NO: 23-A557

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

AMENDED 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 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?

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

III. 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?

IV. WHETHER WILLIAM 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 IN VIOLATION OF HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL?

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.

TABLE OF CONTENTS

APPENDIX

TABLE OF CITATIONS AND AUTHORITIES

Cases

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

Other Authorities

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

NO: 23-A557

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, State of Florida

AMENDED 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 was corrected to strike the three year minimum mandatory sentence for possession of a firearm." A Notice of Appeal was filed and the ruling was affirmed, *per*

curiam, in *Newkirk v. State*, 2023 Fla.App. LEXIS 6450 (Fla. 4th DCA 2023). This Petition timely follows.

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[1]) 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.

---

[1] 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. (R 789-790) [Emphasis added]

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 decades 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 case 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 ERRORS PERMEATED WILLIAM NEWKIRK'S PENALTY AND SENTENCING PROCEEDINGS RESULTING IN IMPOSITION OF UNLAWFUL NATURAL LIFE SENTENCES

II. PETITIONER'S CONCURRENT NATURAL LIFE SENTENCES WERE UNLAWFUL BASED UPON FUNDAMENTAL ERROR; 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 both of William Newkirk's Claims I and II. The arguments which follow support both claims.

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 as the sole basis to impose a natural life sentence on both robbery-firearm Counts (R 789), without ordering a mandatory PSI or allowing William Newkirk to allocute at sentencing. 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 minimum mandatory sentences, using firearm reclassification, pursuant to Section 775.087(1). Under either theory, William Newkirk's federal constitutional rights to Due Process of law, a fair trial and meaningful adversarial proceedings were violated.

The Florida Legislature did not authorize the trial court to seek a natural life Advisory Sentence from the jurors at the time of William Newkirk's trial. While the State

disputed 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.

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 (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. Certiorari review is warranted.

At bar, the Jurors were given penalty phase instructions, and a form which included a sentence of "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[2], 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 stemmed from the illegal sentence imposed on 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; 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

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

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) claimed:

"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 have been 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, constitute fundamental error of the trial court.

No Mandatory PSI was Prepared as Required by Law

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.

Petitioner 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.

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 sentences 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.

Probation Would Not Have Supported a Natural Life Sentence

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) would have considered the probation department recommendation for sentencing, by law.

No Allocution Statement Was Permitted By The Trial Court

Newkirk desired to allocute to the Court at sentencing, but was denied that right and sentenced without allowing the Defendant his right of allocution. The denial of the right of allocution affects the "fairness, integrity, or public reputation of judicial proceedings." *United States v. Packer*, 83 F. 4th 193 (3rd Cir. 2023).

"Allocution is the right of the defendant to make a final plea on his own behalf to the sentencer before the imposition of sentence." *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002).

In *United States v. Sustayta*, 723 Fed. Appx. 688 (11th Cir. 2018) the Court dealt with an identical issue. In *Sustayta*, the Court held:

> Under Federal Rule of Criminal Procedure 32, Sustayta had a right to speak or present mitigating information before the district court imposed his sentence, not just during the sentencing proceeding. Fed. R. Crim. P. 32(i)(4)(A)(ii); see also *United States v. Carruth*, 528 F.3d 845, 846-47 (11th Cir. 2008) (explaining that the right of allocution extended to revocation of supervised release hearings). Because Sustayta's attorney failed to object to the district court's denial of Sustayta's right to speak before imposition of the sentence, we review the denial of this right for plain error. *United States v. Doyle*, 857 F.3d 1115, 1118 (11th Cir. 2017). "We will reverse a district court's decision under the plain error rule only if there is (1) error, (2) that is plain, and (3) that affects substantial rights, and if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotation marks omitted).

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 Rule 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 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), the 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).").

"Allocution is the right of the defendant to make a final plea on his own behalf to the sentencer before the imposition of sentence." *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002).

In *United States v. Sustayta*, 723 Fed. Appx. 688 (11th Cir. 2018) the Court dealt with an identical issue. In *Sustayta*, the Court held

> Under Federal Rule of Criminal Procedure 32, Sustayta had a right to speak or present mitigating information before the district court imposed his sentence, not just during the sentencing proceeding. Fed. R. Crim. P. 32(i)(4)(A)(ii); see also *United States v. Carruth*, 528 F.3d 845, 846-47 (11th Cir. 2008) (explaining that the right of allocution extended to revocation of supervised release hearings). Because Sustayta's attorney failed to object to the district court's denial of Sustayta's right to speak before imposition of the sentence, we review the denial of this right for plain error. *United States v. Doyle*, 857 F.3d 1115, 1118 (11th Cir. 2017). "We will reverse a district court's decision under the plain error rule only if there is (1) error, (2) that is plain, and (3) that affects substantial rights, and if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotation marks omitted).

> As to the first two requirements, the district court's failure to offer Sustayta an opportunity to allocute prior to imposing the sentence was error, and it was plain. See *Prouty*, 303 F.3d at 1252 ("Because [Federal Rule of Criminal Procedure 32] specifically requires the district court to offer the defendant the opportunity to allocute, the court's failure to do so was a 'clear' or 'obvious' error."); *Doyle*, 857 F.3d at 1118 (same).
>
> As to the third requirement, the district court's error affected Sustayta's substantial rights. We recently explained that because the Sentencing Guidelines are now advisory, a defendant is "entitled to a presumption that he was prejudiced by the district court's failure to afford him his right of allocution, . . . even if he received a sentence at the low end of his advisory guidelines range." *Doyle*, 857 F.3d at 1121. This satisfies the plain error rule's third requirement. Id. Finally, because the allocution error affected Sustayta's substantial rights, the fourth requirement is also met. See id. at 1118 ("We have held that if the allocution error affects the defendant's substantial rights, which is the third requirement, the fourth one—that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings—is also met." (internal quotation marks omitted)). Thus, the district court committed plain error in denying Sustayta the opportunity to allocute before his sentence was pronounced. *Id.* at 690

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. Federal constitutional law also provides for the right of allocution. 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.

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 and concerns the Petitioner's fundamental constitutional rights to Due Process of law and fair adversarial proceedings.

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.*

Certiorari review by this Court is warranted.

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.

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 suggests 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 trial 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.

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 separate sentencing hearing. Certiorari review is warranted.

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. Thus, he claims an illegal sentence was imposed.

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

several related Florida cases identifying improper use of Section 775.087 to create a life minimum.

For example, 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, the Court lacked statutory authority to sentence Wooden to natural life with the firearm reclassification statute, or otherwise.

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.

At first blush, Newkirk's sentences appear to be improper because the secondary offenses were sentenced more harshly 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 IN VIOLATION OF HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL

Newkirk never received a full sentencing hearing, but rather, Newkirk received what turned out to be 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 after hearing argument pertaining to what sentence is just and appropriate.

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.

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 and constitutional right to a PSI ordered before sentencing and to allocute at that sentencing, making the procedures utilized unlawful according to Florida statutes and settled rights to Due Process of law.

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

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,

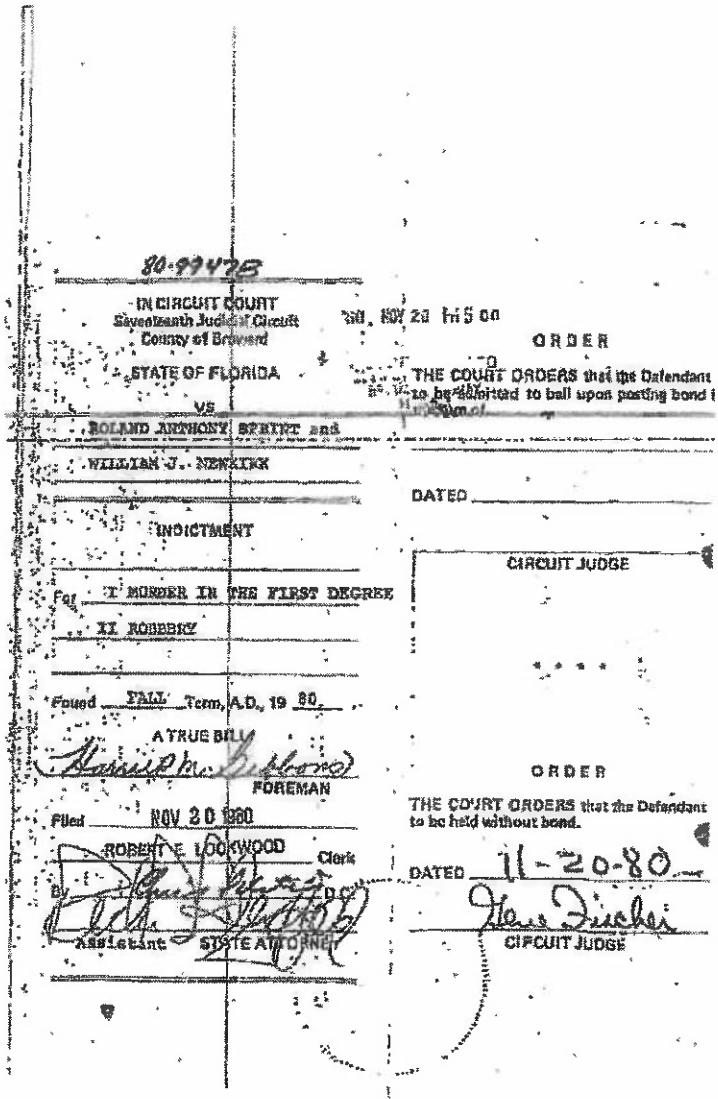
LAW OFFICES OF RICHARD ROSENBAUM
Primary Email: Richard@RLRosenbaum.com
Secondary Email: Pleadings@RLRosenbaum.com

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
February 21, 2024

APENDIX

APPENDIX



80-9947B

IN CIRCUIT COURT
Seventeenth Judicial Circuit
County of Broward

80 NOV 20 PM 5 00

STATE OF FLORIDA

VS

ROLAND ANTHONY STRINT and
WILLIAM J. NEWKIRK

INDICTMENT

For I MURDER IN THE FIRST DEGREE
II ROBBERY

Found FALL Term, A.D., 19 80

A TRUE BILL

FOREMAN

Filed NOV 20 1980

ROBERT E. LOCKWOOD Clerk

By D.C.

Assistant STATE ATTORNEY

ORDER

THE COURT ORDERS that the Defendant to be admitted to bail upon posting bond i

DATED

CIRCUIT JUDGE

ORDER

THE COURT ORDERS that the Defendant to be held without bond.

DATED 11-20-80

CIRCUIT JUDGE

A-1

IN THE NAME AND BY THE AUTHORITY OF THE

STATE OF FLORIDA

In the Circuit Court of the Seventeenth Judicial Circuit

of the State of Florida,

For Broward County, at the FALL, 1980, Term thereof, on the 20th

day of November in the year of our Lord One Thousand Nine Hundred and

Eighty to-wit: The Grand Jurors of the State of Florida, inquiring to and for the

County of Broward, State of Florida, upon their oaths do present that

COUNT I

ROLAND ANTHONY SPRINT and

WILLIAM J. NEWKIRK

on the 4th day of May, in the year of our Lord One Thousand Nine

Hundred and Eighty, in the County of Broward, State of Florida,

did then and there unlawfully and feloniously and from a premeditated design to effect the death of a human being, JOSEPH EUGENE URSO, did kill and murder him, the said JOSEPH EUGENE URSO by shooting him with a .32 caliber revolver, against the form of the statute in such case pursuant to Section 782.04 and 777.011 of the Florida Statutes, and

COUNT II

ROLAND ANTHONY SPRINT and WILLIAM J. NEWKIRK on the 4th day of May, in the year of our Lord One Thousand Nine Hundred and Eighty, in the County of Broward, State of Florida, did unlawfully take from the person or custody of JOSEPH EUGENE URSO, certain property of value, to-wit: a 1966 Pontiac Motor Vehicle, with the intent to permanently deprive JOSEPH EUGENE URSO of a right to the property or a benefit thereof, by force, violence, assault or putting the said JOSEPH EUGENE URSO in fear, and in the course thereof, there was carried a firearm or other deadly weapon, to-wit: a .32 caliber revolver,

against the form of the statute in such case pursuant to Sec. 812.13(1)(2)(a) and 777.011 of the Florida Statutes, made and provided to the evil example of all others in the like case offending, and against the peace and dignity of the State of Florida.

A TRUE BILL

FOREMAN

I HEREBY CERTIFY that I have advised the Grand Jury returning the Indictment as authorized and required by law.

Assistant State Attorney for the Seventeenth Judicial Circuit of the State of Florida, Prosecuting for said State

BROWARD COUNTY, FLORIDA
I certify this document to be a true and correct copy of the original.
WITNESS MY HAND AND SEAL
on JUL 01 2002
Clerk of the Court
BY D.C.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

THE STATE OF FLORIDA	INFORMATION FOR
vs.	
ROLAND ANTHONY SPRINT	ROBBERY
WILLIAM J. NEWKIRK	

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, charges that

ROLAND ANTHONY SPRINT

and WILLIAM J. NEWKIRK

on the 4th day of May A.D. 19 89, in the County and State aforesaid,

did then and there unlawfully take from the person or custody of Daniel Cortez, certain property of value, to-wit: U. S. currency with the intent to permanently deprive Daniel Cortez of the right to the property or a benefit thereof, by force, violence, assault or putting the said Daniel Cortez in fear, and in the course thereof, there was carried a 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(2)(a),

BROWARD COUNTY, FLORIDA
I certify this ... and
said correct copy ...
WITNESS ... 1 ...
BY ... 6-21-93
ROBERT ...
BY ...

A-2

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me ROBERT B. CARNEY, duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn says that testimony has been received under oath from the material witness or witnesses and that the allegations as set forth in the foregoing Information are based upon facts that have been sworn to as true by the material witness or witnesses and which, if true would constitute the offense therein charged, and that he has instituted this prosecution in good faith.

Robert B. Carney
Assistant State Attorney, 17th Judicial Circuit of Florida

Sworn to and subscribed before me this 5th day of January, A.D. 19 81

ROBERT E. LOCKWOOD
Clerk of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida

By B. J. Herman
Deputy Clerk

A TRUE COPY
Circuit Court Seal

To the within Information, Defendant pleaded _____

ROBERT E. LOCKWOOD
Clerk of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida

By _____
Deputy Clerk

Case No. 81-634CF10

IN THE
CIRCUIT COURT
Seventeenth Judicial Circuit of Florida
In and for Broward County
STATE OF FLORIDA

THE STATE OF FLORIDA
vs.
ROLAND ANTHONY SPRINT
WILLIAM J. NEWKIRK

Information for
ROBERT

Presented by State Attorney and Filed
JAN 6 1981

ROBERT E. LOCKWOOD
Clerk of the Circuit Court
MICHAEL J. SATZ
State Attorney

JAN 19

STATE OF FLORIDA

vs.

WILLIAM J. NEWKIRK

Sheriff's No. BS 80-6481
State Atty ROBERT CARNEY
Ct. Rep. GLORIA HORAITIS
BOOK 361 PAGE 2213

FELONY
JUDGMENT AND SENTENCE

YOU, WILLIAM J. NEWKIRK, being now before the Court, attended by your attorney, SCOTT EBER, and you having (xx) been tried and found guilty of ~~(xx)xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ ~~XXXXXXXXXXXXXXX~~ CT.I - MURDER IN THE FIRST DEGREE X
F.S. 782.04

the Court now adjudges you to be guilty of said crime.

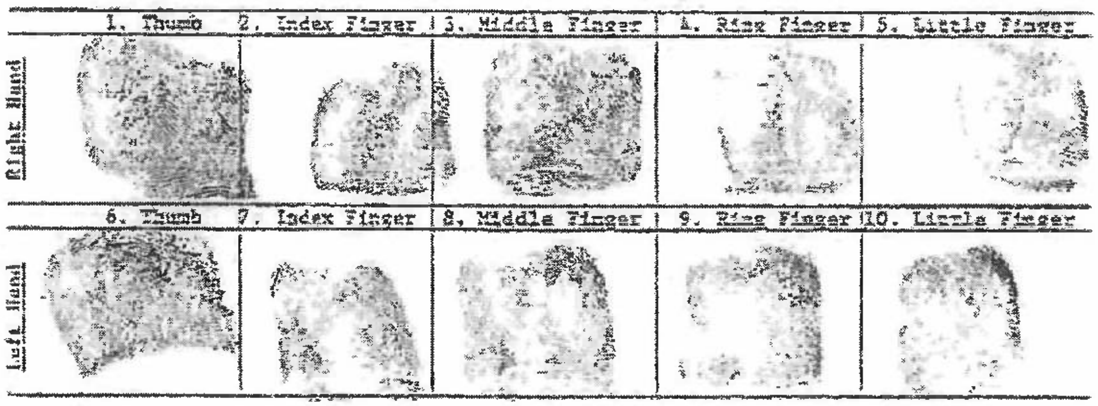
What have you to say why sentence should not be imposed? Saying nothing sufficient, it is

THE JUDGMENT OF THE COURT and the Sentence of the Law that you be confined in the FLORIDA DEPARTMENT OF CORRECTIONS for a term of LIFE IMPRISONMENT, WITH A MANDATORY MINIMUM SENTENCE OF TWENTY FIVE (25) YEARS, CREDIT 133 DAYS SERVED, PLUS $10.00 VICTIM COSTS, $2.00 ASSESSMENT.

DONE AND ORDERED in open Court at Fort Lauderdale, Broward County, Florida, this 2nd day of APRIL 19 81.

[signature]
JUDGE, CIRCUIT COURT

FINGERPRINTS OF DEFENDANT



I hereby certify that the above and foregoing fingerprints on this judgment are fingerprints of the defendant, WILLIAM J. NEWKIRK, and that they were placed thereon by said defendant in my presence, in open court, this 2nd day of April 19 81.

[signature]
JUDGE, CIRCUIT COURT

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record 6 day April 19 81 and recorded in CIRCUIT COURT MINUTES 361 page 2213 Record Verified
ROBERT E. LOCKWOOD, CLERK
S. Tucker D.C.

NUNC PRO TUNC 4-2-81

vs.

WILLIAM J. NEWKIRK

Sheriff's No. BS 80-6481
State Atty ROBERT CARNEY
Ct. Rep. G. HORAITIS
BOOK 361 PAGE 2207

FELONY
JUDGMENT AND SENTENCE

YOU, WILLIAM J. NEWKIRK, being now before the Court, attended by your attorney, SCOTT EBER, and you having (X) been tried and found guilty of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX CT. II - ROBBERY WITH A DEADLY WEAPON F.S. 812.13(2)a

the Court now adjudges you to be guilty of said crime.

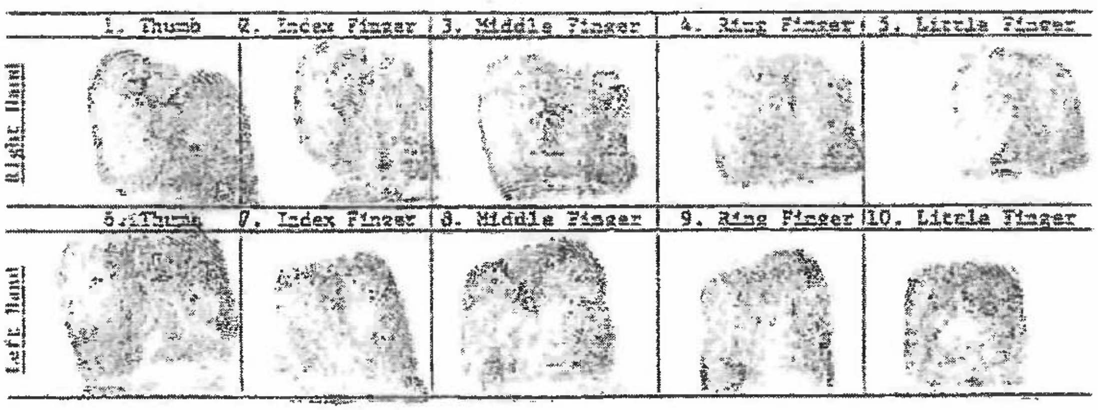
What have you to say why sentence should not be imposed? Saying nothing sufficient, it is

THE JUDGMENT OF THE COURT and the Sentence of the Law that you be confined in the FLORIDA DEPARTMENT OF CORRECTIONS for a term of LIFE IMPRISONMENT, WITH CREDIT FOR 133 DAYS SERVED, CONCURRENTLY WITH SENTENCE IN COUNT I OF THE INDICTMENT IN THIS CASE, PLUS $10.00 VICTIM COSTS, $2.00 ASSESSMENT.

DONE AND ORDERED in open Court at Fort Lauderdale, Broward County, Florida, this 2 day of APRIL 19 81.

[signature]
JUDGE, CIRCUIT COURT

FINGERPRINTS OF DEFENDANT



I hereby certify that the above and foregoing fingerprints on this judgment are fingerprints of the defendant, WILLIAM J. NEWKIRK, and that they were placed thereon by said defendant in my presence, in open court, this 2nd day of April 19 81.

[signature]
JUDGE, CIRCUIT COURT

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record
6 day April 19 81
and recorded in CIRCUIT COURT MINUTES
361 page 2207 Record Verified
ROBERT E. LOCKWOOD, CLERK
S. Tucker D.C.

4-2-81

STATE OF FLORIDA

vs.

WILLIAM J. NEWKIRK

Case No. [redacted]

Sheriff's No. BS 80-6481

State Atty ROBERT CARNEY

Ct. Rep. G. HORAITIS

BOOK 361 PAGE 2214

FELONY
JUDGMENT AND SENTENCE

YOU, WILLIAM J. NEWKIRK, being now before the Court, attended by your attorney, SCOTT EBER, and you having (X) been tried and found guilty of (XX)[redacted] ROBBERY WITH A DEADLY WEAPON, F.S. 812.13(2)a

the Court now adjudges you to be guilty of said crime.

What have you to say why sentence should not be imposed? Saying nothing sufficient, it is

THE JUDGMENT OF THE COURT and the Sentence of the Law that you be confined in the FLORIDA DEPARTMENT OF CORRECTIONS for a term of LIFE IMPRISONMENT, WITH A MANDATORY MINIMUM THREE YEAR SENTENCE, CREDIT 133 DAYS SERVED, TO RUN CONCURRENTLY WITH SENTENCE IMPOSED IN CASE 80-9947 CF-B PLUS $10.00 VICTIM COSTS, $2.00 ASSESSMENT.

DONE AND ORDERED in open Court at Fort Lauderdale, Broward County, Florida, this 2nd day of APRIL 19 81.

JUDGE, CIRCUIT COURT

FINGERPRINTS OF DEFENDANT

	1. Thumb	2. Index Finger	3. Middle Finger	4. Ring Finger	5. Little Finger
Right Hand					
	6. Thumb	7. Index Finger	8. Middle Finger	9. Ring Finger	10. Little Finger
Left Hand					

I hereby certify that the above and foregoing fingerprints on this judgment are fingerprints of the defendant, WILLIAM J. NEWKIRK, and that they were placed thereon by said defendant in my presence, in open court, this 2 day of April 1981.

JUDGE, CIRCUIT COURT

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record
6 day April 1981
and recorded in CIRCUIT COURT MINUTES
361 page 2214 Record Verified
ROBERT E. LOCKWOOD, CLERK
A. Tucker D.C.

NUNC PRO TUNC 4-2-81

33

00730

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM JOSEPH NEWKIRK,

Defendant.
_____/

CASE NOs: 80-009947 CF10B
81-000634 CF10B
DIVISION: FB (H. DAVIS)

MOTION TO CORRECT ILLEGAL SENTENCE, FILED 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

COMES NOW, Defendant, William Joseph Newkirk (hereinafter referred to as "Newkirk" or "Defendant") by and through the undersigned attorney, files this 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, and states as follows:

Introduction

On April 2, 1981, William J. Newkirk, age 20 at the time of sentencing, was convicted of first-degree murder and two Counts of robbery with a deadly weapon, following a jury trial in the Seventeenth Judicial Circuit, Broward County, Florida. Specifically, the jury found that defendant along with another individual, Roland Sprint, murdered seventeen-year-old Joseph Urso in the process of stealing his car, which was subsequently utilized in an armed robbery of Farm Store employee, Daniel Cortes. On that same date, the Defendant was sentenced to Life imprisonment with a minimum/mandatory term of twenty-five (25) years on the murder charge. As to the robbery charges, the Defendant was sentenced to concurrent *natural* life sentences with a three-year minimum/ mandatory

A-4

term of imprisonment on the Information robbery Counts only. [Attachment 12][Attachment 10, PDF 717-718] Trial and sentencing were conducted in front of the Honorable Arthur J. Franza. The State was represented by ASA Robert Carney and the Defendant was represented by Scott T. Eber[1].

APPENDIX

The Defendant hereby incorporates the following Appendix containing Attachments 1-14, into the body of the instant Motion by specific reference, as though the contents thereof were fully set forth herein:

Attachment #:	Description:	PDF Pagination #:
Attachment 1	Direct Appeal 4D81-875 - Mandate, 7/23/82	3-32
Attachment 2	First Pro Se 3.850, 12/12/83	33-43
Attachment 3	Second 3.850 With Counsel, 12/23/86	44-60
Attachment 4	Third Pro Se 3.850, 5/22/95	61-75
Attachment 5	First Petition for Writ Of Habeas Corpus, With Counsel, 7/15/89	76-105
Attachment 6	Second Petition for Writ Of Habeas Corpus, Pro Se, 2/7/13	106-122
Attachment 7	Third Petition for Writ Of Habeas Corpus, With Counsel, 12/16/14	123-141
Attachment 8	Fourth Petition for Of Writ Habeas Corpus, Pro Se, 3/3/20	142-170
Attachment 9	Indictment, 9/20/80 & Information, 1/5/81	171-174
Attachment 10	Complete Trial Transcripts, Penalty Phase, & Sentencing, 3/30/81-4/2/81	175-720
Attachment 10)(A)	Transcript Motion in Limine Insert, 3/30/81	721-724
Attachment 11	Jury Verdicts & Sentencing Recommendation, 4/2/81	725-727

[1]Defendant's trial attorney, Scott T. Eber, was also Defendant's appellate attorney in this capital murder death penalty case, notwithstanding that Eber had been an attorney for less than 6 years at the time of Defendant's capital murder- death penalty trial. The Florida Bar Website lists Eber's admission date as May 22, 1975, less than 6 years prior to Defendant's trial.

Attachment 12	Judgment & Sentence All Counts, 4/2/81	728-730
Attachment 13	Record on Direct Appeal, 8/20/81	731-784
Attachment 14	*DOC Information concerning William Newkirk*	*785-786*

Statement of Facts

Defendant has been in custody for 42 years, and would have been eligible for parole 15 years ago, but for, the trial court's natural life sentences imposed on the two robbery Counts.

From the Trial Transcripts

> "MR. CARNEY: Punishment, in this case, and in any case, and I will discuss that in a moment, is up to the Judge. The jury can render an advisory sentence. I will outline what I think the facts are. I will outline the concept of law. The facts of the case, you will find, are quite different than, what we are talking about right now, but I am outlining a concept of law. The final say as to what sentence is imposed is unique with the Judge, and he is the only one in the Judicial system who has that authority or that responsibility, and it is a tremendous responsibility on him.
>
> We can advise. I can make a recommendation; and the jury -- *this 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.*
>
> You can recommend, each of you can recommend, endorse, absolutely, that you feel that the Defendant should receive the death penalty; and the Judge can throw it out and give him life, and by the same token, all twelve of you could recommend that the Defendant receive life imprisonment, and the Judge can throw it out and invoke the death penalty.
>
> The penalty that is imposed for the case is uniquely with the Judge, and the Judge will have an opportunity, like you, to listen to all of the facts in the case, to weigh the degree of culpability between two parties or more parties that are involve and determine what sentence he feels is appropriate, but the final decision is with him." [Attachment 10, PDF 252-254][From State's *Voir Dire* by Robert Carney][Italic added]
>
> "*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.*" [Attachment 10, PDF 680-681][From Jury Instructions Read by the Honorable Arthur Franza][Italics added]
>
> "THE COURT: Let the Record reflect that we are back on the Newkirk case and the Defendant is in the courtroom with his attorney, and the State Attorney is here. A note came out of the jury room at 10:20, and I am reading it at 10:25.
>
> *"Q: After the jury has come to a verdict, do we return a second time for deliberating on a recommendation for sentence?"*

Bring them out. I'm going to tell them we are going to do it right now. Bring them in. (Thereupon, the following proceedings were resumed within the presence of the jury:)

THE COURT: Let the Record reflect that all of the jurors are seated in the jury box; and, in answer to your question, ladies and gentlemen, which is: "After the jury has come to a verdict, do we return a second time for deliberation on sentence?" Depending upon your verdict, I don't know if you have arrived at one; but if you do arrive at one, and if there has to be an advisory recommendation, we will do it immediately after your verdict if you arrive at one. Does that answer your question? Thank you. You may return and deliberate." [Attachment 10, PDF 692-693][From Jury Deliberations] [Italics added]

"Should a majority of the jury determine that the Defendant should be sentenced to death you should recommend an advisory sentence as follows:

"A majority of the jury advise and recommend to the Court that it impose the death penalty upon the Defendant, William J. Newkirk"

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine that the Defendant should not be sentenced to death. you should then render an advisory sentence as follows:

"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."

Let the Record reflect that this Court is now signing this instruction on this 2nd day of April, 1981, at 2:22 p.m.

The advisory sentence, ladies and gentlemen of the jury, are attached to these instructions, one for life imprisonment and one for the death penalty. I will sign the certificate after you have returned your advisory sentence. You may now retire, ladies and gentlemen, and deliberate your verdict." [Attachment 10, PDF 712-713][From Penalty Phase Instructions][Italics added]

"THE COURT: Ladies and gentlemen, have you arrived at an advisory sentence?

MR. LEE: Yes, we have, Your Honor.

THE COURT: Please hand it to the Clerk.

Let the Record reflect that the Court is now signing the certificate as to the advisory sentence, this 2nd day of April, 1981. Please publish the verdict. *You are lucky, son.*

THE CLERK: In the Circuit Court of the 17th Judicial Circuit, Broward County, Florida, Case No. 80-9947 CF B, Judge Franza, the State of Florida, Plaintiff, versus, William J. Newkirk, Defendant, *advisory sentence, the majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, William J. Newkirk,* Robert Lee, foreman." [Attachment 10, PDF 714][From Penalty Advisory Sentence][Attachment 11, PDF 727][Italics added]

Immediately after polling the Jury...

"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 [on the 2nd robbery Count], *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." [Attachment 10, PDF 717-718][From Sentencing Transcript][Italics added]

DIRECT APPEAL AND PRIOR POST CONVICTION HISTORY

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's filed a Statement of Particulars which only listed *capital premeditated murder*. [Attachment 1, PDF 3-30] The Fourth District Court of Appeal affirmed the Judgment and sentence on direct appeal in 1982. [Attachment 1, PDF 31-32][Attachment 10A]

3.850 Motions

Defendant has filed three (3) prior motions for post-conviction relief, pursuant to Rule 3.850 Fla. R. Crim. P. [Attachments 2-4, PDF 33-75]

#1 On or about December 12, 1983, Defendant filed a Pro Se "Motion for Post-Conviction Relief" alleging 10 grounds for post-conviction relief, labeled grounds "A" through "J". [Attachment 2, PDF 33-40] Defendant was not granted a hearing on this motion. On February 22, 1984, the Honorable Arthur J. Franza Denied Defendant's *motion on the merits*[2], by written Order, using ineffective assistance

[2]Defined as examining Defendant's allegations substantively, in consideration of currently existing Florida caselaw,

of counsel standards pronounced in *Knight v. State,* 394 So. 2d 997 (Fla. 1981). [Attachment 2, PDF 42-43]

#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 Pre-Sentence Investigation Report[3] ordered for Defendant, for the two robbery Counts, which should have remained a discretionary sentence with the Court, at sentencing. [Attachment 3, PDF 44-60] The Court summarily Denied the Motion as *successive*, and stating that these *matters should have been raised on Defendant's direct appeal*[4]. *Id.* at 58-59

#3 On or about May 22, 1995, Defendant 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". [Attachment 4, PDF 61-75] The Court (the Honorable Howard M. Zeidwig) denied the Motion *on the merits*, as legally insufficient to warrant relief. *Id.* at 71-73.

Habeas Corpus Petitions

#1 On or about June 15, 1989, Defendant through counsel Sharon Bradley, filed a "Petition for

---

and ruling, as opposed to denying the motion due to some alleged procedural default proffered by the State, and adopted by the trial court, a.k.a. a summary denial.

[3]Defendant had no prior felony convictions at the time he was sentenced to Life on the two robbery Counts and asserts that preparation of a PSI could reasonably have changed the outcome of the proceedings.

[4]But as previously stated, Defendant's trial attorney was also appointed to be Defendant's appellate attorney. To the extent the issue was missed in trial it defies logic that the same counsel would see the issue for direct appeal, in a circular, round robin fashion. The Fourth District has held that the *manifest injustice* exception also applies to Rule 9.141 Fla. R. App. P. Petitions in certain cases. See *Johnson v. State*, 226 So. 3d 908 (Fla. 4th DCA 2017); *Wardlow v. State*, 212 So. 3d 1091 (Fla. 2d DCA 2017). Additionally, failure to raise an issue on direct appeal is no longer a law of the case doctrine procedural bar for claims alleging illegal sentence or fundamental errors of the trial court, *McBride, Duckworth, infra.* Any suggestion to the contrary is wrong.

Writ Of Habeas Corpus" [ineffective assistance of appellate counsel], pursuant to Rule 9.030(b)(3) and Rule 9.100 Fla. R. App. P., directly with the 4th District Court of Appeal. [Attachment 5, PDF 76-105] The Writ was simply "Denied" without explanation by the 4th DCA. *Id.* at 104-105

#2 On or about February 7, 2013, Defendant Pro Se, filed a "Petition for Writ Of Habeas Corpus" with the trial court. [Attachment 6, PDF 106-122] The Petition was summarily denied (by the Honorable Michael J. Rothschild) relying upon the State's Response, alleging that the petition was successive and otherwise procedurally barred. *Id.* at 116

#3 On or about December 16, 2014, Defendant through counsel Barry Witlin, filed a "Petition for Writ Of Habeas Corpus". [Attachment 7, PDF 123-141] Again, the Court denied the Petition relying upon the State's Response alleging the motion was time barred, successive, and already addressed on direct appeal. *Id.* at 141 (The Order denying this Petition is titled "Order Denying Motion to Correct Sentence Under Florida Rule of Criminal Procedure 3.800", notwithstanding that no such titled Motion was filed by Defendant. *Id.*

#4 On or about March 3, 2020, Defendant Pro Se, filed a "Petition for Writ Of Habeas Corpus To Correct a Manifest Injustice" with the trial court. [Attachment 8, PDF 142-170] Again the State responded that the petition was either time barred, procedurally barred, or successive. The Court summarily Denied the Petition and thereafter, issued a separate Order prohibiting the Defendant from filing any more "Pro Se" requests for post-conviction relief with the trial court. *Id.* at 166-174

THIS COURT HAS JURISDICTION TO HEAR NEWKIRK'S MOTION/PETITION *ON THE MERITS*

From the outset, the Defendant, Newkirk, acknowledges that this Motion/Petition addresses two cases from decades ago, *State v. William Newkirk*, Case No: 80-9947 CF10B and *State v. William Newkirk*, Case No: 81-634 CF10B. Newkirk concedes that he has filed prior post-conviction motions and has been unsuccessful in his quest to have the Court vacate his Judgment and Conviction and correct his illegal sentences or, alternatively, issue a Writ of Habeas Corpus as a result of Newkirk's unlawful

detention which has resulted in a manifest injustice. Specifically, because of the natural Life sentence imposed on the robbery Counts.

Although his is an "old case" and Newkirk has served 42 years, Newkirk presents some claims which have never before been presented, some never adjudicated on the merits, and some which the State might argue in response as being "identical" to those previously raised. The Court can, and should correct an illegal or unlawful sentence "at any time." *State v. Gray*, 435 So.2d 816, 818 (Fla. 1983), rev'd on other grounds; see also, *Latimore v. State*, 288 So.3d 1225, 1227 (Fla. 5th DCA 2020). Although it may be argued that the issues raised should also be brought as such a Motion for Post-Conviction Relief rather than as a Petition for Writ of Habeas Corpus, Newkirk asserts that habeas is a proper vehicle to bring the sentencing issues to the Court, and that Florida courts have continued to grant Petitions for Writ of Habeas Corpus when a sentence is illegal.

> "The writ of habeas corpus is a common-law writ of ancient origin designed as a speedy method of affording a judicial inquiry into the cause of any alleged *5 unlawful custody of an individual or any alleged unlawful, actual deprivation of personal liberty." *Porter v. Porter*, 60 Fla. 407, 409-10, 53 So. 546, 547 (1910). It is "a writ of right," *Ex parte Amos*, 93 Fla. 5, 11, 112 So. 289, 291 (1927), "enshrined in [the] Constitution [of Florida] to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries." *Baker*, 878 So. 2d at 1246 (Anstead, C.J., specially concurring). *Accordingly, where improper jury instructions result in a denial of due process, habeas proceedings may afford an avenue for relief. See State v. Montgomery*, 39 So. 3d 252, 258 (Fla. 2010), receded from by *Knight v. State*, 286 So. 3d 147 (Fla. 2019) ("[F]undamental error occurred . . . where [the defendant] was indicted and tried for first-degree murder and ultimately convicted of second-degree murder after the jury was erroneously instructed on the lesser included offense of manslaughter.")

This Court has jurisdiction to hear Newkirk's Motion/Petition on the merits.

The *Law of The Case Doctrine* is Not a Bar

The defendant is entitled to relief pursuant to Rule 3.800(a), Fla.R.Crim.P., via this Motion to Correct Illegal Sentence. This is true regardless of whether the Rule 3.800 Motion is successive or not,

and is true even where a defendant failed to appeal a prior trial court denial of an identical motion previously filed, because the *law of the case doctrine* does not bar review by an appellate court that an illegal sentence should be corrected. *State v. McBride,* 848 So. 2d 287 (Fla. 2003). In *McBride*, the Florida Supreme Court stated:

"The district court correctly held that the *law of the case doctrine does not prevent McBride from relitigating the legality of his habitual offender sentence*. That doctrine requires that "questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Florida Dep't of Transp. v. Juliano,* 801 So.2d 101, 105 *290 (Fla. 2001) (emphasis added). *Law-of-the case principles do not apply unless the issues are decided on appeal. Id.*; see also *Kelly v. State,* 739 So.2d 1164, 1164 (Fla. 5th DCA 1999) (holding that "[s]uccessive 3.800(a) motions re-addressing issues previously considered and rejected on the merits and reviewed on appeal are barred by the doctrine of law of the case"). Because McBride did not appeal the previous order denying his rule 3.800 motion, the district court correctly held that the law of the case doctrine does not apply." *Id.* At 289 (Italics added)" *Id.* at 288-289).

William Newkirk's instant Motion/Petition is well founded and is not barred by the *law of the case doctrine,* because Claims raised by Newkirk below[5] have never been raised before by the Defendant, and therefore, have not been decided on the merits, or been the subject of any appeal. *McBride* at 288-289

The *Doctrine of Res Judicata* is Not a Bar

Second, the *doctrine of res judicata,* does not prevent a defendant's entitlement to relief from a Rule 3.800(a) Motion to Correct Illegal Sentence, or even a successive one, pursuant to the *doctrine of stare decisis* in Florida on this exact issue.

> "The *doctrine [of res judicata]* would require a motion to correct an illegal sentence to raise all arguments that the sentence is illegal. Subsequent motions would be barred if they contained arguments that were or could have been raised in the prior motion. Rule 3.800, however, allows a court to correct an illegal sentence "at any time." *Florida courts have held, and we agree, that the phrase "at any time" allows defendants to file successive motions under rule 3.800.* See *Raley v. State,* 675 So.2d 170, 173 (Fla. 5th DCA 1996); *Barnes v. State,* 661 So.2d 71, 71 (Fla. 2d DCA 1995). Thus, rule 3.800 expressly rejects application of *res judicata* principles to such motions." *McBride* at 290 (Italics added)

William Newkirk's instant Motion/Petition is not barred by the *doctrine of res judicata,* because a

[5]Claim 2 was previously raised, but in the wrong context. Claim 2 is repeated here because it brings all of Newkirk's other Claims together in a cohesive fashion.

Rule 3.800(a) motion can be brought "at any time", through judicial grace, and the *doctrine of stare decisis* in Florida specifically permits judicial consideration of this filing, regardless of the State's claims it is ultimately, or successive. *McBride* at 290; *Carter v. State*, 786 So.2d 1173 (Fla. 2017).

The *Doctrine of Collateral Estoppel* is Not a Bar

Third, the *doctrine of collateral estoppel*[6] could be argued to preclude a successive Motion to Correct Illegal Sentence, but only where *the identical issues were previously raised* in a previously filed 3.800(a) Motion, such as in the *McBride* case. In the event the *doctrine of collateral estoppel* is found to apply, the Court must then determine whether the *manifest injustice exception to the doctrine of collateral estoppel* should be applied. *See McBride* at 291-292 (Note that the *McBride* Court specifically held that a *manifest injustice exception to the doctrine of collateral estoppel* exists in Florida, conferring jurisdiction to the trial court) *Id.*

William Newkirk's instant Amended Motion is not barred by the *doctrine of collateral estoppel,* because the "identical issues" contained in the instant Motion have never previously been raised in any Rule 3.800 motion or *habeas corpus* petition filed by Newkirk.

Even If *Collateral Estoppel* Were Applicable to Newkirk's Case, The *Manifest Injustice* Exception to Collateral Estoppel Would Also Be Applicable

> "This Court has long recognized that *res judicata* will not be invoked where it would defeat the ends of justice. *See deCancino v. E. Airlines, Inc.*, 283 So.2d 97, 98 (Fla. 1973); *Universal Constr. Co. v. City of Fort Lauderdale,* 68 So.2d 366, 369 (Fla. 1953). The *law of the case doctrine* also contains such an exception. *See Strazulla v. Hendrick,* 177 So.2d 1, 4 (Fla. 1965). We have found no Florida case holding that such an exception applies to *collateral estoppel.* Federal courts and other state courts, however, have held that **the *collateral estoppel doctrine* does contain such a *manifest injustice* exception.** *See, e.g., Comm'r of Internal Revenue v. Sunnen,* 333 U.S. 591, 599 (1948); *Thompson v. Schweiker,* 665 F.2d 936, 940 (9th Cir. 1982); *Tipler v. E.I. duPont deNemours Co.,* 443 F.2d 125, 128 (6th Cir. 1971); *Dowling v. Finley Assocs., Inc.,* 727 A.2d 1245, 1249 n. 5

[6]"In 2000, Respondent [McBride] filed a motion under Florida Rule of Criminal Procedure 3.800(a), asserting that the habitual offender sentence imposed for the attempted first-degree murder was illegal and requesting that he be resentenced. The court denied the motion, and McBride did not appeal. The following year, McBride filed another motion under the same rule asserting the same argument. Noting the successive nature of the claim, the trial court denied the motion, and this time McBride appealed." *Id.* at 288. In McBride's case the *doctrine of collateral estoppel* applied, however, so did the *manifest injustice exception to the collateral estoppel doctrine,* based on McBride's illegal sentence issues dealing with an improper habitual felony offender sentence imposed. *Id.* at 291-292

(Conn. 1999); *Kansas Pub. Employees Ret. Sys. v. Reimer Koger Assocs., Inc.*, 941 P.2d 1321, 1333 (Kan. 1997); *State v. Harrison*, 148 Wn.2d 550, *292 61 P.3d 1104, 1109 (Wash. 2003). We agree. ***We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice.***" *McBride* at 291-292 (Italics and Emphasis added)

William Newkirk avers that the claims raised in the instant Motion are not barred by the *doctrine of collateral estoppel*, but even if they were, the failure of this Court to address the instant Motion on the merits would result in a *manifest injustice*, based upon fundamental error starting at the onset of Newkirk's Penalty Phase, and resulting in an illegal sentence of natural life in the two-armed robbery Counts, for which Newkirk is entitled to a *de novo* resentencing.

The 4th District Court of Appeal in *Martinez* faced the issue of collateral estoppel as a bar to the defendant's illegal sentence claims. "The issue in *Martinez* was not whether the sentences were illegal but whether their admitted illegality resulted in a manifest injustice." 216 So.3d at 736-737. Likewise, *McBride* addressed the manifest injustice standard. McBride at 291-292; *Thornton v. State*, 276 So.3d 976, 978 (Fla. 2nd DCA 2019).

In *Thornton*, the post-conviction court denied the defendant's Motion to Correct Illegal Sentence as successive and ruled that Thornton was estopped from re-arguing the same issues raised in a prior 3.800 motion, citing *McBride* and *Martinez*.. *Id.* at 977-978.

In *Thornton*, the defendant pled guilty to sexual battery with a deadly weapon in three separate cases in a global plea resolving nine cases. *Id.* at 977. Pursuant to a Plea Agreement, Thornton's total sentence was capped at 100 years. At sentencing, the trial court sentenced Thornton to 90 years to be served concurrently. Thornton filed a Rule 3.800 Motion.

In *Thornton*, the 2nd DCA held:

"Additionally, the cases cited by the postconviction court, McBride and *Martinez*, support our conclusion that Thornton is not barred from having his motion considered. The issue in *Martinez* was not whether the sentences were illegal but whether their admitted illegality resulted in a manifest injustice. 216 So. 3d at 736-37. Likewise, *McBride* addressed the manifest injustice standard. 848 So. 2d at 291-92. Whether a manifest injustice has been proven is not the issue in our case as Thornton has yet to receive a judicial determination on the legality of his ninety-year

sentences." *Id* at 978.

The Court further held:

> In his motion to correct illegal sentence, Thornton contended that because the sexual batteries were life felonies but life sentences were not imposed, the maximum sentence for each offense was forty years. *See* § 775.082(3)(a), Fla. Stat. (1989) ("[F]or a life felony committed on or after October 1, 1983, [a defendant may be sentenced to] a term of imprisonment for life *or* [to] a term of years not exceeding 40 years." (Emphasis added)). Thornton acknowledged that correction of his sentences would not affect his release date. *Id* at 977.
>
> The State argued that the motion should be denied because Thornton could be resentenced to a collective term of ninety years in prison through the imposition of consecutive sentences. The State relied exclusively on *Martinez v. State*, 216 So. 3d 734 (Fla. 4th DCA 2017) (en banc), where the Fourth District affirmed the denial of a successive rule 3.800 motion: "Having determined that the trial court properly decided that the defendant's second rule 3.800(a) motion was collaterally barred as successive and there is no manifest injustice to the sentence imposed for count one, we affirm the trial court's denial of relief." *Id.* at 740-41. The State also asserted, without citation or support, that Thornton's stipulation in 1993 that he would be permitted to bring another rule 3.800 motion raising this issue "in the event that the state of the law changes" prevents him from bringing the current motion because the law has not changed. *Id* at 977.

At bar, Newkirk's claims are not barred by collateral estoppel. New issues are raised herein which could not be raised before based upon Newkirk's *pro se* filing and based upon law which has developed concerning armed robbery offenses and the interplay with the 10-20-Life statute.

Fundamental Error is An Independent Basis for Jurisdiction Based Upon the *Doctrine of Manifest Injustice*

In *Duckworth v. State*, 2020 Fla.App. LEXIS 6487 (Fla. 3rd DCA May 13, 2020), the Third District Court of Appeal succinctly sets forth historical caselaw relative to the common law writ of *habeas corpus* in Florida, and why improper jury instructions rising to the level of fundamental error fall within the ambit of the *doctrine of manifest injustice* jurisdiction of the court, regardless of how old the case is, or whether there was a contemporaneous objection by defense counsel in trial.

> "The writ of habeas corpus is a common-law writ of ancient origin designed as a speedy method of affording a judicial inquiry into the cause of any alleged *5 unlawful custody of an individual or any alleged unlawful, actual deprivation of personal liberty." *Porter v. Porter*, 60 Fla. 407, 409-10, 53 So. 546, 547 (1910). It is "a writ of right," *Ex parte Amos*, 93 Fla. 5, 11, 112 So. 289, 291 (1927), "enshrined in [the] Constitution [of Florida] to be used as a means to correct manifest injustices and its availability for use

> when all other remedies have been exhausted has served our society well over many centuries." Baker, 878 So. 2d at 1246 (Anstead, C.J., specially concurring). ***Accordingly, where improper jury instructions result in a denial of due process, habeas proceedings may afford an avenue for relief.*** *See State v. Montgomery*, 39 So. 3d 252, 258 (Fla. 2010), receded from by *Knight v. State*, 286 So. 3d 147 (Fla. 2019) ("[F]undamental error occurred . . . where [the defendant] was indicted and tried for first-degree murder and ultimately convicted of second-degree murder after the jury was erroneously instructed on the lesser included offense of manslaughter."); *see also Walton v. State*, 208 So. 3d 60, 65 (Fla. 2016) ("[T]he failure to correctly instruct the jury on a necessarily lesser included offense constitutes fundamental error.") (citations omitted).
>
> Here, Duckworth abandoned any preserved challenge to the adequacy of the jury instructions by failing to contemporaneously object. Accordingly, ***he bears "the burden of proving that the instruction given affected the trial in such a way as to render the trial fundamentally unfair."*** *McCrae v. Wainwright*, 439 So. 2d 868, 870- *6 71 (Fla. 1983) (citing *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982))." *Id.* at 5-6

Duckworth is an important current reminder that certain jury instructions are actionable regardless of how old the case is, whether there was a contemporaneous objections or not, whether those issues were *deemed waived* for failure to raise them on direct appeal or not, and whether in accord with conventional Florida caselaw, those issues raised would otherwise be considered procedurally barred, time barred, or barred by the doctrine of collateral estoppel, vis-a-vis the failure to raise those claims years ago on some first filing.

Conclusion – This Court has Jurisdiction to Entertain William Newkirk's Claims

Based on the aforementioned *McBride, Duckworth* and *Thornton* cases, with respect to Rule 3.800 Fla.R.Crim.P. and the common law writ of *habeas corpus* in Florida considering the doctrine of *manifest injustice,* the instant Motion/Petition should not be *denied* on the typical grounds alleged by the State that it is either: successive, duplicitous, barred by the *law of the case doctrine,* barred by the *res judicata doctrine,* or barred by the *collateral estoppel doctrine.* It is not barred. Any such grounds alleged for barring a hearing on the merits of the instant Motion would be disingenuous. Moreover, William Newkirk claims that the failure to grant a hearing on the merits of the instant Motion would result in a further *manifest injustice.*

Summary of the Argument Concerning Jurisdiction

Newkirk contends that the sentences meted out in this case were illegal and unlawful. Newkirk's entire penalty phase, including the Penalty Phase Jury Instructions, the Advisory Sentence Recommendation Forms utilized, the Penalty Phase Advisory Sentence Recommendation, the absence of sentencing hearing, the absence of pretrial investigation, and the natural life sentences imposed for the two robbery Counts stemmed from fundamental errors of the trial court, resulting in illegal sentences imposed based thereon. As such, Newkirk is constitutionally entitled to a proper and legal resentencing.

The instant Motion/Petition is not time barred, successive, duplicitous, or otherwise procedurally barred. To the extent this Court intends to summarily deny this Motion/Petition, Newkirk requests a hearing regarding the jurisdiction of the trial court to hear this Motion/Petition on the merits, as cited in the Relief Requested section at the end hereof.

LEGAL ARGUMENTS

Claim 1: During William Newkirk's Penalty Phase, the Jury Was Provided an *Illegal Advisory Sentence Instruction and Advisory Sentence Recommendation Verdict Form*, Without Defense Objection, That Was Subsequently Utilized by the Trial Court in Sentencing Defendant to Natural Life Sentences for the Two Robbery Counts; Resulting in *Fundamental Error* of the Trial Court Embedded into Defendant's Penalty Phase and Sentence - Rendering Defendant's Sentence Imposed Illegal for the Two Robbery Counts

The two advisory sentence instructions and verdict forms provided to the Jury were for: 1.) Death, as the maximum sentence; and 2.) Life (meaning natural life), either as the maximum sentence for the two robbery Counts, as first-degree felonies punishable by life, or as a minimum mandatory sentence using firearm reclassification, pursuant to § 775.087(1)(1979). The Jury was never provided an instruction or form for "Life with a 25-year minimum mandatory before being eligible for parole", which was the proper instruction and form to use for penalty phase deliberations in 1981.

The Court clearly accepted the Jury's Advisory Sentence, however, the Juror's had *no legislative or constitutional authority* to recommend Life without the possibility of parole, and Newkirk argues that the Jurors were not even cognizant they were recommending *life without parole* to the trial court, because

the Jurors received no instruction for that.[10] 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.*

The trial court's instruction and form 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, *infra, Id.*

In the case of *Bates v. State*, 750 So. 2d 6, 11 (Fla. 1999), a capital murder death penalty case, the Jurors returned 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.

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)." *Id.* at 11

Bates argued in the alternative "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 the alternative argument lodged in Bates, the Supreme Court stated:

---

[10]Aside from being an illegal instruction to the Jurors in Newkirk's Penalty Phase, Jurors were not even advised what the differences were between life, with a 25-year minimum mandatory before being eligible for parole, verses actual natural life.

> "Appellant'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 (Italics added)

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. That would represent a violation of Article 2 § 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.

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

> "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.*." [Attachment 10, PDF 717][Attachment 11, PDF 727][Attachment 12] (Italics added)

Relative to Defendant's penalty phase, these are the possibilities, all of which constitute an illegal sentence for William Newkirk forty-two (42) years ago:

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

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 the entire three (3) Counts as opposed to just the capital murder Count; or

5. This was all just an honest mistake.

No matter how one view the situation, it still constitutes fundamental error during the penalty phase of Newkirk's capital murder trial and sentencing.

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. [Attachment 10, PDF 680-681]

In Newkirk's case, the Jurors recommended life on the homicide, and the trial court sentenced life on the two robbery Counts. There was no Pre-Sentence Investigation ordered and defense counsel was not even permitted to lodge arguments at sentencing. Sentencing occurred so fast it was less than a full page in the transcripts, *infra.*

The fact that the trial court did not Order any pre-sentencing 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, *infra.*

In sum, because the trial court specifically accepted the Juror's advisory sentence in this case, 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 resentencing in accordance with the Jurors legally interpreted advisory sentence as accepted by the trial court. *Supra, Bates, Whitfield, Whitehouse.*

Claim 2: Immediately Following the Penalty Phase, the Trial Court Sentenced William Newkirk Without First Ordering a Mandatory Pre Sentence Investigation Report, or Conducting a Sentencing *Hearing;* Relative to the Two Robbery Counts That Were *Discretionary* with the Trial

Court, with a Sentencing Range Stated in the Trial Jury Instructions of Probation on the Low End to Natural Life on the High End; Considering That Defendant Was Nineteen at the Time of the Offense, with No Prior Adult Felony Convictions

The trial court instructed the Jurors that *probation* was the low-end discretionary sentence for the two-armed robbery Counts, during initial trial Jury Instructions. [Attachment 10, PDF 680-681] Sometime later in the proceedings, natural life became the new minimum. The only way that could have occurred in Newkirk's case was the application of § 775.087(1)(1979) to Newkirk's case by the trial court; and for the reasons delineated below, that is what occurred at some point between the first Jury's Verdict and the Penalty Phase Instructions read. That is the only way that the trial court could have gotten from Point A to Point B, because 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 as such, which constitutes fundamental error of the trial court.

Defendant's Claim 2, *supra,* was a subject of Defendant Second Motion for Post-Conviction Relief, filed with counsel Bernard F. Daley, Jr. on December 23, 1986, and summarily Denied by the trial court as *time barred* and *successive.* [Attachment 3]

Paragraph 8 of that Motion [Attachment 3] states:

> "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, on behalf of Newkirk, filed this claim as a Rule 3.850 Motion, as opposed to a Rule 3.800 Motion, which looks to be a procedural mistake. 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, in 1986, unearthed the fact that Newkirk's robbery Counts were actually sentenced as life felonies, as fundamental error of the trial court.

Defendant's Claim 2, *supra,* was one of the claims within Defendant's First Petition for Writ Of

Habeas Corpus, filed directly with the 4th District Court of Appeal by counsel Sharon Bradley on July 15, 1989; and Denied *without any explanation* on October 31, 1989. Again, that filing by Ms. Daley looks like a procedural *faux pas*, because the trial court never ruled on Ms. Bradley's *habeas corpus* petition relating to, *inter alia,* failure to Order a mandatory pre-sentencing investigation report, and the 4th DCA did not have jurisdiction to consider much of that filing[12] *ab initio*. Ms. Bradley never filed the petition with the trial court. The Warden filed a jurisdictional motion to dismiss instead of any Response on the merits. [Attachment 5, PDF 80-82, 104]

Defendant's Claim 2, *supra,* standing alone and at first blush, could look like a harmless error. The Court may look at the situation and determine that the trial court improperly sentenced Defendant to Life for the two robbery Counts, without considering a *mandatory pre-sentence investigation* report - so what? The trial court had authority to sentence Defendant to Life anyway on the two robbery Counts after considering any pre-sentence investigation report provided to the trial court before sentencing. That's what Defendant's Claim 2, supra, looks like superficially. But in reality, the failure of the trial court to Order a pre-sentence investigation report in Newkirk's case was merely a symptom of other latent, embedded, and egregious, fundamental sentencing errors of the trial court; that Newkirk now claims below for the first time.

Had the trial court Ordered the pre-sentence 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. In reality, probation[13] was the minimum authorized sentence for both of the robbery

---

[12]Ms. Daley was also attempting to reopen the direct appeal by alleging ineffective assistance of Scott Eber, Defendant's Appellate and Trial Attorney, and by asking for a new direct appeal in 1989 based thereon; a full seven (7) years after Newkirk's 4th DCA Mandate in 1982.

[13]The trial court did not even afford defense counsel an opportunity to utter a single word at Newkirk's sentencing and did not permit Newkirk to allocate. The trial court just stated: "[T]hey [the Jurors] 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." [Attachment 10, PDF 717] After that single statement the trial court sentenced Newkirk to natural Life in

firearm Counts, not a life minimum. [Attachment 10, PDF 680-681]

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 on 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 as life felonies, in error.

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 19 at the time of the offense and had no prior adult felonies. The probation department would have recommended something less, and the trial court, as mandated by the Rule 3.710 Fla. R. Crim. P. (1981), would have to have considered the probation department recommendation for sentencing, by law. [Attachment 3][Attachment 5]

Because the failure of the trial court to Order a mandatory pre-sentence investigation report, prior to sentencing Defendant on the two robbery Counts, where Defendant was a first time adult felony offender, and considering that the sentencing range for robbery-firearm was between probation and natural life in prison, Defendant's Claim 2, *supra,* is both material and relevant to Defendant's claims of an illegal sentence imposed in the above-styled cases 42 years ago, and is symptomatic of much bigger problems with Newkirk's entire penalty phase and sentencing proceedings.

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. [Attachment 10, PDF 697-719]

Defendant incorporates by specific reference the arguments, caselaw and rules cited by defense counsels Daley [Attachment 3] and Bradley [Attachment 5] into the instant Rule 3.800 Motion, as they are material and relevant to the issues of illegal sentence imposed by the trial court on the two robbery

---

prison on the two robbery Counts, specifically following the illegal Advisory sentence of the Jurors, *supra,* Claim 1; *Bates v. State,* 750 So. 2d 6, 11 (Fla. 1999)

Counts.[14]

The harm feared by Defendant is the harm realized by Defendant, that is, Newkirk was sentenced to natural life for the two-armed robbery Counts *without a proper sentencing hearing on the Record*, which could have unearthed the fundamental error from Newkirk's penalty phase 42 years ago, because the Advisory Sentence Recommendation Instructions and Verdict Form, standing alone, represents a violation of Article 2 § 3 of the Florida Constitution, as a violation of separation of powers[15]. The trial court gave the jurors more authority than the Florida Legislature gave the Jurors, as fundamental error of the trial court. Florida Statutes § 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.

Claim 3: Florida Statutes § 775.087(1)(1979) Could Not Lawfully Be Applied to Reclassify the Two Robbery-firearm Counts to Life Felonies Resulting in an Illegal Sentence

The trial courts use of § 775.087(1)(2)(1979) in Newkirk's Penalty Phase and Sentencing is fundamental error for two (2) separate grounds:

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, for purposes of Newkirk's Penalty Phase Instructions, Advisory Sentence Recommendation Verdict

---

[14]Defendant's references to 'the two robbery Counts' mean the second and third Counts sentenced, however, those two robbery Counts came from Count 2 of the Capital Murder Indictment (Case No.: 80-009947 CF 10 B) and Count one of a separate Robbery Information (Case No.: 81-000634 CF 10 B) that was consolidated into the capital murder trial. Defendant references the three Counts in the instant Motion/Petition to mean: Count 1 capital murder, Count 2 robbery deadly weapon and Count 3 robbery deadly weapon at sentencing, or the two robbery Counts meaning the robbery Counts collectively decided as a part of Newkirk's capital murder death penalty trial penalty phase.

[15]The trial court (judicial branch) usurped authority from the Florida Legislature (legislative branch) by authorizing the Jurors to make an advisory sentence recommendation of "Life".

Forms, and for sentencing, when they were not; based upon the four corners of the charging documents [Attachment 9] and trial Verdict forms, with no Interrogatories propounded. [Attachment 11]. In so doing, the trial court took away the discretionary sentence nature of the two robbery Counts at sentencing, as fundamental error. Application of § 775.087(1)(a)(1979) to robbery-firearm charged in both robbery Counts, pursuant to § 812.13(2)(a)(1979) represented a double enhancement, *per se*, as well as a *double jeopardy violation*[16/17], and expressly prohibited by the text of § 775.087(1)(1979) itself. *See also Apprendi, infra.*

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. 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).

---

[16]It is irrelevant that Newkirk was charged with two felonies in each robbery Count, charged in the alternative, or disjunctively charged. It is material and relevant that Newkirk was actually charged with robbery-firearm in both robbery Counts, because those felonies, once charged as robbery-firearm cannot make the jump to § 775.087(1)(1979) to be reclassified to Life felonies, *per se*. The use of the word "or" by the State, firearm "or" other deadly weapon, to wit: a firearm, translates to robbery-firearm charges in both robbery Counts. The trial court however, applied § 775.087(1)(1979) by forgetting the robbery-firearm aspects of those Counts and then, preparing trial Jury Instructions for robbery-other deadly weapon, to wit: a firearm. The trial court then made the robbery Counts a Life minimum for use during Newkirk's entire Penalty Phase, including Instructions, Forms, Recommendations, and Penalty Phase Verdict, accepted by the court and used by the court to sentence Newkirk to life on the two robbery Counts without a sentencing *hearing*. The trial court pronounced sentence on the Record, but there was no hearing whatsoever. Newkirk is entitled to resentencing on the two robbery Counts as first degree felonies punishable by up to life.

[17]The trial court fashioned a way to turn the two first degree felonies punishable by up to life, into Life minimum offenses, without any additional findings or facts made by the Jurors, and based upon defective charging documents charging disjunctive separate Florida robbery felonies connected by the "or" word. That is the definition of *double jeopardy*, because the same conduct resulted in elevated punishment rubber stamped by the Jury, without Legislative authority, and in violation of Article 1 § 9 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

> *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 has established guilt of that crime.
>
> *A special interrogatory verdict such as for 10–20–Life is thus analytically separate from verdicts for 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 underlying crimes.
>
> The Florida Supreme Court has advised 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 pre-requisite for application of § 775.087(1)(2)(1979) to Newkirk's Penalty Phase and sentencing. [Attachment 10, PDF 697-719]

Attachment 10, PDF 697-719 sets forth fundamental error of the trial court in Newkirk's penalty phase and sentencing, notwithstanding that the trial transcripts are devoid of how the trial court achieved the felony reclassification, prior to Newkirk's Penalty Phase proceedings. The fact that there is no Record of this, means that the trial court did this *sua sponte.*

Moreover, application of § 775.087(1)(1979) in any context whatsoever[18], under the specific facts

[18]Here the trial court used § 775.087(1)(1979) to *sua sponte* reclassify the robbery Counts to life felonies for Newkirk's penalty phase, as evidenced by the penalty phase jury instructions, advisory sentence recommendation form utilized, and for adopting the Juror's ultimate sentence of Life, as a minimum mandatory, for the two robbery

of Newkirk's case is also a violation of *Apprendi, infra,* because the firearm was an essential element of the robbery Counts charged in the Indictment and Information, and therefore, needed an additional special finding by the Jurors in order to increase the punishment to natural Life for the robbery Counts as a minimum, *infra, Apprendi, See also Moss v. State,* 270 So. 3d 559 (Fla. 1st DCA 2019)

Essentially the trial court transferred the two robbery Counts to Life felonies, without any legal justification or lawful authority. In so doing, the trial court gave the Jurors more authority for a sentence recommendation than authorized by the Florida Legislature, because *the trial court wanted* the Jurors to recommend either Death, or natural Life, and the trial court was a stickler for following Juror recommendations. [Attachment 10, PDF 717-718] In so many words, Newkirk asserts the robbery Counts were ruled upon by the Court, either to correct charging errors made by the State, or otherwise[19], *infra.*

Lastly, the application of § 775.087(1)(1979) in any context in Newkirk's penalty phase whatsoever was fundamental error of the trial court, as Newkirk was specifically charged with robbery-firearm, which by definition, cannot be firearm reclassified to a higher-level felony.

Newkirk's sentence on the two robbery Counts is illegal and Newkirk is entitled to resentencing based upon Rule 3.800 Fla. R. Crim. P., and alternatively, the rules attendant to the Common Law Writ Of Habeas Corpus.

There was no firearm reclassification statute[20] charged in Newkirk's Indictment or Information,

---

Counts, *supra,* all as fundamental error of the trial court.

[19]Either: 1.) The trial court prepared both sets of Jury Instructions and Verdict Forms itself, and later handed them to counsel after the fact; or 2.) The trial court conducted substantive charging conferences, side bar, and off the Record, which is also fundamental error of the trial court. Newkirk was unaware of any substantive charging conferences held side bar, or during a lunch break with no court reporter present, *infra,* and certainly did not authorized defense counsel to conduct substantive charging conferences side bar, or to conduct any proceedings off the Record. [Attachment 10, PDF 611][Attachment 10, PDF 697]; *See Fleehearty v. State,* 712 So. 2d 396 (Fla. 4th DCA 1998). The unusual nature of Newkirk's Penalty Phase coupled with the fact that matters attendant thereto were conducted off the Record, suggests that the robbery charges were improperly viewed as Life felonies, specifically for presentation to the Jurors. Moreover, these errors are so *covertly embedded* into Newkirk's trial and penalty phase, that five attorneys over a 42-year period could not see these fundamental errors, which is itself a testament as to why these claims were never raised before by Newkirk.

[20]In order to utilize § 775.087(1)(2)(1979), Fla.Stat. to firearm reclassify an offense to the next higher offense level

there are no references on the Record to firearm reclassification, or changing the two robbery Counts to Life felonies in Newkirk's Penalty Phase; there are no references to § 775.087 on the Record; there is no mention of special Interrogatories propounded on the Record; and there are no special Interrogatory Forms noted either, there were no special Interrogatories propounded to the Jurors because they are not of Record, relative to actual carrying or actual possession of a firearm by Newkirk. The Record does reflect that the trial court read Jury Instructions for robbery-deadly weapon, while ignoring robbery-firearm, which was apparently the catalyst, or spring board, for the rest of the robbery Count errors in Newkirk's trial and Penalty Phase.

In the Indictment Count 2, the robbery Count states: "...and in the course thereof, there was carried a firearm or other deadly weapon, to-wit: a .32 caliber revolver, against the form of the statute in such case pursuant to Sec. 812.13(2)(a) and 777.011 of the Florida Statutes." [Attachment 9, PDF 171-172], but does not state who carried or possessed the firearm.

Newkirk was not even charged with possession of the firearm or other deadly weapon in Count 3, but rather, the co-defendant, Roland Sprint was. [Attachment 9, PDF 173].

As such, there should have been no firearm reclassification implicated in Newkirk's trial, penalty phase, or sentencing, but it appears from the Record there was a *latent firearm reclassification*

Subsection (1), and for minimum mandatory sentencing, Subsection (2), the firearm cannot be an element of the original offense charged, and there must be *actually carried and in actual possession by a defendant, not a co-defendant*. The actual possession by one defendant requirement cannot be met simply by using a Principal theory of culpability, but rather, 'carried' and 'actual possessed' by a defendant must be proven through a special Interrogatory answered in the affirmative by the Jurors, that must be proven by the State beyond a reasonable doubt. In Newkirk's Indictment there was no allegation who carried or actually possessed the firearm in Count 2 of the Indictment, and in the Information robbery Count it was alleged by the State that the co-defendant Sprint actually possessed the firearm used, which means that Sprint actually carried the firearm possessed in the Information Robbery Count charged, as alleged by the State. The Jurors made no finding who possessed or carried the firearm in either robbery Count, and as such, § 775.087(1)(2)(1979) cannot be used to reclassify the robbery Counts to a Life felony in Newkirk's case. Moreover, to the extent that Newkirk's robbery-"firearm or other deadly weapon Counts" were reclassified to Life felonies, via § 775.087(1) for Newkirk's Penalty Phase, that procedure was wholly illegal and fundamental error of the trial court, as there is no legal way to reclassify Newkirk's offenses to Life felonies, pursuant to application of Florida Statutes § 775.087(1)(2)(1979) to either robbery Counts as charged, or to the Penalty Phase Verdicts, as rendered. The entire procedure employed by the trial court in Newkirk's Penalty Phase was unconstitutional and fundamental error.

embedded into Newkirk's Penalty Phase Jury Instructions, Advisory Sentence Forms, and subsequent sentencing by the trial court.

Subterfuge Employed With §§ 812.13(2)(a) And 775.087(1)(2) In Newkirk's Trial

Newkirk argues that the trial court improperly considered the firearm reclassification statute § 775.087(1979) at some point prior to preparing the penalty phase advisory sentence jury instruction and advisory sentence verdict form presented to the Jurors[21].

Trial Instructions and Verdict Forms-

> "THE COURT: All right. *We have had a jury charge conference*[22], 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." [Attachment 10 PDF 611]

Penalty Phase Instructions and Verdict Forms-

> "THE COURT: Let the Record reflect that the Defendant is in the courtroom, together with his attorney. All right, gentlemen, have you looked at the charge to the jury and advisory sentences?
> MR. EBER: Yes, Judge.
> THE COURT: Is it acceptable?
> MR. EBER: Yes, Judge.
> MR. CARNEY: Yes." [Attachment 10, PDF 697]

That was the onset of the fundamental error that carried right through to the rest of Newkirk's Penalty Phase and Sentencing right there. *Id.*

From the Record that follows PDF 697 It is clear that the two robbery Counts were presented to the Jurors as "Life" felonies, as a minimum mandatory sentence, as opposed to first degree felonies punishable by *up to life*.

Keep in mind, the trial court permitted the Jurors to recommend an overall sentence for the entire

---

[21]It is irrelevant how this occurred, but the fact remains, it did occur. As previously stated, Newkirk did not authorize off the Record proceeding to occur outside of his presence, especially charging conferences in his capital murder death penalty trial, conducted at lunch time, off the Record, *infra.*

[22]This Record suggests that the trial court handed both counsel a set of written instructions beforehand and then acknowledged on the Record with no objections or changes suggested by either.

three charges, not just the capital murder Count; especially considering the trial court's intentions stated on the Record. [Attachment 10, PDF 717]["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 scheme, aside from being unconstitutional, is that it permitted the Juror's to recommend a natural Life sentence for the robbery Counts, as a minimum sentence, notwithstanding that probation was the minimum discretionary sentence for the robbery Counts. [Attachment 10, PDF 680-681] Then the trial court accepted that illegal recommendation. [Attachment 10, PDF 717]

This allegation is 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. *Id.* The Record is devoid of a sentencing *hearing. Id.*

These facts from the Record support that conclusion:

1. The trial court sentenced Newkirk to a 3-year minimum mandatory on Count 3, without any oral pronouncement thereof, and without any reference whatsoever in the Record to firearm reclassification or firearm minimum mandatory, which means that the trial court considered § 775.087(2)(a)(1979) at some point for preparation of the Judgment and Sentence for Count 3, at least after-the-fact. [Attachment 12, PDF 730] That minimum mandatory is illegal, for the same reasons expressed above.

2. Both the Indictment and Information charged Newkirk with "robbery": 1.) Count 2 of the Indictment charged: "and in the course thereof, there was *carried a firearm or other deadly weapon, to wit: a .32 caliber revolver*"; and 2.) Count 1 of the Information charged: "... *there was carried a firearm or other deadly weapon, to wit: a firearm.*" It is clear from the four corners of both charging documents,

the Capital Murder Indictment Count 2[23], and the Information Count 1, that Newkirk was charged with robbery-firearm, not robbery-deadly weapon, in the two robbery Counts- on paper. [Attachment 9 PDF 172-173]

3. The trial court read the Indictment and Information to the Jurors as written in the charge to the Jury section of Newkirk's trial. [Attachment 10 PDF 653-655]

4. But when it came time for Jury Instructions, Verdict Forms, and Sentencing, the robbery charges were stated as "robbery- deadly weapon"[24], as charged in the Indictment and Information, while the "robbery-firearm", as charged in the Indictment and Information was simply *swept under the carpet* and never mentioned again. From a detailed review of the entire trial Record in Newkirk's case, including the so called 'charging conference', the trial court did that, *sua sponte*, without defense objection. [Appendix]

5. It appears that the trial court alone prepared the Jury Instructions, which were then presented to the State and defense counsel for review, accepted by the State and defense counsel without objection; as evidenced by Newkirk's charging conference, the shortest charging conference that the undersigned attorney has ever seen.

Charge Conference

> "THE COURT: All right. We have had a jury charge conference[25], 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.

---

[23]As a side note, any actual or constructive amendments to a Capital Murder Indictment not actually Amended by a reconvened Grand Jury, represent fundamental error of the trial court, and also, divesting the trial court of jurisdiction for sentencing. In Newkirk's case robbery-firearm, as charged by the Grand Jury in Count 2 of the Indictment [Attachment 9] was constructively amended to robbery-deadly weapon by the trial court, as fundamental error. [Attachment 10, PDF 652 et. seq.]

[24]The only practical reason to delete "robbery-firearm" from § 812.13(2)(a) references, is to later use the firearm for reclassification of the felony to a life felony, pursuant to §§ 775.087(2)(a), because the firearm would no longer be an essential element of the robbery Count.

[25]This Record suggests that the trial court handed both counsel a set of written instructions beforehand and then acknowledged on the Record with no objections or changes suggested by either.

MR. EBER: No, Judge.
THE COURT: Call the jury in." [Attachment 10 PDF 611]

Charge Conference in Penalty Phase

"THE COURT: Let the Record reflect that the Defendant is in the courtroom, together with his attorney. All right, gentlemen, have you looked at the charge to the jury and advisory sentences?
MR. EBER: Yes, Judge.
THE COURT: Is it acceptable?
MR. EBER: Yes, Judge.
MR. CARNEY: Yes." [Attachment 10, PDF 697]

7. § 775.087(1)(1979) provides:

"775.087 Possession or use of weapon; aggravated battery; *felony reclassification; minimum sentence.*-

(1) Unless otherwise provided by law, *whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries,* displays, uses, threatens, or attempts to use *any weapon or firearm,* or during the commission of such felony the defendant commits an aggravated battery, *the felony for which the person is charged shall be reclassified* as follows:

(a) *In the case of a felony of the first degree, to a life felony..*" *Id.*

Note that application of § 775.087(1)(2)(1979) requires special Interrogatories propounded to the Jurors, because application of the firearm reclassification statute requires special finding and proof beyond a reasonable doubt, but there were none in Newkirk's case, as a violation of *Apprendi. See Birch v. State,* 248 So. 3d 1213, 1219 (Fla. 1st DCA 2018).

8. It appears that the trial court, *sua sponte,* reclassified the "robbery-other deadly weapon" alternative Counts charged in Count 2 of the Indictment and Count 1 of the Information, into Life felonies by using the .32 caliber revolver to reclassify robbery-deadly weapon to a Life felonies, pursuant to § 775.087(1)(a), also prohibited by *Wooden,* for purposes of Newkirk's penalty phase, in order to present "Life" as a minimum mandatory sentence for the robbery Counts, during Newkirk's penalty phase instructions and forward through sentencing.

Aside from being fundamental error on numerous grounds, Newkirk was actually charged with

robbery-firearm, so there should have been no *sua sponte, off the Record,* felony reclassification prior to Newkirk's penalty phase proceedings, because the firearm was an element of the offenses charged under § 812.13(2)(a)(1979). The fact is that ASA Carney never asked for that reclassification, and *the trial court just did it sua sponte and off the Record.*

9. The following penalty phase advisory sentence instruction was read to the Jurors by the trial court:

> "On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine that the Defendant should not be sentenced to death. you should then render an advisory sentence as follows:
>
> "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." [Attachment 10, PDF 712-713]

10. The trial courts advisory sentence recommendation instruction resulted in this penalty phase Verdict read:

> "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." [Attachment 10, PDF 714] [Attachment 11, PDF 727]

11. The illegal advisory sentence recommendation was fully accepted by the trial court, as an advisory sentence[26] for the entire case:

> "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." [Attachment 10, PDF 717]

Newkirk's natural life sentences are illegal and Newkirk is entitled to resentencing now.

Claim 4: Newkirk's Sentence for the Two Robbery Counts Is Illegal, Because the Natural Life Sentence Imposed on the Two Robbery Counts, as Secondary Offenses, Exceeds the 25 Year Minimum Mandatory Sentence Imposed on the Primary Offense

Defendant argues that once the trial court-imposed life with a 25-year minimum mandatory

[26]As previously stated, the trial court did not seek or obtain an advisory sentence from the Probation Department, because no mandatory pre-sentence investigation was Ordered for the two discretionary sentence robbery Counts prior to imposition of sentence.

sentence before becoming eligible for parole on the capital murder court, that 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, Defendant's instant Claim follows the logic in these related Florida cases identifying improper use of § 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 §§ 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's 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 year 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.*

Defendant is cognizant that in 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 Defendant was charged with capital murder and two Counts of robbery deadly weapon; however, the logic 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.

In an analogous case, *Latimer v State*, following a jury trial, Latimore was convicted of attempted voluntary manslaughter, third-degree grand theft, possession of a short-barreled shotgun, and armed robbery with a weapon. Latimore only challenges his sentence as to the armed robbery conviction. Per the verdict form, the jury found Latimore "[g]uilty as charged of Armed Robbery with a firearm." The jury made a special finding that Latimore discharged a firearm and caused death or great bodily harm to

another person. Latimore's written judgment on this count listed the crime as "robbery with a firearm" in violation of sections 812.13(1) and (2)(b), Florida Statutes (2001).

As to the armed robbery charge, the information charged that Latimore:

> [I]n violation of [Florida Statutes] 812.13(1) [and] (2)(b), . . . by force, violence, assault or putting in fear take away from the person or custody . . . certain property of value . . . with the intent to deprive . . . rights to said property or a benefit therefrom and, in the course of committing said robbery, carried a weapon, to wit: a shotgun.

The Court of Appeals held that:

> When a person is convicted of robbery, and during the commission of the robbery a firearm was involved, that person is subject to a minimum mandatory sentence. § 775.087(2)(a), Fla. Stat. (2001). Specifically, if the person "actually possessed" a firearm, the law requires that they "shall be sentenced to a minimum term of imprisonment of 10 years," but if the person "discharged a 'firearm' . . . and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." § 775.087(2)(a)(1), (3), Fla. Stat. (2001). These mandatory minimums do not apply when a defendant possessed or used a firearm while perpetrating a manslaughter. *See* § 775.087(2)(a)(1), Fla. Stat. (2001); *see also Wilson v. State*, 542 So. 2d 433, 434 (Fla. 4th DCA 1989).
>
> To pursue an enhanced mandatory sentence as the 10-20-Life statute [prescribes], the state must allege the grounds for enhancement in the charging document. The statutory elements for such enhancement must be precisely charged in the information. [I]f the state wishes to give notice of an enhancement by reference to a statute in the charging document, the state must refer to the specific subsection which subjects the defendant to the enhanced sentence. An information's failure to cite to the specific statutory subsection, while simultaneously failing to precisely charge the elements, cannot be cured by a jury's factual findings.
>
> *Espinoza v. State*, 264 So. 3d 343, 344 (Fla. 5th DCA 2019) (internal quotations and citations omitted). Additionally, the State cannot rely on grounds alleged in one count to support an enhanced mandatory sentenced on a different count. *Solomon v. State*, 254 So. 3d 1121, 1124 (Fla. 5th DCA 2018) (citations omitted). Lastly, an information that alleges the defendant "carried" a firearm cannot support a mandatory minimum sentence based on actual possession. *Grant v. State*, 138 So. 3d 1079, 1085-86 (Fla. 4th DCA 2014).
>
> Because the information did not allege that Latimore discharged a firearm, or that he violated the specific statutory subsection for discharging a firearm causing great bodily harm, the Court determined that his sentence was illegal. The information's allegations that he "carried a weapon, to-wit: a shotgun" are insufficient. *See Espinoza*, 264 So. 3d at 344-45 ("The information does not allege that Espinoza discharged the firearm. It also does not allege that Espinoza used a firearm to commit bodily harm. Instead, the information charges aggravated battery in the alternative by alleging Espinoza used a firearm or knowingly caused great bodily harm, which suggests that any use of the firearm did not cause great bodily harm. Although the defect may have been cured by

citation to the specific subsection of the statute, here, the information charged Espinoza with violating subsection 775.087(2), not subsection 775.087(2)(a)(3) as required." (citing *Bienaime v. State*, 213 So. 3d 927, 929 (Fla. 4th DCA 2017))).

Id at 1226-1227

Once the trial court accepted the Jurors recommendation for the capital murder Count and imposed a 25 year minimum mandatory on Count 1, that the trial court could not thereafter *go back* and increase the punishment to natural life for the two robbery Counts, the secondary offenses,[27] 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.*

The trial court accepted 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 got and clearly accepted on the Record.

Claim 5: Defendant's Penalty Phase, Advisory Verdict, and Sentencing Violated *Apprendi V. New Jersey*, 530 U.S. 466 (2000), Considering That Newkirk's Case Was Presented to the Jury as a Life Minimum Mandatory Advisory Sentence, or a Death Maximum Advisory Sentence, Where the Jury Did Not Find Beyond a Reasonable Doubt That Newkirk Either Carried or Possessed the Firearm Used

It is clear from the Record that the trial court presented *natural* Life" as a minimum mandatory to the Jurors in Newkirk's penalty phase as a minimum, and Death as a maximum.

Interestingly, it appears from that Record that the trial court prepared the Jury Instructions, Verdict Forms, and Penalty Phase Verdict Forms, because the Record is devoid of any discussions on the

[27]In 1981, there were no sentencing guidelines, because the first sentencing guidelines went into effect on October 1, 1983, however, the logic of primary offenses and secondary offenses still applies to Newkirk's case. Moreover, had the guidelines existed in 1981, Newkirk's sentence for the two robbery Counts *would have* represented a departure from the guidelines, requiring written reasons from the trial court.

Record by either the State or defense counsel regarding the same, other than the one statement from the trial court that the instructions were prepared, and inviting any objections from the parties, and accepted without any objections. [Attachment 10, PDF 697]

For Newkirk's Penalty Phase there is not even a Record that any charging conference occurred whatsoever, which supports the conclusion that the trial court prepared both the Penalty Phase Instructions, and Advisory Sentence Recommendation Forms, *sua sponte*. *Id.*

In order to make "Life" a minimum in the robbery Counts, the trial court considered the firearm reclassification statute § 775.087(1)(2)(1979) to make the robbery Counts "Life" felonies for presentation to the Jurors via the penalty phase Jury Instructions and advisory sentence form provided to the Jurors, otherwise *natural* "Life" would not have been presented as a minimum.

The Jurors had no special Interrogatories propounded to them relative to who "carried" or "actually possessed" the .32 caliber revolver firearm used by the trial court for firearm reclassification. As previously stated, Newkirk claims fundamental error of the trial court by reclassifying the robbery Counts to life felonies, and imposing "actual possession" minimum mandatory sentences, using § 775.087(1)(2) as a *spring board*, because Newkirk was already charged with robbery-firearm in both robbery Counts, pursuant to § 812.13(2)(a)(1979); representing a double whammy, and illegal.

The trial court clearly tagged Newkirk with actual possession of the firearm in the Information Robbery Count, notwithstanding, that the Information charged the co-defendant, Anthony Sprint with actual possession of the firearm for the Farm Store Robbery of Cortes. [Attachment 12, PDF 730]

§ 775.087 requires special Interrogatories propounded to the Jurors before firearm reclassification sentences can be legal, because "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a Jury and proved beyond a reasonable doubt," *Apprendi, infra.* In Newkirk's case, although the statutory maximum provided by § 812.13(2)(a)[28] was life, the minimum

[28] § 812.13(2)(a)(1979) is a first-degree felony, punishable by life, but it is still a first-degree felony, because Florida does not have any offense category labeled "first degree felony punishable by life". Once reclassified pursuant to §

was probation. The trial court presented the robbery Counts to the Jurors as a Life minimum, by surreptitiously utilizing firearm reclassification, pursuant to § 775.087 (1979) in the process.

Here, the trial court wanted to advise the Jury that Life was *a minimum sentence for all of Newkirk's charges wrapped into a ball,* and fashioned a means to justify the Life minimum Jury Instructions, a life minimum advisory sentence form submitted to the Jurors, and a life minimum advisory sentence received back from the Jurors. [Attachment 11, PDF 727]

> "In Apprendi, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,* and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. 2348. Four years later, in *Blakely v. Washington,* 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), the Supreme Court clarified that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Although both Apprendi and Blakely were decided well after Peters' 1989 offenses, both are pertinent as they "apply to all de novo resentencings that were not final when Apprendi and Blakely issued regardless of when the conviction or original sentence was final." *State v. Fleming,* 61 So.3d 399, 408 (Fla.2011)."
> *Peters v. State,* 128 So. 3d 832, 848 (Fla. 4th DCA 2013)(Italics added)

Newkirk claims that the trial court violated *Apprendi* because firearm reclassification considerations applied by the trial court for Newkirk's penalty phase and sentencing should have been proven by the State beyond a reasonable doubt, as evidenced by special Interrogatories prior to firearm reclassification used to foster the pretense that Life was a minimum for Newkirk's robbery Counts.

In fact, the statutory range for sentencing Newkirk's two robbery Counts, was and still remains, probation at the bottom, up to life as a maximum, for purposes of resentencing. **Not Life as a minimum as presented by the trial court to the Jury during Newkirk's penalty phase.** [Attachment 10, PDF 680-681]

Newkirk is entitled to resentencing for the two-armed robbery Counts.

Claim 6: The Jury Instruction Violated William Newkirk's Fundamental Rights by Omitting

---

775.087(1)(1979) by the trial court in the case *sub judice,* Life became the minimum, which is what the trial court wanted to present to the Jurors for purposes of advisory sentence, so that the trial court could later acknowledge on the Record that "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.". [Attachment 10, PDF 717]

Special Interrogatories Propounded, Such That Application of § 775.087(1)(1979) Reclassification of Felonies to Life Minimum Constitutes Fundamental Error

> "The punishment provided by law for the crime of robbery is greater if, as charged in this case, the Defendant, during the commission of such crime or his accomplice, if any, carries, displays, uses, threatens to use or attempts to use, any weapon or Should you find the Defendant guilty of robbery, it will be necessary for you to find, in your verdict, whether it has been proved, beyond a reasonable doubt, that the Defendant, during the commission of said crime, did or his accomplice, if any, carried, displayed, used or threatened to use or attempted to use, any weapon, or firearm." [Attachment 10, PDF 668-669]

This instruction is good enough for a Juror's finding of guilt for Newkirk on the two robbery-firearm Counts, because one can be convicted of § 812.13(2)(a) under an alternative theory of prosecution imposing culpability upon Newkirk as a Principal to Roland Sprint. In sum, for a conviction of § 812.13(2)(a) the State need not prove beyond a reasonable doubt who carried or possessed the firearm used.

However, the felony reclassification statute does not operate on the principle theory and a defendant whose felony is reclassified to Life must "carry" and "possess" the firearm in order to reclassify the felony, based upon special findings by the Jurors proven beyond a reasonable doubt. Moreover, § 775.087(1)(2)(1979) is a sentencing consideration by the trial court, not something that should have been presented to the Jurors, as effecting a capital murder death penalty Advisory Sentence Recommendation Instruction or Form. That was the disconnect, because the trial court simply turned the two robbery Counts into Life minimum felonies, prior to Newkirk's Penalty Phase, *sua sponte* and *off the Record, infra.*

The entire trial Record is devoid of ANY reference to felony reclassification, firearm reclassification, § 775.087, Life felony, however, that is what the trial court achieved off the Record, without legal basis, and as fundamental error of the trial court.

That instruction [Attachment 10, PDF 668-669], standing alone, applies to the Jury's determination of guilt for § 812.13(2)(a)(1979), but has nothing to do with § 775.087(1)(1979), *per se,*

Birch, supra.

Claim 7: William Newkirk's Sentence for *Natural* Life in Count 2 of the Indictment, Represented an *Illegal Stacking of Minimum Mandatory Sentences* for Offenses Committed in a Single Criminal Episode

Defendant's Indictment charges and Information charge were consolidated by the trial court upon motion made by defense counsel[29]. [Attachment 13, PDF 755-759] Although the two robbery Counts were charged separately, *defense counsel made a motion to consolidate the two cases into a single trial*, presumably because the State had filed a § 90.404(b) Motion with the trial court, that was pending. *Id.* From a practical standpoint, that looks like an absurd defense trial tactic, on it's face, in a Capital Murder Death Penalty case.

At first blush, Defendant's sentences look 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, actually, 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 that defendant will die in prison.

Defendant 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.

Claim 8: Newkirk's Fundamental Due Process Rights under Article 1 § 9 of the Florida

[29]Although this is not a Rule 3.850 Motion, it does not appear to be a competent trial tactic for any defense counsel to consolidate a separate robbery firearm case into a capital murder death penalty trial for obvious reasons. Scott Eber, Esquire, Newkirk's trial and appellate attorney was an attorney 5 years prior to Newkirk's trial, something that would not be permitted today, for obvious reasons.

Constitution, and the Fifth Amendment and Fourteenth Amendment to the United States Constitution were Violated at Sentencing

Newkirk never received a sentencing hearing, but rather, Newkirk received a sentencing mandate by the trial court. The trial court did not ask the State to present any further evidence, witness testimony or arguments. The trial court did not ask the State for any 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. Newkirk's *sentence was imposed as a mandate by the trial court*, as opposed to a discretionary sentence of the court related to the two robbery Counts.

The utter lack of sentencing hearing procedure on the Record corroborates Newkirk's arguments that the trial court used § 775.087(1)(1979) to "surreptitiously"[30] reclassify the two robbery Counts to Life felonies, and thereafter believed that Life was a minimum mandatory for the two robbery Counts, based on felony reclassification statute.[31] Moreover, the trial court did not Order a pre-sentence investigation report prior to sentencing which was immediate based on the Juror's illegal recommendations. The lack of a 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.

---

[30]This word "surreptitiously" is used for lack of a better word. The Record is devoid of any discussions on this topic and this was not what happens at a normal sentencing hearing. The trial court believed that Newkirk's minimum mandatory sentence was Life with a 25-year minimum mandatory on the capital murder Count, and natural Life x2 on the robbery Counts, which constituted fundamental error of the trial court. The fact that the trial Record is devoid of any references to felony reclassification means that § 775.087(1)(1979) reclassification was achieved by the trial court, off the Record.

[31]The Record further supports the proposition that the trial court also prepared both the penalty phase jury instructions and the penalty phase advisory sentence Verdict forms *sua sponte*, because the trial Record is devoid of any penalty phase charging conference other than the trial court handing completed instructions and forms to the parties.

> "THE COURT: Let the Record reflect that the Defendant is in the courtroom, together with his attorney. All right, gentlemen, *have you looked at the charge to the jury and advisory sentences?*
> MR. EBER: Yes, Judge.
> THE COURT: Is it acceptable?
> MR. EBER: Yes, Judge.
> MR. CARNEY: Yes." [Attachment 10, PDF 697]

"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." [Attachment 10, PDF 717-718][Italics added]

Newkirk's sentence imposed approximately 42 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.

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 he is still entitled to such a hearing, where Newkirk can present witness testimony and/or mitigation of sentence. Further, Newkirk claims entitlement to a pre-sentence investigation Ordered by this court prior to re-sentencing, because such a report was mandatory in 1981 for Newkirk's case, pursuant to Rule 3.710 Fla. R. Cim. P. (1981), *supra,* Claim 2.

"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).

Newkirk moves this Court to vacate the sentences imposed for the two robbery Counts, hereinabove described, and for a resentencing for the same, in accordance with the parameters hereinabove described.

Claim 9: William Newkirk's Constitutional Rights to a Fair Trial, Due Process of Law and Fair Adversarial Proceedings were Violated when the Trial Court Judge Assumed the Role of Prosecutor in Newkirk's Prosecution, Penalty Phase and Sentencing

Claim 9 is raised by Newkirk, because the Record as a whole supports his argument and the logical conclusion, for these reasons:

1) Both the first charging conference and the penalty phase charging conference evidences the fact that the trial court prepared both sets of documents, and verdict forms. [Attachment 10, PDF 611 ("Are there any objections to the jury charges *as I have stated that I would instruct the jury on?*")]; [Attachment 10, PDF 697 ("All right, gentlemen, *have you looked at the charge to the jury and advisory*

sentences?")];

2) Embedded in the Jury Instructions was the proposition that Newkirk was charged with **Robbery-Deadly Weapon, as opposed to Robbery-Firearm.** [Attachment 10, PDF 631, PDF 654, PDF 655, PDF 694, PDF 696] [Attachment 11, PDF 725-726][Attachment 12, PDF 729-730];

3) But in fact, **Newkirk was charged with Robbery-Firearm in Count 2** of the Indictment [Attachment 9, PDF 172], and Count 1 of the consolidated Information. [Attachment 9, PDF 173] As such, the robbery Counts were actually amended to robbery-deadly weapon, including Count 2 of the Indictment, to fix a charging *faux pas* in the Indictment and Information, and to permit the trial court to present reclassified natural Life felonies in Newkirk's penalty phase, related to the two robbery Counts;

4) The firearm reclassification statute § 775.087(1)(1979) could not be used to reclassify a robbery-firearm charge from a first-degree felony to a Life felony, because the firearm, as charged, was an element of robbery-firearm, as charged. *Id.;*

5) **Newkirk was not charged with robbery-deadly weapon,** to wit: a .32 caliber revolver, but rather Newkirk was charged, in the disjunctive, with robbery- firearm or deadly weapon, to wit: a .32 caliber revolver. That means Newkirk was charged with robbery-firearm, not robbery deadly weapon;

6) In Newkirk's trial the Jury Instructions, the Court deleted the robbery-firearm charge and proceeded with robbery-deadly weapon; however, the Jurors were read the entire Indictment and Information, verbatim, twice. [Attachment 10, PDF 184-186][Attachment 10, PDF 653-655];

7.) In Newkirk's trial, the Verdict Forms provided to the Jurors did not contain the charges of robbery-firearm, alleging instead, robbery-deadly weapon, [Attachment 11, PDF 726-727];

8) Newkirk alleges that the trial court did all these things *sua sponte* in order to use the .32 caliber revolver to reclassify the two robbery Counts to Life felonies, pursuant to § 775.087(1)(1979), so that the trial court could then *sua sponte* use that firearm reclassification to prepare penalty phase jury instructions and advisory sentence verdict forms, presenting the two robbery Counts to the Jurors as Life

felonies, as a minimum mandatory sentence, for the entire case wrapped into a bundle;

9) In so doing, *the trial court assumed the role of prosecutor* in violation of Newkirk's constitutional rights to a fair and impartial arbitrator, a fair trial, and as fundamental error of the trial court. The fact that the trial court did these things and defense counsel did not object to these things is irrelevant, because the trial court failed to take into consideration the fact that robbery-firearm was clearly charged, and then by ignoring the "or" word in preparation of the Jury Instructions and Verdict Forms;

10) The Record reflects that the trial court did these things, not ASA Robert Carney, because the Record is devoid of any substantive charging conference dialogue, and because the limited dialogue suggests that the trial court in fact conducted one charge conference off the Record, and then handed counsel Penalty Phase paperwork already completed by the trial court, to review off the Record, only to have no objections lodged on the Record;[32]

11) The Record reflects that the trial court asked ASA Robert Carney, whether the State had any objections to the instructions that the trial court intended to read to the Jurors. [Attachment 10, PDF 611] If ASA Robert Carney wrote them he would not be asked whether he objected to them. *Id.;*

12) The Record reflects that the trial court asked ASA Robert Carney and defense counsel "... have you looked at the charge to the jury and advisory sentences." [Attachment 10, PDF 697] If ASA Robert Carney wrote them he would not need to look at them. Judge Franza wrote them. *Id.;*

13) Newkirk claims that the trial court assumed the role of prosecutor in his trial and manipulated the robbery Counts to make them appear to be Life felonies presented to the Jury, without objection from defense counsel, and as fundamental error of the trial court. Newkirk was deprived of a neutral arbitrator, because these things were achieved by the trial court and completely off the Record. [Attachment 10];

---

[32]If there was a substantive charging conference off the Record, that also constitutes fundamental error of the trial court under the specific facts of Newkirk's case, because the only proceedings conducted off the Record in Newkirk's capital murder trial directly pertain to the identical fundamental errors claimed by Newkirk in the instant Motion/Petition.

14) Newkirk claims that the trial court assumed the role of prosecutor by conducting one, if not two, charging conferences off the Record, regarding the specific fundamental errors delineated in the instant Motion/Petition, where felony reclassification may have been discussed that is invisible on in Newkirk's trial transcripts and file Records;

15) Newkirk claims that the trial court assumed the role of prosecutor at sentencing, as evidenced by this comment on the Record: "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." [Attachment 10, PDF 718];

16) Newkirk claims that the trial court assumed the role of prosecutor by not conducting any due process sentencing hearing.

> "While a trial court may ask relevant questions of witnesses at a hearing, the court commits fundamental error when it assumes the role of prosecutor and introduces its own evidence. *See Padalla v. State*, 895 So.2d 1251, 1252 (Fla. 2d DCA 2005) ("In the present case, the trial court assumed the role of the prosecutor and, in so doing, committed fundamental error."); *Cagle v. State*, 821 So.2d 443, 444 (Fla. 2d DCA 2002) (holding that the trial court committed fundamental error by calling and examining its own witness at defendant's revocation of probation hearing); *Edwards v. State*, 807 So.2d 762, 763 (Fla. 2d DCA 2002) ("The trial court called and did all of the questioning of the two State witnesses, a probation officer and a police officer, turning the witnesses over to the defense for cross-examination."); *Lyles v. State*, 742 So.2d 842, 843 (Fla. 2d DCA 1999) ("Whether intentional or not, the trial judge gave the appearance of partiality by taking *sua sponte* actions which benefitted the State.")." *Smith v. State*, 205 So. 3d 820, 821 (Fla. 2nd DCA 2016)(Italics added).

> " In *Sparks*, this court held that the trial court judge had committed reversible error when she coached the prosecution during an unrecorded bench conference as to how it should further cross-examine the defendant, after the prosecutor had already announced in the presence of the jury that he had no further cross- examination questions for the defendant. *See Sparks*, 740 So.2d at 34-37. This court held that in so doing the trial court judge had ceased being a neutral magistrate and had instead assumed the role of prosecutor. See id. at 37. In J.F., a juvenile delinquency case, the trial court had directed the prosecution to obtain and present crucial fingerprint evidence which the state had not previously indicated it wished to submit into evidence. *See J.F.*, 718 So.2d at 252. On appeal, the fourth district held that the trial court in that case had, through its actions, crossed the line and become an arm of the prosecution. *See id.*
> While the second district in Lyles held that a trial court had similarly crossed the line between neutral arbiter and prosecutor by directing the state in a violation of probation hearing to reopen its case and present additional determinative evidence, *see Lyles*, 742 So.2d at 843." *Kirkpatrick v. State*, 769 So. 2d 515, 518 (Fla. 1st DCA 2000)(Italics

added).

At bar, based upon the Judge's departure from his role as a neutral arbitrator, resentencing is required.

Claim 10: William Newkirk's 3 Year Minimum Mandatory Sentence Imposed on the Robbery Count Is Illegal, Because the Information Charged the Co-defendant Roland Sprint with Actual Possession, and Therefore, the Jurors Legally Could Not and Did Not Find Beyond a Reasonable Doubt That Newkirk Was in Actual Possession of the Same Firearm, Because No Interrogatories Were Propounded

No § 775.087 (2)(1979) 3-year minimum mandatory was orally pronounced at Newkirk's sentencing. No Interrogatories were propounded to the Jurors relative to actual possession. *The Information Count affirmatively states that Roland Spring possessed the firearm, not Newkirk.* There is no legal basis to impose a firearm 3 year minimum mandatory upon Newkirk regarding Count 1 robbery-firearm of the consolidated Information.

Newkirk never carried or was in actual possession of the firearm for any Count charged, either in the Indictment or Information, and the Jurors made no specific finding that he did. For that reason alone, § 775.087(1)(2)(1979) cannot be used to reclassify ANY of Newkirk's Counts, or to impose a minimum mandatory sentence on any of the robbery Counts.

Newkirk was not the shooter in the capital murder Count and was not the *armed* robber that carried or possessed the firearm in the Farm Store robbery of Cortes. Newkirk's culpability in this case stems from the State's prosecution based upon the principle theory of culpability for Newkirk. Roland Sprint was the shooter and person in actual possession of the firearm implicated in this case, not Newkirk.

The firearm possession minimum mandatory sentence imposed on Newkirk is illegal and must be Vacated.

Claim 11: The Trial Court Conducted at Substantive Charge Conferences off the Record, and Outside the Presence of William Newkirk in Violation of William Newkirk's State and Federal Constitutional Rights

Off the Record proceedings (charging conference(s)) in Newkirk's case caused the fundamental

errors identified in the instant Motion/Petition to remain undetected for 42 years, notwithstanding review by four former appellate attorneys. Former appellate attorneys thought this was a failure of the trial court to Order a Pre-Sentence Investigation Report prior to sentencing Newkirk, but never made the connection that the trial court actually sentenced Newkirk to Life as a minimum, following an illegal sentence recommendation during Newkirk's Penalty Phase. The reason that these fundamental errors remained undetected, is because of the failure of a trial Record discussing felony reclassification, to the extent there was such a discussion *off the Record*. Newkirk claims that the failure of a trial Record related to the specific fundamental errors of the trial court alleged herein, is itself fundamental error in Newkirk's capital murder death penalty case.

Rule 2.070(d) Fla. R. Jud. Admin. (2007) states in pertinent part:

"(d) Record. When trial proceedings are being reported, *no part of the proceedings shall be omitted unless all of the parties agree to do so and the court approves the agreement.* When a deposition is being reported, no part of the proceedings shall be omitted unless all of the parties and the witness so agree." *Id.* (Italics added)

Newkirk did not agree for trial counsel to have off the Record discussions in his capital murder trial regarding charging conferences where felony reclassification may have been discussed, and did not waive his right to have a complete trial Record, for which Defendant now claims fundamental error of the trial court. To the extent defense counsel engaged in a substantive charging conference and/or substantive Penalty Phase charging conference, the trial court conducted said conferences off the Record and without Newkirk's knowledge or consent.

Rule 3.180(a)(2007) Presence of Defendant, states:

"(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

(1) at first appearance;
(2) when a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of rule 3.170(a);
(3) at any pretrial conference, unless waived by the defendant in writing;
(4) at the beginning of the trial during the examination, challenging, impaneling, and

swearing of the jury;
(5) at all proceedings before the court when the jury is present;
(6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;
(7) at any view by the jury;
(8) at the rendition of the verdict; and
(9) at the pronouncement of judgment and the imposition of sentence." *Id.* (Italics added)

Newkirk claims that holding *substantive charging conference*(s) off the Record, and outside Newkirk's presence, without his knowledge or consent, constituted fundamental error to the extent that occurred, because that is specifically where the trial court would have discussed felony reclassification issues with counsel prior to trial Jury Instructions and Verdict Forms read, and again for, Penalty Phase Jury Instructions and Advisory Sentence Recommendation Verdict Forms read and presented to the Jurors.

The Main Trial Charging Conference Was Off the Record at Lunchtime [Attachment 10, PDF 611 states, in pertinent part]

(Thereupon, the following proceedings were had outside the presence of the jury)

MR. EBER: Judge, I simply want to renew my motion for directed judgment of acquittal on the grounds previously stated at the close of the State's case.
THE COURT: All right. I presume you have the same arguments?
MR. CARNEY: We are adopting them.
THE COURT: Same ruling, motion denied. All right.

(Thereupon, a luncheon recess was taken.)
(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.

(Thereupon, the following proceedings were had within the presence of the jury)" [Attachment 10, PDF 611]

For the main charging conference, *the trial court affirmatively stated that it had a charging conference with counsel off the Record. Id.* There is no way to recreate this off the Record charging

conference from 42 years ago. *See Fleehearty v. State*, 712 So. 2d 396 (Fla. 4th DCA 1998); *See also Alexander v. State*, 575 So. 2d 1370 (Fla. 4th DCA 1991)(Missing trial transcripts or off the Record proceeding may constitute reversible error, when they cannot be recreated.)

The Penalty Phase Charging Conference Reference [Similarly, Attachment 10, PDF 697 states, in pertinent part]

"(Thereupon, a lunch recess was taken.)

(Thereupon, the following proceedings were had outside the presence of the jury)

THE COURT: Let the Record reflect that the Defendant is in the courtroom, together with his attorney. All right, gentlemen, have you looked at the charge to the jury and advisory sentences?

MR. EBER: Yes, Judge.
THE COURT: Is it acceptable?
MR. EBER: Yes, Judge.
MR. CARNEY: Yes." *Id.* [Attachment 10, PDF 697]

This reference stands for the proposition that the trial court prepared the Penalty Phase Charge to The Jury and Advisory Sentence Forms and then handed a written copy to the parties for examination on the Record, where neither counsel had any objection. To the extent there was any substantive charging conference related to Newkirk's Penalty Phase it was off the Record, and is not even mentioned whatsoever on the Record. Newkirk cites these abnormalities as a bonafide reason why none of his former counsel identified the fundamental errors claimed in the instant Motion/Petition over the last 42 years. The lack of trial court transcripts on these specific issues cause these fundamental errors to remain latent and undetected since 1981.

Newkirk further cites these abnormalities to rebut any State Response that the lack of charging conference trial transcripts should somehow negate any of Newkirk's Claims here. This is not a coincidence that the only trial transcripts that contain off the Record discussions pertain to the exact fundamental errors claimed by Newkirk in this filing; and none others. Moreover, to the extent the trial court *sua sponte* created the Penalty Phase Instructions and Forms, the trial court just changed the two

robbery-firearm Counts, *sua sponte*, and made them Life felonies for Newkirk's Penalty Phase without legal justification; creating fundamental error for the entirety of Newkirk's Penalty Phase.

Newkirk is entitled to resentencing on the two-armed robbery Counts.

Claim 12: The State And/or the Trial Court, Amended Count 2 of the Capital Murder Indictment in Trial, as Fundamental Error of the Trial Court, Which Divested the Trial Court of Jurisdiction to Impose Sentence on the Indictment, *in Toto*

William Newkirk's claims herein spawned from the off the Record charging conference discussion had, as acknowledged on the Record by the trial court. [Attachment 10, PDF 611] It is clear from the Record that somebody changed the Indictment Count 2 Robbery-Firearm, to wit: a firearm charge, to Robbery-Deadly Weapon, to wit: a firearm, specifically in order to "fix" the charging document in order to present the robbery Count to the Juror's in Newkirk's Penalty Phase as a life felony, minimum, instead of the discretionary sentence offense that it was.

The Robbery-Firearm aspects of Indictment Count 2 were deleted and replaced with robbery – deadly weapon following Newkirk's off the Record charging conference. Newkirk claims that Robbery-Firearm was deleted so that the trial court could portray the Robbery charge as a Life felony, through felony reclassification of the Robbery Count using § 775.087(1) (1979), which was also **not** charged in the Indictment.

Either the State or the trial court amended the Indictment in order to foster that Penalty Phase scheme, as fundamental error of the trial court, without defense objection. It was made to appear as though Newkirk was not charged with Robbery-Firearm, or that the .32 caliber revolver was not already an *element* of robbery firearm, in both Count 2 of the Indictment and Count 1 of the consolidated Information.

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, § 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)

Newkirk 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 Newkirk's Penalty Phase, Advisory Sentence Verdict and subsequent acceptance of that Life recommendation and natural Life sentence imposed.

For purposes of the instant Motion/Petition, Newkirk's intent is to show all of the improprieties in his Penalty Phase in order to persuade this Court of his entitlement to resentencing on the robbery Counts, as Newkirk has been in custody already for approximately 42 years, and has not been eligible for parole board hearing due to these fundamental errors that Newkirk seeks to correct now.

Newkirk is entitled to resentencing on both Robbery-Firearm Counts.

CONCLUSION AND RELIEF REQUESTED

William Newkirk is entitled to resentencing on the two robbery Counts, based upon the

aforementioned Claims combined, or based upon any one of them individually. In the alternative, that this Court will Grant an evidentiary hearing regarding the Claims raised in this Rule 3.800 Motion to Correct Illegal Sentence, or in the alternative, Petition for Writ Of Habeas Corpus, and then to Grant and to schedule a resentencing hearing, focusing on resentencing Newkirk's two robbery Counts.

WHEREFORE, the Defendant, William Newkirk, prays that this Court will Grant the relief requested in the instant Motion/Petition.

DECLARATION OF WILLIAM NEWKIRK

I, WILLIAM NEWKIRK, the Defendant in the above styled case, do hereby declare under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this Petition/Motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing Petition/Motion, that the facts contained in the Petition/Motion are true and correct, and that I have a reasonable belief that the Petition/Motion is timely filed. I certify that this Petition/Motion does not duplicate previous motions/petitions that have been disposed of by the Court. I further certify that I understand English and have read the foregoing Petition/Motion or had the Petition/Motion read to me.

Dated this 30 day of MARCH, ~~2021~~ 2021.

William Newkirk

WILLIAM NEWKIRK, DC # 077675

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion/Petition has been filed via e-Portal Filing with the Clerk of Courts, and copies furnished via e-Portal Filing to the Broward State Attorney's Office (courtdocs@sao17l.state.fl.us) on this 4th day of APRIL, 2022.

Respectfully submitted,

LAW OFFICES OF RICHARD ROSENBAUM
Primary Email: RichardatRLRosenbaum.com
Secondary Email: PleadingsatRLRosenbaum.com

/s/ RICHARD L. ROSENBAUM

Richard L. Rosenbaum, Esq.
Fla. Bar No: 394688
315 SE 7th Street, Suite 300
Fort Lauderdale, FL 33301
Telephone (954) 522-7007
Facsimile (954) 522-7003

Filing # 169071339 E-Filed 03/20/2023 09:13:54 AM

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, v. WILLIAM NEWKIRK, Defendant.	Case No. 80-9947CF10B 81-634CF10B Judge: Hunter Davis

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE [OR] PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court upon Defendant's Motion to Correct Illegal Sentence [or] Petition for Writ of Habeas Corpus, pursuant to Rule 3.800(a) and Rule 3.800(b), Florida Rules of Criminal Procedure, filed with the Court on April 4, 2022. Pursuant to Court Order, the State filed a Response to the instant pleading on April 14, 2022. Thereafter, Defendant filed a Reply to the State's Response on December 21, 2022, and the State filed a Response to Defendant's Reply on February 2, 2023. The Court, having examined the instant pleadings, the State's Response, Defendant's Reply, the State's Response to Defendant's Reply, the court file, and applicable law, finds as follows:

On April 2, 1981, Defendant was convicted by jury of first-degree murder and robbery with a deadly weapon in case 80-9947CFB. On April 2, 1981, Defendant was convicted by jury of robbery with a deadly weapon in case 81-634CFB. On that same day, Defendant was sentenced to life in prison, with no eligibility for parole for 25 years for murder in the first degree, and concurrent life sentences for the robbery with a deadly weapon charges in both cases. Defendant appealed his conviction and sentence, which were affirmed *per curiam* by the Fourth District Court of Appeal. The mandate entered on July 23, 1982, the date the instant case became final.

In the instant pleading, Defendant raises the following claims:

A-5

Claim 1:

Defendant alleges that during the penalty phase, the jury was provided an illegal advisory sentence instruction and advisory sentence recommendation form, resulting in fundamental error and rendering Defendant's sentence illegal for his two counts of robbery with a deadly weapon.

Claim 2:

Defendant alleges that the trial court sentenced Defendant without ordering a pre-sentence investigation report, or conducting a sentencing hearing.

Claim 3:

Defendant alleges that the two robbery-firearm counts were illegally reclassified to life felonies, resulting in an illegal sentence.

Claim 4:

Defendant alleges that the sentence for the two robbery counts is illegal because the natural life sentence exceeds the 25-year minimum mandatory sentence on the primary offense.

Claim 5:

Defendant alleges that the penalty phase, advisory verdict, and sentencing violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), considering that Defendant's case was presented as a life minimum mandatory sentence, where the jury did not find beyond a reasonable doubt that Defendant carried or possessed the firearm used.

Claim 6:

Defendant alleges that the jury instructions violated Defendant's fundamental rights by omitting special interrogatories propounded, and that the application of §775.087(1)(1979) reclassification of felonies to life minimum constituted fundamental error.

Claim 7:

Defendant alleges that the sentence for natural life in Count 2 constituted illegal stacking of minimum mandatory sentences for offenses that were committed in a single episode.

Claim 8:

Defendant alleges that his fundamental due process rights under Article 1, Section 9 of the Florida Constitution and the fifth amendment of the United States Constitution were violated at sentencing.

Claim 9:

Defendant alleges that his constitutional rights to a fair trial, due process, and fair adversarial proceedings were violated when the trial court judge assumed the role of prosecutor.

Claim 10:

Defendant alleges that the 3 year minimum mandatory sentence imposed on the robbery count is illegal, as the Co-Defendant Roland Sprint was charged with actual possession of the firearm, and therefore the jurors legally could not and did not find beyond a reasonable doubt that Defendant was in actual possession of the same firearm, because no interrogatories were propounded.

Claim 11:

Defendant alleges that the trial court conducted a substantive charge conference off the record, and outside the presence of Defendant, resulting in a violation of Defendant's state and federal constitutional rights.

Claim 12:

Defendant alleges that the state and/or trial court amended Count 2 of the Capital Murder Indictment in trial, which was fundamental error of the trial court, and divested the trial court of jurisdiction to impose a sentence on the indictment.

The Court adopts and incorporates herein the legal and factual reasoning that is contained in the State's Response[1] 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. As more fully set forth in the State's Response, the instant pleading fails for the following reasons:

Claim 1:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired. Even assuming the claim raised could be addressed, it would nonetheless fail as Defendant's sentence of life imprisonment with no possibility of parole for 25 years was within the court's ability to impose.

Claim 2:

[1] The State has certified that a copy of its 109-page Response was sent to counsel for Defendant via e-mail on April 14, 2022, and its 11-page Response to Defendant's Reply on February 2, 2023; as such, an additional copy is not attached hereto.

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 3:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired. Even assuming the claim raised could be addressed, it would nonetheless fail as nothing in the judgment in either case reflects that the armed robbery counts were reclassified to life felonies.

Claim 4:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's sentence was within the court's ability to impose. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 5:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's sentence was within the court's ability to impose, as the jury made factual findings that Defendant was guilty of crimes which were punishable by life imprisonment. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 6:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's claim attacks the judgment, not the legality of the sentence. The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 7:

Defendant's argument is without merit. The record reflects that Defendant's sentences are being run concurrently, and as such, there was no stacking of mandatory minimum sentences.

Claim 8:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's claim attacks the judgment, not the legality of the sentence. The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 9:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's claim attacks the judgment, not the legality of the sentence. The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 10:

Defendant's argument in Claim 10 has merit, as the indictment did not specifically charge Defendant with possession of a firearm. As such, the three year mandatory minimum sentence for possession of a firearm in case 81-634cf10b is hereby stricken.

Claim 11:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's claim attacks the judgment, not the legality of the sentence. The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Claim 12:

This matter is not cognizable in a motion to correct illegal sentence, as Defendant fails to allege how the Court could not have imposed the sentence under any set

of circumstances. *Carter v. State*, 786 So. 2d, 1173 (Fla. 2001). Defendant's claim attacks the judgment, not the legality of the sentence. The issue was or could have been raised on appeal, and is not cognizable in a motion for post-conviction relief. Furthermore, if the instant motion were to be treated as a motion for post-conviction relief, it would be both impermissibly successive and untimely and procedurally barred, as the two-year requirement to file a rule 3.850 motion, as set forth in rule 3.850(b), expired.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion to Correct Illegal Sentence [or] Petition for Writ of Habeas Corpus, is hereby **DENIED** in part as to Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12; and **GRANTED** in part as to Claim 10, to wit: the three year mandatory minimum sentence for possession of a firearm in case 81-634cf10b is hereby stricken.

The Defendant has thirty (30) days from the date of this order to file an appeal.

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida, this 20th day of March, 2023.

HUNTER DAVIS
CIRCUIT COURT JUDGE

Copies furnished to:

Joel Silvershein, Esq.
Assistant State Attorney

Richard L. Rosenbaum, Esq.
Counsel for Defendant
315 SE 7th Street, Suite 300
Fort Lauderdale, FL 33301
Richard@RLRosenbaum.com

Copies Furnished to:
Joel Michael Silvershein, Email : jsilvershein@sao17.state.fl.us
Office of the State Attorney, Email : courtdocs@sao17.state.fl.us
Richard L Rosenbaum, Email : Pleadings@RLRosenbaum.com
Richard L Rosenbaum, Email : Richard@RLRosenbaum.com
Richard L Rosenbaum, Email : MCruz@RLRosenbaum.com

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WILLIAM NEWKIRK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0997

[September 14, 2023]

Appeal of order denying rule 3.800 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Hunter Davis, Judge; L.T. Case Nos. 80-9947CF10B and 81-000634CF10B.

Richard L. Rosenbaum of the Law Offices of Richard Rosenbaum, Fort Lauderdale, for appellant.

No appearance required for appellee.

PER CURIAM.

Affirmed.

WARNER, CONNER and KUNTZ, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

A-6