IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: SC19-1511
4th DCA NO.: 4D17-3034
LT NO.: 94-12537CF10A

DAVID PUZIO,

Defendant/Petitioner
vs.

STATE OF FLORIDA,

Plaintiff/Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the District Court of Appeal
Fourth District, State of Florida

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CERTIFICATE OF INTERESTED PERSONS

Petitioner certifies that the following persons have or may have an interest in the outcome of this case:

Honorable Paul Backman

(Circuit Court Judge, 17th Judicial Circuit)

Steven J. Hammer, Esquire & Kevin J. Kulik, Esquire

(Trial Counsel for Petitioner)

DAVID PUZIO

(Defendant/Petitioner)

Michael J. Satz, Esquire

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By Assistant State Attorney

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(Attorney General)

By Deputy Solicitor General, Attorney General

(Appellate Counsel for Respondent)

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PRELIMINARY STATEMENT

Petitioner, David Puzio, was the Defendant and the State of Florida was the Plaintiff, in the Criminal Division of the Circuit Court of the 17th Judicial Circuit. David Puzio will be referred to in this brief as “Petitioner, Defendant, or Mr. Puzio." The State of Florida, the Plaintiff, will be referred to as "the State, or Respondent."

The following symbols will be used in citations to the record and transcripts:

R: Record on Appeal

R2: from Petitioner’s “Appendix to Motion to Supplement the Record on Appeal”

S: sentencing order of the trial court, issued on May 11, 2018, from Petitioner’s “Appendix to Motion to Supplement the Record on Appeal”

IB: Petitioner’s initial brief to the 4th DCA, docketed in case # 4D17-3034

AB: Respondent’s answer brief to the 4th DCA, docketed in case # 4D17-3034

MRH: Petitioner’s motion for rehearing to the 4th DCA, docketed incase # 4D17-3034

OSC: 4th DCA’s Order to Show Cause, docketed in case # 4D17-3034

ROSC: Respondent’s response to the 4th DCA’s Order to Show Cause, docketed in case # 4D17-3034

New Dispo: trial court’s new disposition order, issued on May 23, 2018, from Petitioner’s “Appendix to Motion to Supplement the Record on Appeal”

STATEMENT OF THE CASE AND FACTS

On July 27, 1994, David Puzio, Petitioner, was charged by Indictment with two counts of first-degree murder and one count of armed carjacking. The incident occurred on July 1, 1994. On that date, Petitioner was 16 years old. The State sought the death penalty.

The evidence at trial revealed that when the two victims were shot and killed, Petitioner was in the back seat of the victim's vehicle. In the back seat with 16-year-old Petitioner were two men: Elias Nieves and Alex Ramirez. Mr. Nieves and Mr. Ramirez were in their early 20's. Mr. Nieves and Mr. Ramirez were never charged with a crime. At trial, both men testified that Petitioner was the shooter.

Trial began on November 4, 1996. During trial, the State proceeded on two theories of first-degree murder: premeditated murder and felony murder. During closing argument, the State argued both premeditated and felony murder, as well as the principal theory. (R2 1474 at 14-23)

The State emphasized: "it's not necessary for felony murder for one to have a fully formed conscious intent to kill. If you have the specific intent to take someone's property, temporarily or permanently, be it the car, be it the money, if you have that intent and while you are doing this by force, violence, fear, or assault, somebody is killed, it's called first degree murder." (R2 1475 at 5-16)

In its rebuttal closing, the State reiterated: "there are two ways first degree murder

can be proven, premeditated, and during the commission of a robbery or carjacking someone dies, regardless of your intent to kill, it's first degree murder." (R2 1560 at 7-17)

The State also addressed the principal theory, arguing that, if the defendant helps another person commit a crime, he is a principal and must be treated as if he did all the things the other person did. (R2 1571 at 15 to 1572 at 2)

At trial, the defense argued that Petitioner was innocent of all three counts. The defense argued that Petitioner was passed out from intoxication in the back seat of the victim's vehicle, when one of the two men in the back seat committed the murders. The defense requested and was given a voluntary intoxication defense instruction. (R2 2046-2047)

The jury was also instructed on premeditated murder, felony murder, and the principal instruction. The verdict form did not differentiate between premeditated murder and felony murder. (R2 2024-2064)

During deliberations, the jury asked a question: "On the verdict form, there is only one option for first degree murder, while there are two ways, premeditated or felony murder, that are not the same. We don't understand why there aren't two separate categories on the verdict form, so we can make a distinction under first degree." (R2 1654 at 1-8) In the same note, the jury requested a pitcher of hot water. (R2 1654 at 8-9)

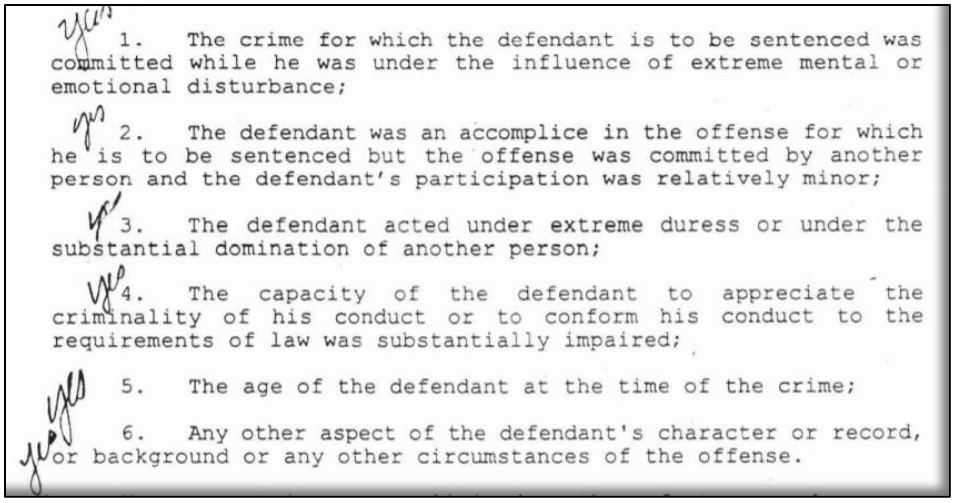
When the jury was provided with the pitcher of water, but not the answer to their question, they sent another note: "Is there a problem with the question regarding the distinction between felony and premeditated murder?" (R2 1654 at 1-13). The judge called the jury into the courtroom. The judge stated that the answer to the question was contained within the jury instructions. (R2 1656 at 6-12)

On November 20, 1996, the jury found Petitioner guilty of all three counts. On December 16, 1996, the penalty phase began for the two counts of first-degree murder. In their Advisory Sentence, the jury was given a set of instructions and was asked to consider aggravating and mitigating factors.

Next to the Aggravating Factor: "the crime for which the defendant is to be sentenced was committed for financial gain," the jury wrote the word "no." (R2 2097).

Next to the Aggravating Factor: "the crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification," the jury wrote the word "no." (R2 2097)

Next to the Mitigating Factor: "the defendant was an accomplice in the offense for which he is to be sentenced <u>but the offense was committed by another person and the defendant's participation was relatively minor</u>," the jury wrote the word "yes." (R2 2099, emphasis supplied) In fact, the jury wrote "yes" next to all the mitigators:



1. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance;

2. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;

3. The defendant acted under extreme duress or under the substantial domination of another person;

4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

5. The age of the defendant at the time of the crime;

6. Any other aspect of the defendant's character or record, or background or any other circumstances of the offense.

On December 18, 1996, the jury unanimously recommended life over death on each count of first-degree murder. On December 18, 1996, the trial court sentenced Petitioner to life without parole with credit for 914 days on each count of first-degree murder to run concurrent to each other.

On January 14, 1997, Juror Lois Tyler testified before the trial court pursuant to a hearing requested by counsel due to possible juror misconduct. Unrelated to the issue of juror misconduct, Ms. Tyler testified, "all 12 of us said that David [Puzio] was not the one who actually did the shooting, that he was in the presence of someone who did the shooting." (R 48 at 13 to 49 at 4) (R2 1714 at 21 to 1715 at 4)

On January 16, 1997, Petitioner was transported from the Broward County Jail to the Florida Department of Corrections for the rest of his life.

Twenty one years later, on April 24, 2017, Petitioner appeared before the trial court for a resentencing pursuant to *Miller v. Alabama*, 567 US 460 (2012), *Falcon*

v. State, 162 So.3d 954 (Fla. 2015), and *Horsley v. State*, 160 So.3d 393 (Fla. 2015).

At the resentencing hearing, Petitioner argued that he should be sentenced under Florida Statute 775.082(1)(b)2 because the jury did not find beyond a reasonable doubt that Petitioner actually killed, attempted to kill, or intended to kill the victims. Petitioner cited to *Apprendi v. New Jersey*, 530 US 466 (2000); *Alleyne v. United States*, 570 US 99 (2013); and a Fifth DCA case that was currently before the Florida Supreme Court for a question certified to be of great public importance, *Williams v. State*, 211 So.3d 1070 (5th DCA 2017) (R 39 at 3 to 40 at 4)

Petitioner argued that, as evidenced by the jury instructions of felony murder and the principal theory; the verdict form; and the State's closing arguments, the jury had not concluded that Petitioner was the shooter. Petitioner directed the trial court to the jury's questions during deliberations; the jury's "yes" and "no" findings during the penalty phase; and Ms. Tyler's testimony that all 12 jurors did not find that Petitioner was the shooter. (R 33 at 17 to 34 at 16) Petitioner emphasized that the jury found that Petitioner "was an accomplice to the offense for which he is to be sentenced, but the offense was committed by another person and [Petitioner's] participation was relatively minor." (R 45 at 13-19)

The trial court decided to leave the issue in abeyance and proceed with the resentencing. (R 48 at 6-12) The trial court did not re-address the issue of whether Petitioner intended/attempted/or actually killed the victims or whether to sentence

Petitioner under 775.082(1)(b)1 or (1)(b)2 at any time during the hearing.

Four months later, on August 28, 2017, Petitioner and the State appeared before the court for the conclusion of the resentencing hearing. The court incorrectly stated that the defense heavily relied on "checkmarks" that were placed next to the mitigating factors in the jury's Advisory Sentence. (R 123 at 21-24) The court noted that whether the "checkmarks" constituted the jury's actual findings was a matter the court "can and does take into consideration." (R 124 at 9-11) In fact, the jury had written either "yes" or "no" next to the mitigating and aggravating factors, not "checkmarks." (R2 2097-2099)

The court also referenced Ms. Tyler's testimony in the hearing after the sentencing and verdict, in which she testified that "the jury didn't believe that Mr. Puzio was, in fact, the shooter." (R 123 at 24 to 124 at 5)

The court then stated that based on everything that was presented, the court could not impose a life sentence in good conscience and that a life sentence could not withstand an appeal. (R 124 at 12-16) The trial court continued that, "under 775.082 when you get to paragraph two, which I think - I'm sorry - paragraph 1a, which I think is applicable at this point, while the Court does not find that Mr. Puzio, after the hearing, which was conducted by the Court in accordance with 921.1404 [sic] that while it may not be applicable, I find that the term of punishment of 60 years is an appropriate sentence." (R 124 at 22 to 125 at 4)

The judge continued, "the Court, of course, says that based on those findings, which the Court will make, that if life isn't an appropriate sentence, then of course the minimum sentence that the Court can impose is 40 years." (R 125 at 5-8 emphasis supplied). As to the counts of first-degree murder, the court stated, "there was no one else charged, there was no one else blamed, and [Petitioner] was the sole person that was charged and convicted." (R 125 at 20-24)

The court continued, "and, yes, I realize there was a principal theory placed in there, and I'm also aware of the findings of the jury, I wouldn't say finding, the indication of a finding that he wasn't the shooter and that he was influenced by others." (R 125 at 25 to 126 at 4). The judge then reiterated that he was sentencing Petitioner to 60 years on the two counts of first-degree murder. (R 126 at 11-13). On September 25, 2017, Petitioner filed a notice of appeal.

On February 21, 2018, the Fourth District Court of Appeal (4th DCA) relinquished jurisdiction back to the trial court, at Petitioner's request. Petitioner requested the Court to relinquish jurisdiction for the limited purpose of asking the trial judge to comply with Florida Statute 775.082(1)(b)3. The statute states that the trial judge shall make a written finding of whether a defendant is eligible for a sentence review hearing after 15 years or 25 years. The finding shall be based upon whether the defendant attempted/intended/ or actually killed the victim.

On February 22, 2018, this Court decided *Williams v. State,* 242 So.3d 280 (Fla.

2018)

On May 11, 2018, the trial court issued written findings in a sentencing order. In the sentencing order, the court stated that Petitioner was sentenced on the two counts of first-degree murder under F.S. 775.082(1)(b)1, because Petitioner "actually killed, intended to kill or attempted to kill" the victims." (S2 and S6) The trial court reiterated that, "as that Court indicated at resentencing, there was no one else charged, there was no one else blamed, and Petitioner was the sole person that was charged and convicted." (S3) The judge cited the sentencing hearing transcript, in which the judge stated the same thing. (S3)

The trial judge also stated, "the Court proceeded under 775.082(1)(b)1 as the Defendant was convicted of killing the victims." (S3) "However, the Court also noted that one of the jurors later reported that the jury did not believe the Defendant was the shooter," and "it was not clear whether this was an actual finding of the jury or 'buyer's remorse.'" (S3)

The judge included a footnote at "buyer's remorse." The footnote stated, "While the Court is aware of the recently issued Florida Supreme Court of Florida (sic) opinion in *Williams v. State*, 2018 WL 1007810, the remand was limited for the sole purpose of issuing written findings." (S3) Following the sentence with the footnote about *Williams*, the judge continued that "although it proceeded under subsection 775.082(1)(b)(1), Florida Statutes, that it equally finds a 60 year sentence

appropriate under 775.082(1)(b)(2) in light of the facts of the case." (S3)

In the "Findings of the Court" section of the order, the trial court stated that the "facts established at trial" were: "the Defendant shot the victims multiple times from behind, with a .380 semi-automatic gun, causing both of their deaths," and the Defendant killed one victim first "then turned the gun" on the other victim. (S4) "The crimes were thought-out," because, "the Defendant shot the victims from behind and dumped their bodies on the road." (S6) The judge claimed that, "the jury found the Defendant guilty, as charged, by committing first degree murder by shooting the victim with a handgun." (S6) "The Defendant is being resentenced as the shooter and primary person to effect the death of the victim." (S6)

On May 23, 2018, the trial court issued a new disposition order without notifying Petitioner or Respondent. In the new order, the trial judge handwrote, "corrected as to min/man." (New Dispo) The trial judge checked the box on the disposition order form labeled "other mandatory minimum" and handwrote, "40 yrs CT I and II pursuant to F.S. 921.1402(2)(a)." (New Dispo)

On August 8, 2018, Petitioner filed the initial brief with the 4th DCA. Petitioner argued that the trial judge committed reversible error under *Williams* and *Alleyne* when the court improperly made a finding that Petitioner "actually killed, intended to kill, or attempted to kill the victim" and sentenced Petitioner under Florida Statute 775.082(1)(b)1. Petitioner contended that since the error was not harmless, the

proper remedy was to remand Petitioner's case for a new sentencing hearing under the correct statue, F.S. 775.082(1)(b)2. (IB 18-30)

In its Answer Brief, Respondent conceded that an *Alleyne* error occurred, and that Petitioner was entitled to a resentencing. Respondent stated that "*Williams v. State*, 242 So.3d 280 (Fla. 2018) held that if there is no jury finding that the defendant killed, intended to kill, or attempted to kill the victims, the question becomes whether that lack of finding is harmless." (AB 13) Respondent continued, "it would appear that this standard applies to [Petitioner's] resentencing." (AB 13) Respondent quoted *State v. Fleming*, 61 So.3d. 399, 402 (Fla. 2011): "[B]ecause resentencing proceedings are *de novo* in nature, *Apprendi* and *Blakely* necessarily apply to resentencings held after *Apprendi* and *Blakely* issued, even where the conviction was final before they issued." (AB 13) Respondent continued that, "The trial court did not have the benefit of *Williams* at the time it ruled." (AB 13)

Respondent argued that, "under the unique facts of [Petitioner's] case, it does not appear the 'error' is harmless." "Should this court agree, it should remand for Petitioner to be resentenced, allowing for a review after 15 years." (AB 16)

Respondent directed the 4th DCA to five unique facts of Petitioner's case which supported the conclusion that the error was not harmless. First, "the jury was instructed on principals and felony murder." (AB 15) Second, "the prosecutor briefly argued the concept of felony murder and principals." (AB 15) Third, "one of the

other persons in the back of the car told three people that he was the shooter." (AB 15) Fourth, Respondent quoted the jury's question during deliberations. (AB 15-16) Fifth, during the penalty phase the jurors found that Petitioner was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the Petitioner's participation was relatively minor. (AB 16)

On May 8, 2019, the 4th DCA issued an opinion. Pursuant to *Williams* and *Alleyne*, the 4th DCA held that the trial court erred by sentencing Petitioner under 775.082(1)(b)1 when no jury has found beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill, the victims. The 4th DCA held that the error was not harmless because the record did not demonstrate beyond a reasonable doubt that a rational jury would have found the defendant killed, intended to kill, or attempted to kill the victims. 2019 WL 2017967, 44 Fla. Weekly D1243 (not reported); *Puzio v. State*, 278 So.3d 82, 86 (4th DCA 2019)

To support its holding, the 4th DCA made several findings. First, Petitioner presented evidence that one of the other men was the shooter. Second, the State argued to the jury that Petitioner could be found guilty of murder either as a premeditated act or under a felony murder theory. Third, the trial court instructed the jury on both theories of first-degree murder. Fourth, next to the mitigating factor: "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was

relatively minor," the jury wrote the word "yes." *Id*.

The 4th DCA reversed the trial court's resentencing of Petitioner under 775.082(1)(b)1 and remanded Petitioner's case for the correction of the sentence under 775.082(1)(b)2. However, the Court held that Petitioner "need not be present for this ministerial correction of his sentence." *Id*.

On May 23, 2019, Petitioner filed a Motion for Rehearing to the 4th DCA. Petitioner argued that while the 4th DCA correctly found that the trial court erred by sentencing Petitioner under 775.082(1)(b)1, the 4th DCA misapprehend the remedy for a non-harmless *Williams* and *Alleyne* violation when it denied Petitioner a resentencing hearing and held that Petitioner need not be present for the "ministerial correction" of his sentence under the appropriate statute. (MRH 2)

Petitioner argued that in accordance with *Williams*, the 4th DCA must remand Petitioner's case for a re-sentencing. The resentencing hearing should be free from the judge's illegal findings. The judge should consider the factors in 921.1401(a) through (j) in accordance with the jury's finding that Petitioner did not kill the victims. (MRH 10)

On June 17, 2019, the 4th DCA ordered that Respondent shall show cause in writing, if any there be, within ten days from the date of this order, why Petitioner's May 23, 2019 motion for rehearing should not be granted. (OSC)

On July 8, 2019, after being granted an extension, the State responded to

Petitioner's Motion for Rehearing.

In its response, the State retreated from its former concession that Petitioner was entitled to a *de novo* resentencing hearing. For the first time, the State referenced the trial court's belated sentencing order on May 11, 2018. The State argued that the trial judge "found that the same sixty-year sentence was warranted under Section 775.082(1)(b)2." (ROSC 1)

The State continued, "In other words, the trial court specifically found it would have imposed the same sentence even if [Petitioner] did not personally kill, attempt to kill, or intend to kill the victims and was entitled to review after 15 years." (ROSC 1) The State concluded that the 4th DCA "properly determined that Petitioner need not be present for the ministerial correction of sentence." The State cited one case, *Muyico v. State*, 50 So.3d 1227, 1228 (Fla. 4th DCA 2011) (ROSC 1-2)

On August 7, 2019, the 4th DCA denied Petitioner's request for rehearing and substituted the August 7, 2019 opinion for the May 8, 2019 opinion. The new opinion by the 4th DCA is word-for-word the same as its previous opinion with two additions. First, the 4th DCA added the paragraph:

"Along with the new disposition order, the trial court issued a new sentencing order to detail its resentencing findings in writing. Besides the findings described above, the court also noted that 'although it proceeded under subsection 775.082(1)(b)(1), Florida Statutes, that it equally finds a sixty-year sentence

appropriate under section 775.082(1)(b)(2) in light of the facts of this case.'" *Puzio*, at 85.

This is incorrect. The trial court only issued the sentencing order because Petitioner requested the 4th DCA to relinquish jurisdiction so that Petitioner could ask the judge to comply with 775.082(1)(b)3. The statute only required the judge to state in writing if Petitioner was eligible for a review at 15 years or 25 years.

The trial judge did not issue the sentencing order at the same time as the new disposition order. The trial court issued the new disposition order 12 days after the sentencing order, without jurisdiction and without consulting the parties.

Second, the 4th DCA added the State's explanation for its "ministerial correction" remedy for Petitioner's illegal sentence: "The defendant is not entitled to a new sentencing hearing under section 775.082(1)(b)2., because the trial court already stated that 'it equally finds a sixty-year sentence appropriate under section 775.082(1)(b)(2) in light of the facts of this case.' We agree with the state that the trial court's comments conclusively show that the court would have imposed the same sentence." The 4th DCA cited two cases: *Brooks v. State*, 969 So. 2d 238, 238 (Fla. 2007) and *Muyico v. State*, 50 So. 3d 1227, 1228 (Fla. 4th DCA 2011).

On September 13, 2019, Petitioner requested that this Court exercise its jurisdiction and entertain Petitioner's case on the merits. On June 25, 2020, this Court accepted jurisdiction of Petitioner's case.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal reversibly erred when it held that Petitioner's remedy for a non-harmless Alleyne violation was merely a "ministerial correction" of his sentence, rather than a sentencing hearing in accordance with Petitioner's jury's findings.

Under the 4th DCA's remedy, Petitioner's sentence remains illegal and in violation of the 6th and 8th amendments to the United States Constitution. The 4th DCA's remedy entitles Petitioner to a review of his illegal sentence after 15 years instead of 25 years. However, Petitioner's actual sentence will remain illegal.

At Petitioner's sentencing hearing, the trial judge ignored and overruled Petitioner's jury's finding. Petitioner's jury specifically found that Petitioner did not kill the victims; that the victims were killed by another individual; and that Petitioner's participation in the offense was relatively minor.

In direct opposition to Petitioner's jury, the trial judge illegally decided that Petitioner killed the victims and sentenced him accordingly. The trial judge violated the sanctity of Petitioner's jury's findings. Under the 4th DCA's remedy, the violation remains. A review hearing after 15 years is meaningless if Petitioner is denied a legal sentencing hearing. At a legal sentencing hearing, the trial judge would respect and adhere to Petitioner's jury's finding that Petitioner did not kill the victims.

The 4th DCA's belated justification for their "ministerial correction" remedy is without merit. The 4th DCA relied on a written comment by the trial judge in a sentencing order. The trial judge issued the sentencing order nine months after Petitioner was sentenced and while Petitioner's case was already on appeal.

The trial judge's comment was that he "equally finds a 60 year sentence appropriate under section 775.082(1)(b)2 in light of the facts of the case." The 4th DCA held that this comment conclusively showed the trial court would have given the same sentence.

As a threshold issue, the trial judge's comment was outside of his jurisdiction. Therefore, the 4th DCA should not have used this comment to deny Petitioner a resentencing hearing. The trial judge issued the sentencing order because Petitioner asked the 4th DCA to relinquish jurisdiction to the trial court, for the limited purpose of requesting the trial judge to comply with F.S. 775.082(1)(b)3. The statute requires the judge to do one thing: state in writing whether a defendant is eligible for a review of his sentence at 15 years or 25 years. The trial judge's additional comment was outside his limited jurisdiction and outside the requirements of the statute.

Additionally, the 4th DCA's reliance on *Brooks* and *Muyico* to justify its "ministerial correction" remedy is misplaced. First, these cases deal with scoresheet and reclassification errors. The trial court's error in Petitioner's case was constitutional.

Second, in *Muyico*, the trial judge made his comment at the defendant's actual sentencing hearing. In Petitioner's case, the trial judge did not make the comment at Petitioner's actual sentencing hearing. At the sentencing hearing, the trial judge decided unequivocally the Petitioner killed the victims and sentencing him accordingly.

Third, the trial judge made the comment after he became aware of *Williams v. State*, 242 So.3d 280 (Fla. 2018), which rendered his sentence illegal. The trial judge specifically noted this in the sentencing order. The judge's comment was an attempt to justify his illegal sentence.

Finally, the 4th DCA ignored that the reason the judge supposedly believed that 60 years was appropriate under either statute was "in light of the facts of case." The "facts of the case" found by the trial court were false, illegal, and in direct opposition to Petitioner's jury's finding. Even if the 4th DCA could determine that the trial court would have given Petitioner the same sentence, the judge's reason for doing so remains illegal and unconstitutional.

There is no justification for denying Petitioner a sentencing hearing free from the judge's illegal findings and consistent with Petitioner's jury's finding that Petitioner did not kill the victims. The 4th DCA's "ministerial correction" will not cure Petitioner's unconstitutional sentence. This Court should remand Petitioner to the trial court for a sentencing hearing in accordance with Petitioner's jury's findings.

ARGUMENT

ISSUE I: The 4th DCA reversibly erred by deciding that Petitioner's remedy for a non-harmless Alleyne violation was a "ministerial correction" of his sentence rather than a resentencing hearing in direct and express conflict with *Williams*

The 4th DCA's remedy denies Petitioner due process and violates his 6th Amendment right to a jury trial. The error is particularly egregious because Petitioner's jury specifically found that Petitioner did not commit the murders; that murders were committed by another individual; and that Petitioner's participation in the offense was relatively minor.

The 4th DCA's holding renders the jury's finding meaningless. The remedy deprives Petitioner of a sentencing hearing in compliance with the Eighth Amendment, *Miller*, and F.S. 921.1401(a) through (j), at which the jury's findings would be given due consideration vis-à-vis the sentencing factors. The 4th DCA's holding directly and expressly conflicts with *Williams*, as well as *Williams'* progeny.

See: *Leppert v. State*, 249 So.3d 1322, 1323 (5th DCA 2018) ("Because we conclude that the [Alleyne] error is not harmless, we reverse the sentence imposed for the murder conviction and remand for Leppert to be resentenced on that charge pursuant to section 775.082(1)(b)2"); *Wall v. State*, 251 So.3d 1014, 1015 (5th DCA 2018) ("*Williams* specifies resentencing as though there had been a jury finding that Wall did not kill, intend to kill, or attempt to kill [the victim]…" "We, therefore,

remand for resentencing on Count One pursuant to section 775.082(3)(b)2."); *Washington v. State*, 257 So.3d 520, 521 (2nd DCA 2018) (Alleyne violation not harmless; "therefore, we remand for the trial court to resentence Washington under section 775.082(1)(b)2"); *Toye v. State*, 2D16-5423, 2019 WL 6720431, (December 11, 2019) (remanded for resentencing under 775.082(1)(b)2, at which a sentencing hearing shall be conducted in accordance with 921.1401); *O'Neal v. State*, No.4D19-472, 2020 WL 3261476, (June 17, 2020) (remanded for resentencing hearing because Alleyne violation was not harmless).

Specifically, in *Toye v. State*, the re-sentencing judge made a finding that Ms. Toye intended to kill the victims and sentenced her to life in prison pursuant to statutes 775.082(1)(b)1 and 921.1402(2)(a). The State asked that Ms. Toye be sentenced under 775.082(1)(b)2 and recommended that the judge consider something less than a life sentence for Ms. Toye.

Ms. Toye appealed her sentence to the Second District Court of Appeal (2nd DCA). While her appeal was pending, this Court decided *Williams*. The 2nd DCA held that Ms. Toye was sentenced in violation of *Williams* and *Alleyne* because there was not a "clear jury finding" that Ms. Toye intended to kill the victims. The 2nd DCA determined that the error was not harmless.

In Ms. Toye's case, the State agreed that there was an *Alleyne* violation and that the error was not harmless. However, the State argued that to reverse Ms. Toye's

sentence, "all that [was] required on remand is for the sentencing court to correct Ms. Toye's sentence to conform to the jury's finding that she did not actually kill, intend to kill, or attempt to kill victims; therefore she is entitled to have her sentence reviewed after fifteen years." *Id*.

The 2nd DCA held that Ms. Toye was entitled to a resentencing hearing. The Court stated that, in *Williams*, the defendant's case was remanded for resentencing, and "not simply for correction of Williams' sentence to reflect that he was entitled to have his sentence reviewed after fifteen years." The 2nd DCA continued, "We are not willing to infer that the court did not mean what it said when it held that 'resentencing is the appropriate remedy for an Alleyne violation that is not harmless.'" *Toye*, quoting *Williams*, at 292-293.

Like Ms. Toye, Mr. Williams, Mr. Leppert, Mr. Wall, Mr. Washington, and Mr. O'Neal, Petitioner is entitled to a re-sentencing hearing. The 4th DCA denied Petitioner his right under *Williams*, *Alleyne*, and Florida Statute 921.1401 to be sentenced in accordance with his jury's findings.

ISSUE II: The 4th DCA's belated justification for its "ministerial correction" remedy is without merit

In its new opinion, the 4th DCA "agree[d] with the State that the trial court's comments conclusively show that the court would have imposed the same sentence." There are three inescapable problems with this belated justification.

A. The judge's comment was outside of the trial court's limited jurisdiction and should not have been considered by the 4th DCA and used against Petitioner

As a threshold issue, the trial court's comment was outside of his limited jurisdiction. The judge did not make this comment at Petitioner's sentencing hearing. Rather, the trial judge offered this comment as an after-thought in his sentencing order on May 11, 2018. The trial judge issued the sentencing order nine months after Petitioner was sentenced and after Petitioner's case was already on appeal.

When the trial court pronounced Petitioner's sentence on August 28, 2017, Petitioner's sentence became final for appellate purposes. When Petitioner filed a notice of appeal on September 25, 2017, the trial court lost jurisdiction of Petitioner's case. Four months later, on February 16, 2018, Petitioner requested that the 4th DCA relinquish jurisdiction back to the trial court for the limited purpose of allowing Petitioner to ask the trial court to comply with Florida Statute 775.082(1)(b)3. (Motion to Relinquish Jurisdiction, docketed in 4D17-3034) Petitioner asked the 4th DCA to relinquish jurisdiction for this limited purpose so

that the Record on Appeal would be complete.

Florida Statute 775.082(1)(b)3 states:

"The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(a) or (c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim."

On February 21, 2018, the 4th DCA relinquished jurisdiction "to permit the trial court to make findings of fact, as set forth in Petitioner's motion." (Order Relinquishing Jurisdiction, docketed in 4D17-3034) (emphasis supplied) On March 9, 2018, Petitioner filed a motion with the trial judge to make written findings pursuant to the requirements of 775.082(1)(b)3. (Request for Written Findings, docketed in 94-12537CF10A)

On May 11, 2018, the trial judge responded to Petitioner's request with the sentencing order. Pursuant to 775.082(1)(b)3 and the trial court's limited jurisdiction, the only written finding that should have been contained in sentencing order was whether Petitioner was eligible for a sentence review hearing after 15 years or 25 years. Instead, the trial court included the comment that the State and 4th DCA relied upon to deny Petitioner a constitutional sentencing hearing.

The trial judge acknowledged that his jurisdiction was limited. In a footnote, trial

court stated: While the court is aware of the recently issued Florida Supreme Court opinion in *Williams v. State*, "the remand was limited for the sole purpose of issuing written findings." (S3 FN2 emphasis supplied) In next sentence, the trial judge ignored the "sole purpose" of the remand, and offered a belated musing that he "equally finds a 60 year sentence appropriate under section 775.082(1)(b)2 in light of the facts of the case." (S3)

The comment by the trial court was outside the requirement in Florida Statute 775.082(1)(b)3 and outside of the trial court's limited jurisdiction. The 4th DCA should not have considered the comment and used it to deny Petitioner a sentencing hearing in accordance with his jury's findings.

B. The trial judge's comment cannot "conclusively show that the judge would have given the same sentence"

The only case cited by the State on this issue was *Muyico*. The 4th DCA also cited *Muyico*, and added *Brooks*, which is cited in *Muyico*. The 4th DCA's reliance on *Brooks* and *Muyico* is erroneous. Neither case is analogous to Petitioner's case.

First, Petitioner's case did not involve a scoresheet or reclassification error. Second, the trial judge did not make this comment at Petitioner's sentencing hearing. Third, the trial judge made the comment after he became aware that he sentenced Petitioner illegally under *Williams*.

(1) Petitioner's case did not involve a scoresheet or reclassification error

In *Brooks*, this Court determined which harmless error standard applied to sentencing scoresheet errors raised under 3.800(a). *Id*. at 238 At a probation revocation sentencing, the judge sentenced Brooks to ten years. *Id*. at 240 This Court held that for motions filed under rule 3.800(a), if the trial court could have imposed the same sentence using a correct scoresheet, any error is harmless. *Id*. at 243 Because the trial court could have sentenced Brooks to ten years under a correct scoresheet, the error was harmless. *Id*. at 244

In *Muyico*, the trial judge erred by re-classifying the defendant's crime as a life felony, which carried a 30-year minimum mandatory, instead of a first-degree felony punishable by a term of years not to exceed life. *Id*. at 1229 The judge sentenced the defendant to 99 years. *Id*. The 4th DCA held that "a classification error raised in a rule 3.800(a) motion, like a scoresheet error raised in a rule 3.800(a) motion, is harmless if the sentencing court 'could have imposed' the same sentence." *Id*. citing *Brooks*, at 243

Muyico and *Brooks* contain dicta regarding the "would-have-imposed" standard, also regarding scoresheet and reclassification errors. In *Brooks*, this Court "note[d] that when a scoresheet error is presented using any of the three procedures described above, [direct appeal, 3.800(b), 3.850], any error is harmless if the record conclusively shows that the trial court *would have imposed* the same sentence using

a correct scoresheet." *Id*. at 241 (emphasis in original)

In *Muyico,* the 4th DCA noted that even under the more defendant-friendly "would-have-imposed" standard discussed in *Brooks*, the judge's comments at Muyico's sentencing hearing conclusively showed that the judge would have imposed the same sentence. *Muyico,* at 1229 citing *Brooks,* at 238 Neither *Brooks* nor *Muyico* discussed the "would-have-imposed" standard vis-à-vis constitutional Alleyne violations.

Petitioner's case does not involve a scoresheet or reclassification error. When a judge makes a scoresheet or reclassification error, the defendant's crime, conduct, and state-of-mind remain the same. In Petitioner's case, the court constitutionally erred in violation of *Alleyne* by making an illegal finding that Petitioner killed the victims. This was in direct opposition to the jury's findings. In Petitioner's case, the judge's constitutional error changed Petitioner's crime, conduct, and state-of-mind. *Brooks* and *Muyico* do not apply to Petitioner's case.

(2) <u>The trial judge did not make the comment at Petitioner's sentencing hearing</u>

In *Muyico,* the 4th DCA read the trial judge's comments in the transcript from the defendant's sentencing hearing to determine that the judge "would-have-imposed" the same sentence. In contrast, at Petitioner's sentencing hearing, the trial judge decided unequivocally that Petitioner was the shooter and sentenced him

accordingly. At no point in the sentencing hearing did the judge state that 60 years was appropriate for Petitioner under 775.082(1)(b)2. The trial court made this additional comment in writing nine months after Petitioner's sentencing and in response to this Court's holding in *Williams*.

Neither *Brooks* nor *Muyico* confronted a situation where the trial court made comments in writing almost one year after the sentencing hearing, and after the trial judge became aware that his sentence was illegal. The 4th DCA erred by applying the "would-have-imposed" standard discussed in *Brooks* and *Muyico*.

In fact, in *Ashley v. State*, 850 So.2d 1265 (2003), this Court cited a long-standing principal of law that a court's oral pronouncement of sentence controls over the written documents. *Ashley*, at 1269 citing *State v. Jones*, 753 So.2d 1276, 1277 (Fla. 2000). In *Ashley*, the trial court issued the written judgment and sentence within days after the oral sentencing. *Id*. at 1267 In the written judgment, the trial court noted that the defendant was a habitual violent felony offender (HVFO) *Id*.

Although the State presented uncontradicted evidence of HVFO at the hearing the day before the sentencing, the trial judge did not make this oral pronouncement at the sentencing hearing. *Id*. This Court acknowledged the First District Court of Appeal's contention that it was likely the trial judge made a simple mistake, and that the judge's intention was always to sentence Ashley as HVFO. *Id.* However, this Court held that judicial policy requires that the actual imposition of sentence prevails

over a subsequent written order to the contrary. *Id*. at 1268

Likewise, the trial judge's actual imposition of Petitioner's sentence and his findings made under 775.082(1)(b)1 should prevail over the comment in his subsequent written order, which claims that he considered an appropriate sentence under 775.082(1)(b)2. Even if the "would have imposed" standard applied, the 4th DCA was bound by the trial judge's comments at Petitioner's sentencing hearing. By using judge's written comment against Petitioner, the 4th DCA is in direct and express conflict with *Ashley*.

(3) The trial judge made the comment to justify Petitioner's sentence after the judge became aware of *Williams*

The trial court's comment in Petitioner's case is analogous to the holding in *Shull v. Dugger*, 515 So.2d 748 (Fla. 1987). In *Shull*, the trial court sentenced the defendant to an upward departure based on a justification that was valid at the time of sentencing. *Id*. at 749 After the defendant was sentenced, this Court issued a decision in another case which held that the justification used by the trial court was no longer a legal reason for departure. *Id*. Without the upward departure, the defendant would have completed his sentence. *Id*.

In *Shull*, the State conceded that the defendant was entitled to resentencing but argued that the defendant was "not entitled to be released prior to resentencing *since the trial court may be able to justify a departure from the sentencing guidelines*." *Id.*

(emphasis in the original) This Court disagreed and held, "we believe the better policy requires the trial court to articulate all of the reasons for the departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results." *Id*. at 750

At Petitioner's sentencing hearing, the trial judge decided that Petitioner killed the victims and sentenced Petitioner to 60 years based on that finding. Six months later, this Court decided *Williams*. *Williams* invalidated the judge's finding and held that it was constitutionally impermissible for the judge to determine whether a defendant attempted/intended/killed the victim.

The trial judge knew that his sentence had become illegal under *Williams*. (S3 FN 2) The trial judge attempted to justify his original sentence in the sentencing order by adding the gratuitous comment that, although the court proceeded under 775.082(1)(b)1, it equally finds a 60 year sentence appropriate under 775.082(1)(b)2 in light of the facts of the case. (S3) This is the kind of "unwarranted effort to justify an original sentence" that this Court warned of in *Shull*.

In *Fleming*, this Court explained that its holding in *Shull* "preclude[d] the possibility of a judge providing an after-the-fact justification for a previously imposed departure sentence." *Fleming*, FN 7 quoting *Jones v. State*, 559 So.2d 204, 206 (Fla. 1990) In Petitioner's case, this possibility is the reality. In his sentencing

order, the trial judge provided an after-the-fact justification for his previously imposed sentence of 60 years.

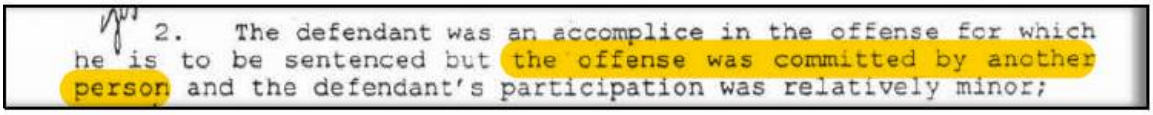
Further, the trial's court after-the-fact justification for his sentence leads to an "absurd result," as noted by this Court in *Shull*. Indeed, the judge found a 60-year sentence was appropriate when he decided that Petitioner shot and killed the victims. (R 12-124; S3) However, the jury unequivocally found that: (1) Petitioner did not kill the victims; (2) Petitioner's participation in the offense was relatively minor; (3) Petitioner was under the influence of extreme mental or emotional disturbance when the victims were killed by another person; (4) Petitioner acted under extreme duress or under the substantial domination of another person; and (5) Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R2 2099)

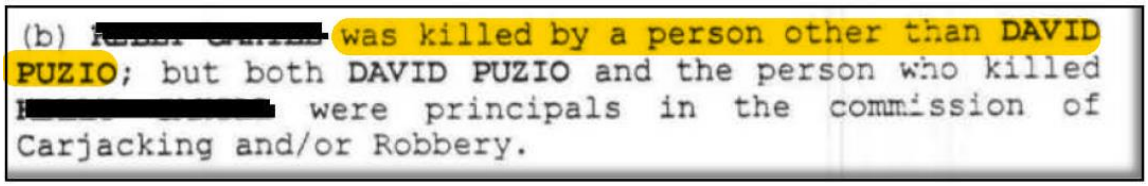
It strains credulity that the same sentence is warranted regardless of whether Petitioner killed the victims or whether someone else killed the victims, as decided by the jury. In other words, the same 60-year sentence for Petitioner, who did not commit the murders, is an absurd result.

Imposing the same 60-year sentence regardless of whether Petitioner killed the victims is disproportionate to Petitioner's conduct and culpability. The legislature determined that a juvenile defendant who attempted/intended/killed the victim is more culpable than a juvenile defendant who did not attempt/intend/kill the victim.

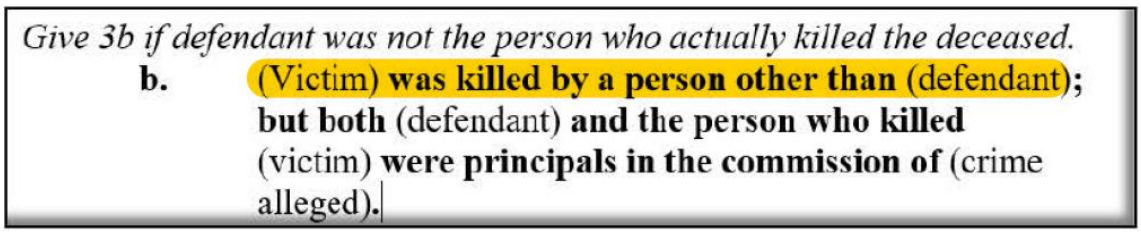
Therefore, the legislature set a sentencing floor of 40 years for a juvenile defendant who attempted/intended/killed the victim.

In Petitioner's case, the jury decided that Petitioner committed the crime of felony murder, not premeditated murder. Indeed, during deliberations the jury asked why they could not distinguish between premediated murder and felony murder. (R2 1654 at 1-8) Additionally, the jury's Advisory Sentence finding mirrored the jury instruction for first degree felony murder in Petitioner's case. (R2 2099, 2026)


2. The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;


(b) [redacted] was killed by a person other than DAVID PUZIO; but both DAVID PUZIO and the person who killed [redacted] were principals in the commission of Carjacking and/or Robbery.

Further, Petitioner's jury instruction for felony murder mirrors the new jury instruction for felony murder constructed in response to *Williams*: Florida Jury Instruction Felony Murder - First Degree 7.3 3(b):


Give 3b if defendant was not the person who actually killed the deceased.

b. (Victim) **was killed by a person other than** (defendant)**; but both** (defendant) **and the person who killed** (victim) **were principals in the commission of** (crime alleged).

In *Graham v. Florida*, the United States Supreme Court explained that "the concept of proportionality is central to the Eighth Amendment. Embodied in the

Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' *Graham v. Florida*, 130 S.Ct 2011, 2021 (2010) quoting *Weems v. United States*, 216 U.S. 349, 367 (1910) Sentencing Petitioner to the same 60 years regardless of whether he committed the offense of premediated murder or felony murder is not proportional to the offense.

Further, Petitioner's sentence is 60 years day-for-day. Petitioner will not be released until 2054, when he will be 76 years old. If Petitioner lives in accordance with the life expectancy of incarcerated males, he will die in prison.[1] (See 1994 Florida Statutes 944.275, 921.0012, & 921.0013) This additional fact exposes the absurdity of sentencing Petitioner to the same 60 years when he did not commit the murders.

C. The 4th DCA ignored the crucial part of the trial judge's comment: that the court equally finds a 60-year sentence appropriate under 775.082(1)(b)(2) **in light of the facts of the case**

Finding a 60-year sentence appropriate regardless of whether Petitioner killed the victims or someone else killed the victims, begs the question of why. According to

[1] https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/

the trial judge, the answer is: "in light of the facts of the case." However, the "facts of the case" found by the judge were false and in direct opposition to the jury's findings. Even if the "would-have-imposed" standard applied, the trial judge "would-have-imposed" the same sentence under 775.082(1)(b)2 based on his false, illegal, and unconstitutional conclusion that Petitioner killed the victims.

First, the trial judge found that there was no one else charged; there was no one else blamed; and that Petitioner was the sole person who was charged and convicted. (R 125 at 20 to 24; S3) This is false. The jury blamed someone else for killing the victims when they found that "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor."

Second, the trial court found that "the defendant was convicted of killing the victims." (S3) This is false. The jury did not convict Petitioner of killing the victims. This is evident from the verdict form; the jury instructions; the jury's questions; and the jury's findings in the Advisory Sentence that Petitioner did not kill the victims.

Third, the trial judge found that Ms. Tyler's testimony that "the jury did not believe the Defendant was the shooter" could have been an "actual finding" or "buyer's remorse." (R 123 at 24 to 124 at 5; S3) This was another effort by the trial judge to disregard and overrule the jury's findings. Even without Ms. Tyler's testimony, the jury unequivocally found that someone else killed the victims and that

Petitioner's participation in the offense was relatively minor. (R2 2099)

Fourth, the trial court found that Petitioner "shot the victims multiple times from behind, with .380 semi-automatic gun, causing both of their deaths." (S4) This is false. The jury found that the victims were shot and killed by someone else. Under *Williams* and *Alleyne*, it was unconstitutional for the trial court to find that Petitioner killed the victims.

Fifth, the trial court found that Petitioner "shot the victims from behind." Specifically, the court found that Petitioner killed one victim and then "turned the gun" on the other victim. (S4) This is false. These "facts" were contradicted by the jury. They were also unconstitutional and illegal findings by the court.

Thus, even if the "would-have-imposed" standard applied, the trial judge "would-have-imposed" the same sentence because he believed that Petitioner shot and killed the victims. The same 60 sentence under the correct statute would be based on the same illegal and unconstitutional findings by the trial judge.

The 4th DCA should have treated the trial judge's incorrect finding in the same manner as the court treated the trial judge's incorrect finding in *Hadley v. State*, 190 So.3d 217 (4th DCA 2016). In *Hadley*, the trial judge erroneously found that Hadley previously committed a capital offense. *Id*. at 219 This caused the trial court to make an incorrect finding as to "the nature and extent of the defendant's prior criminal history" under 921.1401(2)(h). *Id*. at 219 *Id*. The 4th DCA remanded the defendant

for a resentencing hearing with the proper consideration of the sentencing factor. *Id*.

Likewise, in Petitioner's case, the trial judge erroneously found that Petitioner shot and killed the victims. This caused the trial court to make an incorrect finding as to the "nature and circumstances of the offense committed by the defendant" and "the extent of the defendant's participation in the case" under 921.1401(2)(a)&(f).

As in *Hadley*, Petitioner's trial judge "made a finding of fact that was unsupported by the record." *Id*. Specifically, the trial judge made a finding of fact that was contradicted by the jury's findings. Pursuant to its holding in Hadley, the 4th DCA should have remanded Petitioner's case for a resentencing hearing.

CONCLUSION

Wherefore, Petitioner requests that this Court reverse the Fourth District Court of Appeal's holding that Petitioner is not entitled to a re-sentencing hearing and order that Petitioner shall be remanded to the trial court to receive a re-sentencing hearing. The re-sentencing hearing shall be conducted by the trial judge in accordance with F.S. 921.1401 vis-à-vis the findings made by Petitioner's jury. After the sentencing hearing, the trial judge shall sentence Petitioner under F.S. 775.082(1)(b)2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Kevin A. Golembiewski, Deputy Solicitor General, Office of the Attorney General, PL-01, the Capitol, Tallahassee, Florida 32399 at Kevin.Golembiewski@myfloridalegal.com this 12th day of August, 2020.

CERTIFICATE OF FONT AND TYPE SIZE

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