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IN THE SUPREME COURT OF FLORIDA

MARLON FARON KELLY,

Petitioner,

v. **CASE NO. SC14-916**

STATE OF FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

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MARLON FARON KELLY,

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v. CASE NO. SC14-916

STATE OF FLORIDA,

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_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Marlon F. Kelly was the defendant in the circuit court, the appellant in the District Court of Appeal, and is the Petitioner as to the instant case. He will be referred to in this brief as "Petitioner," "defendant," or by his proper name. Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parentheses. Reference to the supplemental record is SR.

II. STATEMENT OF THE CASE AND THE FACTS

Marlon F. Kelly was charged with two counts of aggravated battery and one count of aggravated assault, as well as one count of possession of a firearm by a convicted felon.(I-1) The battery and assault counts each alleged a different victim and each count also charged the use of a firearm. All charges were based on a single incident on October 10, 2011. The parties stipulated during trial that the defendant was a convicted felon. (I-25)

Following a jury trial, the defendant was found guilty as charged, and the jury specifically found that he discharged a firearm causing great bodily harm to the victims of the aggravated batteries, and discharged a firearm in the course of the aggravated assault and the possession of a firearm by a convicted felon. (I-47-8) The court sentenced the defendant to 40 years concurrent on the aggravated batteries, with a 25 year minimum mandatory based on 10-20-life, and 20 years concurrent on each of the other charges, also based on 10-20-life. (I-50-62)

Kelly filed a Florida Rule of Criminal Procedure 3.800(b)(2) motion alleging that his sentence was illegal for two reasons: (1) because the offenses had been illegally reclassified to first degree felonies due to the use of a firearm, when the use of a firearm was made an element of the offense due to the phrasing of special jury findings, see, e.g., Metz v. State, 15 So. 3d 32 (Fla. 2d DCA 2009)(because jury was not provided with option of finding

defendant guilty of aggravated battery based solely on great bodily injury, offense could not be enhanced for use of deadly weapon);[1] and (2) because the court expressly pronounced at the sentencing hearing that the mandatory minimum would be 25 years, it could not exceed that 25 year sentence when imposing the mandatory minimum for a second degree felony. See, e.g., Brown v. State, 983 So. 2d 706 (Fla. 5th DCA 2008)("[o]nce the trial court imposed a mandatory minimum term of 25 years, it could not exceed the 30-year maximum penalty for a first-degree felony").

The trial court agreed that the degree of offense could not be enhanced for the use of a firearm under these circumstances, and ordered a resentencing hearing. The trial court did not agree that it was limited to a 25 year mandatory minimum sentence, however, and stated it was restructuring the mandatory minimum sentence to 37.75 years in order to effectuate its original intent in sentencing the defendant. At that hearing, the defense argued that

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[1] See also Webb v. State, 997 So. 2d 469 (Fla. 2d DCA 2008)(jury verdict form unclear as to which form of aggravated battery they found defendant committed; jury not given option of choosing bodily injury type of aggravated battery without use of firearm, therefor could not enhance degree of offense based on use of firearm). See also Phillips v. State, 99 So. 2d 615 (Fla. 1st DCA 2012), and Cabral v. State, 944 SO. 2d 1026 (Fla. 1st DCA 2006)("the verdict returned by the jury included findings that appellant knowingly and intentionally caused great bodily harm, permanent disability and permanent disfigurement; that appellant used a weapon; and that appellant used a deadly weapon. In addition, the judgment of conviction describes the offense as 'aggravated battery with great bodily harm and with a deadly weapon.' Thus, it cannot be said that appellant's conviction for aggravated battery was not based on the use of a deadly weapon.

the court could not resentence the defendant to a mandatory minimum term greater than the 25 years originally imposed, and to do so violated double jeopardy.

The First DCA ruled in its written opinion, issued on March 14, 2014, that the trial court had erred: the "new sentence increasing the mandatory minimum portion of Appellant's sentence from 25 years to 37.55 years was legally impermissible."

However, the First DCA also certified conflict "with the Fourth District's opinion in Wiley [v. State, 125 So. 3d 235 (Fla. 4th DCA 2013)] to the extent that case holds that, under section 775.087(2)(b), Florida Statutes, a trial court may impose a sentence **in addition to its selected mandatory minimum** sentence imposed under the 10-20-Life statute only if otherwise authorized by another statute. The First DCA announced in the opinion that: "With the rendering of the instant decision, . . ., circuit courts in the First District may, **pursuant to section 775.087(2)(b)**, Florida Statutes, impose a sentence in addition to its selected mandatory minimum sentence without regard to whether additional statutory authority for such an additional sentence exists."[2] (E.s.)

This issue was not argued by any party below, nor was this

[2]The trial court did in fact impose a sentence greater than the 25 year mandatory minimum on remand in this case, and that appeal is currently pending before the First DCA. Case No. 1D14-3033. A stay of the new appeal proceedings has been issued in the First DCA as of this date.

interpretation of the statute in any way suggested as an appropriate remedy in this case. This is the question presented at this stage of the appeal.

III. SUMMARY OF THE ARGUMENT

The sole purposes of Section 775.087 are to provide for reclassification of certain offenses (not pertinent here) and mandatory minimum sentences, based on the use of weapons or firearms in certain offenses. This section does not authorize changes to the general sentencing provisions of Chapter 775 except as specifically outlined in Section 775.087(2)(c). In issuing its pronouncement with regard to the permissible scope of sentencing under Section 775.087(2)(b), the First DCA in effect issued an advisory opinion, as no party argued the point or suggested it as an appropriate remedy. In addition, the District Court's reading of the statute is patently incorrect as a matter of law.

Not only did the First DCA certify conflict with Wiley v. State, but the Fourth DCA has now also certified conflict with the First DCA in Kelly, see Levine v. State, 2014 WL 5149098 (Fla. 4th DCA, October 15, 2014).

IV. ARGUMENT

ISSUE:
THE FIRST DCA ERRED AS A MATTER OF LAW IN RULING THAT SECTION 775.087(2)(b) PROVIDES AUTHORIZATION FOR A SENTENCING COURT TO IMPOSE ANY SENTENCE IT CHOOSES IN EXCESS OF THE STATUTORY MAXIMUM IN ADDITION TO THE MANDATORY MINIMUM SENTENCE IT HAS ALREADY SELECTED, ESSENTIALLY ABROGATING THE GENERAL PENALTIES PROVISION OF SECTION 775.

Statutory language at issue:

Section 775.087(2)(b):

> Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum mandatory sentence, or from imposing a sentence of death pursuant to other applicable law. Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not authorize a court to impose a lesser sentence than otherwise required by law.

Section 775.087(2)(c):

> If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

Standard of Review

A question of law must be reviewed de novo. See, e.g., Jackson v. State, 64 So.3d 90, 93 (Fla. 2011).

Argument

In essence, the First DCA has ruled that even after

determining the mandatory minimum sentence under Section 775.087(2), a trial court may, also on the authority of Section 775.087(2), impose any core or general sentence it chooses over and above the chosen mandatory minimum, and without reference to any other statutory authority. This is clearly an incorrect reading of the entire statutory sentencing framework of Section 775, Florida Statutes.

Conflicting cases

While the First DCA cited only Wiley v. State, as conflicting with its ruling as to the meaning and scope of authorization provided by Section 775.087(2)(b), in fact, there are numerous other cases that agree with Wiley and conflict with Kelly, which were brought to the DCA's attention in a rehearing motion. See, e.g., Wooden v. State, 42 So. 3d 837 (Fla. 5th DCA 2010), review denied 51 So. 3d 466 (Fla. 2010); McLeod v. State, 52 So. 3d 784 (Fla. 5th DCA 2010); Sheppard v. State, 113 So. 3d 148 (Fla. 2d DCA 2013); Martinez v. State, 114 So. 3d 1119 (Fla. 2d DCA 2013); Prater v. State, 113 So. 3d 147 (Fla. 2d DCA 2013); Roberts v. State, 39 FLW D10 (Fla. 5th DCA, Dec. 20, 2013); Antoine v. State, 138 So. 3d 1064 (Fla. 4th DCA 2014). And just recently, the Fourth DCA certified conflict with the First DCA's ruling in Kelly in Levine v. State, 2014 WL 5149098 (Fla. 4th DCA, October 15, 2014).

Statutory language not strictly construed and rule of lenity not given effect

The First DCA's ruling is wrong as a matter of law first because it is axiomatic that sentencing statutes must be strictly construed according to their letter. See, e.g., Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991); State v. Owens, 95 So. 3d 1018 (Fla. 5th DCA 2012); State v. Chubbuck, 83 So. 3d 918 (Fla. 4th DCA 2012). There is nothing in the language of Section 775.087(2)(b) to indicate that the mandatory minimum sentencing law is intended to replace the general sentencing law or be applied without regard to it. As this would be a major change in the law, the assumption is that the Legislature would have expressed its intent to do so in some specific fashion. On the contrary, general criminal penalties are addressed in Section 775.082, entitled "**Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.**" Mandatory minimum sentences do not serve as a replacement for general criminal penalties, except to the extent they may exceed the statutory maximum as acknowledged in Mendenhall v. State, 48 So. 3d 740 (Fla. 2010), and specifically outlined in Section 775.087(2)(c):

> If the minimum mandatory terms of imprisonment imposed pursuant to this section exceed the maximum sentences authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the mandatory minimum sentence must be imposed. If the mandatory minimum terms of imprisonment pursuant to this section

> are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, then the sentence imposed by the court must include the mandatory minimum term of imprisonment as required in this section.

If the First DCA's interpretation of the statute were correct, there would be no need for the language above that states that if the mandatory minimum is less than the sentence that could be imposed as authorized by 775.082 [the general sentencing law], that sentence must include the mandatory minimum. As it is, the First DCA's ruling fails to attribute any meaning to this language. A statute should not be interpreted to render its language mere surplusage. See Mendenhall.

Petitioner suggests that, far from any ambiguity, there is no plain reading of the statutory language involved that would yield the interpretation the First DCA has rendered in this case, basically ignoring the general sentencing portion of Section 775, and infusing the mandatory minimum law with a brand new significance as a general sentencing statute. But should this Court determine that there is some kind of ambiguity in the language at issue, then secondly, the First DCA's ruling is wrong as a matter of law because it overlooks the rule of lenity, which applies to the reading of sentencing laws. See Clines v. State, 912 So. 2d 550 (Fla. 2005):

> Based on the above analysis, we conclude that section 775.084 is ambiguous about whether multiple recidivist categories may be applied to a single criminal sentence. Although the Legislature certainly intended for

> recidivists to be sentenced "for extended terms," § 775.0841, Fla. Stat. (2002), there is no clear evidence that the Legislature intended for sentences to be extended under multiple recidivist categories, only one of which ultimately matters. . . .
>
> We therefore apply the rule of lenity. Florida has codified the rule as follows: "The provisions of this [criminal] code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (2002). We have explained that the rule "is applicable to sentencing provisions" if they "create ambiguity or generate differing reasonable constructions." Nettles v. State, 850 So.2d 487, 494 (Fla. 2003).

The crux of the First DCA's ruling

In reaching its ultimate ruling on the authority provided by Section 775.087, the First DCA reasoned as follows in disagreeing with the Wiley case, and of necessity, with the list of cases above from other district courts of appeal:

> to the extent Wiley stands for the proposition that, under section 775.087(2)(b), a trial court may impose a sentence in addition to its selected mandatory minimum, only if there is separate statutory authority to do so, we respectfully disagree with that decision, and we decline to follow it.
>
> . . .
>
> Thus, in Wiley, the Fourth District interpreted section 775.087(2)(b) as providing that, once a trial court imposes a mandatory minimum sentence, it can impose a sentence above that minimum only if otherwise authorized by law—that is, by an authorized sentence enhancer such as the habitual felony offender provision applicable in that case. We disagree.
>
> First, if, pursuant to Mendenhall [v. State, 48 So. 3d 740 (Fla. 2010)], a trial court may impose a mandatory minimum that exceeds the maximum sentence that would

> otherwise apply but for the 10-20-Life statute, it seems logical that the court could also impose a total sentence that exceeds that otherwise applicable maximum sentence. This interpretation is supported by the plain language of section 775.087(2)(b), Florida Statutes: "Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law in addition to the minimum mandatory sentence, or from imposing a sentence of death pursuant to other applicable law." FN1 (Emphasis added.)
>
> Unlike the court in Wiley, as we read the statute, the phrase "as authorized by law," as used in this provision does not refer to some external authorization for a sentence in excess of the trial court's selected mandatory minimum (such as the habitual offender statute in Wiley); rather, it refers to the maximum sentence authorized by law but for the 10-20-Life enhancement. In support of this interpretation, we point to the phrase "or from imposing a sentence of death pursuant to other applicable law." § 775.087(2)(b) (emphasis added). The emphasized language clearly refers to external authority for imposing the death sentence, in contrast to the "as authorized by law" language that appears earlier in the statute. Had the Legislature intended for this phrase to refer to a sentence-enhancing statute, we are of the opinion that it would instead read "as otherwise authorized by law."

It appears that the existence of another sentence enhancement, the Habitual Felony Offender provision, in Wiley confused the First DCA here with regard to the need for another source of authority for a sentence higher than the mandatory minimum. In certain cases referred to in Section 775.087, the general sentencing provision, 775.082, does permit a sentence in excess of the mandatory minimum. For example, for a first degree felony, even after a firearm mandatory minimum of 25 years has been selected, the court may still impose a 30 year sentence, because that is what the general

sentencing law allows for a first degree felony.

With all due respect, the conclusion reached by the panel in this case is neither logical nor legally correct. The panel has basically turned Section 775.087 from a special sentencing enhancement provision to a general sentencing provision, which it cannot do. To that extent, Petitioner contends that the answer does indeed lie in the Mendenhall opinion, which clearly lays out the difference between general or core sentencing provisions and special sentencing enhancements:

> Section 775.082(3)(b), **which is in the general sentencing statute**, provides the maximum sentence for a first-degree felony: "For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment." However, section 775.087(2)(a)(3) clearly states: "[T]he convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison." Section 775.087(2)© makes reference to section 775.082 and states that the mandatory minimum, when it exceeds the statutory maximum, must be imposed. (E.s.)

Meaning of "as authorized by law"

In its written opinion, the First DCA attributed significance to the use of the phrase "as authorized by law" rather than "as otherwise authorized by law." Petitioner would suggest that, while consistency of language is preferable, this is a distinction without any real difference in this case. To the extent the First DCA's logic rests on the language used to refer to death penalty cases, petitioner suggests such cases are by nature in a separate

category of cases. Petitioner contends that the primary reason for including "as authorized by law" language is to be clear that we are talking about laws generated by the state Legislature. See, e.g., Florida Carry, Inc. V. University of North Florida, 133 So. 3d 966 (Fla. 1st DCA 2013)("The phrase "by law" indicates that the regulation of the state right to keep and bear arms is assigned to the legislature and must be enacted by statute.")

Petitioner suggests that this language also simply means that subsections 775.087(2)(b) and 775.087(2)(c) must be read *in pari materia* to determine the appropriate sentence enhancement. In any event, the use of that language certainly does not indicate an intent to completely revise the general sentencing law in Section 775.082.

Legislative history

Nothing in the Staff Analysis of HB113/SB194, which resulted in Laws of Florida 99-12, the foundation for this section of the statute, suggests any intent to rewrite the general sentencing provisions of Section 775. Neither does it attribute any particular significance to the "as authorized by law" or "otherwise authorized by law" language. In fact, the analysis includes the following under "Effect of Proposed Changes":

> Express authoritative language is provided to judges to sentence an offender to a longer sentence of incarceration of death if it is otherwise provided by law. This authority is given in all instances where an offender is subject to a minimum mandatory ter of imprisonment to s. 775.087, F.S. Therefore, if because of

> another sentencing enhancement statute or because of the Criminal Punishment Code, an offender could be sentenced to an incarcerative period that is longer than the minimum mandatory sentence required under s. 775.087, F.S., the court can sentence the offender to the longer incarcerative period. An offender, however, will have to serve his or her minimum mandatory sentence as part of that longer sentence. Therefore, an offender will not be able to earn gain-time for the minimum mandatory portion of his or her sentence; thus, the offender serves day-for-day on the minimum mandatory portion of the sentence.

Section 775.087 authorizes reclassification of offenses (not pertinent here) and mandatory minimum sentencing, and nothing more. It does not purport to override general sentencing laws except as specified in 775.087(2)(c), as recognized in Mendenhall. It is "an enhancement statute applying to the punishment prescribed by statute for the underlying offense." See Jackson v. State, 659 So. 2d 1060 (Fla. 1995).

V. CONCLUSION

This court must quash the ruling of the First DCA with regard to the broad sentencing authority attributed by that court to Section 775.087(2)(b), and remand for further proceedings, in which no sentence greater than the 25 year mandatory minimum may now be imposed in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Heather Ross, Assistant Attorney General, Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Crimapptlh@myfloridalegal.com as agreed by the parties, and by U.S. mail to petitioner, Marlon Kelly, #125876, Santa Rosa Annex, 5850 E. Milton Rd., Milton, FL 32583, on this 3rd day of November, 2014.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO

PETITIONER'S INITIAL BRIEF ON THE MERITS

Kelly v. State, 39 Fla. Law Weekly D570 (March 14, 2014)
(Rehearing denied May 5, 2014)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MARLON FARON KELLY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-4795

Opinion filed March 14, 2014.

An appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

Nancy A. Daniels, Public Defender, M.J. Lord, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.

THOMAS, J.

Appellant raises two issues on appeal. He contends that the trial court committed reversible error during resentencing by imposing a mandatory minimum sentence that exceeded the court's original mandatory minimum sentence. Appellant also argues the trial court erred by admitting into evidence certain photographic evidence. We affirm this second issue without further comment. For

the reasons explained below, we reverse the trial court's sentence imposed on resentencing.

Factual Background

Appellant was convicted of two counts of aggravated battery, one count of aggravated assault (all charged as first-degree felonies), and one count of possession of a firearm by a convicted felon. The jury specifically found: Appellant discharged a firearm, causing great bodily harm to the victims of the aggravated batteries; Appellant discharged a firearm in the course of the aggravated assault; and possession of a firearm by a convicted felon. Appellant was sentenced to 40 years' imprisonment as to each of the aggravated battery charges, both to run concurrently. Pursuant to section 775.087(2)(a), Florida Statutes (the "10-20-Life statute"), the trial court imposed the 25-year minimum sentence provided by that law. The court also sentenced Appellant to 20 years' imprisonment on the aggravated assault conviction, to run concurrently with the other sentences, which was also a mandatory minimum based on 10-20-Life.

Appellant subsequently filed a Florida Rule of Criminal Procedure 3.800(b)(2) motion alleging that his sentence was illegal. Appellant argued that the phrasing used in the verdict form pertained to the special finding that a firearm was used in the commission of the crime; thus, the use of a firearm was made an element of the offense of aggravated battery, and therefore, the aggravated battery

charges were second-degree, not first-degree felonies, carrying a maximum 15-year sentence, rather than the 30-year maximum applicable to first-degree aggravated battery. Appellant also contended that, because the court expressly pronounced at the sentencing hearing that the mandatory minimum would be 25 years, it could not exceed that 25-year sentence when imposing the mandatory minimum for a second-degree felony. Appellant further argued that, pursuant to Mendenhall v. State, 48 So. 3d 740 (Fla. 2010), the maximum penalty the court could impose was 25 years, because the batteries were second-degree felonies, yet the court specifically imposed a 25-year mandatory minimum for use of the firearm.

The trial court issued a show cause order, to which the State responded by arguing the sentence was legal pursuant to section 775.087(2)(a)3., Florida Statutes, which provides that "regardless of whether the use of a weapon is an element of a felony," and during the course of committing a felony the defendant discharged a firearm resulting in death or great bodily harm, the convicted felon "shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison."

The trial court issued an order granting Appellant's motion with respect to the issue of reducing the felonies from first to second degree. Addressing

Appellant's claim that his 40-year sentence was illegal, and that any sentence above the 25-year mandatory minimum was also illegal, the trial court found:

> In Mendenhall v. State, 48 So. 3d 740 (Fla. 2010), the Florida Supreme Court held that under the '10-20-Life' statute, a defendant could be sentenced to a mandatory minimum sentence of 25 years to life irrespective of the statutory maximum for the offense. However, Mendenhall did not specifically authorize a sentence above the statutory maximum *beyond* the mandatory minimum sentence.

(Citation omitted; emphasis in original.) The trial court then cited the Fourth District's recent opinion in Wiley v. State, 125 So. 3d 235 (Fla. 4th DCA 2013), and found:

> because counts one and two should be second-degree felonies, a 40-year sentence is not authorized by law. Therefore, Defendant should be resentenced to a legal sentence that will effectuate the intent of the Court. See Bernal v. State, 76 So. 3d 1112 (Fla. 1st DCA 2011) (a Court may restructure a sentence on the counts challenged by a defendant as long as the overall term of the sentence is the same). The Court's original intent was for Defendant to serve the 25-year mandatory minimum sentence followed by 15 years in prison, during which he would be eligible for gain time awards. Pursuant to section 944.275, Florida Statutes, a defendant must serve at least 85% of his sentence regardless of the amount of gain time accrued. Accordingly, under the original 40-year sentence, if Defendant were to accrue the maximum gain time award available, he would have to serve 12.75 years after completing the 25-year mandatory minimum. Therefore, in order to impose a sentence clearly authorized by Mendenhall without increasing the overall term of incarceration, it appears that a mandatory minimum sentence of 37.75 years would be permissible at resentencing and would effectuate the Court's intent. However, both parties should be prepared to argue the permissible sentencing range at resentencing.

(Emphasis in original.)

After a resentencing hearing, the trial court imposed its new sentence comporting with the sentence discussed in this order, and this appeal followed.

Analysis

The trial court's new sentence involves two issues: First, whether it erred by imposing a greater mandatory minimum sentence than its previous sentence included; and second, whether it was incorrect in determining that it was not permitted to impose once again a 40-year overall sentence. Because both issues present questions of law, our review is *de novo*. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). We conclude that the trial court erred in both instances.

Increased Mandatory Minimum Sentence

"It is well established that once a defendant has begun serving a lawfully-imposed sentence, the defendant may not thereafter be resentenced for an increased term of incarceration." Rizzo v. State, 430 So. 2d 488 (Fla. 1st DCA 1983). This principle applies to any increase to a mandatory minimum aspect of a sentence. See Macias v. State, 572 So. 2d 22, 23 (Fla. 4th DCA 1990) (holding it was error to increase a mandatory minimum sentence once the court entered a written sentence which the appellant had begun serving).

Although the trial court here declared at the resentencing hearing that its intent at the time it imposed the original sentence was for Appellant to serve 40 years in prison, it is clear from the transcript of the original sentencing hearing,

and the written sentencing documents signed at that hearing, that the court's sentence was for 40 years' imprisonment, with a special provision that Appellant serve a mandatory minimum of 25 years.

If the court intended for Appellant to mandatorily serve the entirety of 40 years, it could have legally imposed such a sentence pursuant to section 775.087(2)(a)3, Florida Statutes, at the time of the original sentencing. That statute provides, in relevant part:

> Any person who is convicted of a felony . . . regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

In Mendenhall, our supreme court held that, regardless of what the maximum sentence may have been, but for this statute, a trial court has the discretion to impose a mandatory minimum in excess of 25 years. 48 So. 3d at 742. Here, the trial court did not do so in its original sentence; thus, its new sentence increasing the mandatory minimum portion of Appellant's sentence from 25 years to 37.55 years was legally impermissible.

Also, contrary to the trial court's finding, this new sentence was not, as in Bernal v. State, 76 So. 3d 1112 (Fla. 1st DCA 2011), a mere restructuring to comport with its intent while also ensuring that the overall length of Appellant's

sentence was not increased. Rather, the trial court upwardly modified Appellant's sentence by making the entire sentence a mandatory minimum, thus impermissibly increasing the previously-imposed mandatory minimum sentence.

It is clear from the trial court's order issued in advance of the resentencing hearing, and in our review of the transcript from that hearing, that the court relied on the Fourth District's Wiley opinion, which the trial court read as prohibiting a sentence in addition to a selected mandatory minimum sentence, if the resulting overall sentence exceeds the statutory maximum sentence for an offense absent the 10/20/Life requirement. Pursuant to Wiley, the trial court was of the opinion that it could not reimpose a sentence of 40 years with a 25-year minimum because such a sentence would exceed the 15-year maximum applicable to a second-degree aggravated battery felony. The court thus attempted to navigate the Mendenhall and Wiley decisions by imposing a mandatory minimum that did not exceed its original overall sentence of 40 years' imprisonment. As discussed below, however, to the extent Wiley stands for the proposition that, under section 775.087(2)(b), a trial court may impose a sentence in addition to its selected mandatory minimum, only if there is separate statutory authority to do so, we respectfully disagree with that decision, and we decline to follow it.

Permissible Sentencing Range

In Wiley, the appellant was convicted of second-degree murder and

sentenced to life in prison pursuant to the 10-20-Life statute. On appeal, the conviction was reduced to third-degree murder, and the case was remanded for resentencing. 125 So. 3d at 237. On remand, "[i]n conjunction with the determination that Wiley was a habitual felony offender, the trial judge, pursuant to the 10/20/Life statute, sentenced Wiley to life in prison with the requirement that he serve a mandatory minimum imprisonment of 25 years." Id.

On appeal of this sentence, Wiley argued that it was illegal because it was for life in prison "***plus*** a twenty five (25) year mandatory minimum sentence, pursuant to the 10/20/life statute." Id. at 240 (emphasis in original). Wiley argued that the "'10/20/life statute provides for a mandatory sentence of twenty five (25) years in prison up to life but ***not*** both.'" Id. (emphasis in original). The court rejected this argument, explaining that it "misconstrues the trial court's sentence imposition." Id.

The Wiley court explained that "the 10/20/Life statute . . . 'requires the imposition of a mandatory minimum sentence where a firearm is possessed or used during the commission of certain enumerated crimes, including murder.' *Mendenhall*, 48 So.3d at 746." Wiley, 125 So. 3d at 240-41. That mandatory minimum, the court noted, is 25 years. Id. at 241. The court then opined that, "while *Mendenhall* pertained to the trial court's discretion to set a mandatory minimum sentence, it did not address whether the trial court might impose a

sentence longer than the mandatory minimum and in excess of the statutory maximum sentence as provided in section 775.082." Id.

It was in this context that the Fourth District stated:

> In this regard, section 775.087(2)(b) provides that the mandatory minimum sentence in subsection (2)(a)3. does "not prevent a court from imposing a longer sentence of incarceration *as authorized by law* in addition to the minimum mandatory sentence." (Emphasis added). From a literal reading of the statute, it appears that while a trial judge may sentence a defendant pursuant to section (2)(a)3. to a mandatory minimum sentence between twenty-five years to life, the trial judge may give a sentence *over* the **mandatory minimum selected** only if "authorized by law."

Id. (italicized emphasis in original; bolded emphasis added).

The court continued: "Here, Wiley's conviction for third-degree murder was properly reclassified pursuant to the 10/20/Life statute as a first-degree felony, punishable by a maximum of 30 years in prison. However, the trial court also found Wiley to be a habitual felony offender, which, pursuant to section 775.084(4)(a) 1.," allowed a life sentence. Id. "Therefore, because Wiley was determined to be a habitual felony offender and the 10/20/Life reclassification applied, the life sentence was 'authorized by law.'" Id.

Thus, in Wiley, the Fourth District interpreted section 775.087(2)(b) as providing that, once a trial court imposes a mandatory minimum sentence, it can impose a sentence above that minimum only if otherwise authorized by law – that

is, by an authorized sentence enhancer such as the habitual felony offender provision applicable in that case. We disagree.

First, if, pursuant to Mendenhall, a trial court may impose a mandatory minimum that exceeds the maximum sentence that would otherwise apply but for the 10-20-Life statute, it seems logical that the court could also impose a total sentence that exceeds that otherwise applicable maximum sentence. This interpretation is supported by the plain language of section 775.087(2)(b), Florida Statutes: "Subparagraph (a)1., subparagraph (a)2., or subparagraph (a)3. does not prevent a court from imposing a longer sentence of incarceration as authorized by law *in addition to the minimum mandatory sentence*, or from imposing a sentence of death pursuant to other applicable law."[1] (Emphasis added.)

Unlike the court in Wiley, as we read the statute, the phrase "as authorized by law," as used in this provision does not refer to some external authorization for a sentence in excess of the trial court's selected mandatory minimum (such as the habitual offender statute in Wiley); rather, it refers to the maximum sentence authorized by law but for the 10-20-Life enhancement. In support of this interpretation, we point to the phrase "or from imposing a sentence of death

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[1] See also § 775.087(2)(c) ("If the mandatory minimum terms of imprisonment pursuant to this section are less than the sentences that could be imposed as authorized by s. 775.082, s. 775.084, or the Criminal Punishment Code under chapter 921, *then the sentence imposed* by the court *must include the mandatory minimum* term of imprisonment as required in this section.") (emphasis added).

pursuant to *other applicable law*." § 775.087(2)(b) (emphasis added). The emphasized language clearly refers to external authority for imposing the death sentence, in contrast to the "as authorized by law" language that appears earlier in the statute. Had the Legislature intended for this phrase to refer to a sentence-enhancing statute, we are of the opinion that it would instead read "as *otherwise* authorized by law."

Here, as the trial court correctly noted, at the time it imposed its sentence, it was bound by the Wiley decision, which at the time was the only appellate decision on this issue. With the rendering of the instant decision, however, circuit courts in the First District may, pursuant to section 775.087(2)(b), Florida Statutes, impose a sentence in addition to its selected mandatory minimum sentence without regard to whether additional statutory authority for such an additional sentence exists.

Conclusion

Based on the foregoing, we reverse the trial court's sentence and remand for resentencing, with Appellant present, consistent with this opinion. We affirm the trial court's decision to allow into evidence the photographs to which Appellant objected at trial. We also certify conflict with the Fourth District's opinion in Wiley to the extent that case holds that, under section 775.087(2)(b), Florida Statutes, a trial court may impose a sentence in addition to its selected mandatory

minimum sentence imposed under the 10-20-Life statute only if otherwise authorized by another statute.

AFFIRMED in part, REVERSED in part, and REMANDED for resentencing; CONFLICT CERTIFIED.

MARSTILLER and MAKAR, JJ., CONCUR.