IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

CASE NO.: 5D16-0370

KENNETH PURDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

APPENDIX TO APPELLANT'S INITIAL BRIEF

Matthew R. McLain, Esquire
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Counsel for Appellant

APPENDIX INDEX

FILED IN OPEN COURT
THIS 13 DAY OF June, 1995
Fran Carlton, Clerk
BY Carol Thomas D.C.
1:04 PM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, FLORIDA

SPRING TERM 1995

THE STATE OF FLORIDA

vs

B) JEFFREY JERROD HOLT
B/M DOB: 07/08/78
A) KENNETH PURDY
B/M DOB: 06/22/77

INDICTMENT

COUNT I MURDER IN THE FIRST DEGREE 782.04

COUNT II ARMED ROBBERY 812.13

COUNT III CARJACKING 812.133

NO: CR95-~~5061~~ 6887
DW 12

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

The Grand Jurors of the County of Orange, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Orange, upon their oaths do present that Jeffrey Jerrod Holt and Kenneth Purdy did on the 1st day of June, 1995, in Orange County, Florida in violation of Florida Statutes 782.04 and 775.087, from a premeditated design to effect the death of Willie Townsel, murder Willie Townsel, in the County and State aforesaid, by shooting him with a deadly weapon, to-wit: a firearm.

COUNT II

And the Grand Jurors of the County of Orange duly called, impaneled and sworn to inquire and true presentment make in and and for the body of the County of Orange, upon their oaths do further present that Jeffrey Jerrod Holt and Kenneth Purdy, did on the 1st day of June, 1995, in Orange County, Florida in violation of Florida Statutes 812.13(2)(a) and 775.087 by force, violence, assault or putting in fear, take away from the person or custody of Ronnell Mitchell certain property, to-wit: U. S. Money Current, as owner or custodian thereof, with the intent to permanently deprive the said owner or custodian of the property, and in the course of committing the robbery, Jeffrey Jerrod Holt and/or Kenneth Purdy did carry a firearm or other deadly weapon, to-wit: a firearm.

EXHIBIT
A

COUNT III

And the Grand Jurors of the County of Orange duly called, impaneled and sworn to inquire and true presentment make in and and for the body of the County of Orange, upon their oaths do further present that Jeffrey Jerrod Holt and Kenneth Purdy, did on the 1st day of June, 1995, in Orange County, Florida in violation of Florida Statute 812.133(1)(2)(a), take a motor vehicle from Ronnell Mitchell, as owner or custodian thereof, with the intent to permanently or temporarily deprive said owner or custodian of the motor vehicle, when in the course of the taking there was the use of force, violence, assault, putting Ronnell Mitchell in fear.

A TRUE BILL

Joseph G. Becker
Foreman of the Grand Jury

As authorized and required by law, I have advised the Grand Jury returning this indictment.

For LAWSON LAMAR, STATE ATTORNEY
Ninth Judicial Circuit of Florida

Filed and presented in Open Court, in the presence of the Grand Jury this 13 day of June, 1995.

FRAN CARLTON
Clerk of the Circuit Court

By: Carol A. Thomas
Deputy Clerk

This indictment encompasses the transaction and all charges listed on Complaint Number OCSO 95-181189 and CR95- and the bond thereon is hereby superseded. The Orange County Sheriff's Office shall substitute the charge(s) and bond indicated on this indictment for those on the above-cited complaint.

The Jury was released at 3:35 p.m., September 25, 1997.

Counsel for the Defense renewed the Motion for Judgment of Acquittal. Following arguments, the Court denied the Motion as to Counts 2 and 3. The Court granted the Motion in part to Count 1 charged as First Degree Premeditated Murder will be sent back to the Jury as First Degree Felony Murder.

The charging conference was held at 4:00 p.m., September 25, 1997.

COURT RECESSED at 4:55 p.m., September 25, 1997 until 9:30 a.m., September 26, 1997.

COURT OPENED at 10:00 a.m., September 26, 1997 with all Officers present. Susan McGee was present as Official Court Reporter.

Closing arguments were presented to the Jury.

The Jury was charged, retired, and deliberated.

The Jury sent a note requesting to hear the taped interview of defendant Kenneth Purdy (State's exhibit #55).

The Jury was brought into the Courtroom to hear the tape.

The Jury was retired to continue deliberating.

Having deliberated, the Jury returned with the following verdicts, to wit.

VERDICT
(as to Count 1)

WE THE JURY, find the Defendant, guilty of Felony First Degree Murder as charged in the information.

SPECIAL FINDING

WE THE JURY, Find that the Defendant did possess, carry, display, use, or attempt to use a firearm.

SO SAY WE ALL.

DATED at Orlando, Orange County, Florida, on this 26th day of September, 1997.

/s/ Edwin R. Barfield
FOREPERSON

VERDICT
(as to Count 2)

WE THE JURY, find the Defendant, guilty of Armed Robbery With Firearm or Deadly Weapon, as charged in the information.

SPECIAL FINDING

WE THE JURY, Find that the Defendant did possess, carry, display, use, or attempt to use a firearm.

SO SAY WE ALL.

DATED at Orlando, Orange County, Florida, on this 26th day of September, 1997.

/s/ Edwin R. Barfield
FOREPERSON

VERDICT
(as to Count 3)

WE THE JURY, find the Defendant, guilty of Armed Carjacking as charged in the information.

SPECIAL FINDING

WE THE JURY, Find that the Defendant did possess, carry, display, use, or attempt to use a firearm.

SO SAY WE ALL.

Dated at Orlando, Orange County, Florida, on this 26th day of September, 1997.

/s/ Edwin R. Barfield
FOREPERSON

The Jury was polled and discharged.

The Court adjudicated the Defendant guilty. Sentencing is set for October 13, 1997 at 11:00 a.m..

COURT RECESSED at 4:00 p.m., September 26, 1997; subject to call.

FRAN CARLTON, Clerk of the Circuit and County Courts
By: _____, Deputy Clerk in attendance
April L. Dennis

SENTENCE - PREPARED BY: DC - COUNTY - SENTENCING JUDGE

10/29/97 - MULLIN - ORANGE - MIHOK, A T

OFFENDER NAME - DOB - DC# 374830 - BLACK - MALE

PURDY, KENNETH - - 06/22/77 - OBTS# - HISP: NO - PLEA

REVOCATION OF PROBATION OR COMMUNITY CONTROL ONLY? N

. PRIMARY OFFENSE: QUALIFIER:

DOCKET	FEL/DEG	FLORIDA STATUTE	LEVEL	OFF.DATE
9506887	1ST/LIF	812.13(2)(A)	09	06/01/95

DESCRIPTION: 1212 - ROBBERY W/FIREARM OR D/WEAPON
(LVL=PTS: 1=4,2=10,3=16,4=22,5=28,6=36,7=42,8=74,9=91,10=116)

I. 91.0

I. ADDITIONAL OFFENSES: SUPPLEMENTAL PAGE ATTACHED: N

DOCKET	FEL/MM	FLORIDA STATUTE	LEV.	QUALIFY	CNT.	PTS.
9506887	1ST/LIF	812.133(2)(A)	09		001 X 10.8	10.8

DESCRIPTION: 1216 - CARJACK W/FA,DEADLY WEAPON
(LVL=PTS: M=.2,1=.7,2=1.2,3=2.4,4=3.6,5=5.4,6=7.2,7=8.4,8=9.6,9=10.8,10=12)

SUPPL.PAGE POINTS 0.0

II. 10.8

II.VICTIM INJURY:

		NBR	TOTAL			NBR	TOTAL
2ND DEGREE MURDER	120 X	0 =	0	SLIGHT	4 X	0 =	0
DEATH	60 X	0 =	0	SEX PENETRATION	40 X	0 =	0
SEVERE	40 X	0 =	0	SEX CONTACT	18 X	0 =	0
MODERATE	18 X	0 =	0				

III. 0.0

. PRIOR RECORD: SUPPLEMENTAL PAGE ATTACHED: Y

FEL/MM	FLORIDA STATUTE	LEV.	QUALIFY	NUM.	PTS.
3RD DEG	812.014(2)(C)6	04		001 X 02.4	2.4

DESCRIPTION: 2404 - GRAND THEFT MOTOR VEHICLE

3RD DEG	784.021(1)(B)	06		001 X 04.8	4.8

DESCRIPTION: 1318 - AGG ASSLT-INTENT COMMIT FELONY

3RD DEG	784.021(1)(A)	06		001 X 04.8	4.8

DESCRIPTION: 1317 - AGG ASSLT-W/WPN NO INTENT TO K
(LVL=PTS: M=.2,1=.5,2=.8,3=1.6,4=2.4,5=3.6,6=4.8,7=5.6,8=6.4,9=7.2,10=8)

SUPPL.PAGE POINTS 0.4

IV. 12.4

PAGE SUBTOTAL 114.2

FILED IN OPEN COURT
THIS 2 DAY OF
Ryan Carlton
BY

EXHIBIT
C

OFFENDER NAME	- DOCKET	- DATE OF SENTENCE
PURDY, KENNETH -	- 9506887	- 10/29/97

	PAGE 1 SUBTOTALS	114.2
LEGAL STATUS VIOLATION = 4 POINTS	V.	4.0
RELEASE PROGRAM VIOLATION - 6 POINTS X NBR VIOLATIONS	VI.	0.0
I. FIREARM OR DESTRUCTIVE DEVICE = 18 POINTS	VII.	0.0
II. SEMI-AUTOMATIC WEAPON OR MACHINE GUN = 25 POINTS	VIII.	0.0
SUBTOTAL SENTENCE POINTS		118.2

. ENHANCEMENTS:
NONE

ENHANCED SUBTOTAL SENTENCE POINTS	0.0
TOTAL SENTENCE POINTS	118.2

SENTENCE COMPUTATION

IF TOTAL SENTENCE POINTS ARE LESS THAN, OR EQUAL TO 40, THE SENTENCING COURT MAY NOT IMPOSE A STATE PRISON SENTENCE. THE SENTENCING COURT MAY INCREASE TOTAL SENTENCE POINTS THAT ARE LESS THAN OR EQUAL TO 40 BY UP TO 15 PERCENT AND MAY IMPOSE A STATE PRISON SENTENCE IF THE INCREASED TOTAL EXCEEDS 40 POINTS.

0.0	X 1.15 =	0.0
TOTAL SENTENCE POINTS		INCREASED SENTENCE POINTS

IF TOTAL SENTENCE POINTS ARE GREATER THAN 40 AND LESS THAN 52 THE DECISION TO INCARCERATE IN A STATE PRISON IS LEFT TO THE DISCRETION OF THE COURT. IF TOTAL SENTENCE POINTS ARE GREATER THAN 52 THE SENTENCE MUST BE A STATE PRISON SENTENCE. A STATE PRISON SENTENCE IS CALCULATED BY DEDUCTING 28 FROM TOTAL OR INCREASED SENTENCE POINTS.

118.2	MINUS 28 =	90.2
TOTAL OR INCR. POINTS		STATE PRISON MONTHS

THE SENTENCING COURT MAY INCREASE OR DECREASE STATE PRISON MONTHS BY UP TO 25 PERCENT EXCEPT WHERE THE TOTAL SENTENCE POINTS WERE LESS THAN OR

POINTS. / X 0.75 = 67.6

90.2 MINIMUM STATE PRISON MONTHS

STATE PRISON MONTHS

\ X 1.25 = 112.7

MAXIMUM STATE PRISON MONTHS

==

TOTAL SENTENCE IMPOSED	YEARS	MONTHS	DAYS
✓ STATE PRISON	Life *	______	______
__ COUNTY JAIL	______	______	______
__ COMMUNITY CONTROL	______	______	______
__ PROBATION	______	______	______

TIME SERVED = _ 2 years + 310 Days

DESIGNATE THE PARTICULAR TYPE OF SENTENCE WHERE AN ENHANCED OR MANDATORY SENTENCE IMPOSED.

__ HABITUAL FELONY OFFENDER __ GUIDELINES AGGRAVATED DEPARTURE

__ HABITUAL VIOLENT OFFENDER __ GUIDELINES MITIGATED DEPARTURE

MANDATORY PURSUANT TO: __ S.775.087 __ S.893.13 __ S.893.135

Defendant: KENNETH PURDY Case Number: CR-O-95- 6887 OBTS Number: 0008032817

SENTENCE

(as to Count 001)

The defendant being personally before this court, accompanied by the defendant's attorney of record, Andrea Black, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT THAT:

The Defendant is hereby committed to the custody of the Department of Corrections.

TO BE IMPRISONED:

For a term of natural life.

SPECIAL PROVISIONS

(As to Count 001)

The following provision(s) apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Other Provisions:

Jail Credit	It is further ordered that the defendant shall be allowed a total of 2 Year(s), 310 Day(s) as credit for time incarcerated before imposition of this sentence.

EXHIBIT D

SENTENCE

(as to Count 002)

The defendant being personally before this court, accompanied by the defendant's attorney of record, Andrea Black, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT THAT:

The Defendant is hereby committed to the custody of the Department of Corrections.

TO BE IMPRISONED:

For a term of 112.7 Month(s).

It is further ordered that the sentence imposed for this count shall run consecutive to Count 1.

It is further ordered that the sentence imposed for this count shall run concurrent with Count 3.

SPECIAL PROVISIONS

(As to Count 002)

The following provision(s) apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Other Provisions:

Jail Credit	It is further ordered that the defendant shall be allowed a total of 2 Year(s), 310 Day(s) as credit for time incarcerated before imposition of this sentence.

SENTENCE

(as to Count 003)

The defendant being personally before this court, accompanied by the defendant's attorney of record, Andrea Black, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT THAT:

The Defendant is hereby committed to the custody of the Department of Corrections.

TO BE IMPRISONED:

For a term of 112.7 Month(s).

It is further ordered that the sentence imposed for this count shall run consecutive to Count 1.

It is further ordered that the sentence imposed for this count shall run concurrent with Count 2.

SPECIAL PROVISIONS

(As to Count 003)

The following provision(s) apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Other Provisions:

Jail Credit	It is further ordered that the defendant shall be allowed a total of 2 Year(s), 310 Day(s) as credit for time incarcerated before imposition of this sentence.

In the event the above sentence is to the Department of Corrections, the Sheriff of Orange County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of indigence.

In imposing the above sentence, the court further recommends:

- The minimum mandatory imposed in Counts 2 and 3 are consecutive to the minimum mandatory in Count One.

Filed in Open Court this 6th day of November, 1997.

Fran Carlton
Clerk of the Circuit and County Courts

By: A. Dennis / E. Griffin,
Deputy Clerk in Attendance

Done and Ordered at Orange County, Florida this 6th day of November, 1997.

Honorable A. Thomas Mihok, Judge Presiding

Filing # 27602506 E-Filed 05/21/2015 05:19:21 PM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. **CASE No.: 1995-CF-006887-A-O**

KENNETH PURDY,

Defendant.
_____/

DEFENDANT'S SUCCESSIVE VERIFIED MOTION FOR POST-CONVICTION RELIEF

Defendant, KENNETH PURDY (hereafter "Defendant" or "Purdy") by and through the undersigned counsel and pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and hereby moves this Court to grant him relief pursuant to the Florida Supreme Court's recent decision in *Falcon*. In support of his Motion, the Defendant states, as follows:

I. FACTUAL AND CRIMINAL BACKGROUND

1. On or about June 13, 1995 Defendant was charged, by way of Indictment, with First Degree Premeditated Murder (Count I), Armed Robbery (Count II), and Armed Carjacking (Count III). The crimes allegedly occurred on or about May 31,1995, when Mr. Purdy, whose date of birth is June 22, 1977, was under the age of eighteen.

2. On September 26, 1997, a jury found Mr. Purdy guilty of First Degree Felony Murder, Armed Robbery and Armed Carjacking. On November 6, 1997, Mr. Purdy was sentenced to life in prison for murder, 112.7 months with the Department of Corrections with a three-year minimum mandatory term of imprisonment for armed robbery, to run consecutively to Count II. Additionally, Mr. Purdy was sentenced to 112.7 months in the Department of Corrections with a three-year minimum mandatory term of imprisonment for armed carjacking, to run consecutively to Count III.

3. In light of the recent holding of the Florida Supreme Court in *Falcon v. State*, 40 Fla. L. Weekly S151 (Fla. 2015), Mr. Purdy submits his sentence is illegal, as it was imposed in violation of the Eighth Amendment to the United States Constitution. Specifically, Mr. Purdy submits his sentence is illegal, since he was 17 at the time of the alleged crime, and he was sentenced to a mandatory term of life in prison, without the possibility of parole.

II. ARGUMENT

4. Florida Rule of Criminal Procedure 3.800(b)(2) provides, in pertinent part: "A motion to vacate a sentence that exceeds the limits provided by law may be filed at anytime. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that...the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the made of the decision announcing the retroactivity...."

5. The Florida Supreme Court, in *Falcon*, held "that the United States Supreme Court's decision in *Miller*[1] applies retroactively to any juvenile offender seeking to challenge the constitutionality of his or her sentence pursuant to *Miller* through collateral review."

6. The *Falcon* decision applied to Purdy. Purdy was found guilty of First Degree Felony Murder, he was sentenced pursuant to Crimes- Capital Felonies-Penalties, found in the 1994 Fla. Sess. Law Serv. Ch. 94-228 (WEST), which reads in pertinent part: "(1) A person who has been convicted of a capital felony shall be punished by death or life imprisonment . . . (a) If

[1]In *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), the Supreme Court reviewed two cases in which defendants were sentenced to mandatory terms of life imprisonment without the possibility of parole for homicide offenses committed while they were juveniles. The Supreme Court reversed the sentences imposed and held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' "

convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole . . . " *Id.* (emphasis added). The sentencing guidelines from the time of Purdy's punishment illustrate that Purdy was sentenced pursuant to a mandatory life sentence without the possibility of parole. This is the same sentencing scheme deemed unconstitutional in *Miller* and found to apply retroactively in *Falcon*. Therefore, Purdy's sentence to life is constitutionally invalid.

7. The Florida Supreme Court's decision in *Horsley v. State*, 40 Fla. L. Weekly S155 (Fla. 2015) outlines the appropriate remedy. Specifically, this court should conduct a resentencing proceeding in conformance with chapter 2014-220, Laws of Florida, because "most juveniles should be provided 'some meaningful opportunity" for future release from incarceration if they can demonstrate maturity and rehabilitation." *Id.* at *12 (citing *Miller*, 132 S. Ct. at 2469). First this court must determine whether Purdy "actually killed, intended to kill, or attempted to kill the victim." Ch. 2014–220, § 1, Laws of Fla.[2] When this court determines that Purdy did not "actually kill, intend to kill, or attempt to kill the victim," this court has broad discretion to impose a sentence of any lesser term of years, with judicial review after 15 years if he is sentence to more than 15 years' imprisonment.

WHEREFORE, the Defendant, KENNETH PURDY, respectfully requests this Court enter an Order:

A. Vacating Purdy's sentence in this case;

B. Scheduling an evidentiary hearing;

C. Scheduling a resentencing hearing proceeding in conformance with chapter 2014-220, Laws of Florida; and

[2] As in *Falcon*, the jury never determined whether Purdy actually killed, intended to kill, or attempted to kill the victim. Indeed, Purdy has filed multiple post-conviction motions asserting Ronnell Mitchell accidently shot the victim.

D. Awarding such other and further relief as this Court deems just and proper.

DATED this May 21, 2015.

Respectfully submitted,

Matthew R. McLain
Matthew R. McLain, Esq.
Florida Bar No. 98018
BROWNSTONE, P.A.
201 North New York Ave., Suite 200
Winter Park, Florida 32789
Telephone: (407) 388-1900
Facsimile: (407) 622-1511
Matthew@Brownstonelaw.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to opposing counsel this 21st day of May, 2015.

Matthew R. McLain
Matthew R. McLain, Esq.

NOTARIZED VERIFICATION

STATE OF Florida

COUNTY OF Dade

Before me, the undersigned authority, personally appeared KENNETH PURDY, who first being duly sworn, says that he: (1) is the Defendant in the above styled proceeding; (2) reads, writes and understands English; (3) has read the Motion for Post-Conviction Relief and understands the contents of the motion; and (4) under the penalties of perjury, hereby swears and affirms that the foregoing is true and correct.

KENNETH PURDY

The foregoing was acknowledged before me this 18th day of MAY, 2015, by KENNETH PURDY, who produced STATE ID# A-374830 as identification, and who did / did not take an oath.

Notary Public

My Commission Expires:

ENRIQUETA BERGOUIGNAN
MY COMMISSION # FF 202092
EXPIRES: February 22, 2019
Bonded Thru Budget Notary Services

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH PURDY,

Defendant.
_____/

CASE NO.: 1995-CF-006887-A-O
DIVISION: 12

ORDER GRANTING "DEFENDANT'S SUCCESSIVE VERIFIED MOTION FOR POST-CONVICTION RELIEF"

THIS MATTER is before the Court on "Defendant's Successive Verified Motion for Post-Conviction Relief" filed on May 21, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. After reviewing Defendant's Motion, the court file, and the record, the Court finds as follows:

PROCEDURAL HISTORY

On September 26, 1997, Defendant was convicted of first-degree felony murder, armed robbery, and armed carjacking. On November 6, 1997, he was sentenced to the following consecutive terms in the Department of Corrections: life for the murder and 112.7 months for the other two offenses. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 725 So. 2d 1137 (Table) (Fla. 5th DCA 1998).

On July 20, 1999, Defendant filed a Motion for Postconviction Relief pursuant to Rule 3.850, alleging nine claims of ineffective assistance of counsel and one claim of trial court error. The motion was denied on May 24, 2000. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 773 So. 2d 560 (Table) (Fla. 5th DCA 2000).

On April 14, 2004, Defendant filed a second Motion for Postconviction Relief pursuant to Rule 3.850, alleging newly discovered evidence in the form of a confession which his co-defendant, Christopher Phillips, gave to a fellow inmate. The motion was denied on March 31, 2005. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 907 So. 2d 545 (Table) (Fla. 5th DCA 2005).

On July 24, 2006, Defendant filed a "Motion to Vacate, Set Aside, or Correct Sentence Based on Newly Discovered Evidence" pursuant to Rule 3.850, and on October 21, 2008, he filed a Supplement to Motion for Postconviction Relief, alleging newly discovered evidence in

the form of the sworn affidavit of Jimel Johnson, which purportedly indicated that the gunshot that killed the victim was received after the commission of the armed robbery and carjacking and was not a result of the underlying felonies. The Court conducted an evidentiary hearing on October 21, 2008, and denied the Motion on November 20, 2008. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 43 So. 3d 708 (Table) (Fla. 5th DCA 2010).

On March 29, 2011, Defendant filed a fourth Motion for Postconviction Relief pursuant to Rule 3.850, and an Amended Verified Motion for Postconviction Relief Based on Newly Discovered Evidence on September 23, 2011, alleging newly discovered evidence in the form of the gun used to kill the victim. The motion was denied on July 31, 2014. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 158 So. 3d 605 (Table) Fla. 5th DCA 2015).

On October 9, 2012, Defendant filed a Motion to Correct Illegal Sentence pursuant to Rule 3.800(a), alleging that his life sentence was illegal in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), since he was 17 years old at the time of the alleged crime. The motion was denied on April 2, 2014. He appealed, and the Fifth District Court of Appeal *per curiam* affirmed. *Purdy v. State*, 150 So. 3d 1174 (Table) (Fla. 5th DCA 2014).

ANALYSIS AND RULING

In the instant Motion, Defendant alleges that his sentence of life without parole violates the Eighth Amendment's prohibition against cruel and unusual punishment pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in light of the recent holding in *Falcon v. State*, No. SC13-865, 2015 WL 1239365 (Fla. Mar. 19, 2015). He asserts that he was seventeen years old at the time of the offenses, and that the trial court had no other option but to sentence him to life without parole, as this was the only sentence available to a juvenile offender until the ruling in *Miller*. He requests a resentencing hearing at which time the Court should determine whether he actually killed, intended to kill, or attempted to kill the victim, and exercise its discretion to impose a sentence of any lesser term of years.

On March 19, 2015, the Florida Supreme Court held that the decision in *Miller* applies retroactively to any juvenile offender seeking to challenge the constitutionality of his or her sentence pursuant to *Miller* through collateral review. *Falcon*, 2015 WL 1239365.[1] Thus, in

[1] The Mandate in *Falcon* was issued on May 22, 2015.

accordance with *Falcon*, this Court will conduct a resentencing hearing in conformance with chapter 2014-220, Laws of Florida, at which time the Court will consider the enumerated and any other pertinent factors relevant to the offense and Defendant's youth and attendant circumstances. *Id.*

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. "Defendant's Successive Verified Motion for Post-Conviction Relief" is **GRANTED**.
2. A resentencing hearing is hereby set for the 30th day of June, 2015, at 11:00 a.m./~~p.m.~~ in Courtroom 12-D.
3. This is a non-final, non-appealable Order. This matter is not ripe for appeal until completion of the hearing.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this day of June, 2015.

Original Signed
MARK S. BLECHMAN
Circuit Judge, this
JUN 15 2015
and conformed copies
were furnished by
Judicial Assistant

MARK S. BLECHMAN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has been furnished by U.S. Mail or hand delivery to **Matthew R. McLain, Esquire**, Attorney for Defendant, Brownstone, P.A., 201 North New York Avenue, Suite 200, Winter Park, Florida 32789; and to the **Office of the State Attorney, Postconviction Felony Unit**, Post Office Box 1673, 415 North Orange Avenue, Suite 200, Orlando, Florida 32801, on this _____ day of June, 2015.

Judicial Assistant

SENTENCE
As to Count: 1

The defendant being personally before this court, accompanied by the Defendant's attorney of record, MATTHEW RAUL MCLAIN, Esquire, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT THAT:

The Defendant is hereby committed to the Department of Corrections.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED:

__X__ For a term of: 40 Years (NO GAIN TIME)

___ For a term of Life.

SPLIT SENTENCE

___ Followed by a period of on Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___Followed by a period of on Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate ordered entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarnation portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS
As to Count: 1

Mandatory/ Minimum Provisions:

Firearm

___ It is further ordered that the 3-year minimum mandatory imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking

It is further ordered that the mandatory minimum imprisonment provision of section893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

___ It is further ordered that the Mandatory Minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

Controlled Substance Within 1,000 Feet of School

___ It is further ordered that the 3-year minimum imprisonment provision if section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

EXHIBIT
G

Habitual Felony Offender

___ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender

___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.84(4)(b), Florida Statutes. A minimum term of must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act

___ It is further ordered that the defendant shall serve a minimum of year(s) before release in accordance with section 775.0823, Florida Statutes.

Capital Offense

___ It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun

___ It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statues, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise

___ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Taking a Law Enforcement Officer's Firearm

___ It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0857(1), Florida Statutes, is hereby imposed for the sentence specified in this count

Other Provisions:

Retention of Jurisdiction

___ The Court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983) for a term of

Jail Credit

__X__ It is further ordered that the defendant shall be allowed a total of **2 Years, 310 Days and ALL DOC time Served** Days as credit for time incarcerated before imposition of this sentence.

CREDIT FOR TIME SERVED
IN RESENTENCING AFTER
VIOLATION OF PROBATION
OR COMMUNITY CONTROL

___ It is further ordered that the defendant be allowed ___ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count _____. (Offences committed before October 1,1989)

___ It is further ordered that the defendant be allowed ___ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time serve on case/count_____. (Offenses committed between October 1, 1989 and December 31, 1993)
___ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6)

___ The Court allows unforfeited gain time previously awarded on the above case/count (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)).

___ It is further ordered that the defendant be allowed ___ days' time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit of ____ (served prior to arrest as violator) and the Department of Corrections shall compute and apply credit for time served on the original DOC sentence only, pursuant to section 921.0017, Florida Statutes. (Offenses committed on or after January 1, 1994)

CONSECUTIVE/ CONCURRENT

___ As to Other Counts:

___ As to Other Cases:

In the event the above sentence is to the Department of Corrections, the Sheriff of Orange County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the legal right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of Indigence.

Done and Ordered at Orange County, Florida on November 18, 2015

Honorable Judge: _____
Mark S Blechman

Filed in Open Court on: November 18, 2015

Deputy Clerk in Attendance: Maria F.,
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

ORIGINAL

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH PURDY,

Defendant./

CASE NUMBER: 1995-CF-6887-A-O

DIVISION NUMBER: 12-1

RESENTENCING HEARING

BEFORE

THE HONORABLE MARK BLECHMAN

In the Orange County Courthouse
Courtroom 12D
Orlando, Florida 32801
November 18, 2015
Shelly Coffey, RPR

A P P E A R A N C E S:

THERESA MILLS-UVALLE
KELLY HICKS
Assistant State Attorney
415 North Orange Avenue
Orlando, Florida 32801
On behalf of the State

BROWNSTONE LAW
MATTHEW McLAIN
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
On behalf of the Defendant

EXHIBIT
H

PROCEEDINGS

- - -

THE CLERK: 1995-CF-6887-A-O, Kenneth Purdy.

THE COURT: Good afternoon, Mr. Purdy.

THE DEFENDANT: Good afternoon, sir.

THE COURT: I'm going to ask you to raise your right hand so that the clerk can place you under oath, please.

THE CLERK: Do you solemnly swear or affirm the testimony you're about to give in this cause is the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: Yes, ma'am.

THE CLERK: Thank you.

THE COURT: For our record, would you state your name, please?

THE DEFENDANT: Kenneth Purdy.

THE COURT: And, Mr. McLain, those are Gator colors or autumn colors?

MR. McLAIN: Those are Gator colors, Your Honor.

THE COURT: I wasn't sure. For the record, would you announce your identity?

MR. McLAIN: Matthew McLain for the defendant.

THE COURT: And would you announce your presence, Ms. Hicks?

MS. HICKS: State attorney's office, Kelly Hicks. And I believe those are Syracuse University colors.

THE COURT: There wouldn't be any blue in there, as my dad used to tell me, since he was a Syracuse graduate.

MS. MILLS-UVALLE: And Terri Mills-Uvalle for the State.

THE COURT: Okay. We are here for a sentencing pursuant to Florida Statute 775.082. In effect, it's a resentencing based upon the Supreme Court pronouncement that a person who commits a capital offense while under the age of 18 may not be sentenced to life in prison without a possibility of an early release showing rehabilitation.

I believe the facts of this case are that you committed this crime when you were 17 years, 11 months and one week old, which technically places you under the age of 18. And so the Supreme Court, choosing an arbitrary date of 18, decided that those last three weeks put you in a category where you were not fully developed and entitled to an opportunity for early release.

We had a hearing, pursuant to Florida Statute 921.1401, where your attorney presented a number of items addressing the issues under subparagraph 2, and

I'll go over those in a minute, and the State, as well, had an opportunity to present evidence and to object to the defense evidence.

In addition, I have reviewed the entire transcript of the trial. I believe it was 20 years ago, and I believe Judge Mihok was the trial judge for your trial. I've also reviewed what I believe to be the appropriate case law in this case, as well as the statutes that apply to this case.

So under either subsection of the statutes I have to deal with today, a hearing under 921.1401 was held, and so I'll consider that complete and move forward on sentencing, once I announce under what subsection we're going under. Before I continue with my findings and rulings, I had ordered that the State choose -- the proverbial choice of choosing between impaneling a jury of 12 citizens, in order to prove beyond a reasonable doubt, and, therefore, a finding by a jury beyond a reasonable doubt whether or not you actually killed, intended to kill or attempted to kill the victim in this case.

The State filed a notice of appeal, and that was dismissed, I believe, and ultimately filed a motion, with all -- a well-written response, indicating that the State is declining my request for them to choose

and not make any choice.

I think Ms. Mills-Uvalle filed that document or signed that document.

MS. MILLS-UVALLE: That's correct.

THE COURT: Okay. So here we are. As I see it, the options are for me under 775.082(b)(1) or Subsection (b)(2) to impose a sentence in this case. Under Subsection (b)(1) if you killed, intended to kill or attempted to kill the victim, I may, after our sentencing hearing, which we've already had, as I indicated, sentence you to life imprisonment, if I believe that life imprisonment is an appropriate sentence, or, if it's not, to a term of years of no less than 40 years. So that statute, in my opinion, creates what's known as a mandatory minimum of 40 years, because that's the least I could give you.

Further, if I do sentence you under that subsection, you are entitled to a hearing under 921.1402(2)(a), and, again, that's within 25 years. And at that point I can and I have the authority to order your release. So if the 40 years is not a technical mandatory minimum, the 25 years is certainly a mandatory minimum, and that only applies if you killed, intended to kill or attempted to kill the victim.

Under Subsection 2 of that, if you did not actually kill, intend to kill or attempt to kill the victim, then I may sentence you again to a term of years up to and including life in imprisonment or any lesser sentence, even going below the 40 years mentioned in Subsection (b)(1). So that is the reason I am interpreting the 40 years as a mandatory minimum.

However, if I sentence you under Subsection (b)(2) to any sentence, including up to life in prison, then you would be entitled to the same hearing under 921.1402(2)(c), but that would be within 15 years. So that creates what's known as, in my opinion, a mandatory minimum of 15 years. You must serve at least 15 years before I can order more time or your release.

THE DEFENDANT: Yes, sir.

THE COURT: So there's a ten-year difference, creating, in my opinion, a mandatory minimum. I believe that the -- I don't believe. I know the Supreme Court in *Apprendi*, A-P-P-R-E-N-D-I, *versus New Jersey*, in June of the year 2000, mandated that any fact that either increases a punishment or creates a mandatory sentence or a mandatory minimum, that that fact must be found by a jury beyond a reasonable doubt.

An analogous situation is somebody charged with drug trafficking and the different amounts of the drug which create the mandatory minimum of different ranges. If it were cocaine, it would be three or seven or 15 years. And the Supreme Court found and held that a jury must decide that by proof beyond a reasonable doubt.

The State -- *Apprendi* also has a plethora of opinions since then following that ruling, and so when I cite *Apprendi* for the record, it's *Apprendi* as well as its progeny.

The State of Florida, in its response, argues that based upon a the Fifth District Court of Appeal case of *Williams versus State* -- and I have it. Give me a second here. *Williams versus State* at 171 So.3d. 143. That based upon that case from the Fifth District Court Of Appeal that I, as the judge, have the legal authority to make that finding.

In this two-page opinion, in the last paragraph of the opinion, in the middle of the paragraph it addresses this issue in one sentence and says, that because the jury did not find that Williams actually possessed and discharged a firearm during the crime, the Court must make a written finding as to whether Williams, who's the defendant in that case, killed,

intended to kill or attempted to kill the victim.

And so it does address and support the State's argument in this case. It doesn't go into detail as to what authority a court has to make that. It doesn't address *Apprendi*. I took it upon myself to read the briefs filed by the attorneys in the case. All three briefs, none of them mention *Apprendi*. In fact, none of the briefs mention who, if anybody, should make this finding. So, to my knowledge, it wasn't presented to the Court. To my knowledge, the court addressed this issue without having -- clearly, without having it briefed. And, in my opinion, the court's one sentence is in contradiction to the United States Supreme Court of *Apprendi* and its progeny.

I do want to note for the record, and the State can use this any way it wants, that I have read the transcript. And, in my opinion, if I had the authority to make a finding, I would find that you are the person who actually killed, intended to kill or attempted to kill the victim. However, based upon *Apprendi* and its progeny, I don't believe that I have the legal authority to make that decision, and so as a result, it is my intent to sentence you under Florida Statute 775.082(b)(2).

I've offered the State an opportunity to impanel

a jury of 12 to make that finding, and they have respectfully declined making that choice. And so I'm ready to proceed to sentence.

And at this point we've already had the 921.1401 hearing. I'm about to make findings based upon that and continue with the sentencing, but I'll give, based upon my pronouncement, each side an opportunity to recommend a sentence, if it wishes.

I'll start with Mr. McLain with the defense, and then I'll go to the State.

MR. McLAIN: Thank you, Your Honor.

The sentence that the defense will be recommending to the Court is credit for time served. As we presented at the hearing that this Court had on the 921.1401, there's mitigation in this case and proof that Mr. Purdy has rehabilitated himself.

You know, one of the more compelling components, too, which is a fact the Court has to consider, is that the victim's mother in this case has said she desires that he be released, as well. And we think that should carry a lot of weight with the Court, as well as Mr. Purdy's proof of rehabilitation.

Since his incarceration, he has had a very slight history, disciplinary history, of reprimands with the Department of Corrections. You know, I think there

was perhaps three or four incidents, which Mr. Purdy explained at his hearing. He also presented character witnesses that attested to his good behavior, including attorneys, including his family members, and also set forth a plan of what he will do if released.

And I think it's noteworthy that he is not going back to the same circumstances that he was in when he was a juvenile. That certainly led to many problems and him having to encounter those problems head-on. He will be moving out of the county where he grew up, with a fiancee who's employed as a professional nurse. And we believe that a sentence -- a sentencing scheme should be for him to be released at this time.

THE COURT: Okay. It's my interpretation that I am resentencing him on Count 1 today, and that based upon my resentence, your client would be entitled to a 1402(2)(c) hearing, at which time he can be released. But this is actually the sentencing, and so regardless of what my sentence is, your client under Subsection (b)(2) has already served a 15-year mandatory minimum in order to have that hearing.

So, State, what's your recommendation regarding sentencing?

MS. HICKS: Thank you, Judge.

THE COURT: Ms. Hicks.

MS. HICKS: If I could just address one thing that you said.

THE COURT: And I'll give you -- you may have the opportunity now.

MS. HICKS: Okay. Thank you. Your Honor, one of the things that you said was -- unless I misunderstood you -- where the State was coming with the authority for Your Honor. I think maybe what you said was in that opinion, the *Williams* opinion, it doesn't say where the Court gets the authority to make the finding.

And that authority actually comes from the statute in this case. The 775.082 statute specifically says that it is the Court that makes the finding. So we just wanted to make sure that the Court had notice of that provision in the statute.

I understand your ruling with *Apprendi*. I guess you're effectively saying that the statute is unconstitutional because of *Apprendi*.

THE COURT: Where does it say "the Court"? It says, "A person who actually" --

MS. HICKS: Within the statute -- if you continue reading within the -- and I apologize. I didn't bring a copy of the --

THE COURT: I've got a copy, if you don't mind my

highlighted version.

MS. HICKS: No, of course not. I haven't read it in awhile, but...

THE COURT: Okay. Because later on in that paragraph of (b)(1) it says, "If the Court finds that a life sentence is appropriate."

MS. HICKS: Do you have 1402?

THE COURT: Right here. It starts at the bottom. You have to look up.

MS. HICKS: Sorry.

THE COURT: Starts at the bottom here and actually goes to the next page.

MS. HICKS: Right. I know it's in here somewhere, Judge. But I can have Ms. Mills-Uvalle look for it, because it's actually -- but...

THE COURT: And regardless of whether it's in there or not --

MS. HICKS: Yes. Your ruling is going to be the same. I understand that. But I just wanted to be clear that it's my recollection -- again, I haven't read the statute in a few months. It's my recollection that it's actually in the statute, that it says -- because if you look at *Williams*, the part the Court is quoting, I think it's actually quoting the statute where it says that the Court makes the

written finding, if I remember correctly.

THE COURT: Well, it cites to it, but it doesn't -- it's citing that the finding must be made that the -- that Williams killed, intended to kill or attempted to kill. I don't think it's -- there's not quotes around it, and I don't think it's citing as a quotation that the Court must make the finding.

MS. HICKS: It says under subparagraph 775.082(3) -- well, I guess it's Subsection (1)(a) -- (1)(b)(3), "The Court shall make a written finding as to whether the person is eligible for a sentencing review hearing under 921.1402. Such finding shall be based on whether the person killed, intended to kill or attempted to kill the victim."

THE COURT: "Such finding shall be based upon" -- it doesn't say the Court makes that finding. Let's say a jury made that finding. I could base it upon that finding.

MS. HICKS: Okay. Just then it's an interpretation of the statute, but I just wanted to put that out there because we all know we're appealing something.

THE COURT: I know that.

MS. HICKS: So something's getting appealed by somebody.

THE COURT: I think we need clarification. And while I'm confident I'm right, I would like an appellate court to say I am or I'm not. I'm not offended if an appellate court says I'm wrong.

I do want to point out one more thing for the record, and then I'll let you continue, if you don't mind.

MS. HICKS: Sure.

THE COURT: It's one of the privileges of being a judge. I get to interrupt people, and I apologize for that, Ms. Hicks.

The indictment in this case on Count 1 charged you with premeditated first degree murder. However, during the course of the trial, during the closing argument -- and I think, Ms. Mills-Uvalle, you were the prosecutor.

MS. MILLS-UVALLE: I was.

THE COURT: The State did not proceed under a premeditated theory of first degree murder and proceeded under a felony first degree murder, which it's entitled to do. All of that is legal, legitimate. Had the State proceeded under premeditated first degree murder and had the jury made the finding it did, the special finding that you actually possessed a firearm, I believe I could have

used that as a finding to support the requirement that you killed, intended to kill or attempted to kill. But because you were convicted of felony first degree murder and because the interrogatory verdict only had the one choice, which was only necessary at that time -- we didn't know back then what we know now -- the only finding required was that you possessed a firearm. And the jury found you possessed a firearm, but it doesn't mean because it was a felony murder that you actually killed, intended to kill or attempted to kill. So further facts that my finding is based upon, that if things were just a little bit different, I would have made a different finding.

Please continue.

MS. HICKS: She actually got a JOA on the premeditated aspect.

Sorry.

MS. MILLS-UVALLE: That's okay.

THE COURT: So you tried.

MS. HICKS: Yeah. She, actually, got JOA'd on the premeditated part.

One of the things that just -- maybe this is not really necessary. But one of the things I think is interesting about -- having worked with the statute a little bit and having done several of these hearings

now, one of the things I worry about is -- and maybe the legislature needs to clarify -- is that, I think, because we oftentimes deal with actually possessed or didn't actually possess or actually killed and didn't actually kill, I think when you first read the statute and it says, was the person who actually killed, intended to kill or attempted to kill the victim, I think a lot of us probably have the tendency -- I know I certainly did -- to read that very narrowly in terms of whether he was either the one who did it or -- but more like the principal theory. And I don't believe that's what the intent of the legislature is when it's talking about that provision of the statute, because if that's what the intent of the legislature was in terms of -- like more like the principal theory. If two people commit a crime and one person's the actual shooter and one person is not, then that -- the person who's not could never fall under the first subsection of the statute, and that's not what the intent of the legislature was.

So, for example, if you take a premeditated theory of first degree murder where two people get together and they decide, we really want to kill somebody, and then they carry out their plan but, of course, only one of them is the one who actually pulls

the trigger, in that scenario both of them could be convicted under the first subsection, the (1)(b)(1).

THE COURT: I agree.

MS. HICKS: And I just want to make sure that it's not a narrow reading of the statute in terms of more like principal theory.

THE COURT: Right. But that's the premeditated version of first degree murder. The felony version is different and creates more issues for the State.

MS. HICKS: I totally agree with that. I completely agree with that. I just -- I just know that the very first time I ever read it -- and I think when a lot people read it, you just immediately -- because of the way we work in our system, you immediately think of principal theory. One person did it; one person didn't.

THE COURT: Right.

MS. HICKS: So, therefore, one person gets it and one person --

THE COURT: But I think you're covered with the "intended to kill" language in that.

MS. HICKS: And I think what I'm getting at is I think the reason the legislature wants the judge to be the one who makes the finding is because I think it would be very difficult for a jury to make a special

finding in a situation like this because you have to go into what people intended, which is something that we don't otherwise do in our law. And it's very easy for a jury to make a very factual finding of actually possessed a firearm or actually discharged a firearm or actually did this, but now we're asking -- we would have to be asking them -- there are so many different scenarios in which somebody could actually fall under the (1)(b)(1), which is very different from principal theory versus not principal theory or actual possession versus not actual possession.

THE COURT: Right.

MS. HICKS: So with my argument this morning, I just want to put that kind of out there in terms of whoever reads this next.

But the State's position is that although Your Honor -- of course, we object to Your Honor not making the finding. And it's the State's position that Your Honor should be the one to make the finding; that based on the transcript, the trial in this case -- and Your Honor has already said if you could find it, you would find that he was the one. So we would, of course, agree with that. But recognizing that you're going to be sentencing him under the (1)(B)(2) Section, you can still sentence him to

anything that you want to sentence him to.

The State, in this case, has not asked for a life sentence, and we're not asking for a life sentence. What we asked for was the 50 years. We asked for that the first time. Even though you're sentencing him under the (1)(b)(2), you can still sentence him to 50 years in the Department of Corrections.

Now, the interesting thing is -- and we argued this at the last hearing -- it's the State's position that because he is guilty of a capital offense, first degree murder, he would not be entitled to gain time. So the State would be asking that you specify in your sentencing order, whatever your ultimate sentence is, if it's not credit for time served, that it be clear he is not entitled to gain time because the statute does not allow for gain time in this case. So that means that the State still believes that 50 years is an appropriate sentence in this case.

As Your Honor just pointed out after defense counsel made their argument, this is a sentencing hearing. And I mentioned this at the first hearing when we did this a couple of months ago. Everything that the defense presented at that hearing a couple of months ago would be very appropriate for the review hearing, but this isn't the review hearing. This is

the sentencing hearing. And so the Court -- while we don't have the benefit of a scoresheet because we can't do a scoresheet, we do know that this defendant had a criminal history. This was not his first entrance into the criminal justice system.

In fact, Ms. Mills-Uvalle, I believe, was telling me that he actually had previously been direct filed. Even though he was a juvenile committing this crime, he had already been in the adult system. So this was somebody who, by his own admission, had an upbringing that involved a criminal history. He had already had all the chances that the juvenile system presented. He then had the chances that the adult system presented. And then he then decided to go out and commit a carjacking. And during the course of that carjacking, he murdered somebody. He is guilty of capital first degree murder.

And he was, like you have already recognized, extraordinarily close to his 18th birthday. We wouldn't be here having this conversation if this murdered had happened three weeks later, or somewhere in that ballpark.

So it's the State's position that looking at the facts of the case, looking at his criminal history, and then asking yourself what is an appropriate

sentence for somebody who commits first degree murder? And his time in the Department of Corrections, which I believe is somewhere in the ballpark of 20 years at this point, is not enough for first degree murder, because it isn't even what somebody gets nowadays for discharging a firearm, not killing somebody. And you can't not compare crimes. You can't say that when somebody nowadays in 2015 discharges a firearm but doesn't kill somebody, if they -- they get 20 years in the Department of Corrections. If they discharge a firearm and they hit somebody but don't kill that person, they get 25 years in the Department of Corrections.

And this man killed somebody. He deserves to go to prison for 50 years, and the Court can then decide. If you sentence him to, quite frankly, anything over credit for time served, the next decision that needs to be made is when is he entitled to his review hearing. And then the next -- there are other decisions that have to also be addressed, which is the State's position: He has not yet begun to serve his sentence on the other crimes.

He was sentenced consecutively. So there is an issue where the Court -- whether we address it now or later, an issue that needs to be addressed, because

it's not addressed by the juvenile sentencing statute, is, okay, you can resentence him on one crime, but you can't resentence him on the other crimes. And those crimes were consecutive to this. So even if you give him credit time served, even if you -- or if you give him something over and we do the review hearing, we also need to address -- it's the State's position, even if you gave him credit for time served, he now needs to start serving the other sentences on the other crimes he's committed.

But with respect to the first degree murder, this is a man who killed somebody. He deserves to go to prison for at least 50 years because we can't -- because we're not asking for life. And so although we could give it, we're asking for 50 years in the Department of Corrections, even under section (1)(b)(2).

THE COURT: And do you agree with me under (1)(b)(2) that Mr. Purdy is entitled to the hearing under 1402 immediately based upon him serving more than 15 years?

MS. HICKS: Well, I'm actually hesitant to agree with you.

THE COURT: He's entitled to it. Why are you hesitant?

MS. HICKS: Only because -- I mean, I think you're ultimately right. Yes. I think it's hard for me to stand here and say he's not, but the concern that I have --

THE COURT: It shouldn't be hard for you to do that.

MS. HICKS: I will tell you why, because what the legislature -- this is -- is the Court aware of any other situation where we are using a 2014 statute and applying it to a crime that happened in 1995? This is a statute that the legislature has said, okay, although the statute itself didn't become applicable until 20 years later, we want you to apply it to what happened 20 years ago. Obviously, it's inherently unfair to the State.

And what we're now saying is that he committed a crime 20 years ago. We're going to use the statute now. I think a question can be made is he entitled to his review hearing 15 years from today, because today is the day that you are sentencing him pursuant to the statute that's now in place, or is he entitled to his review hearing five years ago because he was originally sentenced 20 years ago? That's why I'm hesitant to necessarily come out and agree that he's entitled to his review hearing five years ago because

he's being sentenced today. He's entitled to his original arguments he made that he's entitled to his review hearing 15 years from today.

THE COURT: Okay. It's my opinion, since I'm sentencing you under (1)(b)(2), that you'd be entitled to a hearing within 15 years from your original sentencing, which makes you entitled now to a hearing under 1402.

Mr. McLain, do you need to say anything?

MR. McLAIN: Yes, Your Honor.

You know, inherently unfair? You know, the thing that surprises me, there is no case law on this issue, you know. Your Honor is, you know, faced with very difficult decisions, coming up with the appropriate rulings.

Falcon says that a defendant can be sentenced and receive a hearing under the 1401 right away. So I don't know where the State gets their idea that it's going to be 15 years from today.

And it is inherently unfair, the situation. Mr. Purdy, according to the United States Supreme Court, was unconstitutionally sentenced to a cruel and unusual punishment, life without parole. That's cruel and unusual. It's inherently unfair. Think about Mr. Purdy's situation of that day when he was

sentenced. He had in his mind no opportunity to be released from prison.

What did he do? Did he go to the Department of Corrections and raise hell, because he said, look, I'm going to die in here anyways? No. He went ahead there and he tried to better himself, despite getting knocked down by this Court, despite getting knocked down by the District Court of Appeal, despite getting knocked down by the Florida Supreme Court, despite getting knocked down from the Federal District Court, despite being knocked down from the Federal Circuit Court of Appeals and the U.S. Supreme Court. He's gotten knocked down every single time. And what does he do? He keeps trudging forward. He rehabilitates himself. And that's why we're here today.

Inherently unfair? Yes. Think about Mr. Purdy. Is that inherently unfair what he's been through and how he has persevered and how he is in the position right now to be released into society with team players with him, including his family, his fiancee?

Five years from now, ten years from now, we're not going to know where Mr. Purdy is and if he's going to have a support system. But today we know. If he's released, he's going to go into society with the best chances to succeed. And that's what the U.S. Supreme

Court has said. This is inherently unfair for Mr. Purdy as well, and I would like the Court to know that.

THE COURT: Mr. Purdy, is there anything you wish to say before I impose sentence or -- first, have you understood everything that's happened thus far?

THE DEFENDANT: Absolutely, Your Honor. Absolutely.

THE COURT: Anything else you would like to say to me?

THE DEFENDANT: Yes. I would like to just reiterate, briefly reiterate, my previous testimony, how I'm extremely and sincerely apologetic concerning the situation that happened, as well as contrite.

And like I've testified before you, Your Honor, I can't change nothing that happened before. I understand your ruling. I respect your ruling, but I am not a murderer. I didn't kill anybody. I'd like to reiterate that. And I'd like to thank this Court for this rare and unique opportunity to be heard after so many years of being incarcerated. And I thank this Court. Thank you.

THE COURT: Thank you. In examining 921.1401, which are the factors that I must consider at a sentencing hearing such as this, subparagraph 2 lists

ten factors; that your attorney presented witnesses and evidence in order to show that you should be entitled to the least possible sentence that I can sentence you to. I've considered all those factors.

They include the nature and circumstance of the offense committed by the defendant.

And I've already indicated my opinion of reading the transcript and the evidence, and that this was an armed robbery over rims, and a human being died as a result of it.

B is the effect of the crime on the victim's family and the community. The mother of the victim testified, as Mr. McLain pointed out, that she wants you to be released. And when asked why or on her own, she stated it's because she doesn't think you did it. Of course, I disagree with that thought, that if that's the reason she thinks you should be released, then that doesn't carry much weight with this Court, based upon my belief.

But setting that aside, the sentence continues, "and on the community." And the effect of a robbery, an armed robbery, and a murder on the community is devastating and is something that, I think, deteriorates our fabric and our community when people take other people's property, when people take other

people's property by the use of a threat of death or firearm, and lastly when people murder, take other people's lives.

C is your age, which we indicated already what it was at the time, your maturity, your intellectual capacity, your mental and emotional health at the time of the offense.

As I recall, you and your brother were living on the streets. Your mother was not taking care of you. You were with relatives when you were with anybody at all. Your peer group became your family. I think that's what led to you committing all the crimes that you committed as a youth.

THE DEFENDANT: Yes, sir.

THE COURT: That it was a matter of either not thinking about consequences or wanting to be a part of the group and making decisions to be a part of the group, not realizing what you were doing to other human beings.

I've considered that.

I've also considered that your brother was in the same circumstance as you, and he was able to make a different decision, maybe just one different decision that allowed him to be a successful, unincarcerated family person. As I recall, he was married with a

family.

THE DEFENDANT: Yes, sir.

THE COURT: And so it might have just been that one more bad decision that you made than he made, but, regardless, he had the same upbringing and he was able to become a productive member of society.

D indicates your background, which I've discussed, including your family, home and community environment, which I've discussed, and I'm well aware of.

E is the effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences of your participation in the offense.

You had prior criminal histories. You knew that if you got caught -- and, of course, you were counting on not getting caught when you were stealing these rims. If you got caught, there were consequences. So I've considered that.

I don't believe that you were immature or -- well, I think you were impetuous, but I don't think that you were immature as to how the system worked when you were three weeks before you turned the age of 18.

F is the extent of your participation in the offense. I've already addressed that.

G is the effect, if any, of familial pressure or peer pressure on your actions. I wasn't presented with any evidence to support that.

H is the nature and extent of your prior criminal history. You, by your own admission, have a -- had a violent prior criminal history, which this was just the final part of that. You know that and I know that.

I is the effect, if any, of characteristics attributable to your youth on your judgment. You had youth. You were only three weeks away from being an adult, where we wouldn't be here today. The year 18 of somebody's life is an arbitrary date. People mature at different times. I would -- I am of the opinion that males mature slower than females. However, just by the arbitrary choosing of year 18 of your life are you entitled to this hearing. Had the legislature said 17 or 16 -- not the legislature. The Supreme Court. And I don't know that there's any empirical evidence that in three weeks you would miraculously be of a mature mind and make logical decisions, but that's what the Supreme Court did. They chose an arbitrary date. And so I don't believe that there's any effect of characteristics attributable to your youth.

J is the possibility of rehabilitating the defendant. Interestingly, 20 years ago I wouldn't know the answer to that. Possibly I would say there is no chance of it based upon your criminal history. But we are in a unique position where I can look back and see somebody who when they were told they cannot get their GED, fought and petitioned for that opportunity; somebody, who when they were told they can't get a certification for a professional type license, petitioned and fought to take -- and I believe it was an HVAC certification. Somebody who, even though they knew they were facing life in imprisonment, for some reason decided to better themselves. And I think that "some reason" is the true capabilities that you possess as a human being, not as a person that you were when you were 17 years old or younger, but as a person that you have matured to be.

So giving great, the greatest of weight to J, the possibility of rehabilitating you, I will impose the following sentence, with my opinion and understanding that you would be entitled to a hearing under 921.1402(2)(c) and that you've already served sufficient time to have that hearing. It's my opinion that there are procedures for you to ask for that

hearing, and I intend to not consider the testimony you presented as if we already had that hearing, because I want to give the State an opportunity to appeal my decision in this case.

However, when we had that hearing -- because I believe I'm correct in my interpretation of the law, when we had that hearing, under the factors of 921.1402(2)(c), I believe that you will have served sufficient time based upon those factors for this offense.

Do you understand what I said?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I will sentence you to 40 years in the Department of Corrections. You will receive no gain time since this was a capital offense. You will receive credit for all the time that you served up to this date on Count 1.

Anything else, State?

MS. HICKS: I don't believe so, Judge. No, I don't think so.

THE COURT: Anything else, Mr. McLain, sir?

MR. McLAIN: Yes, Your Honor.

Just for the record, we would be objecting to this Court's determination of gain time. There's nothing in the statute, of the 2014 statute, that

precludes him being awarded gain time, and also it's a separation-of-powers argument, as well, between the judicial and the executive branch.

THE COURT: Isn't it really a moot point since he's entitled to the hearing technically immediately as long as he -- I think he's got to petition for it or request it under the rules, under the statute.

MR. McLAIN: I guess the problem then becomes, you know, if there's an appeal taken by the State, you know, does that disentitle him to a review right away or does he have to wait until this appeal is finalized? Because that could be -- if they take it all the way to the Florida Supreme Court, which this is an issue of first impression, it's very possible it's two or three years down the road. So, you know, that's one of the concerns. And we want to make sure that he is getting gain time, 65 per percent. That's quite a bit chunk of time out of 40 years.

THE COURT: Okay.

MR. McLAIN: And we'd also like the Court to go ahead and make a ruling on the applicability of the 1994 guidelines to this offense, as well, which we believe, you know, should be applied, as well, and restrict the Court to a sentence between 94 months and I think it was 157 months.

THE COURT: Okay. We are here only on Count 1. And so you're asking me to rule on issues regarding a Criminal Punishment Code guideline which addresses Counts 2 and 3. I believe Counts 2 and 3. So I neglect to do so at this time, but you have your record.

Mr. Purdy, you have 30 days to appeal the judgment and sentence of this Court. If you wish to appeal, it must be in writing. If you cannot afford an attorney, I will appoint one for you.

Do you understand your sentence?

THE DEFENDANT: Yes, sir.

THE COURT: And good luck to you.

THE DEFENDANT: Your Honor, can I have a question, one question? Are we entitled right now at this very moment to ask for judicial review upon the statute that I'm being sentenced upon?

THE COURT: The statute, as I read it, permits you to petition for that. The hearing? You're talking about the hearing?

THE DEFENDANT: Exactly.

THE COURT: The 1402 hearing. It allows you to petition to do so. So I'm requiring that you go through that procedure.

THE DEFENDANT: Is...

MR. McLAIN: Your Honor, could I have a second to confer?

THE COURT: Sure. Yes. Mr. McLain, I'm going to put on the overhead noise so you can have some semblance of privacy.

(The defendant and counsel conferred.)

MR. McLAIN: Your Honor, just one thing, in regards to the other two counts, that those would be run consecutive or the Court does not believe it has discretion to touch those two counts?

THE COURT: I don't believe I have discretion to touch those two counts, to modify them or to change them, so they are what they are.

MR. McLAIN: And the second point that we'd like to make is I would like to make an oral motion pursuant to the statute, 921.1402, to have review of his sentence at this time and also for the Court to take judicial notice of the evidence that we presented in support of his rehabilitation.

THE COURT: Okay. I will not have a hearing at this time.

MR. McLAIN: Okay.

THE COURT: Okay.

So, Ms. Hicks, Ms. Mills-Uvalle, Mr. McLain, thank you very much for your presentation at the last

hearing. It was an excellent job, as well as this hearing.

This case has caused me, more than any other case in 33 years of being a member of the Florida Bar, to think out the process, the effect of a murder in our society, and the unbelievable rehabilitation that you have shown and, through your attorney, were able to demonstrate for me at our hearing in the past.

Good luck to you.

(Proceedings were concluded at 2:50 p.m.)

C E R T I F I C A T E

STATE OF FLORIDA:

COUNTY OF ORANGE:

I, Shelly Coffey, RPR, Official Court Reporter of the Ninth Judicial Circuit of Florida, do hereby certify, pursuant to Florida Rules of Judicial Administration 2.535(h)(3), that I was authorized to and did report in stenographic shorthand the foregoing proceedings, and that thereafter my stenographic shorthand notes were transcribed to typewritten form by the process of computer-aided transcription, and that the foregoing pages contain a true and correct transcription of my shorthand notes taken therein.

WITNESS my hand this 29th day of December 2015, in the City of Orlando, County of Orange, State of Florida.

Shelly Coffey, RPR

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **Case No.: 1995-CF-006887-A-O**

vs.

KENNETH PURDY,

Defendant.
_____/

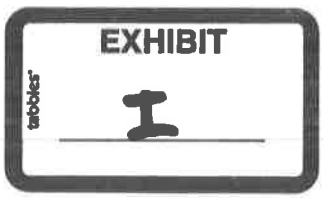
APPLICATION FOR JUDICIAL REVIEW

COMES NOW Defendant, KENNETH PURDY, by and through undersigned counsel, and files this application for judicial review pursuant to section 921. 1402, Florida Statutes. In support, Mr. Purdy states:

1. On November 18, 2015, this Court sentenced Mr. Purdy pursuant to section 775.082(1)(b)(2), Florida Statutes. This Court determined Mr. Purdy would be entitled to judicial review of his sentence after 15 years of incarceration.

2. Mr. Purdy has been incarcerated for more than 20 years.

3. Mr. Purdy is entitled to immediate judicial review in accordance with section 921.1402, Florida Statutes. *See Falcon v. State*, 162 So. 3d 954, n. 5 (Fla. 2015) ("Because Falcon has already served more than fifteen years of a sentence to her first-degree murder conviction, it is possible, depending on the sentence she ultimately receives on remand, that she will be immediately eligible for a sentence review after being resentenced. However, we leave it to the trial court to resolve any specific issues relating to the application of the new legislation in this case.").



4. At the sentence review hearing, the court is required to consider enumerated factors to determine whether it is appropriate to modify the juvenile offender's sentence. Fla. Stat. 921.1402(6)(a-i).

5. As indicated by this Court, the evidence presented by Mr. Purdy at resentencing demonstrated to the Court that he has been rehabilitated and is reasonably believed to be fit to reenter society. Due to the Court's findings, an additional hearing on Mr. Purdy's rehabilitation, where evidence could be introduced, would appear unnecessary.

6. Section 921.1402(7), Florida Statutes, provides:

> If the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years. If the court determines that the juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified.

WHEREFORE, the Defendant, Kenneth Purdy, respectfully requests this Court:

(1) grant judicial review of Mr. Purdy's sentence;

(2) find Mr. Purdy has been rehabilitated and is reasonably believed to be fit to reenter society;

(3) modify Mr. Purdy's sentence to allow for his immediate release to society while serving 5 years of probation[1];

(4) grant any such further relief this Court deems just and appropriate.

[1] Mr. Purdy believes the Court has the authority to also modify the sentences for counts 2 and 3, the non-homicide offenses, because they are part of the sentencing scheme. *See United States v. Matos*, 611 F. 3d 31 (1st Cir. 2010); *Sanders v. State*, 698 So. 2d 377 (Fla. 1st DCA 1997). Nevertheless, the Court could modify Count 1 only in a manner to still allow for Mr. Purdy's immediate release to society while on probation.

DATED this 19th day of November, 2015

Respectfully submitted,

/s/ Matthew R. McLain
Matthew R. McLain, Esquire
Florida Bar No. 98018
BROWNSTONE, P.A.
201 North New York Ave., Suite 200
Winter Park, Florida 32789
Telephone: (407) 388-1900
Facsimile: (407) 622-1511
matthew@brownstonelaw.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to opposing counsel this 19th day of November, 2015.

Matthew R. McLain
Matthew R. McLain, Esquire

KENNETH PURDY Case Number:1995-CF-006887-A-O OBTS:

SENTENCE
As to Count: 1

The defendant being personally before this court, accompanied by the Defendant's attorney of record, MATTHEW RAUL MCLAIN, Esquire, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

IT IS THE SENTENCE OF THE COURT THAT:

The Defendant is hereby committed to the Department of Corrections.

___ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED:

_X__ For a term of: 20 years, 6 months and 13 days in the Department of Corrections

___ For a term of Life.

SPLIT SENTENCE

___ Followed by a period of on Community Control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

_X__Followed by a period of 10 years on Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate ordered entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarnation portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS
As to Count: 1

Mandatory/ Minimum Provisions:

Firearm

___ It is further ordered that the 3-year minimum mandatory imprisonment provision of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.

Drug Trafficking

It is further ordered that the mandatory minimum imprisonment provision of section893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

___ It is further ordered that the Mandatory Minimum imprisonment provision of section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

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Controlled Substance Within 1,000 Feet of School

___ It is further ordered that the 3-year minimum imprisonment provision if section 893.13(1)(e)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

Habitual Felony Offender

___ The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Violent Felony Offender

___ The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.84(4)(b), Florida Statutes. A minimum term of must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Law Enforcement Protection Act

___ It is further ordered that the defendant shall serve a minimum of year(s) before release in accordance with section 775.0823, Florida Statutes.

Capital Offense

___ It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.

Short-Barreled Rifle, Shotgun, Machine Gun

___ It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statues, are hereby imposed for the sentence specified in this count.

Continuing Criminal Enterprise

___ It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Taking a Law Enforcement Officer's Firearm

___ It is further ordered that the 3-year mandatory minimum imprisonment provision of section 775.0857(1), Florida Statutes, is hereby imposed for the sentence specified in this count

Other Provisions:

Retention of Jurisdiction

___ The Court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983) for a term of

Jail Credit

_X_ It is further ordered that the defendant shall be allowed a total of **20 years, 6 months and 13 days in the Department of Corrections** as credit for time incarcerated before imposition of this sentence.

CREDIT FOR TIME SERVED
IN RESENTENCING AFTER
VIOLATION OF PROBATION
OR COMMUNITY CONTROL

___ It is further ordered that the defendant be allowed ___ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on case/count _____. (Offences committed before October 1,1989)

___ It is further ordered that the defendant be allowed ___ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time serve on case/count_____. (Offenses committed between October 1, 1989 and December 31, 1993)
___ The Court deems the unforfeited gain time previously awarded on the above case/count forfeited under section 948.06(6)

___ The Court allows unforfeited gain time previously awarded on the above case/count (Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1)).

___ It is further ordered that the defendant be allowed ___ days' time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit of ____ (served prior to arrest as violator) and the Department of Corrections shall compute and apply credit for time served on the original DOC sentence only, pursuant to section 921.0017, Florida Statutes. (Offenses committed on or after January 1, 1994)

CONSECUTIVE/ CONCURRENT

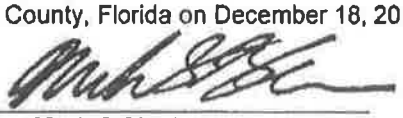
___ As to Other Counts:

___ As to Other Cases:

In the event the above sentence is to the Department of Corrections, the Sheriff of Orange County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the legal right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to assistance of counsel in taking the appeal at the expense of the State on showing of indigence.

Done and Ordered at Orange County, Florida on December 18, 2015

Honorable Judge: 

Mark S Blechman

Filed in Open Court on: December 18, 2015

Deputy Clerk in Attendance: Mario A.
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

ORIGINAL

STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH PURDY,

Defendant./

CASE NO. 1995-CF-006887-A-O

DIVISION 12

RESENTENCING PROCEEDINGS

BEFORE

THE HONORABLE MARK S. BLECHMAN

In the Orange County Courthouse
Courtroom 12-D
Orlando, Florida 32801
Friday, December 18, 2015
Heather Jewett, RPR, FPR

A P P E A R A N C E S:

THERESA J. MILLS-UVALLE, ESQUIRE
KELLY B. HICKS, ESQUIRE
Office of the State Attorney
415 North Orange Avenue
Building B
Orlando, Florida 32801
On behalf of the State

MATTHEW R. McLAIN, ESQUIRE
Brownstone Law
201 North New York Avenue
Suite 200
Winter Park, Florida 32789
On behalf of the Defendant

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P R O C E E D I N G S

(The following proceedings commenced on Friday, December 18, 2015, at 10:34 a.m.)

THE CLERK: 1995-CF-6887, Kenneth Purdy.

THE COURT: Okay. Good morning, sir.

THE DEFENDANT: Good morning, sir. How are you doing, sir?

THE COURT: I'm fine. Thank you.

Please raise your right hand so the clerk can place you under oath and get your identity.

KENNETH PURDY,

the defendant herein, testified upon his oath as follows:

THE COURT: Please state your name for the record.

THE DEFENDANT: Kenneth Purdy.

THE COURT: Thank you.

For the defense?

MR. McLAIN: Matthew McLain for Kenneth Purdy.

THE COURT: Good morning.

For the State?

MS. MILLS-UVALLE: Teri Mills-Uvalle on behalf of the State, and Kelly Hicks.

THE COURT: Good morning, ladies.

Okay. I have calendared this hearing for a

sentence review, pursuant to Florida Statute 921.1402, having already sentenced on November 18th, Mr. Purdy, to 40 years in the Department of Corrections, which provides him the opportunity to have a hearing after 15 years. I ruled at that time that -- we had on August 14, 2015, a de facto hearing under 921.1402 and addressed the factors under Paragraph No. 6.

I set off this sentencing to give the State an opportunity to appeal my last ruling, if they chose to do so. I did not see a notice of appeal; so I'm prepared to go forward on a sentence modification pursuant to 921.1402.

State, is there an appeal pending that I'm unaware of?

MS. MILLS-UVALLE: No, Your Honor.

THE COURT: Okay. So with that, is there anything the defense would like to present in mitigation before I impose a modified sentence in this case?

MR. McLAIN: Your Honor, we would just ask the Court to take judicial notice of the prior proceeding, which was taken place in August, where we introduced the testimony of six witnesses.

THE COURT: For the record, that would be Rosie Browne with an E at the end; Marco Moten;

Paetra, P-a-e-t-r-a, Brownlee; Octavius -- Octavius, O-c-t-a-v-i-u-s, Smith; Sandy Love; Robert Siriani, S-i-r-i-a-n-i; and the defendant, Kenneth Purdy.

MR. McLAIN: Yes, Your Honor. That's correct.

In addition to that, I do have letters from some of those witnesses, if the Court would like to receive those as well.

THE COURT: Are they duplicative?

MR. McLAIN: They are duplicative.

THE COURT: I don't need to hear that, then. I recall what they said and was affected by what they said. So . . .

MR. McLAIN: Thank you, Your Honor.

And just to sum up what *Horsley* is about is if a juvenile can show maturity and rehabilitation, he should be afforded an opportunity for release. And the statute requires, if the Court does grant release, 5 years' probation, we would be asking for that.

THE COURT: Actually, it says "at least 5 years."

MR. McLAIN: "At least." Yes, Your Honor.

THE COURT: Okay. Thank you very much.

State, anything else before I impose sentence?

MS. HICKS: Just although the defense hasn't touched on it today, it's the State's position that you only have jurisdiction over Count 1. You can't do

anything with respect to Counts 2 and 3 for which he received consecutive sentencing to Count 1. So I believe the only issue would be the probation that I believe is forthcoming from Your Honor would be consecutive to the sentence he still has to serve on Counts 2 and 3.

THE COURT: I'm not sure how that would work. Mandated to order at least 5 years, and I'm going to impose probation. Actually, in fact, I intend to impose 10 years' probation, which I'm sure Mr. Purdy can do because he has an amazing support staff outside the prison system.

But I don't know how the DOC is going to deal with that. I'll let them deal with that. But my intent is to make that occur at the conclusion of the sentence on Count 1. Because part of the sentence on Count 1 -- logically, what the Department of Corrections would do would not have that probation begin until all the incarcerative sentences are served, and I'm not sure how they're going to deal with it. Do you know how they're going to deal with it?

MS. HICKS: No. But I think the safest thing would be to say that the probation on Count 1 would be consecutive to the sentences on Counts 2 and 3 because

then I don't think they have a choice but to make it after he serves his prison sentence on Counts 2 and 3.

THE COURT: Is that a legal sentence if I'm sentencing someone to prison followed by probation and having a break in there on his sentence? I don't know that that's legal. If you think it's legal, I'll impose that, but I don't believe it's legal.

Defense, do you have a position on that?

MR. McLAIN: Your Honor, I think the Court can craft his sentence where it reduces his current sentence to a date where he could be released today on 10 years of probation. So I believe it's 9 years to run consecutive to this count. So the Court could reduce his sentence to -- I guess he's served over 20 years --

THE COURT: 20 years, 6 months, and 13 days.

MR. McLAIN: Correct. So we can reduce it to 10 years and then have that sentence already run out. He can be released on probation. That's what we'd be asking for.

And, again, you know, I think the State's running afoul from, you know, what the purpose of the statute is. It's to give this person an opportunity -- to try to make them serve an additional 9 years when he has shown maturity and rehabilitation would run afoul to

it.

You know, I just think it's real interesting. I did some research on the legislative intent, and I pulled the votes for this statute, and it really surprised me. It was the house of representative. 117 yeas, 0 nays, and 2 not votings. Unanimous.

The senate was the same thing. It was unanimous without, I think, 2 or 3 people voting. 36 yeas and 4 not voting.

So there was an overwhelming amount of support to allow juveniles at the time of the offense, and he was a juvenile at the time of both offenses, to go ahead and be released once he's shown maturity and rehabilitation. So we'd ask the Court to craft his sentence to allow his release on rehabilitation today.

COURT DEPUTY: Put your phones away.

THE COURT: Okay.

FROM AUDIENCE 1: I was trying to shut it off, and I don't know how.

FROM AUDIENCE 2: I was trying to shut it off --

THE COURT: Okay. That's fine.

MR. McLAIN: And further to that point, Your Honor, I would also -- in our request for judicial review, we noted a few cases. That's *United States versus Matos,* 611 F.3d 31; *Sanders v.*

State, 698 So.2d 377. And those cases talk about a sentencing scheme.

This is a part of a sentencing scheme that the judge originally imposed, and I think it speaks in volumes that the Court didn't max him out on those other counts. It was 9 years when he could have maxed them out on both of those counts. So we're looking at the sentencing scheme. Mr. Purdy has spent over 7,000 days in prison or in jail, and we ask that he be released on the 10 years of probation, ask the Court to craft a sentence to allow that.

THE COURT: Okay. Ms. Hicks, if you want to continue.

MS. HICKS: There's no procedural method for you to be able to do that. It's that simple.

THE COURT: Talk to me about the probation. Are you confident that I could order the probation to begin at the conclusion of all the incarcerative sentence?

MS. HICKS: I haven't done the research, Judge, but I think that you can -- what -- what is the -- is there a rule that you are thinking of that says you can't do that?

THE COURT: There's this case law that I'm thinking of, and I can't point to it right now, that

says I cannot have --

MS. HICKS: Split?

THE COURT: -- have a sentence split by incarceration. That's my concern.

MS. HICKS: Okay. Well, if you're concerned on that, Judge -- our concern here is less with the probation and more with making sure that Counts 2 and 3 are not touched today. We don't believe you have any -- you don't have any way to do that. There's no method by which you can do that. We are only here with respect to Count 1. The new juvenile sentencing statutes only apply to Count 1.

If the -- it's interesting that he cites legislative intent. If the legislature intended for a juvenile sentencing statute to be passed that applied to all crimes that juveniles committed, they would have done that, and they didn't. In fact, what they did -- what the legislature could have done was created "This is a juvenile sentencing statute. We -- any -- if a -- somebody under the age of 18 commits a crime, whether it's an F-3, F-2, F-1, or capital first-degree murder, this is the sentencing statute that applies to juveniles. Nothing else applies. 10-20-Life doesn't apply, fees. Any other sentencing statute doesn't apply. This is how you sentence

juveniles." They didn't do that.

You have to look at the plain language of the statute. Whenever you are doing statutory interpretation, while you can look at the numbers and how many legislatures voted for what, the courts all say the very first thing you have to look at to look at the legislative intent is the plain language of the statute. The legislatures did not create a juvenile sentencing statute. They actually included the juvenile sentencing procedures into what is arguably the most serious sentencing statute we have because they put it right in there with HFO, HFVO, PRR, and all of those good statutes. So they actually did it, in my opinion, the exact opposite of what they could have done. They didn't say, "This is how you sentence juveniles." They said, "This is what you do when these juveniles commit the most serious offenses."

Now, I will say this: Ultimately, the defense may be right. Maybe the intent of the legislature is that somebody like Mr. Purdy who commits multiple crimes should get out after 20 years, even if they get mandatory consecutive sentencing, but they didn't do that. And it's really important to note because today -- this statute became effective in July of 2014.

And although the courts have said we have to apply it to people like Mr. Purdy who committed their crime 20-something years ago, if you think about somebody right now, if somebody commits a crime today, if they commit -- the example that I oftentimes use is aggravated assault with a firearm. It is an F-3. If they have three separate victims, they will go to prison for 60 years, if they discharge that firearm in front of three different people. That's what the case law says. That's what the statute says. And the legislature has not addressed F-3s as a juvenile.

So if a 17-year-old goes out and commits three aggravated assaults with a firearm and they have discharged, they will get 60 years in the Department of Corrections because there is no sentencing statute that applies to specifically them, and the new juvenile statute doesn't apply to them. As a judge, you only have authority to sentence that juvenile to what the sentencing statute said.

And if the legislature wanted to amend 10-20-Life and say that it doesn't apply to juveniles or amend the consecutive versus concurrent -- because the legislature has also said that it's the intent of the legislature that people should be sentenced consecutively, and that is exactly what Judge Mihok

did in this case. He took the intent of the legislature from back 20 years ago, which is that somebody gets sentenced consecutively, and he did that. And now we're here 20 years later. You have authority over one count. If the legislature wanted you to have authority over the other counts, they would have given that to you because we know this exists. The 10-20-Life statute was amended not too long ago to specifically say, "You get consecutive sentencing when you commit 10-20-Life statute."

So the legislature knows that if a kid goes out and commits three F-3s, he's going to prison for 60 years. If they want to change that, they may very well change that, and we may very well be back here some day with Mr. Purdy because at some point the legislature says, "Hey, we missed that. We didn't realize that's what's going to happen."

But right now the authority you have is over Count 1. You have no authority -- and the only way to modify a sentence is under Florida Rule of Criminal Procedure 3.800, and it says you only have jurisdiction to modify a sentence 60 days after that sentence is imposed. As the defense has pointed out, we are over 7,000 days since that sentence was imposed; so you're a little bit outside your

jurisdiction to be able to modify Counts 2 and 3. There is no way for you to change it. He has to do the time on those sentences.

THE COURT: Thank you, Ms. Hicks.

Anything further?

MR. McLAIN: Yes, Your Honor. Looking at the plain language of the statute in 921.1402, Subsection . . .

THE COURT: (7)?

MR. McLAIN: Not (7). It's -- I just had it, Your Honor. I apologize. It's Subsection (d). And that's 775.082 3.c.

THE COURT: Why do you say under Subsection (d)?

MR. McLAIN: Subsection --

THE COURT: (d) would have to be under a number.

MR. McLAIN: 2.(d).

THE COURT: 2.(d). Give me a second. Yes.

MR. McLAIN: That cites to statute 775.082 3.c, and that relates to these nonhomicide offenses. So right in the statute it gives the Court jurisdiction to modify even a nonhomicide offense, and we do believe that this Court, turning to -- to that Subsection (7) this Court just referenced, the Court does have the ability to allow Mr. Purdy to be released on a sentence of at least 5 years' probation.

It has authority, and we don't know where the State is coming up with their authority to argue this, especially in light of numerous decisions out of the federal and circuit -- out of the federal circuits and the Florida DCAs that say it's a sentencing scheme, if we look at it.

And if we really look at the legislative intent, it's to give these juveniles an opportunity for release. And the Court can go ahead, we believe, and sentence him in a way that he starts serving probation today and prove to the Court that he has matured; he has been rehabilitated. And he knows, if he messes up on probation, he's coming right back to this Court and will go right back to prison, if he messes up. He's not going to do that, we believe. We ask that the Court go ahead and allow his release for at least on 10 years' probation, like Your Honor's already said.

THE COURT: Okay. Ms. Hicks?

MS. HICKS: You only have -- you only have jurisdiction to review sentences. If the defendant had gotten a life sentence for something the equivalent of a life sentence on Counts 2 or 3, I would agree that they would have filed a motion and you would have had the right to review it. But what the courts have all said -- and I don't have the cites

with me right here. But what the courts have said is -- there's been a number of juveniles who have filed motions under the new juvenile sentencing statute, when they get sentenced to 15 years or 20 years in prison, and all of the courts have rejected those appeals because they did not receive a life sentence or the equivalent of a life sentence, as we've all seen some courts sentence somebody to 90 years and said, "Well, I didn't give you life," and they said, "No. That's a de facto life sentence." 9 years is not a de facto life sentence. He got 9 years on one count and 9 years on the other.

Neither of those are de facto life sentences, and therefore, if the defense had filed a motion, which they did not do, for a review hearing or a modification of the sentence on those two counts, then we'd be having a different discussion. But Issue No. 1, they did not file a motion -- originally, when they filed their motion to have Count 1 -- his sentence on Count 1 -- motion to modify his sentence on Count 1 or motion for a new legal sentence on Count 1, they did not file a motion for a new legal sentence on Counts 2 and 3. If they had done that, we would have appealed that because you can't -- you have -- the first step in all of this is a motion to

modify the sentence.

What we're here for right now is the review hearing. So they're trying to put the cart before the horse. They're trying to say, "Well, we've never talked about Counts 2 and 3, but now that we've gotten to the review hearing, could you please modify the sentence?" No, you can't. You don't have any jurisdiction. And even if they had filed a motion to modify Counts 2 and 3, one, we would have argued you have no jurisdiction and, two, we would have argued, even under the new juvenile sentencing statute, he did not receive a life or a de facto life sentence on Counts 2 or 3; and therefore you don't have any jurisdiction to change that, even in light of the fact that he was sentenced as a juvenile, because of the sentence that he received.

THE COURT: Well, the defense actually did present a methodology in which I could impose that by giving, I think, a 10-year sentence on Count 1 and giving credit for the 10 years, which would mean that the remaining -- I think it's a 9-year, 41-day. I don't think it was a straight 9 years. It's just something in my mind's eye has that 41 after that. Let's say it's 9 years for purposes of this discussion to give that consecutive, in which case that would

have been served with the 20 years, 6 months, and 13 days.

So you don't need to respond to that, but the defense gave me a methodology in which to do that, and you're saying there's no way to do that. There is a way to do that, if I wanted to.

MS. HICKS: Back in November, but we're here for the review hearing today. You already sentenced him to 40 years, which is why we didn't appeal your sentence back in November. We're here for the review hearing today. You already sentenced him to 40 years. You're here to determine if he gets out now.

THE COURT: No -- well, what I'm doing is I'm modifying the sentence. I'm modifying that 40-year sentence.

MS. HICKS: Yeah. But the only modification you can make is whether or not he gets out now and then gets probation. You can't say, "I sentenced you to 40 years, and now I'm sentencing you to 10 years." We're only here to determine whether or not he gets out at 20 years, and you're modifying what's left of his sentence.

THE COURT: Well, why can't I modify what's left of his sentence to instead of saying -- instead of saying 20 years, 6 months, and 13 days to 10 years?

MS. HICKS: No, no. I very much disagree with that, Your Honor. The purpose of the review hearing is at 20 years to determine whether or not he gets out. It's looking forward, not looking back. We can't --

THE COURT: But the only way to let him out is to modify the sentence.

MS. HICKS: I agree.

THE COURT: So if I'm modifying the sentence, what would preclude me from modifying it to 10 years? Again, you don't need to argue this. I'm just pointing out that you had made a statement that the -- there's no vehicle. I think there is a vehicle to do so, as proposed by the defense.

Anything else, sir?

MR. McLAIN: No, Your Honor.

THE COURT: Okay. And anything you wish to say to me, Mr. Purdy, before I modify your sentence today?

THE DEFENDANT: Thank you for the opportunity, Your Honor. It's been -- it's been -- it's been a long time, and I just want to thank this Court for the opportunity. I've been given a rare and unique opportunity the last time, and I repeat those words.

And I want to thank my lawyers and everything they've done. I mean, you guys are really, really,

really, like -- I've never seen anything like it. Thank you. With humility and gratitude, thank you.

Thank you, Your Honor.

THE COURT: Okay. There is no doubt that the conduct that you participated in more than 20 years, 6 months, and 13 days ago was reprehensible --

THE DEFENDANT: Yes, sir.

THE COURT: -- not acceptable in any organized, civilized society --

THE DEFENDANT: Yes, sir.

THE COURT: -- and behavior such as that not only wrongs society, but worse than that, it wrongs individuals. And you are in a position, which is shared more and more by young people in our society, and that's not having a stable home environment.

The phrase "running in the streets" is commonly used, and from the testimony I heard from your brother is simply that. That's what you were doing. You didn't have a stable home. Your family, in effect, became your peer group, and a peer group is the worst kind of family to act as a role model, and I believe you fell upon that.

The fact that your brother was able to achieve success by following the rules of society indicates that you potentially could have done that as well.

You made other decisions. You might have both made horrible decisions, and certainly this decision in participating in this robbery was -- was a reprehensible decision that I would hope that you regret.

THE DEFENDANT: I do. Absolutely. Absolutely.

THE COURT: I don't know that you do, but I think that you do. And over the rims of a vehicle or over money, it's just -- it's -- it deserves punishment.

Interestingly enough, had you been three weeks older, you'd be serving a life sentence, not sitting in front of me, and you and I would never have met. You'd be serving your sentence for the rest of your life. Interestingly enough, had you committed this murder a short time before this -- I'm not sure of the exact date, but your sentence would have been a life sentence with a mandatory minimum 25. Under that system, you would have gotten out in another approximate four and a half years. So it's -- it's the things -- the more things change, the more they're the same. Here we did away with the parole and the 25-year mandatory.

Here I'm prepared to modify your sentence and modify it to what you've already served. So -- which is close to the 25 years. But it does not mitigate

the fact that you're responsible for the death of a human being.

I was amazed and affected by his mother coming in here and saying that she wanted you released from prison. I don't know of any other situation where the mother of a person who was killed in his youth would come in and speak on behalf of the murderer, but that's what happened in your case.

You also develop relationships outside of prison.

You also, against the rules of prison, sought out and obtained your GED certificate, I believe your HVAC certificate as well. Even though you were prohibited by the procedures of the Department of Corrections because you were serving a life sentence and their policy is why waste -- I presume why waste a resource -- a limited resource on somebody who's going to be with us for life. You must have, in your mind, thought on some level, even though you might have had hope of getting released, but thought on some level -- you were serving a life prison sentence, and yet you still sought this out. And of all the things, that impressed me possibly more than anything else.

THE DEFENDANT: Yes, sir.

THE COURT: Of course, hearing from the other witnesses also affected me, and under the subsections

in Paragraph No. 6 of 921.1402, having heard that testimony on August 14, 2015, I believe that you have been rehabilitated, and I believe that -- and I reasonably believe that you are fit to reenter society.

I am sure that many people would agree that someone who commits a murder deserves to be warehoused for life, no matter what age they are, even if they're 17 years or 16 years. But you are, I think, a good argument against warehousing people for life that commit even reprehensible crimes because you are a different person that you were at age 17, as everybody in this courtroom is. Everybody in this courtroom matures on some level to some extent. I believe, I hope, that you've matured dramatically, and I believe you have, which is why I believe you're fit to reenter society. I believe you have a support system of both professional attorneys and relationships once you reenter society, which gives me hope and confidence that you'll be able to follow the rules of society.

My concern is that you have been institutionalized now for half your life, and so it's not going to be an easy task for you. You're going to be given a lot more freedom than you had before, but you're going to have a threat that can be parallel to

a parable called the Sword of Damocles. So you're going to have a sword hanging over you of life imprisonment, and you'll be on probation for 10 years, once you're released from incarceration. If you violate probation, you come before me, and I would seriously consider the fact that I made a mistake in finding that you were reasonably rehabilitated and that you were fit to reenter, and I would seriously consider putting you, now an adult, in prison for life having you proven to me that you've made a mistake.

So that's what the Sword of Damocles is. Your attorney can explain the exact parable to you. I'm sure they're aware of it. But it's walking around with a threat hanging over your head. So you have the threat of "You must follow the rules of probation."

And I assure you, even if you're off probation, you successfully complete it, which I hope you will do, if you were to run afoul of the law in the future, every person that you would appear in front of, every judge, every prosecutor would point out that you should have been serving life in prison, and had Judge Blechman not let you out, you couldn't have committed this crime, and now is the time to put you in prison.

THE DEFENDANT: Absolutely.

THE COURT: So you have that burden, which I believe you deserve, based upon your actions, for the rest of your life, not just the 10 years of probation I intend to sentence you to.

Having made those statements, having made those findings, after hearing the testimony from August 14, 2015, I am going to modify your sentence to that on Count 1 time served, which I calculate as 20 years, 6 months, and 13 days.

Is that your calculation, defense?

MR. McLAIN: Your Honor, I calculated it by day; so I don't know the exact translation. But I would trust that that's correct.

THE COURT: I show that he was arrested on June 6th of 1995 -- actually, arrested June 5, 1995.

Does that sound right?

THE DEFENDANT: Yes, sir.

THE COURT: And so by my simple calculations -- and I only went to a public school; so my math is dependent upon that -- I came up with that. If I'm wrong in any way, I will modify that.

State, any objection to the 20 years' calculation, 6 months, and 13 days?

MS. HICKS: I do not do math, Judge. We'll rely on Your Honor.

THE COURT: Mario, the clerk?

Okay. No comments on that; so we're going to go with that.

So we're going to modify your sentence, based upon my findings on Count 1, to 20 years, 6 months, and 13 days, and specifically give you credit for 20 years, 6 months, and 13 days in Count 1.

I must sentence you to a period of probation following that. It says a minimum of 5 years. I'm going to sentence you to 10 years of probation.

Conditions of probation are that you report within 48 hours of your release from all incarceration, that you may be supervised. In any county you choose to reside in, you must first report here in Orange County because this is the sentencing county. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That you'll pay all monetary obligations previously ordered by Judge . . .

MS. HICKS: Mihok.

THE COURT: Mihok in this case at a minimum of $30 per month, and I'll give you 120 days before that first payment is due to give you a chance to obtain employment to make that, what I consider the minimist payment.

I'm going to order that you not possess any weapons while you're on probation, specifically firearms, but any weapons whatsoever.

State, are there any other conditions that you believe to be appropriate?

MS. HICKS: Not with respect to the probation, Your Honor.

THE COURT: Okay. Anything else, defense, that you believe would be appropriate?

MR. McLAIN: For probation, no, Your Honor.

THE COURT: Okay. Then at this point do you have any questions about the sentence I imposed on Count 1 is now modified?

THE DEFENDANT: No, sir. I have no questions.

THE COURT: You do have 30 days to appeal. If you wish to appeal, it must be in writing. If you cannot afford an attorney, I will appoint one for you.

Good luck to you, Mr. Purdy.

MR. McLAIN: And, Your Honor, before we recess, I'd ask if it's the Court's intent for the 9 years to run consecutive for him to finish out or if it's the Court's intent to --

COURT DEPUTY: Outside, please.

MR. McLAIN: -- intent to allow his release today on probation.

THE COURT: Okay. Give me one second so the deputies can maintain order.

It is my opinion that I don't have jurisdiction on Counts 2 and 3; so the order entered by Judge Mihok I don't believe I have jurisdiction over. So that's my ruling. And -- and if I'm wrong, I'm let the Fifth tell me that, and I'll take different action.

MR. McLAIN: Okay. And one final question, Your Honor. In ruling that the 20 years and credit for time served, does that mean the Court is unwilling to modify it to the 10 years to allow his release today?

THE COURT: Yes.

MR. McLAIN: Okay.

THE COURT: Okay?

MR. McLAIN: Thank you.

THE COURT: Thank you.

(Court was adjourned at 11:05 a.m.)

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C E R T I F I C A T E

STATE OF FLORIDA:

COUNTY OF ORANGE:

I, Heather Jewett, Registered Professional Reporter, Florida Professional Reporter, Official Court Reporter of the Ninth Judicial Circuit of Florida, do hereby certify, pursuant to Florida Rules of Judicial Administration 2.535, that I was authorized to and did report in stenographic shorthand the foregoing proceedings; and that thereafter my stenographic shorthand notes were transcribed to typewritten form by the process of computer-aided transcription; and that the foregoing pages contain a true and correct transcription of my shorthand notes taken therein.

WITNESS my hand this 30th day of December, 2015, in the City of Orlando, County of Orange, State of Florida.

Heather Jewett

In the Circuit Court of the
Ninth Judicial Circuit, in and
For Orange County, Florida

State of Florida

Case number: 1995-CF-006887-A-O
Division: Div 12

vs.

KENNETH PURDY

(Corrected order as to correct verbiage as to CT.1)

ORDER OF PROBATION

This case came on this day for: Hearing

DEFENDANT APPEARANCE:

KENNETH PURDY Present

COUNSEL APPEARANCE:

Counsel:MATTHEW MCLAIN Present

Asst State Attorney present:Theresa Mills- Uvalle

This cause coming before the Court to be heard, and you, the defendant, being now present before the court, and you having:

001	**FIRST DEGREE MURDER**	**782.04**	**CAPITAL**		
002	**ARMED ROBBERY**	**812.13(2)(A)**	**FIRST DEGREE FELONY**		
003	**CARJACKING**	**812.133(1)(2)(A)**	**FIRST DEGREE FELONY**		

Court Minutes Per the Court:

Modifies Sentence to the following:

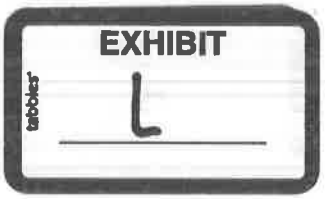
CT1) 20 years, 6 months and 13 days in the Department of Corrections with credit for 20 years, 6 months and 13 days' time served (No gain time is permitted)

Followed by:
10 years of state probation
Defendant to report to probation 48 hours upon release.

After initial intake, probation may be transferred to any state.

Defendant NOT to possess weapons or firearms.

All previous monies imposed by Judge Mihok to be paid thru probation at the rate of $30 monthly. First payment due within 120 days upon release of ALL incarcerations.



CT2 and CT3- Previous Sentence to Remain

IT IS FURTHER ORDERED that you shall comply with the following standard conditions of supervision as provided by Florida law:

(1) You will report to the probation office as directed. Not later than the fifth day of each month, unless otherwise directed, you will make a full and truthful report to your officer on the form provided for that purpose.

(2) You will pay the State of Florida the amount of $20.00 per month, as well as 4% surcharge, toward the cost of your supervision in accordance with s. 948.09, F.S., unless otherwise exempted in compliance with Florida Statutes.

(3) You will pay the State of Florida the amount of $2.00 per month, to the Training Trust Fund Surcharge in accordance with s. 948.09(1)(a)2, F.S., unless otherwise exempted in compliance with Florida Statutes.

(4) You will remain in a specified place. You will not change your residence or employment or leave the county of your residence without first procuring the consent of your officer.

(5) You will not possess, carry or own any firearm. You will not possess, carry, or own any weapons without first procuring the consent of your officer.

(6) You will live without violating the law. A conviction in a court of law shall not be necessary for such a violation to constitute a violation of your probation/community control.

(7) You will not associate with any person engaged in any criminal activity.

(8) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you visit places where intoxicants, drugs or other dangerous substances are unlawfully sold, dispensed or used.

(9) You will work diligently at a lawful occupation, advise your employer of your probation status, and support any dependents to the best of your ability, as directed by your officer.

(10) You will promptly and truthfully answer all inquiries directed to you by the court or the officer, and allow your officer to visit in your home, at your employment site or elsewhere, and you will comply with all instructions your officer may give you.

(11) You will pay restitution, court costs, and/or fees in accordance with special conditions imposed or in accordance with the attached orders.

(12) You will submit to random testing as directed by your officer or the professional staff of the treatment center where you are receiving treatment to determine the presence or use of alcohol or controlled substances.

(13) You will submit a DNA sample, as directed by your officer, for DNA analysis as prescribed in ss. 943.325 and 948.014, F.S.

(14) You will report in person within 72 hours of your release from incarceration to the probation office in Orange County, Florida, unless otherwise instructed by the court or department. (This condition applies only if section 3 on the previous page is checked.) Otherwise, you must report immediately to the probation office located at 27 Coburn Ave Orlando, Fl 32805 (407) 245-0770.

(15)

Special Conditions

___ 1. You must undergo Substance Abuse evaluation and, if treatment is deemed necessary, you must successfully complete the treatment, and be responsible for the payment of any costs incurred while receiving said evaluation and treatment, unless waived by the court.

___ You must obtain a Mental Health evaluation and, if treatment is deemed necessary, you must successfully complete the treatment and be responsible for the payment of any costs incurred while receiving said evaluation and treatment, unless waived by the court.

___ You must obtain a Psycho-Sexual evaluation and, if treatment is deemed necessary, you must successfully complete treatment and be responsible for the payment of any costs incurred while receiving said evaluation and treatment, unless waived by the court.

___ 2. You will be required to pay for drug testing unless exempt by the court.

___ 3. You will enter the Department of Corrections Non-Secure Drug Treatment Program or other residential treatment program/Probation Restitution Center for a period of successful completion as approved by your officer. You are to remain until you successfully complete said Program and Aftercare. You are to comply with all rules and regulations of the Program. You shall be confined in the county jail until placement in said program, and if you are confined in the jail, the Sheriff will transport you to said program.

___ 4. You will abstain entirely from the use of alcohol and/or illegal drugs, and you will not associate with anyone who is illegally using drugs or consuming alcohol.

___ 5. You will submit to urinalysis testing on a monthly basis to determine the presence of alcohol or illegal drugs. You will be required to pay for the test unless exempt by the court.

___ 6. You will not visit any establishment where the primary business is the sale and dispensing of alcoholic beverages.

___ 7. You will remain at your residence between 10 p.m. and 6 a.m. due to a curfew imposed, unless otherwise directed by the court.

___ 8. You will submit electronic monitoring, follow the rules of electronic monitoring and pay the monthly service costs of in the amount of

___ 9.You will not associate with the following person(s) during the period of supervision

___ 10. You will have no contact (direct or indirect) with the victim or the victim's family during the period of supervision.

___ 11. During the period of supervision you will have no contact (direct or indirect) the following person(s).

___ 12. You will maintain full time employment or attend school/vocational school full time or a combination of school/work during the term of your supervision.

___ 13. You will make a good faith effort toward completing basic or functional literacy skills or a high school diploma.

___ 14. You will successfully complete the Probation & Restitution Program, abiding by all rules and regulations.

___ 15. You will attend Alcoholics Anonymous or Narcotics Anonymous meetings at least monthly, unless otherwise directed by the court.

___ 16. You must successfully complete Anger Management and be responsible for the payment of any costs incurred while receiving treatment unless waived.

___ 17. You must successfully complete Batterer's Intervention Program and be responsible for the payment of any costs incurred while receiving treatment unless waived.

___ 18. You will attend an HIV/AIDS Awareness Program consisting of a class of not less than two (2) hours or more than four (4) hours in length, the costs for which will be paid by you.

___ 19. You shall submit your person, property, place of residence, vehicle or personal effects to a warrantless search at any time, by any probation or community control officer or any law enforcement officer.

___ 20. If you have been found to have committed a crime on or after October 1, 2008 for the purpose of benefitting, promoting, or furthering the interests of a criminal gang, you are prohibited from knowingly associating with other criminal gang members or associates, except as authorized by law enforcement officials, prosecutorial authorities, or the court, for the purpose of aiding in the investigation of criminal activity.

___ 21. You will successfully complete a Post-adjudicatory treatment-based drug court program, as provided in s.397.334 (3), F.S.

___ 22. Other:

Additional Conditions

___ Do not possess or consume illegal drugs or alcohol

___ Do not drive without valid Driver's License

___ Do not own or possess any firearms or weapons

___ Complete Impulse Control Class

___ Complete DUI Counter Attack School

___ Do not be in the vicinity of alcohol

___ Write a letter of apology

___ No Contact with children under 18 years of age

___ No return to scene of offense

___ Submit to random urinalysis

___ Complete the Victim Awareness Program

___ Forfeit weapon seized in this case

___ You may travel out of county while on probation

___ Defendant must actively seek gainful employment or be enrolled in school full-time.

___ Defendant must take HIV/STD test.

___ The defendant is to complete the Phoenix House In-House treatment program.

___ Defendant not to return to the prostitution mapping zone.

___ Defendant to have no contact with co-defendant(s)

___ Complete community service at non-profit community service.

___ Probation supervision may terminate early upon approval from the Court.

FINES AND COSTS:

All previous monies imposed by Judge Mihok to be paid thru probation at the rate of $30 monthly. First payment due within 120 days upon release of ALL incarcerations

Effective for offenders whose crime was committed on or after September 1, 2005, there is hereby imposed, in additional to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:

- Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older; or
- Are designated as a sexual predator pursuant to s. 775.21; or
- Has previously been convicted of a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older.

You are hereby placed on notice that should you violate your probation or community control, and the conditions set forth in s. 948.063(1) or (2) are satisfied, whether your probation or community control is revoked or not revoked, you shall be placed on electronic monitoring in accordance with F.S. 948.063.

Effective for offenders who are subject to supervision for a crime that was committed on or after May 26, 2010, and who has been convicted at any time of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses listed in s. 943.0435(1)(a)1.a.(I), or a similar offense in another jurisdiction, against a victim who was under the age of 18 at the time of the offense; the following conditions are imposed in addition to all other conditions:

(a) A prohibition on visiting schools, child care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer. The court may also designate additional location to protect a victim. The prohibition for the sole purpose of attending a religious service as defined in s. 775.0861 or picking up or dropping off the offender's children, grandchildren at a child care facility or school.

(b) A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing a Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court.

YOU ARE HEREBY PLACED ON NOTICE that the court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision. If you violate any of the conditions of your probation, you may be arrested and the court may revoke your probation, adjudicate you guilty if adjudication of guilt was withheld, and impose any sentence that it might have imposed before placing you on probation or require you to serve the balance of the sentence.

IT IS FURTHER ORDERED that when you have been instructed as to the conditions of probation, you shall be released from custody if you are in custody, and if you are at liberty on bond, the sureties thereon shall stand discharged from liability. (This paragraph applies only if section 1 or section 2 is checked.)

IT IS FURTHER ORDERED that the clerk of this court file this order in the clerk's office and provide certified copies of same to the officer for use in compliance with the requirements of law.

DONE, ORDERED and FILED in Open Court on December 22, 2015
(NUNC PRO TUNC 12/18/2015)

Honorable Judge: _____

Mark S Blechman

Deputy Clerk in Attendance: Mario A., Maria F.
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

---

I acknowledge receipt of a copy of this order and that the conditions have been explained to me and I agree to abide by them.

_____

Defendant

Instructed by: _____

Supervising Officer

____ Defendant	____ ACS	__X__ State Atty	__X__ Defense Atty
_X2___ Dockets	____ C.F.S.C.	__X__ Probation	

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, Case No.: 1995-CF-006887-A-O

vs.

KENNETH PURDY,

Defendant.
_____/

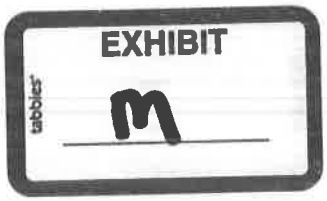
MOTION TO CORRECT ILLEGAL SENTENCE AND MOTION TO MODIFY SENTENCE

COMES NOW, the Defendant, Kenneth Purdy, by and through undersigned counsel, and herby submits this motion to correct illegal sentence and motion to modify sentence pursuant to rules 3.800(b)(1) and (c). In support, Mr. Purdy states:

1. On December 18, 2015, Mr. Purdy was resentenced because he was a juvenile at the time of the convicted crime. For count 1, the Court resentenced Mr. Purdy to 20 years 6 months and 13 days of incarceration. The Court ordered Mr. Purdy be granted credit for 20 years 6 months and 13 days. The Court did not touch the consecutive prison sentences for counts 2 and 3 of 9 years 4 months and 21 days. The counts for 2 and 3 each carried mandatory 3 year prison terms. The mandatory 3 year terms for counts 2 and 3 were stacked.

2. On December 21, 2015, staff at the Department of Corrections reviewed Mr. Purdy's sentence and determined Mr. Purdy was eligible for immediate release. Mr. Purdy was released the evening of December 21, 2015.

3. On December 22, 2015, the Court entered a modified sentence that stated no gain time was to be permitted for count 1.



4. The Department of Corrections determined on December 23, 2015 that it had miscalculated Mr. Purdy's release date. Mr. Purdy was rearrested. The Department of Corrections now has calculated Mr. Purdy's release date for June 30, 2022.

5. Mr. Purdy files this motion to assert that he has been illegally sentenced and that the Court should correct and modify his sentence.

(A) The modified sentence does not comply with the Court's oral pronouncement of sentence.

6. Where a conflict exists between the oral pronouncement of sentence and written sentencing documents, the oral pronouncement controls. *Williams v. State*, 957 So.2d 600, 603 (Fla.2007); *Ashley v. State*, 850 So.2d 1265, 1268 (Fla.2003).

7. At the judicial review hearing, the Court never orally pronounced Mr. Purdy would be precluded from gain time on count 1. Because the modified sentence states no gain time is to be permitted and the oral pronouncement did not, the language contained in the modified sentence must be stricken.

(B) The modified sentence increases Mr. Purdy's sentence in violation of double jeopardy.

8. "Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not be increased without running afoul of double jeopardy principles." *Ashley v. State*, 850 So.2d 1265, 1267 (Fla.2003).

9. At the judicial review hearing, the Court never orally pronounced Mr. Purdy would be precluded from gain time on count 1. The modified sentence increases Mr. Purdy's sentence because it states no gain time is permitted for the over 2 decades Mr. Purdy has been incarcerated.

The language stating that Mr. Purdy is not permitted gain time must be stricken as violating double jeopardy.

(C) The Court lacked jurisdiction to comment on Mr. Purdy's gain time eligibility.

10. *Miller v. State*, 882 So. 2d 480 (Fla. 5th DCA 2006) provides that only the Department of Corrections has the authority to regulate gain time and any comment by a court must be treated as surplusage and stricken. *Miller* also states that even a defendant sentenced to time served is entitled to gain time.

11. *Melvin v. State*, 1D14-0387 (Fla. 1st DCA 2015), states that a defendant is entitled to gain time unless the statute sentenced under specifically precludes it.

12. Undersigned has found two cases involving gain time and juvenile resentencing, *Sullivan v. Jones*, 165 So. 3d 26 (Fla. 1st DCA 2015) and Frederick Bradley (Orange County Case Number 1998-CF-01022)[1]. In each case, the defendant was awarded gain time for the time already served.

13. The language stating that Mr. Purdy is not permitted gain time must be stricken because the Court lacked authority to comment on gain time and no statute pertaining to Mr. Purdy's sentence, sections 775.082, 921.1401, and 921.1402, Florida Statutes, precludes Mr. Purdy from receiving gain time.

(D) The Court was required to immediately release Mr. Purdy from prison after finding him rehabilitated and reasonably believed fit to reenter society.

14. Section 921.1402, Florida Statutes, provides "If the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least

[1] Mr. Bradley was resentenced as a juvenile offender by the judge presiding over this case.

5 years. If the court determines that the juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified." (Emphasis added).

15. At the judicial review hearing, the Court found Mr. Purdy rehabilitated and reasonably believed to be fit to reenter society. Despite these findings, the Court did not modify Mr. Purdy's sentence to allow for him to be immediately released from prison on at least 5 years of probation.

16. The Court must correct Mr. Purdy's sentence to reflect his eligibility for immediate release from prison on the ordered 10 years of probation.

(E) The Court illegally stacked the 3 year mandatory prison sentences for counts 2 and 3.

17. A court is not permitted to stack mandatory prison sentences where the offenses occurred during the same criminal episode and the firearm is only discharged once. *Cook v. State,* 775 So. 2d 425 (Fla. 5th DCA 2001).

18. The Court stacked Mr. Purdy's 3 year mandatory prison sentences for counts 2 and 3. This is illegal because the offenses associated with counts 2 and 3 occurred during the same criminal episode and the firearm was only discharged once. The Court must correct the 3 year mandatory prison sentences for counts 2 and 3 so that they are run concurrent. The current consecutive nature of the sentences for counts 2 and 3 adversely affects Mr. Purdy's accrual of gain time.

(F) The Court should modify Mr. Purdy's sentence to allow for his release on the ordered 10 years of probation.

19. For the reasons explained at resentencing and the judicial review hearing and in light of the statutory intent of section 921.1402, Florida Statutes, Mr. Purdy requests the Court, pursuant to Florida Rule of Criminal Procedure 3.800, to modify his sentence in a manner to allow for his immediate release from prison on the ordered 10 years of probation. As found by the Court previously, Mr. Purdy is rehabilitated and reasonably believed to be fit to reenter society. Any further incarceration is unnecessary.

WHEREFORE, Mr. Purdy respectfully requests the Court to enter an order:

1. Striking the language in the modified sentence that prohibits Mr. Purdy from receiving gain time on count 1;

2. Correcting Mr. Purdy's sentence to reflect his eligibility for immediate release from prison on the ordered 10 years of probation;

3. Correcting Mr. Purdy's sentence to run the 3 year mandatory sentences for counts 2 and 3 concurrently;

4. Modifying Mr. Purdy's sentence in a manner to allow for his immediate release from prison on the ordered 10 years of probation; and

5. Affording any other relief deemed just and proper.

DATED this 30th day of December, 2015.

Respectfully submitted,

/s/ Matthew R. McLain
Matthew R. McLain, Esquire
Florida Bar No. 98018
BROWNSTONE, P.A.
201 North New York Ave., Suite 200
Winter Park, Florida 32789
Telephone: (407) 388-1900
Facsimile: (407) 622-1511
matthew@brownstonelaw.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to opposing counsel this 30th day of December, 2015.

/s/ Matthew R. McLain
Matthew R. McLain, Esquire

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. 1995-CF-6887
DIVISION 12

STATE OF FLORIDA,
Plaintiff,

vs.

KENNETH PURDY,
Defendant.
_____/

ORDER DENYING MOTION TO CORRECT ILLEGAL SENTENCE AND MOTION TO MODIFY SENTENCE

This matter came before the Court for consideration of Defendant Kenneth Purdy's Motion to Correct Illegal Sentence and Motion to Modify Sentence, filed December 30, 2015, pursuant to Florida Rule of Criminal Procedure 3.800(b)(1) and (c).

Procedural History

On September 26, 1997, Defendant was convicted of first-degree felony murder, armed robbery, and armed carjacking. On November 6, 1997, he was sentenced to the following terms in the Department of Corrections: life for the murder and 112.7 months for the robbery and carjacking. The 112.7-month terms were ordered to run concurrent with each other but consecutive to the life sentence. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 725 So. 2d 1137 (table) (Fla. 5th DCA 1998).

On July 20, 1999, he filed a Motion for Postconviction Relief alleging nine claims of ineffective assistance of counsel and one claim of trial court error. This Motion was denied on May 24, 2000. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 773 So. 2d 560 (table) (Fla. 5th DCA 2000).

On April 14, 2004, he filed a second Motion for Postconviction Relief alleging newly discovered evidence in the form of a confession which his co-defendant, Christopher Phillips, gave to a fellow inmate. This Motion was denied on March 31, 2005. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 907 So. 2d 545 (table) (Fla. 5th DCA 2005).

On July 24, 2006, he filed a "Motion to Vacate, Set Aside, or Correct Sentence Based on Newly Discovered Evidence," and on October 21, 2008, a Supplement to Motion for Postconviction Relief with Incorporated Memorandum of Law, alleging newly discovered evidence in the form of the sworn affidavit of Jimel Johnson, which purportedly indicated that the gunshot would that killed the victim was received after the commission of the armed robbery and carjacking and was not a result of the underlying felonies. The Court conducted an evidentiary hearing on October 21, 2008, and denied this Motion on November 20, 2008. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 43 So. 3d 708 (table) (Fla. 5th DCA 2010).

On March 29, 2011, he filed a Motion for Postconviction Relief Based on Newly Discovered Evidence, i.e., an investigator's discovery of the gun that Mr. Johnson said was buried by co-defendant Ronnell Mitchell, followed by an Amended Motion on September 23, 2011, which was denied on July 31, 2014. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 158 So. 3d 605 (table) (Fla. 5th DCA 2015).

On October 9, 2012, he filed a Motion to Correct Illegal Sentence, challenging his life sentence pursuant to *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which was denied on April 3, 2014, based on a finding that *Miller* did not apply retroactively. The Fifth District Court of Appeal per curiam affirmed; *Purdy v. State*, 150 So. 3d 1174 (table) (Fla. 5th DCA 2014).

On May 21, 2015, through counsel, he filed a Successive Verified Motion for Postconviction Relief citing the Florida Supreme Court's opinion in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), which held that *Miller v. Alabama* does apply retroactively. The Court granted relief on June 15, 2015, and set the matter for resentencing.

On November 18, 2015, the Court resentenced Defendant to 40 years in the Department of Corrections for Count 1, with credit for 2 years, 310 days, and all DOC time served, but ordered that he receive "no gain time." There was no change to the sentences for Counts 2 and 3.

On December 18, 2015, the Court conducted a judicial review hearing and modified the sentence for Count 1 to 20 years, 6 months, and 13 days in the Department of Corrections with credit for 20 years, 6 months, and 13 days time served, and again ordered that "no gain time is permitted," followed by 10 years of probation. There was no change to the sentences for Counts 2 and 3.

On December 21, 2015, Defendant was released from the Department of Corrections. He was booked into the Orange County Jail on December 23, 2015, after the State Attorney's Office contacted the Department of Corrections to advise that Defendant had not fully served his sentence in the above-styled case.

Claim (A): The modified sentence does not comply with the Court's oral pronouncement. He argues that at the judicial review hearing, the Court never orally pronounced that he would be precluded from gain time on Count 1.

This claim lacks merit. At the November 18, 2015, hearing, the Court specifically ordered that Defendant would receive no gain time for Count 1 because it was a capital offense. *See* resentencing transcript, pages 32-33. At the December 18, 2015, hearing, the Court imposed a time-served sentence for Count 1, modifying the sentence to "20 years, 6 months, and 13 days, and specifically give you credit for 20 years, 6 months, and 13 days." *See* review hearing transcript, pages 25-26. Furthermore, the Court clarified that it was not willing to modify the sentence in a manner that would allow Defendant would be released that day. *See* review hearing transcript, pages 27-28.

Claim (B): The modified sentence increases his sentence in violation of double jeopardy. He restates the argument in (a) and argues it increases his sentences because it provides that "no gain time is permitted for the over 2 decades" he has been incarcerated.

This claim lacks merit for the reasons set forth in the ruling on Claim (A). Defendant's sentence was not increased. It was reduced from life to 40 years to "time served of 20 years, 6 months, and 13 days." He would not have been entitled to gain time on the original sentence of life, and the December 18, 2015, modification was intended to be a "time served" sentence, for which gain time would not have been applicable.

Claim (C): The Court lacked jurisdiction to comment on his gain time eligibility. He argues this language must be stricken because only the Department of Corrections has the authority to regulate gain time. In support, he cites *Miller v. State*, 882 So. 2d 480

(Fla. 5th DCA 2006), and *Melvin v. State*, 1D14-0387 (Fla. 1st DCA 2015). He also cites two cases involving gain time and juvenile resentencing, and in both, the defendant was awarded gain time for time already served.

This claim lacks merit for the reasons set forth in the ruling on Claims A and B. Even if the reference to gain time constitutes surplusage, the significant factor is that the sentence imposed on December 18, 2015, was intended to be a "time served" sentence, for which gain time would not have been applicable.

Claim (D): The Court was required to immediately release him from prison after finding him rehabilitated and fit to reenter society.

This claim lacks merit. Defendant was resentenced on Count 1 only. This did not affect his 9-year sentences for Counts 2 and 3, which had been ordered to run consecutive to the life sentence.

Claim E: The Court illegally stacked the 3-year mandatory prison sentences for Counts 2 and 3. He argues the offenses occurred during the same criminal episode and the firearm was discharged only once.

This claim lacks merit. At the original sentencing hearing on November 6, 1997, counsel made this objection but the Court noted that there were two victims. *See* original sentencing transcript, pages 8-9.

Claim F: The Court should modify Defendant's sentence to allow for his release on the ordered 10 years of probation.

This claim lacks merit. The Court has consistently declined to do so and finds no reason to modify the sentence at this time,

Based on the foregoing, it is ORDERED AND ADJUDGED:

1. The Motion to Correct Illegal Sentence and Motion to Modify Sentence is DENIED.

2. Copies of the following portions of the record are attached to this Order and incorporated by reference: resentencing transcript, pages 32-33; review hearing transcript, pages 25-28.

3. Defendant may file a notice of appeal in writing within 30 days of the date of rendition of this Order.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this _____ day of January 2016.

Original signed by:
MARK S. BLECHMAN
Circuit Judge, this
JAN 15 2016
and conformed copies
were furnished by
Judicial Assistant

MARK S. BLECHMAN
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Order has been provided this _____ day of January 2016 via U.S. Mail / hand delivery to Matthew R. McLain, Esquire, Brownstone, P.A., 400 North New York Avenue, Suite 200, Winter Park, Florida 32789; Roberta Alfonso, Assistant County Attorney, Post Office Box 1393, Orlando, Florida 32802-1393; and Kelly B. Hicks, Assistant State Attorney, 415 North Orange Avenue, Orlando, Florida 32801.

Judicial Assistant

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT
CRIMINAL JUSTICE DIVISION,
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

PLAINTIFF,

VS. CASE NO: CR95-6687

KENNETH M. PURDY,

DEFENDANT.

SENTENCING PROCEEDINGS

BEFORE THE HONORABLE

A. THOMAS MIHOK

NOVEMBER 6, 1997
REPORTER: SUZANNE HUTSON, RPR
ORANGE COUNTY COURTHOUSE
ORLANDO, FLORIDA 32801

APPEARANCES:

THERESA MILLS, ATTORNEY AT LAW
ASSISTANT STATE ATTORNEY
415 NORTH ORANGE AVENUE
ORLANDO, FLORIDA 32801
APPEARING ON BEHALF OF THE PLAINTIFF

ANDREA BLACK, ATTORNEY AT LAW
609 EAST PINE STREET
ORLANDO, FLORIDA 32801
APPEARING ON BEHALF OF THE DEFENDANT

OFFENSES I DON'T THINK PERMIT SENTENCING, OR AT LEAST THE COURT DOESN'T CONSIDER THAT YOUTHFUL OFFENDER SENTENCING IS APPROPRIATE HERE.

WITH REGARD TO THE CHARGE OF MURDER IN THE FIRST DEGREE, FELONY MURDER, PURSUANT TO STATUTE, THE COURT IS GOING TO IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT ELIGIBILITY FOR PAROLE. AND I'M REQUIRED TO IMPOSE THE THREE YEAR MINIMUM MANDATORY SENTENCE BECAUSE OF THE SPECIAL FINDING OF THE JURY THAT MR. PURDY CARRIED A FIREARM.

WITH REGARD TO ARMED ROBBERY, COUNT TWO, AND CAR JACKING, COUNT THREE, AS TO EACH OF THOSE TWO OFFENSES, THE COURT WILL SENTENCE MR. PURDY TO 112.7 MONTHS IN THE DEPARTMENT OF CORRECTIONS. SENTENCES ON COUNTS TWO AND THREE TO RUN CONCURRENT BUT CONSECUTIVE TO THE LIFE SENTENCE IMPOSED ON COUNT ONE.

AS TO EACH OF COUNTS TWO AND THREE, I'LL IMPOSE THE MINIMUM MANDATORY THREE YEAR SENTENCE. AND THE MINIMUM MANDATORY SENTENCE ON COUNTS TWO AND THREE ARE TO RUN CONSECUTIVE TO EACH OTHER.

MS. BLACK: YOUR HONOR, THIS IS ONE CRIMINAL EPISODE WITH A MINIMUM MANDATORY.

THE COURT: YOU HAVE TWO SEPARATE VICTIMS, THOUGH.

MS. BLACK: TRUE.

THE COURT: SO I THINK THE CONSECUTIVE MINIMUM MANDATORIES ARE APPROPRIATE HERE WITH REGARD TO COUNTS TWO AND THREE. AND AGAIN, MR. PURDY WILL BE ADJUDICATED GUILTY WITH REGARD TO THOSE CHARGES. CREDIT FOR TIME SERVED WITH REGARD TO EACH OF THE SENTENCES IMPOSED WILL BE TWO YEARS PLUS 310 DAYS. AND I'LL APPLY THAT TO EACH OF THE SENTENCES, IMPOSE COURT COSTS OF $255. I'LL IMPOSE RESTITUTION, RESERVE AS TO THE AMOUNT. ANYTHING FURTHER FROM THE STATE?

MS. MILLS: NO, YOUR HONOR.

THE COURT: FROM THE DEFENSE?

MS. BLACK: YES, YOUR HONOR. WOULD YOU FIND MY CLIENT INDIGENT FOR PURPOSES OF APPEAL AND HAVE HIM EXECUTE AN AFFIDAVIT OF INSOLVENCY?

THE COURT: YES. LET ME EXPLAIN MR. PURDY'S RIGHT TO APPEAL WHICH HE INDICATES HE DID WANT TO EXERCISE.

THE DEFENDANT: YES, SIR.

THE COURT: YOU HAVE THE RIGHT TO APPEAL THE JUDGMENT AND SENTENCE OF THE COURT. ANY APPEAL HAS TO BE FILED IN WRITING WITHIN 30 DAYS. IF YOU WANT TO APPEAL AND COULD NOT AFFORD A LAWYER, I WILL APPOINT ONE FOR YOU.

ORIGINAL

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NUMBER: 1995-CF-6887-A-O

DIVISION NUMBER: 12-1

KENNETH PURDY,

Defendant./

SENTENCING HEARING

BEFORE

THE HONORABLE MARK BLECHMAN

In the Orange County Courthouse
Courtroom 12D
Orlando, Florida 32801
November 18, 2015
Shelly Coffey, RPR

APPEARANCES:

THERESA MILLS-UVALLE
KELLY HICKS
Assistant State Attorney
415 North Orange Avenue
Orlando, Florida 32801
On behalf of the State

BROWNSTONE LAW
MATTHEW McLAIN
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
On behalf of the Defendant

hearing, and I intend to not consider the testimony you presented as if we already had that hearing, because I want to give the State an opportunity to appeal my decision in this case.

However, when we had that hearing -- because I believe I'm correct in my interpretation of the law, when we had that hearing, under the factors of 921.1402(2)(c), I believe that you will have served sufficient time based upon those factors for this offense.

Do you understand what I said?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I will sentence you to 40 years in the Department of Corrections. You will receive no gain time since this was a capital offense. You will receive credit for all the time that you served up to this date on Count 1.

Anything else, State?

MS. HICKS: I don't believe so, Judge. No, I don't think so.

THE COURT: Anything else, Mr. McLain, sir?

MR. McLAIN: Yes, Your Honor.

Just for the record, we would be objecting to this Court's determination of gain time. There's nothing in the statute, of the 2014 statute, that

precludes him being awarded gain time, and also it's a separation-of-powers argument, as well, between the judicial and the executive branch.

THE COURT: Isn't it really a moot point since he's entitled to the hearing technically immediately as long as he — I think he's got to petition for it or request it under the rules, under the statute.

MR. McLAIN: I guess the problem then becomes, you know, if there's an appeal taken by the State, you know, does that disentitle him to a review right away or does he have to wait until this appeal is finalized? Because that could be — if they take it all the way to the Florida Supreme Court, which this is an issue of first impression, it's very possible it's two or three years down the road. So, you know, that's one of the concerns. And we want to make sure that he is getting gain time, 65 per percent. That's quite a bit chunk of time out of 40 years.

THE COURT: Okay.

MR. McLAIN: And we'd also like the Court to go ahead and make a ruling on the applicability of the 1994 guidelines to this offense, as well, which we believe, you know, should be applied, as well, and restrict the Court to a sentence between 94 months and I think it was 157 months.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA CRIMINAL JUSTICE DIVISION

ORIGINAL

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 1995-CF-006867-A-O

DIVISION 12

KENNETH PURDY,

Defendant./

RESENTENCING PROCEEDINGS

BEFORE

THE HONORABLE MARK S. BLECHMAN

In the Orange County Courthouse
Courtroom 12-D
Orlando, Florida 32801
Friday, December 18, 2015
Heather Jewett, RPR, FPR

A P P E A R A N C E S:

THERESA J. MILLS-UVALLE, ESQUIRE
KELLY B. HICKS, ESQUIRE
Office of the State Attorney
415 North Orange Avenue
Building B
Orlando, Florida 32801
On behalf of the State

MATTHEW R. McLAIN, ESQUIRE
Brownstone Law
201 North New York Avenue
Suite 200
Winter Park, Florida 32789
On behalf of the Defendant

- - -

I N D E X

THE COURT: So you have that burden, which I believe you deserve, based upon your actions, for the rest of your life, not just the 10 years of probation I intend to sentence you to.

Having made those statements, having made those findings, after hearing the testimony from August 14, 2015, I am going to modify your sentence to that on Count 1 time served, which I calculate as 20 years, 6 months, and 13 days.

Is that your calculation, defense?

MR. McLAIN: Your Honor, I calculated it by day; so I don't know the exact translation. But I would trust that that's correct.

THE COURT: I show that he was arrested on June 6th of 1995 -- actually, arrested June 5, 1995.

Does that sound right?

THE DEFENDANT: Yes, sir.

THE COURT: And so by my simple calculations -- and I only went to a public school; so my math is dependent upon that -- I came up with that. If I'm wrong in any way, I will modify that.

State, any objection to the 20 years' calculation, 6 months, and 13 days?

MS. HICKS: I do not do math, Judge. We'll rely on Your Honor.

THE COURT: Mario, the clerk?

Okay. No comments on that; so we're going to go with that.

So we're going to modify your sentence, based upon my findings on Count 1, to 20 years, 6 months, and 13 days, and specifically give you credit for 20 years, 6 months, and 13 days in Count 1.

I must sentence you to a period of probation following that. It says a minimum of 5 years. I'm going to sentence you to 10 years of probation.

Conditions of probation are that you report within 48 hours of your release from all incarceration, that you may be supervised. In any county you choose to reside in, you must first report here in Orange County because this is the sentencing county. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That you'll pay all monetary obligations previously ordered by Judge . . .

MS. HICKS: Mihok.

THE COURT: Mihok in this case at a minimum of $30 per month, and I'll give you 120 days before that first payment is due to give you a chance to obtain employment to make that, what I consider the minimist payment.

I'm going to order that you not possess any weapons while you're on probation, specifically firearms, but any weapons whatsoever.

State, are there any other conditions that you believe to be appropriate?

MS. HICKS: Not with respect to the probation, Your Honor.

THE COURT: Okay. Anything else, defense, that you believe would be appropriate?

MR. McLAIN: For probation, no, Your Honor.

THE COURT: Okay. Then at this point do you have any questions about the sentence I imposed on Count 1 is now modified?

THE DEFENDANT: No, sir. I have no questions.

THE COURT: You do have 30 days to appeal. If you wish to appeal, it must be in writing. If you cannot afford an attorney, I will appoint one for you.

Good luck to you, Mr. Purdy.

MR. McLAIN: And, Your Honor, before we recess, I'd ask if it's the Court's intent for the 9 years to run consecutive for him to finish out or if it's the Court's intent to --

COURT DEPUTY: Outside, please.

MR. McLAIN: -- intent to allow his release today on probation.

THE COURT: Okay. Give me one second so the deputies can maintain order.

It is my opinion that I don't have jurisdiction on Counts 2 and 3; so the order entered by Judge Mihok I don't believe I have jurisdiction over. So that's my ruling. And -- and if I'm wrong, I'm let the Fifth tell me that, and I'll take different action.

MR. McLAIN: Okay. And one final question, Your Honor. In ruling that the 20 years and credit for time served, does that mean the Court is unwilling to modify it to the 10 years to allow his release today?

THE COURT: Yes.

MR. McLAIN: Okay.

THE COURT: Okay?

MR. McLAIN: Thank you.

THE COURT: Thank you.

(Court was adjourned at 11:05 a.m.)

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **Case No.: 1995-CF-006887-A-O**

vs.

KENNETH PURDY,

Defendant.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that Defendant Kenneth Purdy, through undersigned counsel, appeals to the Fifth District Court of Appeal in Daytona Beach, Florida, from the court's order denying motion to correct illegal sentence on filed on January 15, 2016.

DATED this 28th day of January, 2016.

Respectfully submitted,

/s/ Matthew R. McLain
Matthew R. McLain, Esquire
Florida Bar No. 98018
BROWNSTONE, P.A.
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matthew@brownstonelaw.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to opposing counsel this 28th day of January, 2016.

/s/ Matthew R. McLain
Matthew R. McLain, Esquire

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, **Case No.: 1995-CF-006887-A-O**

vs.

KENNETH PURDY,

Defendant.
_____/

AMENDED NOTICE OF APPEAL[1]

NOTICE IS GIVEN that Defendant Kenneth Purdy, through undersigned counsel, appeals to the Fifth District Court of Appeal in Daytona Beach, Florida, the judicial sentence review proceeding held on December 18, 2015, the new sentence imposed on December 18, 2015, and the court's order denying motion to correct illegal sentence on filed on January 15, 2016.

DATED this 11th day of February, 2016.

Respectfully submitted,

/s/ Matthew R. McLain
Matthew R. McLain, Esquire
Florida Bar No. 98018
BROWNSTONE, P.A.
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Attorney for Defendant

[1] Mr. Purdy's filing of a motion to correct illegal sentence tolled the time to file a notice of appeal. In light of the Fifth District Court of Appeal treating his appeal as a Florida Rule of Criminal Procedure 3.800 summary denial and out of an abundance of caution, Mr. Purdy files this Amended Notice of Appeal to clarify his intent to appeal the judicial sentence review proceeding, the new sentence imposed, and the order denying motion to correct illegal sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts eFiling Portal to the State Attorney's Office and via email to crimappDAB@myfloridalegal.com to the Attorney General's Office this 11th day of February, 2016.

/s/ Matthew R. McLain
Matthew R. McLain, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 11th day of February, 2016 to the Attorney General's Office in the State of Florida.

/s/ *Matthew R. McLain*
Matthew R. McLain, Esquire