibility) as opposed to Life imprisonment as a non parolable offense. Relying on *Hill*, resentencing is required.

Florida Defendant was Rule of Criminal Procedure 3.720(b) imposes requirements on trial judges pertaining to sentencing. This Rue states, "The court shall entertain submissions and evidence by the parties that are relevant to the sentence."

The *Hill* Court stated:

> Florida, defendants in capital cases have a right to make an unsworn statement to the judge prior to sentence being imposed. *See Troy v. State,* 948 So. 2d 635, 648 (Fla. 2006) (recognizing that a defendant in a capital case has the right to "allocate" before the judge prior to sentencing, pursuant to *Spencer v. State,* 615 So. 2d 688 (Fla. 1993)), but that any statement to the jury during the sentencing phase must be subject to cross-examination). Florida cases do not address whether allocution involves an unsworn statement in non-capital cases. *See Ryan v. State,* 78 So. 3d 14, 15 (Fla. 3d DCA 2011) (Emas, J., concurring in part and dissenting in part) (opining that sentencing courts should not be permitted to *sua sponte* raise a defendant's

> apparent lack of remorse, as this would "risk forcing a defendant to choose between maintaining his innocence after trial ... and a defendant's right to allocution before sentencing") (citing Rule 3.720(b)); *Witt v. State,* 983 So. 2d 708, 708 (Fla. 5th DCA 2008) (accepting state's concession to defendant's claim that his "allocution rights" were violated when court did not give him opportunity to speak or present evidence at sentencing); *Adler v. State,* 382 So. 2d 1298, 1304 (Fla. 3d DCA 1980) ("The court denied the motion to vacate the guilty plea, gave the defendant his allocution rights and pronounced sentence"); *Adams v. State,* 376 So. 2d 47, 56 (Fla. 1st DCA 1979) ("The court otherwise remains free to inform itself as in ordinary sentencing through presentence report hearsay, subject to the defendant's right to produce his own witnesses, and his right of allocution").

In *Barlow v. State,* 784 So. 2d 482 (Fla. 4th DCA 2001), the Court described the defendant's pre-sentence unsworn submission as an "allocution hearing" which the Court defined "as an opportunity for the defendant to make an unsworn statement to mitigate the sentence or for a crime victim to make a statement relevant to sentencing." *Id.* at 483, n.1 (Fla. 4th DCA 2001) (citing Black's Law Dictionary 75 (7th ed. 1999)); *see also People v. Evans,* 44 Cal. 4th 590, 80 Cal. Rptr. 3d 174, 187 P.3d 1010, 1012 n.2 (2008) ("The word 'allocution' has often been used for a mitigating statement made by a defendant in response to the court's inquiry." (Citation omitted}); *Craig v. State*, 179 So. 2d 202, 206 (Fla. 1965) (Ervin, J., dissenting) ("Petitioner refers to the fact that a defendant usually has the right of allocution; that is, the right to express without restraint to his sentencer

why judgment or sentence should not be meted out to him."). The Court made clear what *Barlow, Larrieux, Chillingworth, Witt,* and *Dean* have long implied: that a criminal defendant prior to sentencing has the opportunity to make an unsworn statement to the sentencing judge in allocution. Like the receipt of unsworn letters, the opportunity of the defendant to "allocute" gives the defendant a chance to express to the sentencing court any additional information to aid the court in making a sound and reasoned judgment on the most important matter upon which it is called to judge, that is, the appropriate sentence to be meted out to the convicted criminal defendant. 155 So. 3d at 1241-42.

In *Larrieux v. State*, 138 So. 3d 1221, 1221-22 (Fla. 4th DCA 2014), this Court held:

> Immediately after the trial court found Larrieux in violation of his probation, it sentenced Larrieux to forty years in prison, the maximum penalty he faced based on the charges for which he was on probation, without giving Larrieux or his counsel an opportunity to present any evidence or argument in mitigation prior to imposing the sentences. Florida Rule of Criminal Procedure 3.720(b) states that, at a sentencing hearing, "[t)he court shall entertain submissions and evidence by the parties that are relevant to the sentence." Because we find that the trial court departed from the essential requirements set forth in rule 3. 720(b), we reverse the sentence and remand the case for a new sentencing hearing.

On this same issue, other Florida courts agree. For example, the Third District has held:

> [U]nder Florida Rule of Criminal Procedure 3.720(b), before imposing sentence the trial court is required to "entertain submissions and evidence by the parties that are relevant to the sentence." Under the rule, defendant was entitled to make a statement to the court. See *Culbertson v. State*, 306 So. 2d 142, 143 (Fla. 2d DCA 1975). As we view the matter, the opportunity to address the court must be allowed even if the case involves a mandatory sentence. Respecting the right of the defendant to address the court "maximiz[es] the perceived equity of the process. " American Bar Association Standards for Criminal Justice Section 18-5.17 commentary at 208 (3d ed. 1994). Where the court refuses to hear a statement by the defendant, the case must be remanded for a new sentencing hearing. *See Davis v. State,* 642 So. 2d 136, 137 (Fla. 3d DCA 1994); *Hargis v. State,* 451 So. 2d 551, 552 (Fla. 5th DCA 1984); *Ventura v. State,* 741 So. 2d 1187, 1189 (Fla. 3d DCA 1999).

In an analogous case that was also cited as a basis for this Court's ruling in *Witt v. State*, 983 So.2d 708 (Fla. 5th DCA 2008) the Fifth DCA observed:

> "William Witt appeals the sentences entered against him after his violation of probation. He argues that his allocution rights were violated because the court never gave him an opportunity to speak or present evidence at the sentencing hearing. The State concedes error and the record reveals that Witt never had an opportunity to offer evidence or make a statement to the court, as required by Florida Rule of Criminal Procedure 3.720. Accordingly, we reverse Witt's sentences and remand for a new sentencing hearing." 983 So. 2d at 708; *accord Dean v. State,* 60 So. 3d 532, 533 (Fla. 1st DCA 2011) ("The trial court erred in failing to give Petitioner ... the opportunity to address the court before imposing sentence, pursuant to Florida Rule of Criminal Procedure 3.720(b).").

Thus, Florida case law makes it clear that the right to allocution must be afforded to a defendant prior to sentencing in any other criminal trial or

proceeding. *See Larrieux,* 138 So. 3d at 1221-22; *Dean*, 60 So. 3d at 533; *Witt,* 983 So. 2d at 708. Petitioner's due process rights were violated in this case because he was not given the chance, despite his request, "to make an unsworn statement to mitigate the sentence ... ". *Jean-Baptiste v. State*, 155 So. 3d 1237 (Fla. 4th DCA 2015) (quoting *Barlow*, 784 So. 2d at 483 n.1). Petitioner's request to speak to the court on his own behalf may have been interpreted by the trial judge as yet another attempt to delay the conclusion of the hearing. But giving appellant the benefit of the doubt, it could be just as likely that he was requesting his right to allocute before receiving his sentence. *Hill* at 396-397.

The United States Supreme Court has stated:

> The design of Rule 32 (a) did not begin with its promulgation; its legal provenance was the common-law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K. B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32 (a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century -- the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to

> speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement in his own behalf," and "to present any information in mitigation of punishment." We therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32 (a). See *Taylor v. United States,* 285 F.2d 703.
>
> However, we do not read the record before us to have denied the defendant the opportunity to which Rule 32 (a) entitled him. The single pertinent sentence -- the trial judge's question "Did you want to say something?" -- may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play, is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees, and we therefore find that his sentence was not illegal. *Green v. United States*, 365 U.S. 301, 304-305, 81 S. Ct. 653, 655, 5 L. Ed. 2d 670, 673-674 (1961).

Because of the failure of the trial court to allow allocution and order a mandatory pre-sentence investigation report prior to sentencing Petitioner on the two robbery Counts, error occurred. Here, the Petitioner was a first time adult felony offender. Considering that the sentencing range for robbery-firearm was between probation and natural life in prison, Petitioner's claims of an illegal sentence imposed in the above-styled cases over four decades ago should be corrected.

It is clear from the record that the trial court supplanted a mandatory pre-sentence investigation report, including an advisory sentence recommendation from the probation department, with an illegal Advisory Sentencing Recommendation for the two robbery Counts from the Jury, as fundamental error, and resulting in illegal sentences imposed for the two robbery Counts.

Lastly, Petitioner did not waive his right to make an allocution statement in this case where the trial court believed, in error, that Petitioner possessed a firearm, and sentenced Petitioner to natural life as a result of that belief. (R 789-790) As previously stated, the State conceded that Petitioner never possessed a firearm, and that Roland Sprint was the actual shooter, not Petitioner. (R 244-245; 867-868)

Petitioner is entitled to *de novo* resentencing now in order to correct a manifest injustice, irrespective of whether Petitioner has previously filed requests for relief in the past that were summarily denied by the trial court and affirmed on appeal. This case has never been reviewed by this Honorable Court.

In *Prince v. State,* 98 So. 3d 768 (Fla. 4th DCA 2012) the Court found that Prince was entitled to resentencing on a 1985 sentencing error in order to correct a manifest injustice, regardless of the fact that several prior successive and duplicitous motions for relief were denied, stating:

"Although petitioner has filed multiple other pleadings to challenge his sentence, all of which have been denied, we conclude that this is one of those rare cases where a manifest injustice has occurred, which must be remedied by a resentencing of the petitioner. "[W]here ... the court finds that a manifest injustice has occurred, it is the responsibility of that court to correct the injustice if it can." *Adams v. State,* 957 So.2d 1183, 1186 (Fla. 3d DCA 2006); *see also Jamason v. State*, 447 So.2d 892, 895 (Fla. 4th DCA 1983) (*quoting Anglin v. Mayo*, 88 So.2d 918, 919 (Fla. 1956)) ("If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, *it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice.*")." *Id.* at 769; *See also Heatley v. State,* 279 So. 3d 850, 852 (Fla. Dist. Ct. App. 2019)("The trial court's failure to consider a mandatory presentence investigation report before sentencing a defendant is a sentencing error that can be preserved via the filing of a rule 3.800(b) motion." *Albarracin v. State,* 112 So. 3d 574, 574 n.1 (Fla. 4th DCA 2013); *See also White v. State,* 271 So. 3d 1023, 1027 (Fla. Dist. Ct. App. 2019) ("a trial court's failure to consider a mandatory PSI before sentencing a defendant is a sentencing error that may be preserved via the filing of a rule 3.800(b) motion.") *Id.; See also Turner v. State*, 261 So. 3d 729, 734-735 (Fla. Dist. Ct. App. 2018)("We have reversed cases for resentencing where the sentence has been, "at least in part," influenced by improper sentencing considerations. *See, e.g., Love v. State,* 235 So.3d 1037, 1038 (Fla. 2d DCA 2018) (reversing for resentencing "because the State presented evidence of impermissible sentencing factors and [defendant's] sentence may have been based, at least in part, on those impermissible factors"). *Id.*

Reversal and remand is required.

II. THE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3 WERE BASED UPON UNLAWFUL APPLICATION OF FLORIDA STATUTES SECTION 775.087

To the extent that the trial court used F.S. Section 775.087(1)(2)(1979) in Newkirk's Penalty Phase and Sentencing, the Petitioner recalls it likely was part of the off-the-record charge conference. (R 683). As such, fundamental sentencing error exists for two (2) separate reasons:

1. Newkirk was charged with robbery-firearm, not robbery-deadly weapon in both Counts, where the firearm was an element of the offense robbery-firearm, as written; and

2. Newkirk's robbery Counts were reclassified to Life felonies for use in Newkirk's Penalty Phase and Sentencing, when they were not Life felonies.

The trial court used the .32 caliber revolver to reclassify the two robbery Counts to life felonies (off-the-record), for purposes of Newkirk's Penalty Phase Instructions, Advisory Sentence Recommendation Verdict Forms, and for sentencing, when they were not; based upon the four corners of the charging documents (R 243-246) and trial Verdict forms, with no Interrogatories propounded. (R 797-799) In so doing, the trial court took away the discretionary sentence nature of the two robbery Counts at sentencing, as fundamental error.

Since there is no way for the State to refute what occurred in the off the record charge conference which was material and relevant to Petitioner's claims here, and certainly cannot attach portions of the records disputing these claims, this Court should accept certiorari review and remand Petitioner's case for resentencing based on that one ground alone. The Record is incomplete without the potion of the Charge Conference, Petitioner is entitled to resentencing.

Application of Section 775.087(1)(a)(1979) to the robbery-firearm charged in both robbery Counts, pursuant to Section 812.13(2)(a)(1979), represented a double enhancement, *per se*. It is colorable that the trial court believed Petitioner possessed a firearm in error and that the trial court enhanced Petitioners robbery Counts 2-3 to life felonies as a result of that misconception.

Secondly, the two robbery Counts could never be reclassified to Life felonies without special Interrogatories propounded to the Jurors in the main trial, for a special finding by the Jurors that Newkirk actually carried and actually possessed the firearm used in those Counts. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000). That procedure employed by the trial court resulted in an illegal sentence, because no special Interrogatories were propounded to the Jurors relative to the firearm. "By definition, the 10–20–Life sentence enhancement applies only in cases of actual physical possession, not for constructive possession and not

through some other theory such as principal. *Kenny v. State,* 693 So.2d 1136, 1136–37 (Fla. 1st DCA 1997).

"The sentence enhancement created in section 775.087(1) is not itself a substantive offense or an element of any underlying offense. Even though a connection between the enhancement and underlying crime may seem facially logical, a jury's 10–20–Life finding has no legal bearing on the findings or evidence required to convict of an underlying crime. The statute and case law governing the underlying crime apply to determine whether the State established guilt of that crime. A special interrogatory verdict such as for 10–20–Life is thus analytically separate from verdicts for the underlying crimes, and neither eliminates nor supplies an element of the underlying crimes. The need to recognize that functional limitation on a 10–20–Life finding, and similar enhancement and reclassification findings, is one reason why it is advisable to present special interrogatories separately from verdicts for the underlying crimes. The Florida Supreme Court has held that in the course of sequencing charged and lesser offenses in descending order in verdict forms, ''[a]ny factor required to be found by the jury for reclassification or enhancement purposes may then [after sequencing charged and lesser offenses by degree] be placed in a separate

interrogatory at the appropriate place.'' *Sanders v. State,* 944 So.2d 203, 207 (Fla. 2006).

"The court did not specify what ''the appropriate place'' is, but the three-Justice concurring opinion suggested that it be a place separate from the verdict form for the substantive offense..." *Birch v. State,* 248 So. 3d 1213, 1219 (Fla. 1st DCA 2018).

Newkirk was charged as a Principal with co-defendant Roland Sprint who was the shooter and co-defendant who carried and was in actual possession of the .32 caliber revolver, **not Newkirk**. The Jury never found beyond a reasonable doubt that Newkirk carried or possessed a firearm; nor were they asked via special Interrogatories, as required as a prerequisite for application of Section 775.087(1)(2)(1979) to Newkirk's Penalty Phase and sentencing. (R 797-799)

The transcripts set forth fundamental error of the trial court in Newkirk's penalty phase and sentencing. (R 769-791) While the trial transcripts are devoid of how the trial court achieved the robbery life felony reclassification prior to Petitioner's sentencing, it did, as a means to sentence Petitioner as though no other regular sentencing procedures were required by law. (R 789-790) The fact that there is no record of these proceedings means that the trial court achieved felony reclassification *sua sponte* and off the record.

Newkirk's sentencing procedures utilized by the trial court represent fundamental error during sentencing. As a result thereof, Petitioner is entitled to resentencing. No trial court could lawfully have sentenced Petitioner to natural life on robbery Counts 2-3, based on the specific facts of Petitioner's case, considering the Record, jury instructions, penalty phase and sentencing. This Court should remand Petitioner's case for *de novo* resentencing for robbery Counts 2-3.

Sections 812.13(2)(a) and 775.087(1)(2), Fla.Stat. in Newkirk's Case

Newkirk argues that the trial court improperly considered the firearm reclassification statute Section 775.087 off-the-record. (R 769) In fact, the trial court sentenced Petitioner to a 3-year minimum mandatory in Count 3 pursuant to 775.087; regardless that possession was not charged in the Indictment or Information. The State conceded that point is not in dispute. (R 867-868) Yet, the record is devoid of any discussion about 775.087, or minimum mandatories related to firearm possession. The court did that *sua sponte.*

It appears that the trial court's intention was to permit a majority of the jurors to recommend an overall sentence for the entire three charges, not just the capital murder count; especially considering the trial court's statements made on the record after the Advisory Sentence came back. (R 789) "I feel that the people ought to have the last say in cases of this kind, I am going to accept the advisory

opinion of the jury.." *Id.* The problem with that scenario is that the trial court permitted the jurors to recommend a natural Life sentence for the robbery Counts, as a minimum sentence, notwithstanding that probation was the actual minimum discretionary sentence for the robbery Counts. Then the trial court accepted that illegal recommendation. (R 789) It appears that the trail court swam up stream-bypassing constitutional sentencing prerequisites and procedures. Petitioner's natural life sentences were made possible through an array of fundamental sentencing errors employed for that purpose. That claim is more than colorable, and the record as a whole supports that contention, specifically considering the *off-the-record charge conference*, the unlawful Advisory Sentence form prepared and used, and how the trial court interpreted the Advisory Sentence of Life on the record.

This allegation is also buttressed by the fact that the minimum sentence presented to the Jury for the entire case was "Life", not Life with a 25 year minimum mandatory prior to becoming eligible for parole, as well as the fact that Newkirk was afforded no sentencing hearing, but rather received a sentencing mandate from the trial court, related to the two armed robbery Counts. The record is devoid of a sentencing hearing.

> "An illegal sentence subject to correction under Rule 3.800(a) must be one that no judge under the entire body of sentencing laws could possibly impose under any set of factual circumstances. *Wright v. State*, 911 So.2d 81, 83 (Fla. 2005); *Carter v. State*, 786 So.2d 1173, 1181 (Fla. 2001). The illegality must be of a fundamental nature and clear from the face of the record. *Wright*, 911 So.2d at 83–84." *Martinez v. State,* 169 So. 3d 170 (Fla. 4th DCA 2015)

Newkirk's natural life sentences are illegal for robbery Counts 2-3, because no judge could have lawfully sentenced Petitioner to natural life on those Counts considering the specific facts in the record presented here. Petitioner is entitled to a *de novo* resentencing now to correct fundamental sentencing errors of the trial court made in 1981, and failure to do so would represent a manifest injustice.

III. THE NATURAL LIFE SENTENCES IMPOSED ON ROBBERY FIREARM COUNTS 2-3, AS SECONDARY OFFENSES, WERE ILLEGAL SENTENCES IMPOSED, BECAUSE THEY EXCEEDED THE SENTENCE IMPOSED FOR THE PRIMARY OFFENSE, CAPITAL MURDER, FOR WHICH A SENTENCE OF LIFE WITH A 25 YEAR MINIMUM MANDATORY WAS IMPOSED, SUCH THAT THE ROBBERY COUNTS WERE LIMITED TO THE STATUTORY MAXIMUM OF 30 YEARS

Defendant argues that once the trial court-imposed life with a 25-year minimum mandatory sentence before becoming eligible for parole on the capital murder court, the trial court was bound to sentence the two robbery Counts with a statutory cap of 30 years Florida State Prison.

Although there is no Florida caselaw specifically on point, likely due to the unusual nature of the facts of this case, Petitioner's instant Claim follows the logic in these related Florida cases identifying improper use of Section 775.087 to create a life minimum.

In *Wooden v. State,* 42 So. 3d 837 (Fla. 5th DCA 2010), Wooden was charged with second degree murder pursuant to Section 782.04(2) and 775.087. The trial court reclassified the felony based upon findings by the Jury of discharging a firearm causing great bodily harm and sentenced Wooden to natural life.

The 5th DCA, in remanding *Wooden* for sentencing held:

> "Because the jury found that Wooden's discharge of a firearm resulted in great bodily harm, the minimum mandatory range under section 775.087(2)(a)(3) was twenty-five years to life imprisonment. However, once the trial court imposed the minimum mandatory sentence of twenty-five years, it could not exceed the thirty year maximum penalty for a first-degree felony under section 775.082(3)(b). *Brown v. State,* 983 So.2d 706 (Fla. 5th DCA 2008). The twenty-five years to life minimum mandatory range under section 775.087(2)(a)(3) does not create a new statutory maximum penalty of life imprisonment. *See Brown; Yasin v. State,* 896 So.2d 875 (Fla. 5th DCA 2005)." *Id.*

William Newkirk is cognizant that his facts are different than in the *Wooden* case, because Wooden was charged with one count of second-degree murder with a firearm reclassification, while Newkirk was charged with capital murder and two

Counts of robbery deadly weapon; however, the logic and legal reasoning is the same. The logic is that once the *Wooden* court imposed a 25 year minimum mandatory on the primary count, it waived it's statutory authority to sentence Wooden to natural life with the firearm reclassification statute, or otherwise.

That is, once the trial court accepted the Jurors' recommendation for the capital murder count and imposed a 25 year minimum mandatory on Count 1, the trial court could not thereafter go back and increase the punishment to natural life for the two robbery Counts, which were secondary offenses, using the same illegal Advisory Sentence Recommendation of 'life', where the life minimum Penalty Phase Instruction was based upon an improper felony reclassification embedded into Newkirk's Penalty Phase Instructions, Verdict Forms, and sentencing.

Here, it is clear from the record that the trial court accepted a majority of the jurors recommendation of "Life" for the entire case, not just the capital murder Count. The trial court accepted the Juror's Advisory Sentence Recommendation for the entire case but supplanted "Life" as a minimum into the Advisory Sentence Instructions and Advisory Sentence Verdict Form, without objection from defense counsel, and inviting the illegal Advisory Sentence Recommendation from the Jurors that it received and clearly accepted on the record.

Petitioner's Indictment and Information were consolidated by the trial court upon motion made by defense counsel. (R 827-828) Although the two robbery Counts were charged separately, defense counsel filed a motion to consolidate the two cases into a single trial, presumably because the State had filed a Section 90.404(b) Motion with the trial court, which was pending. *Id.*

At first blush, Newkirk's sentences appear to be improper because the secondary offenses were sentenced harsher than the primary offense. The natural life sentences imposed for the two robbery deadly weapon Counts substantively means life as a minimum mandatory sentence, regardless that the Florida statutes don't designate a natural life sentence as a life minimum mandatory. In fact, substantively, or constructively, natural life is a minimum mandatory life, because there is no possibility of parole. A life sentence is a minimum mandatory sentence once imposed, because the Petitioner will die in prison.

Petitioner claims that the trial court could not legally stack natural life in the Indictment robbery count, a secondary offense, after having first imposed life with a 25-year minimum mandatory in Count 1, the primary offense. This is especially true where the trial court affirmatively accepted an illegal Advisory Sentence Recommendation Verdict from the Jurors of natural Life for the entire case, but

then went back and imposed life with a 25-year minimum mandatory on the capital murder count.

IV. NEWKIRK'S RIGHTS UNDER ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 921.231(1) (1980), RULE 3.720(B), FLA.R.CRIM.P. (1980) WERE VIOLATED RESULTING IN THE IMPOSITION OF UNLAWFUL NATURAL LIFE SENTENCES

Newkirk never received a full sentencing hearing, but rather, Newkirk received a sentencing mandate by the trial court. The trial court did not ask the State to present further evidence, witness testimony or arguments. The trial court did not ask the State for a sentencing recommendation. The trial court did not ask defense counsel whether Newkirk had any further witness testimony, mitigation evidence, arguments, or sentencing recommendations. The trial court did not ask Newkirk whether he had anything to say. No PSI was prepared in advance of sentencing. Newkirk's sentence was imposed by the trial court, as opposed to a discretionary sentence of the court.

The utter lack of a proper and lawful sentencing hearing procedure on the record corroborates the arguments made above that the trial court used Section 775.087(1)(1979) to reclassify the two robbery Counts to Life felonies, and thereafter erroneously believed that Life was a minimum mandatory for the two

robbery Counts, based on felony reclassification statute. Moreover, the trial court did not Order a presentence investigation report prior to sentencing based on the Juror's illegal natural Life Advisory Sentence recommendation. The lack of a full and proper sentencing hearing corroborates the fact that the trial court thought it was sentencing a Life felony, as opposed to a first degree felony punishable by life. (R 789-790; 799)

> "...THE COURT: Ms. Bell, do you agree and confirm that a majority of the jurors join in the advisory sentence which you have just read or heard read by the Clerk?
>
> MS. BELL: Yes.
>
> THE COURT: All right. Step forward, Mr. Newkirk. Based upon the jury's recommendation and because I feel that the people ought to have the last say in cases of this kind, I am going to accept the advisory opinion of the jury, even though they felt you committed a heinous crime, a terribly heinous crime. I mean, there should be another man standing next to you right there. You wasted him.
>
> The Court sentences you, sir, to life imprisonment, with a minimum mandatory imposition of twenty-five years before you are eligible for parole.
>
> The Court further sentences you to life imprisonment on Count II of the robbery to run concurrent with the sentence of Count I.
>
> The Court further sentences you to life imprisonment, which means you will spend a lot more than twenty-five years in prison as your partner, Mr. Sprint will, to life imprisonment, to run concurrent with the sentences in Count I and II.

You have thirty days from which to appeal this sentence..."

(R 789-790)

Newkirk's sentence, imposed approximately 44 years ago, was initially imposed in violation of Newkirk's constitutional rights to due process of law during sentencing, as fundamental error of the trial court during the penalty phase and at sentencing.

Newkirk's discretionary sentence range on the two robbery Counts was probation at the bottom to life at the top, and certainly not a natural life sentence minimum. Newkirk was entitled to a sentencing hearing as the Constitution requires relative to the discretionary aspects of Newkirk's sentence, and is still entitled to such a hearing, where Newkirk can present witness testimony and/or mitigation of sentence. Further, Newkirk claims entitlement to a Presentence Investigation Report ordered by this court prior to re-sentencing, because such a report was mandatory in 1981, procedurally, pursuant to Rule 3.710 Fla. R. Cim. P. (1980), and substantively, pursuant to F.S. 921.231(1)(1979). As such, Petitioner also had an absolute statutory right to a PSI ordered before sentencing, making the procedures utilized unlawful according to Florida statutes as well.

"Where resentencing is deemed appropriate, a criminal defendant is "entitled to a de novo sentencing hearing with the full array of due process rights." *St.*

Lawrence v. State, 785 So.2d 728, 729–30 (Fla. 5th DCA 2001) (citations omitted). A successor judge who was not a part of the previous proceedings may not, upon resentencing, base a sentence " 'entirely upon the recommendation of the [previous] trial judge.' " *Spencer v. State,* 611 So.2d 16, 17 (Fla. 3d DCA 1992) (*quoting Moore v. State*, 378 So.2d 792, 793 (Fla. 2d DCA 1979)). Rather, as prescribed by Florida Rule of Criminal Procedure 3.700(c)(1), the successor sentencing judge must "acquaint [ ] himself [or herself]with what transpired at the trial" before passing judgment. *Moore v. State,* 378 So.2d 792, 793 (Fla. 2d DCA 1979). In other words, "[w]hat is essential is for the successor judge to be sufficiently familiar with the case so that the imposition of a sentence is his or her act of independent judgment, not mere reliance on the decision of the original judge." *Ross v. State,* 958 So.2d 442, 443 (Fla. 4th DCA 2007).

Where the record demonstrates that the successor judge "took considerable time with th[e] case prior to resentencing, and ... was thoroughly familiar with the background and circumstances," the resulting sentence will generally be upheld as independently formulated. *Franquiz v. State,* 724 So.2d 128, 129 (Fla. 3d DCA 1998); *Davis v. State,* 677 So.2d 1366, 1368 (Fla. 4th DCA 1996) (successor judge "acquired the degree of familiarity with the case that is required by the rule" by "review[ing] the predisposition report, hear[ing] testimony from a counselor ...,

and consider[ing] other arguments made by both sides"). By contrast, reversal is warranted where the successor judge either fails to familiarize himself or herself with the case or completely abdicates to the prior judge's findings without performing an independent analysis. *See Salters v. State,* 802 So.2d 501, 502 (Fla. 4th DCA 2001) (reversing where the successor judge "declined to familiarize [him]self with the case" and instead sentenced the defendant in conformity with the previous judge's "inten[tion] to impose the most stringent *841 sentence possible"); *Caplinger v. State,* 271 So.2d 780, 781 (Fla. 3d DCA 1973) (reversing where the successor judge "relied solely upon statements of counsel to become informed on the case")." *Peters v. State,* 128 So. 3d 832, 840 (Fla. 4th DCA 2013)(Italics added).

Below, Newkirk requested the Court vacate the sentences previously imposed and for a *de novo* resentencing.

V. PETITIONER IS ENTITLED TO RESENTENCING BASED UPON A CONSTRUCTIVE OFF-THE-RECORD AMENDMENT TO THE CAPITAL MURDER INDICTMENT- CHANGING ROBBERY-FIREARM TO ROBBERY- DEADLY WEAPON TO UNLAWFULLY FOSTER APPLICATION OF 775.087 DURING PETITIONER'S PENALTY PHASE AND SENTENCING, WHERE THE STATE CONCEDED THAT THE TRIAL COURT IMPROPERLY IMPOSED A 775.087 MINIMUM MANDATORY SENTENCE THAT WAS NEITHER CHARGED NOR ADJUDICATED ON-THE-RECORD

This Claim is also spawned from the off the record charging conference discussion had, as acknowledged on the record by the trial court. (R 683)

The Petitioner contends that the Robbery-Firearm aspects of Indictment Count 2 were ignored following Petitioner's off-the-record charge conference. (R 683) Petitioner claims that enabled the trial court to use constructively change the robbery-firearm Counts from first degree felonies to life felonies for purposes of Petitioner's streamlined sentencing without a sentencing hearing. Either the State or the trial court improperly constructively amended the Indictment for sentencing purposes, as F.S. 775.087 was applied by the trial court to sentencing considerations in Count 3, as conceded by the State.

The Fifth District in *Tingley v. State,* 495 So. 2d 1181, 1183 (Fla. 5th DCA 1986) noted that in Florida there is no legal mechanism, or legal authority, to amend or substantively change an Indictment.

> "There is apparently no mechanism in Florida by rule or statute by which an indictment returned by a grand jury can be amended.' If there is an error of substance in an indictment, the only remedy is apparently to convene a new grand jury and issue a new indictment. However, clerical errors in an indictment, such as the date or case number on the caption may be corrected by the court." *Tingley v. State,* 495 So. 2d 1181, 1183 (Fla. 5th DCA 1986)

Moreover, an Indictment cannot be substantively modified by stipulation of the parties and the Court, as addressed in *Johnson v. State,* 969 So. 2d 938, 953 (Fla. 2007):

> A capital crime may be charged only by indictment, but any other felony may be charged by either information or indictment. Art. I, Section 15, Fla. Const.; Fla. R. Crim. P. 3.140(a). An indictment may be amended only to correct a defect, error, or omission in a caption or to eliminate surplusage. Fla. R. Crim. P. 3.140(c)(1), (i)-(j). Otherwise, a trial court has no authority to issue an order amending an indictment. *Snipes v. State*, 733 So.2d 1000, 1004 (Fla.1999). Further, once an indictment has been returned, a grand jury cannot charge a new or different crime through an amendment to the indictment. *Smith v. State,* 424 So.2d 726, 729 (Fla.1982).

However, the grand jury and state attorney have concurrent authority to charge noncapital crimes. *State ex rel. Hardy v. Blount,* 261 So.2d 172, 174 (Fla.1972). Even when the grand jury has declined to charge an offense by Indictment, the state attorney may charge the same offense by Information. *Id.; State ex rel. Latour v. Stone,* 135 Fla. 816, 185 So. 729, 730 (1939)." *Johnson v. State,* 969 So. 2d 938, 953 (Fla. 2007)

Petitioner claims fundamental error of the trial court Amending Count 2 of the Indictment for presentation to the Jury during the Initial Charge to the Jury, and also spawning the Amended charge presentation as a Life felony for purposes of Petitioner's Penalty Phase, Advisory Sentence Verdict, and subsequent acceptance of that Advisory "Life" Sentence (without the possibility of parole after 25 years) recommendation and concurrent natural life sentences imposed on the robbery Counts.

Petitioner has shown a variety of fundamental errors engaged during the penalty phase and sentencing seeking to convince this Court his constitutional entitlement to de novo resentencing. Petitioner would have been eligible for parole board consideration 19 years ago, but for these fundamental sentencing errors that Newkirk seeks to correct now.

Relief Requested

Petitioner is requesting a *de novo* resentencing. This Court should remand Petitioner's case for resentencing for Counts 1-3 (Murder - 1; Robbery with a Firearm – 2 and 3), based upon the aforementioned Claims combined, or based upon any one of them individually.

This Court has remanded criminal cases for *de novo* resentencing based upon manifest injustice without making any other recommendations or imposing

any other requirements on the trial court for resentencing, and that is all Petitioner seeks here. *See Hill v. State,* 246 So. 3d 392, 397 (Fla. 4th DCA 2018)(" We reverse and remand this matter for the successor trial judge to conduct a new sentencing hearing that provides appellant the opportunity for allocution before sentencing. *See Ventura v. State,* 741 So.2d 1187, 1189 (Fla. 3d DCA 1999)] "We leave the decision as to what sentence should ultimately be imposed to the sound discretion of the court.") *Id.*

Upon remand, Petitioner will argue his entitlement to a historically created Presentence Investigation Report, a sentencing hearing, and allocution statement right regarding all of the offenses, which Petitioner contends remain discretionary with the trial court at resentencing, under the specific facts of Petitioner's case.

At resentencing, Newkirk will argue why he should be sentenced to less than natural life in prison, in a true sentencing rehearing, affording Petitioner proper due process of law, pursuant to Article 1 Section 9 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

Certiorari review is warranted.

CONCLUSION

Based upon the foregoing grounds and authority the Appellant, William Newkirk, respectfully requests this Honorable Court grant certiorari and after review, reverse the trial court's Order Denying Relief (R 1024-1030), remand for a de novo resentencing hearing, and such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

LAW OFFICES OF RICHARD ROSENBAUM
Primary Email: Richard@RLRosenbaum.com
Secondary Email: Pleadings@RLRosenbaum.com

By_____
RICHARD L. ROSENBAUM, ESQ.
315 SE 7th Street
Suite 300
Ft. Lauderdale, FL 33301
Telephone: 954-522-7007
Facsimile: 954-522-7003
Florida Bar No: 394688

Ft. Lauderdale, Florida
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