IN THE SUPREME COURT OF LOUISIANA

DOCKET NO. 2018-KH-1012

STATE OF LOUISIANA, *Respondent*

v.

DEREK L. HARRIS, *Petitioner*

On Writ of Certiorari to the Fifteenth Judicial District, Parish of Vermillion, Docket No. 09-51265, Division G, Hon. Laurie Hulin, presiding

Court of Appeal, Third Circuit, No. KH-17-545

BRIEF OF PETITIONER

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BRIEF FOR PETITIONER

Petitioner respectfully requests this Court reverse the judgment of the Louisiana Third Circuit Court of Appeal and the district court and order that his conviction be reversed or, in the alternative, provide him some meaningful opportunity to have his ineffective assistance of counsel sentencing claims properly considered.

OPINION BELOW

The opinion of the Louisiana Third Circuit Court of Appeal can be found at 17-0545 (La.App. 3 Cir. 4/24/18). The decision of the district court is reproduced at *Writ appl.* App. D.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter under Article 5, § 5 of the Louisiana Constitution of 1974. *See also* Louisiana Code of Criminal Procedure Article 930.6

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . .to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of Article I of the Louisiana Constitution provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

Section 13 of Article I of the Louisiana Constitution provides in relevant part:

> "In a criminal prosecution , . . At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment."

Section 20 of Article I of the Louisiana Constitution provides:

> "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment."

Section 22 of Article I of the Louisiana Constitution provides:

> "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

Louisiana Code of Criminal Procedure Article 930.3 provides:

"If a prisoner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

(2) The Court exceeded its jurisdiction;

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(5) The Statute creating the offense for which we was convicted and sentenced is unconstitutional;

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STATEMENT OF THE CASE

On October 2, 2008, an undercover officer knocked on Derek Harris' door and asked if he had any marijuana.[1] Although Mr. Harris sold the undercover officer 0.69 grams of marijuana in exchange for $30.00, he was not a drug dealer, just down on his luck and suffering from a serious drug addiction he had picked up after returning home from military. Four months later, Mr. Harris he was arrested for this offense. Nine months later, Mr. Harris was formally charged by the Vermillion Parish District Attorney's office with distributing marijuana.

In September of 2010, Assistant District Attorney Bart Bellaire offered Mr. Harris' defense counsel a deal: if Mr. Harris pled guilty the State would agree to recommend a 7 year sentence. *See Writ Appl.* App. E. Mr. Harris' defense counsel never communicated this deal to Mr. Harris. Shortly thereafter, Assistant District Attorney Bellaire was replaced on the case by Assistant District Attorney F. Stanton Hardee, III. Assistant District Attorney Hardee offered the maximum of 30 years in exchange for a guilty plea. This far less favorable offer was communicated to Mr. Harris and rejected.

In June of 2012, nearly four years after the purchase, Mr. Harris proceeded to a bench trial. At trial the State did not introduce evidence establishing that Mr. Harris was regularly engaged in the selling of marijuana. No indicia of the drug trade was introduced into evidence. No scales or baggies were seized. No further drugs were confiscated. The only evidence against Mr. Harris was the testimony of an undercover officer, a surviellence video, and the 0.69 grams of marijuana purchased years before. The trial judge found Mr. Harris guilty as charged and ordered a presentencing report.

At sentencing on the charge, the trial judge noted that Mr. Harris was an army veteran[2] and acknowledged, based upon Mr. Harris' prior offenses (and one would assume his general disposition) that Mr. Harris was not a drug dealer but a drug addict. The court appeared inclined to find that Mr. Harris was more in need of treatment than confinement. Nevertheless, the judge sentenced Mr. Harris to 15 years at hard labor, a medium-range sentence. Defense counsel filed a motion to reconsider sentence which was denied. Displeased Mr. Harris was not sentenced to the maximum, Assistant District Attorney F. Stanton Hardee, III filed a habitual offender bill of information alleging Mr. Harris a fourth time offender.

Mr. Harris' prior offenses are as follows: 1991 distribution of cocaine; 1993 simply robbery; 1994 simple robbery; 1997 simple burglary; and 2005 theft under $500. While Mr. Harris does not seek to minimize his past failings, it is important to note that none these prior offenses, or the instant offense,

[1] The correct spelling of Mr. Harris' first name is Derek.
[2] Mr. Harris served 4 years in the military.

involved any violence or credible threats of violence. None resulted in serious bodily injury to any person. Mr. Harris was never found, nor alleged, to be the organizer, leader, manager, or supervisor of others in any offense, and was not engaged in a continuing criminal enterprise to distribute drugs. Moreover, while two of Mr. Harris' prior offenses from the early 1990s were for simple robbery those offenses were not classified as crimes of violence when they were committed. Indeed, a significant period of time (14 years) elapsed between those more serious offenses and the instant offense.[3]

Furthermore, Mr. Harris' offenses from the early 1990s all occurred shortly after the end of his active duty in the military. As the Legislature has since acknowledged, we owe a great debt to the men and women who serve in our armed forces. In recognition of the fact that upon return to civilian life veterans may fall on hard ways, multiple laws have been passed to assist veterans who, like Mr. Harris, may be struggling with drug addiction or mental illness, including establishing the Veterans Court Program Treatment Act, *see* 13:5361 *et seq.*; *see also* La. C. Cr. P. art. 893(G) (suspension of sentence for, among others, veterans and members of the armed services). Unfortunately, when Mr. Harris returned home in the early 1990s these programs did not exist.

On November 15, 2012, after adjudicating Mr. Harris a fourth time felony offender, the trial court sentenced Mr. Harris to life without parole. Shocklingly, Mr. Harris' defense counsel did not present substantial mitigation available to him. He did not argue that the court *can* and *needed to* depart from the mandatory sentence or that the institution of the habital offender proceedings, under the circumstances, constituted an abuse of discretion on the part of the prosecuting authority. Finally, and critically, counsel did not take the basic step of filing or making a motion to reconsider sentence.

On direct appeal, Mr. Harris had appellate counsel for a time; however, that counsel *only* briefed a *bare* excessiveness claim, which was an unpreserved, inchoate error due trial counsel's failure to put forward evidence in mitigation of sentence or file or make a motion to reconsider sentence. La. C. Cr. P. art. 881.1(E). Yet, appellate counsel inexplicably never raised trial counsel's failure to file or make this motion or request a remand to determine that issue or to expand the record on the excessiveness claim so that it could properly be reviewed. La. C. Cr. P. art. 881.4(C).

In its decision on direct appeal, the Third Circuit acknowledged the excessiveness claim was

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[3] Under the current habitual offender scheme, it is unclear whether any of these offenses would have cleansed; however, even had they not cleansed, the sentencing court could have sentenced Mr. Harris to as low as thirty years, if not lower based upon *Dorthey* considerations, among others. *See* La. R.S. 15:529.1(A)(4)(a) and (I) (codifying *State v. Dorthey*, 623 So.2d 1276 (La. 1993); *see also State v. Everidge*, 834 So.2d 1197, 1204 (La. App. 4 Cir. 2002) (holding in the *Dorthey* context, that the "legislature's subsequent changes in criminal statutes are relevant sentencing considerations.").

unpreserved and that the issue was never put to the trial court. Notwithstanding this important and dispositive defect, the Third Circuit reviewed the claim, but were constrained to a *bare* excessiveness error, meaning Mr. Harris was precluded from making any argument or mentioning any evidence not put before the trial court. *Id.* at 700. To be clear, even though the Third Circuit acknowledged this claim was never raised before the trial court and trial counsel never put forth any evidence in support of it, let alone the clear and convincing evidence required to establish an excessiveness claim, it nevertheless held that the trial court did not abuse its discretion in imposing the life without parole sentence; a discretion the trial court was simply, due to trial counsel's failures, never asked to exercise. Judge Cooks alone looked passed the bareness of the claim and grappled with its merits in the light most favorable to Mr. Harris, concluding, in dissent:

> I believe it is unconscionable to impose a life-sentence-without-benefit upon this Defendant who served his country on the field of battle and returned home to find his country offered him no help for his drug addiction problem. It is an incomprehensible, needless, tragic waste of a human life for the sake of slavish adherence to the technicalities of law. It is bereft of fundamental fairness, and absent any measure of balance between imposition of the most severe punishment short of death with the gravity and culpability of the offense.

Id. at 705 (Cooks, J., dissenting). Based upon the well-settled rule in Louisiana that ineffective assistance of counsel claims should be raised at post-conviction, the Third Circuit did reserve Mr. Harris' ineffectiveness claims for post-conviction review. *State v. Harris*, 13-133 (La.App. 3 Cir. 12/11/13), 156 So. 3d 694, 699-700 ("**a claim of ineffective assistance of counsel is typically more properly resolved by post-conviction proceedings as it allows the trial court to conduct a full evidentiary hearing, if warranted.**") (emphasis added).

Mr. Harris thereafter was left to fend for himself. His assigned appellate lawyer filed no further papers on his behalf. Mr. Harris, in proper person, filed for reconsideration but was denied. Mr. Harris filed a pro se writ to this Court but was denied discretionary review.

On or about October 30, 2015, Mr. Harris timely filed a pro se post-conviction petition with the trial court. Pursuant to Article 930.7 of the Code, the trial court appointed counsel to represent Mr. Harris.[4] La. C. Cr. P. art. 930.7. On March 3, 2017, Mr. Harris' *pro se* post-conviction petition was denied. The trial court determined that the ineffective assistance of counsel claims as they relate to Mr. Harris' habitual offender sentence are not cognizable under Louisiana law and that his other ineffectiveness claims were meritless. On April 24, 2018, the Third Circuit denied Mr. Harris' pro se writ application. 17-0545

[4] Unfortunately, like trial counsel and appellate counsel, post-conviction counsel was abjectly deficient.

(La.App. 3 Cir. 4/24/18). On May 23, 2018, Mr. Harris filed a pro se Application for Writ of Certiorari with this Court.

Mr. Harris has pled the following errors requiring relief:

(1) Ineffective assistance of trial counsel for failure to appropriately advise Mr. Harris at the pre-trial stage;
(2) Ineffective assistance of trial counsel for failure to pursue an entrapment defense;
(3) Ineffective assistance of trial counsel for failure to either present evidence or argument in favorable of a downward departure, pursuant to *State v. Dorthey*, 623 So.2d 127 (La. 1993) or to file a motion for reconsideration of sentence.[5]

A Response by the State of Louisiana (State's Brief) was filed August 16, 2019. Amici, the Louisiana Public Defender Board (LPDB) and the Louisiana District Attorney's Association (LDAA), filed briefs at this Court's invitation on August 30, 2019. On July 26, 2019, undersigned counsel enrolled. Mr. Harris filed a *Reply Brief* on September 9, 2019. On October 8, 2019, this court granted Mr. Harris writ application. This brief follows.

SUMMARY OF ARUGMENT[6]

Mr. Harris' life without the possibility of parole sentence as an enhancement for selling less than a gram of marijuana in exchange for $30 is inhumane and excessive. *State v. Sepulvado*, 367 So. 2d 762, 766 (La. 1979). When weighed against the harm done to society, it truly shocks any sense of justice. *State v. Lobato*, 603 So.2d 739, 751 (La. 1993). More shocking, however, is the fact that (1) this outrageous result can be fairly traced to Mr. Harris' trial lawyer's failure to provide effective assistance throughout the course of these proceedings, but particularly at habitual offender sentencing and prior to trial; and, (2) Mr. Harris is now being prevented from ever raising, or having reviewed by any court, the question of whether trial counsel provided in ineffective assistance at habitual offender sentencing.

State ex rel. Melinie v. State, 93-1380 (La. 1/12/96), 665 So.2d 1172, was wrongly decided as claims of ineffective assistance of counsel related to sentencing must be cognizable by application for post-conviction relief. An excessive sentence or a sentence obtained in a proceeding in which there was a substantial violation of the Constitution of the United States or the State of Louisiana is unconstitutional as applied to the individual, and the Louisiana Legislature cannot deprive a defendant the opportunity to litigate these claims. Mr. Harris, therefore, must be permitted to press these claims in post-conviction.

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[5] Additionally, Mr. Harris has also pled ineffective assistance of post-conviction counsel for failure to conduct a reasonable investigation. The Court of Appeal determined the issue could not be reviewed until raised before the trial court.

[6] Arguments previously raised at the *Writ Application* stage by Petitioner not raised here or further briefed are not being waived. In particular, Petitioner wishes to focus this Court's attention of the denial of his right to present any sentencing errors in post-conviction, but does not wish to waive any argument with respect to his other ineffective assistance of counsel claims.

Should this Court be disinclined to overturn or limit the reach of *Melinie*, or find that it was correctly decided, then this Court must create an equitable exception, as it did in *State v. Francis*, 16-KP-0513 (La. 05/19/17), 220 So. 3d 703, 705, and either allow Mr. Harris to proceed in post-conviction or allow him to reinstate his appeal since appellate counsel inexplicably failed to raise trial counsel's ineffective assistance at sentencing before the Third Circuit on direct appeal.

Alternatively, Articles 3 and 881.5 and 882 of Louisiana Code of Criminal Procedure must be read so as to include sentences obtained in violation of the constitution. La. C. Cr. P. arts. 3, 881.5, and 882. "Notably, the United States Supreme Court has stated that an unconstitutional sentence 'is not just erroneous but contrary to law and, as a result void.' Thus, a sentence which is unconstitutionally excessive is also illegal." *State v. Johnson*, 2016-0259 (La.App. 4 Cir. 12/21/16), 207 So.3d 1101, 1104 n. 2 (La.App. 4 Cir. 2016) (quoting *Montgomery v. Louisiana*. 136 S.Ct. 718 (2016)). Likewise, where a sentence is obtained due to a violation of the Sixth Amendment, as it was here, it must also be considered void and therefore illegal. Finally, according to Article 3, "Where no procedure is specifically prescribed by this Code or statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." La. C. Cr. P. art. 3. This Court should either recognize constitutional violations as cognizable under a motion to correct an illegal sentence or otherwise permit Mr. Harris to challenge his detention by filing a motion pursuant to Article 3, as a *meaningful* procedure, commiserate with his extraordinary loss of liberty, is constitutionally required.

In sum, all Mr. Harris asks with respect to his ineffective assistance of counsel sentencing claims is that he be given a fair opportunity to prove them to a court of law. In as much as this Court's holding in *Melinie* prevents him from raising these claims, he asks this court overrule or significantly modify that decision. If the Court's view is that these issues must be raised on first appeal, then Mr. Harris received ineffective assistance of appellate counsel and asks for an out of time appeal to vindicate his rights at that stage. Amici – LPDB and LDAA as well as others – have specific views on where or how defendants should raise these claims, identifying salutary concerns regarding funding, case management and the like.

From Mr. Harris' perspective, however, it does not matter where he is given this right – just that he be granted it.

LAW AND ARGUMENT

I. MR. HARRIS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

A. A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

A defendant has the constitutional right to effective assistance of counsel at sentencing. *See e.g. State v. Sheppard*, 95-0370 (La. 09/13/96), 679 So. 2d 899; *State v. Williams*, 374 So. 2d 1215, 1217 (La. 1979) ("Because defendant was not represented by counsel at the sentencing hearing, no mitigating factors were argued. When the trial judge asked defendant if he had anything to say in his behalf, defendant answered that he did not. As a consequence, the record on appeal contains no evidence of possible mitigating factors which, if argued, might have led the trial court to impose a lesser sentence. Pretermitting the question of whether a defendant's sentence is excessive, we vacate the sentence and remand to the district court for resentencing with counsel.").

Indeed, *Strickland v. Washington*, itself, was a case about whether the defendant received effective representation *at sentencing*. *See also United States v. Conley*, 349 F.3d 837 (5th Cir. 2003) (holding that both trial counsel and appellate counsel provided ineffective assistance of counsel for failing to raise a sentencing error which increased the length of the sentence); *Lair v. State*, 265 S.W.3d 580 (Tex. App. 2008) (counsel ineffective for failure to interview witnesses in mitigation of sentence on a drug possession charge); *Shanklin v. State*, 190 S.W.3d 154 (Tex. App. 2005) (same); *Mikell v. State*, 903 So. 2d 1054 (Fla. App. 2005) (ineffective assistant where counsel did not know the sentencing range).

B. IN LOUISIANA THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING IS HEIGHTENED DUE TO ARTICLE I, SECTION 20 OF THE STATE CONSTITUTION

In 1974 Louisianans ratified Article I, Section 20 for inclusion into our constitution. La. Const. Art. I, § 20 (1974). This new Section greatly expanded protections against inhumane treatment to explicitly include, among other things, the prohibition against excessive sentences. *Id.* As one of the architects of this significant change to our constitutional settlement explained, "the prohibition against 'excessive punishment,' makes a great change in the law and requires courts to do justice in each case, *regardless of any legislative assertion.*" Louis "Woody" Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 39 (1975) (emphasis added). Indeed, Representative Jenkins regarded the new prohibition particularly important where "Mandatory penalties," are concerned as they "are particularly suspect [and] frequently have no relation to the magnitude of the offense." *Id. see also State v. Sepulvado*, 367 So.2d 762, 766 (La. 1979) (recounting the history of Article I, § 20).

This Court recognized in *Sepulvado* that "every imposition of a statutory punishment is done by law, notwithstanding the interposition of a judge as the law's instrument," and in this context flatly rejected the argument that challenges to "punishments meted out under a law must be limited to the Facial constitutionality of the penalty provisions." *Id.* at 766. "It is settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them." *Id.*

Imbued with this new responsibility, this Court began the important task of setting forth factors our courts must consider when a sentence is challenged as excessive. This Court held, among other things, (1) that "Section 20 scrutiny," must include as applied challenges because courts, no less than the Legislature, are not permitted to impose excessive sentences, *Id.*; (2) as such, this guarantee applies not just to categories of sentences, but to individual circumstances, *Id.*; (3) that under Section 20, "the sentencing judge does not possess unbridled discretion to impose a sentence within statutory limits, *regardless of mitigating facts*," *Id.* at 770 (emphasis added); and, (4) that trial courts should afford the accused an evidentiary hearing so that he may "rebut or explain unfavorable facts," noting this practice is necessary to avoid remands to determine the basis of a sentence. *Id.* at 769.

Notably, the *Sepulvado* Court had a complete record before it because the trial court held an evidentiary hearing to determine sentence. It was learned that the defendant and the victim were less than three years apart in age, were in love, and planned to marry, among other things. Notwithstanding this and other evidence, the trial court sentenced the defendant to three and a half years at hard labor. This Court, on appeal, considered not only the age and background of the defendant and the circumstances of the offense, but also data about how this crime was punished throughout the State and whether it had ever been imposed against a person so young (18) as the defendant. *Id.* at 772-773. Ultimately, this Court overturned the decision of the trial court and found the defendant's sentence to be excessive.

Consider what would have happened to the defendant in *Sepulvado* if his trial lawyer had not put forward any evidence, or even raised the excessiveness error, before the sentencing court. The ineffectiveness of the trial lawyer would have deprived the sentencing court *and* this Court, or any other reviewing court, of the ability to adequately determine the excessiveness of the sentence, as the constitution requires the courts to do. The courts would have had no choice (other than *sua sponte* remand for a development of the record) but to approve a sentence which after adequate development and review was determined excessive and unjust.

In this regard, Section 20 quite clearly places a heightened responsibility not only on the courts, but on defense counsel as well. La. Const. Art. I, § 20. This is especially true where, as here, the Habitual

Offender Law is concerned. *See State v. Guidry*, 16-1412 (La. 03/15/17), 221 So.3d 815, 831 ("if a defendant believes that the state has abused its prosecutorial discretion in filing a habitual offender bill such that it seeks to impose an unconstitutionally excessive sentence, the defendant should move the court at the sentencing hearing to depart downward from the mandatory minimum as permitted by *State v. Dorthey*, 623 So.2d 1276 (La. 1993), and, if justice requires, the court ought to grant it.")

Here, Mr. Harris' trial counsel did not put forward any arguments or evidence in favor of a sentence less than life without parole—as an enhancement for selling less than a gram of marijuana. Trial counsel did not file a motion to reconsider the habitual offender sentence or otherwise raise the excessiveness issue before the trial court. The Third Circuit inexplicably was not asked by assigned appellate counsel to remand the matter so that the record could be expanded and the trial judge could consider this issue, as rightly happened in *Sepulvado*. Due to these significant failures, the trial court and the Third Circuit were prevented from conducting the meaningful "Section 20 scrutiny," our constitution requires.

1. Mr. Harris' counsel failed to investigate or present evidence in mitigation of sentence

Mr. Harris' trial counsel did not independently or meaningfully investigate Mr. Harris' background. Counsel did not present any independently gathered evidence—or any evidence whatsoever—in support of a sentence less than life without the possibility of parole. Counsel simply failed to act as an advocate for Mr. Harris at habitual offender sentencing. As a consequence, Mr. Harris received no individualized sentencing determination as envisioned by Section 20 of the constitution. La. Const. Art. I, § 20. Mr. Harris, therefore, was deprived the counsel intended and guaranteed not only by the Sixth Amendment, but the Louisiana constitution as well. U.S. CONST. AMEND. VI; La. Const. Art. I, §§ 13. Where counsel at sentencing fails to act to represent his client's interests in a less harsh sentence, there is a constructive denial of counsel and prejudice is presumed. *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) applying *Cronic*, 466 U.S. 648, 654 (1984) (counsel's failure to subject the prosecution case to adversarial testing violates the Sixth amendment and requires reversal without a showing of prejudice).

Yet, even if this does not amount to a *per se* or *Cronic* violation, Mr. Harris' also makes a strong showing that he was denied effective assistance of counsel under the more stringent test laid out in *Strickland v. Washington*, 466 U.S. 688 (1984). For, at a minimum, an objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensures that all

reasonably available mitigating information and legal arguments are presented to the court.[7] This did not happen here.

In order to succeed on a claim made pursuant to *Dorthey*, defendants must rebut, by "clear and convincing evidence," the presumption that the statute is not excessive as applied to them. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, 676. Defendants, therefore, must put evidence before the trial court if they are to succeed. *State v. Pernell*, 14-0678, (La. App. 4 Cir. 10/15/14), 151 So. 3d 940, 945 ("**The importance of a full evidentiary hearing in the district court on a claim of excessiveness can hardly be overstated.**"). This means trial counsel must investigate and present the issue. *Williams v. Taylor*, 529 U.S. 362 (2000); *see also Glover v. United States*, 531 U.S. 198, 203 (2001) (citing *Williams v. Taylor* in the non-capital context because "any amount of actual jail time has Sixth Amendment significance"). Since Louisiana prohibits excessive sentences, and requires individual circumstances be considered, counsel acts unprofessionally where he fails to conduct a reasonable investigation into factors which may warrant a downward departure from the mandatory minimum. *e.g. Wiggins v. Smith*, 539 U.S. 510 (2003); *Freeman v. State*, 167 S.W.3d 114 (Tex. App. 2005) (applying *Wiggins* in non-capital context); *United States v. Gentry*, 429 F. Supp. 2d 806 (W.D. La. 2006) (Counsel ineffective for failing to file any objections to the presentence report (PSR)); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Rehnquist, J., dissenting). If granted a remand, and permitted to litigate this claim before the trial court, it is reasonably likely Mr. Harris will prevail. *Id.*[8]

2. Counsel was patently deficient for failing to file a motion to reconsider sentence

In the modern criminal world, sentencing is often the main event. *United States v. Lewis*, 823 F. 3d 1075, 1083 (7th Cir. 2016); *United States v. Irey*, 612 F.3d 1160, 1268 (11th Cir. 2010) (Tjoflat, J *concurring and dissenting*) ("[I]f sentences are to inspire the confidence of the defendant and the public, the sentencing hearing in the district court must be the "main event," rather than a "tryout on the road" for the real forum that will determine the sentence. *Wainwright v. Sykes*, 433 U.S. 72, 96, 97 S. Ct. 2497,

[7] Notably, to determine the objective reasonableness of counsel's conduct, the Supreme Court has often referred to the American Bar Association (ABA) guidelines. *See Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed.), require that defense counsel "become familiar with . .. applicable sentencing laws and rules, and what options might be available," and "present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused." ABA Standard 4-8.3 (a), (c). Similarly, Louisiana Public Defender Board Trial Court Performance Standards 751 and 753 require defense counsel to be "familiar with the sentencing provisions and options applicable to a case" and to "ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court."

[8] Note: Mr. Harris need not prove that it is more likely than not that a different sentencing result would have followed but only that the probability of a different result is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

2508, 53 L. Ed. 2d 594 (1977)."). *See also* Bibas, Stephanos, *RESPONSE: The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 422 (2003) ("[M]ost criminal procedure scholars mistakenly view trials as the center of the universe and assume that rational suspects should care mainly about maximizing their chances of success at trial. This academic obsession with trials bears little relationship to the real world, where only about **6% of felony defendants go to trial** and most plead guilty. We live in a world of guilty pleas, not trials, and in this world suspects have many options more desirable than fighting the government's case at trial.").

In this context, effective assistance of counsel at the sentencing stage of a criminal trial – at the point where a lawyer must file to reconsider the sentence – is essential.

Here, not only did trial counsel fail to act as an advocate at habitual offender sentencing, counsel also failed to file a motion to reconsider sentence. This failure resulted in (1) forfeiture of a judicial proceeding (a hearing on the motion and chance to submit evidence); and, (2) an involuntary waiver of an appellate claim (an excessiveness claim). *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (holding that when an attorney's deficient performance costs a defendant an appeal he otherwise would have taken, the court must presume prejudice without requiring the defendant to show that his underlying claims had merit); *accord Garza v. Idaho,* 586 U.S. ___ (2019), 139 S. Ct. 738 (holding that regardless of whether a defendant has signed an appeal waiver, prejudice is presumed when counsel's deficient performance deprives a defendant of an appeal that he otherwise would have taken). In these circumstance, prejudice must be presumed. *Id.* This is because, under Article 881.1 of the Code, if a defendant fails to file or make a motion to reconsider sentence the resulting sentence cannot later be challenged on "appeal or review," La. C. Cr. P. art. 881.1(E); or if it is reviewed, notwithstanding that procedural bar, that review will be constrained to the silent record. The fact that the Third Circuit reviewed a bare excessiveness claim, made on an insufficient record, only reinforces how prejudicial trial counsel's failure to file this basic motion has been for Mr. Harris.

Whether to file a motion to reconsider sentence is not a strategic decision, but a fairly ministerial task. *Flores-Ortega*, 528 U.S. at 477. Counsel need not weigh the positives or negatives of doings so. The motion itself need only state, in broad terms, every basis for which reconsideration is warranted. Once filed, however, counsel is given the important and impactful opportunity to place evidence in support of the motion into the record, whether or not the court agrees to hold a hearing or summarily denies the motion. La. C. Cr. P. art. 881.1(C) (permitting counsel to proffer all evidence where a contradictory hearing is denied).

Here, the failure to file a motion to reconsider sentence deprived Mr. Harris of an important judicial determination by the trial court. It also deprived the trial court of the opportunity to fulfill its Section 20 duties. Even had the trial court denied the motion, it would have had to provide reasons for doing so, and the Third Circuit would have been able to review those reasons for abuse of discretion (or error of law). More significantly, the failure to file a motion to reconsider sentence also deprived Mr. Harris of the opportunity to place evidence in support of his excessiveness claim before the trial court and into the record. *Id.* Finally, the failure to file a motion to reconsider sentence deprived Mr. Harris any *meaningful* review of the excessiveness claim on direct appeal, and deprived that court of the opportunity to fulfill its' Section 20 duties, as well. This is because the Third Circuit did not have a lower court determination to review and did not have a complete record supported by evidence. In this regard both the court and Mr. Harris were also disserved by appellate counsel who did not raise trial counsel's ineffectiveness or ask the court for a remand or a chance to expand the record.

At a hearing on this claim, therefore, Mr. Harris need only prove: (1) Counsel failed to consult with him about whether he wanted counsel to file this motion, *Flores-Ortega*, 528 U.S. at 480; (2) that Mr. Harris never communicated to counsel that he wished to waive having his sentence reconsidered or appealed, *Id.*; and, (3) that Mr. Harris demonstrably wished to have this motion filed and fully litigated. *Id.* Assuming Mr. Harris can establish all of these factors, prejudice is established, and a new sentencing hearing must be held. To be sure, the United States Supreme Court made this even clearer last term in *Garza v. Idaho*, holding the presumption of prejudice applies even where there is a signed appeal waiver as part of his plea agreement. *Garza v. Idaho, supra.*

If granted a remand, and permitted to litigate this claim before the trial court, it is reasonably likely Mr. Harris will prevail.

II. MR. HARRIS MUST BE PERMITTED TO ADVANCE THESE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN SOME FORUM

To be clear, Mr. Harris is being denied a forum to have his right to effective assistance of counsel at sentencing vindicated. As a result, he is being deprived of his liberty without due process. Defendants must be given a mechanism to vindicate their right to effective assistance of counsel at sentencing. No court has ever heard or determined whether Mr. Harris received effective assistance of counsel at habitual offender sentencing. Mr. Harris must now be given that opportunity. Our law and procedures should allow him to do so in any one of the following ways: (1) through post-conviction; (2) through an out-of-time appeal; (3) through motion to correct an illegal sentence; and (4) through Article 3 of the Code of Criminal

Procedure. La. C. Cr. P. art. 3.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING MUST BE COGNIZABLE AT POST-CONVICTION REVIEW

Prohibiting *all* sentencing claims at post-conviction is unworkable, inconsistently applied, and contrary to our constitution.

In *Melinie*, this Court read the statutory provisions of Article 930.3 as limiting the available grounds of post-conviction to challenges to the conviction only, and not the sentence. However, while the Legislature could pass legislation to regulate the time and manner of post-conviction litigation it cannot eliminate entire categories of claims from review without violating a person's rights guarnateed by the Article 1, Section 20 of the Louisiana Constitution of 1974 ("No law shall subject any person to...excessive or unusual punisments."); Section 21 ("The writ of habeas corpus shall not be suspended); Section 22 (All courts shall be open and every person shall have an adequate remedy by due process of law and justice, adminisetered without denial...").

1. The *Melinie* prohibition is unconstitutional and inconsistently applied

This Court's broad prohibition announced in *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, in combination with this Court's rule in *State v. Humphrey*, 13-0481 (La. 11/08/13), 126 So. 3d 1280 prevents Courts from ever assessing the excessiveness of a sentence, and deprives defendants from ever vindicating their right to effective assistance of counsel. These rules are now insulating trial counsel's failures from review and preventing courts from fulfilling their Section 20 duties. *See also State v. Cotton*, 29-2397 (La. 10/15/10), 45 So. 3d 1030, 1030-31 (holding habitual offender adjudications to count as sentencing and barring all claims relating to the proceeding from review in post-conviction).

When interpretating a statute such as Article 930.3, this Court should interpret the statute in a manner that renders the application constitutional. "[A]mbiguous statutes should be interpreted in a constitutional rather than an unconstitutional manner and with lenity toward the defendant." *State v. Caruso*, 98-1415 (La. 03/04/1999), 733 So. 2d 1169, 1172; *State v. Lindsey*, 491 So. 2d 371, 374 (La. 1986) ("When a statute is ambiguous, we generally interpret the statute in a constitutional rather than an unconstitutional manner, and with lenity toward the defendant.").

Even assuming the word "conviction" in Article 930.3(1) was only intended apply to guilty verdicts and not sentencing determinations—which is far from the most natural interpretation of that word in the context of the statute,[9] such an interpretation would conflict with our State constitution. In particular,

[9] *See* Brief of the LPDB as *Amicus Curiae* in Support of Defendant-Petitioner, *State v. Harris* (No. 2018-KH-1012

Article I, Sections 13, 20, 21 and 22. La. Const. Art. I, §§ 13, 20, 21, 22. Clearly, where a statutory provision conflicts with or contradicts a constitutional principle, the statute must yield or be interpreted so as to avoid declaring it unconstitutional.

For example, Article 881.1(E) definitively states that failure to file a motion to reconsider sentence or to raise any specific grounds upon which reconsideration is warranted "shall preclude" raising the issue on appeal. La. C. Cr. P. art. 881.1(E). However, our courts have routinely disregarded the plain language of that provision and addressed sentencing claims, including excessiveness claims, where no motion for reconsideration was filed. *State v. Robinson*, 744 So. 2d 119 (La. Ct. App. 1999) (failure to raise excessiveness of sentence in the motion to reconsider waives the issue for appeal, yet the court overturned the sentence because it was excessive on the record). Our courts do this because, where the issue is raised, courts have a duty under Section 20 to consider whether the sentence is excessive. *Sepulvado*, 367 So. 2d at 766. In fact, this is exactly what happened at Mr. Harris' direct appeal when his appellate counsel raised an inchoate excessiveness claim and failed to ask for a remand so that record could be expanded and the issue first determined by the trial court. The court determined the issue on the *bare* record, even though no motion to reconsider had been filed. As discussed above, such *bare* claims should be disfavored because the trial record is generally silent and unavailing of the issue, as it was here.

As this example demonstrates, however, our court do not feel constrained by the clear words of a statue where to rely on them would result in a violation of constitutional principles. This appears particular true where the issue concerns sentencing error. "Conviction" in La. C. Cr. P. art. 903.3(1) therefore cannot be an impediment to reviewing sentencing claims. For if it is, then it is an impediment to constitutional principles which is disallowed. *Melinie*, therefore, must be unconstitutional in as much as it prevents ineffective assistance of counsel claims.

Moreover, the *Melinie* prohibition is also contradicted by a line of cases from this Court holding that ineffective assistance of counsel claims as they relate to sentencing are, in fact, cognizable at state post-conviction. *State ex rel. Busby v. Butler*, 538 So.2d 164, 166 (La. 1988) (holding "the assignment of error dealing with ineffective assistance of counsel at the sentencing phase of the trial to have merit"); *State v. Brooks*, 505 So. 2d 714, 724 (La. 1987) (in relation to claim of ineffective assistance of counsel at capital penalty trial, stating "[d]efendant has the right to apply for post-conviction relief on the basis of ineffective assistance of counsel" and noting "[d]efendant would not be limited to this record in his

(filed Aug. 30, 2019), at 8-11.

application for post-conviction relief"); *State v. Messiah*, 538 So. 2d 175, 189 (La. 1988) (stating defendant may raise post-conviction claim of constitutionally ineffective assistance of counsel at capital penalty trial); *State v. Deruise*, 98-0541 (La. 04/03/01), 802 So. 2d 1224, 1247-1248 (in capital case raising claims of ineffective assistance of counsel at all stages of capital trial, stating "ineffective assistance of counsel claims are usually addressed in post-conviction proceedings, rather than on direct appeal"). While these cases mainly concern death sentenced prisoners, the post-conviction statute is applicable to all prisoner and does not draw a distinction based upon the sentence imposed. This also undermines the notion that the rationale for excluding all sentencing claim in post-conviction includes ineffective assistance of counsel at sentencing.

For all these reasons, and those previously pled at the *writ stage* by Mr. Harris and discussed by Amicus LPDB, Mr. Harris should be permitted to raise his inefffective assistance of counsel at sentencing claims in state post-conviction proceedings.

2. The *Melinie* prohibition is unworkable

Our courts have long recognized that ineffective assistance of counsel claims are more properly resolved in post-conviction. *See State v. Barnes*, 365 So.2d 1282, 1285 (La.1978); *State v. Truit*, 500 So. 2d 355, 359 (La. 1987); *State v. Reeves*, 06-2419 (La. 05/05/09), 11 So. 3d 1031, 1074 (noting "that '[a] claim of ineffectiveness is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal.'") (quoting *State v. Miller*, 1999-0192 (La. 9/6/00), 776 So.2d 396, 411). As the Third Circuit recognized on direct appeal in this very case, "a claim of ineffective assistance of counsel is typically more properly resolved by post-conviction proceedings *as it allows the trial court to conduct a full evidentiary hearing, if warranted.*" *Harris*, 156 So. 3d at 699-700 (emphasis added). *See also State v. Hayes*, 712 So. 2d 1019, 1021 (La. Ct. App. 1998) ("defendant contends his trial counsel's failure to file a motion for reconsideration of sentence constitutes ineffective assistance of counsel because the failure resulted in a constitutionally excessive sentence. Initially, we note that a claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted...").

Indeed, in order to succeed on an ineffectiveness claim the record will need to be expanded, and an evidentiary hearing likely held. This is because ineffective assistance claims are a "mixed question of law and fact." *Strickland*, 466 U.S. 698. On appeal the court may know the legal rule announced in *Strickland* but it will almost certainly not have all or even most of the facts necessary to determine whether the legal rule is met. Whether the unprofessional error concerns guilt or the sentencing does not matter.

The analysis is the same.

For example, here Mr. Harris' counsel failed to present any evidence in mitigation of the habitual offender sentence, among other things. *Had* appellate counsel raised this issue on appeal, the appellate court would have had no way to assess it. *R. 1-3 of the Uniform Rules of Louisiana Courts of Appeal (direct appeal is limited to "issues which were submitted to the trial court."). Even if the court *assumed*, because they saw no motion to reconsider the habitual offender sentence, that counsel rendered deficient performance, the court would still have *no way* of assessing the prejudice as the record does not contain the evidence which was *not* presented, but *ought* to have been. In such a circumstance all the court could do is either deny the claim (even though there is sufficient evidence outside the record to prove it) or remand the matter back to the trial court. While a remand would certainly be the wiser and more prudent course, at that point a remand is the functional equivalent of reserving the issue for post-conviction. *See State v. Boyd*, 164 So. 3d 259 (La. App. 4th Cir. 2015) (remanding for determination of ineffective assistance of counsel at habitual offender proceeding to determine whether deficiency of counsel at sentencing resulted in significantly harsher sentence.).

Therefore, ineffective assistance of counsel at sentencing claims, like all other ineffective assistance of counsel claims, are impractical to raise on direct appeal.[10] They must be permitted in post-conviction.

B. ASSUMING THE LIMITATION IN *MELINIE* IS CORRECT, MR. HARRIS MUST BE PERMITTED TO TAKE AN OUT OF TIME APPEAL

In *State v. Francis*, 220 So. 3d 703, the defendant raised a claim of ineffective assistance of appellate counsel for their failure to challenge his sentence on direct appeal. Even though this Court held *Melinie* prevented sentencing claims in post-conviction, it nonetheless carved out an equitable exception for the Petitioner and permitted him to bring his claim in post-conviction, holding that his claim "is cognizable in post-conviction and, in fact, must be addressed on collateral review if it is to be addressed at all." *Id.* at 705. Mr. Harris' circumstance is nearly indistinguishable. If *Melinie* applies to prevent Mr. Harris from raising his ineffective assistance of counsel at sentencing claims in post-conviction, then the claim should have been made on direct appeal. Since appellate counsel failed to raise that claim, Mr. Harris should now be permitted to raise it in post-conviction, as an equitable exception to the *Melinie*

[10] To the extent ineffective assistance of sentencing claims must be raised on direct appeal, LPDB has not funded the Louisiana Appellate Project (LAP) to provide representation to perform that representation. *See LPDB brief.* As a result, Mr. Harris' appellate counsel did not perform that function. Ultimately, Mr. Harris takes no view on the systemic issues concerning whether the State should fund appellate counsel to perform this representation or defer the litigation to post-conviction – but notes that in this case he received neither opportunity.

prohibition. In the alternative, this Court could reinstate Mr. Harris' direct appeal before the Third Circuit so that he can raise the issue there.[11]

C. MR. HARRIS MUST BE PERMITTED TO FILE A MOTION TO CORRECT AN ILLEGAL SENTENCE OR A MOTION PURSUANT TO ARTICLE 3 OF THE CODE

As the Fourth Circuit Court of Appeal recently acknowledged "an unconstitutional sentence 'is not just erroneous but contrary to law and, as a result void.' Thus, a sentence which is unconstitutionally excessive is also illegal." *Johnson*, 207 So.3d at 1104 n. 2 (quoting *Montgomery v. Louisiana*. 136 S.Ct. 718 (2016)). If an unconstitutionally excessive sentence is illegal, then a sentence obtained in violation of Mr. Harris' right to effective assistance of counsel at sentencing is also illegal. Assuming this Court provides him no other avenue for his requested relief, he requests he be permitted to avail himself of the procedures outlined in La. C. Cr. P. art. 881.5 and 882.

Finally, if the court is disinclined to permit Mr. Harris to proceed on his ineffective assistance of counsel sentencing claims based upon any of the above discussed mechanisms, he would request he be permitted to proceed under La. C. Cr. P. art. 3, which provides, "Where no procedure is specifically prescribed by this Code or statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." While this procedure may be fairly untested, the Legislature clearly enacted it for circumstances such as these, where a person is without a spelled out procedure to address a constitutional wrong.

III. MR. HARRIS RECEIVED INEFFECTIVE ASSISTNCE OF COUNSEL AT THE PRE-TRIAL STAGE[12]

The courts below erred when they erroneously denied Mr. Harris' ineffective assistance of counsel claim with respect to the failure to communicate a 7 year plea offer, in particular the district court misapplied the test set out in *Missouri v. Frye*, 132 S.Ct. 1399 (2012). *See also Lafler* v. *Cooper*, 566 U. S. 156, 165 (2012); *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

While the test set out in *Frye* broadly follows the rule laid out in *Strickland v. Washington, Supra*, the test itself actually has four different components. First, the defendant must demonstrate his attorney

[11] If the appeal is reinstated, Mr. Harris will likely petition that court to relinquish jurisdiction to the trial court so that the ineffective assistance of counsel claim can be developed and the Third Circuit will have a complete record of the claim to review.

[12] In his *Writ Application* and *Reply Brief* Mr. Harris the trial court error in denying his claim of IATC for failure to pursue an entrapment defense. Petitioner, therefore, will not repeat himself or burden this court with the same arguments previously briefed. He still prays this Court grant him relief on that basis

failed to communicate the plea offer. *See Padilla v. Kentucky,* 559 U.S. at 364 (stating counsel has a "critical obligation… to advise the client of the advantages and disadvantages of a plea agreement"); *see also Banks v. Vannoy*, 808 Fed. Appx. 795, 799 (5th Cir. 2017) ("Under this circuit's precedent, a defendant can make a showing of the denial of a constitutional right regarding his claim that counsel was ineffective for failing to communicate a plea offer").

Second, the defendant must demonstrate he would have accepted the plea offer. *Frye*, 566 U.S. at 147. Third, the defendant must demonstrate the prosecution would not have cancelled the plea and the trial court would have accepted the agreement. *Id.* Fourth, the defendant must show the outcome of the criminal process would have been more favorable had the plea been accepted. *Id.*; *see also United States v. White*, 715 Fed. Appx. 436, 437 (5th Cir. 2018). As with all ineffectiveness claims, the totality of the circumstances must be taken into account in accessing each prong of the test.

Here, the district court's ruling on this claim was as follows:

> This court finds that the defendant's selective memory challenges his credibility and ability to accurately recall past events. Defendant's self-serving testimony is not enough to carry his burden of proof. The evidence does not prove that his counsel's performance was deficient. Therefore, plaintiffs claim of ineffective assistance of counsel for his counsel's failure to convey a plea offer is denied.

See, Writ Appl. App. D at 2.

At the hearing on this issue, Mr. Harris presented physical evidence that the 7 year deal was offered to his counsel by the district attorney, *See Writ Appl.* App. E. He also gave clear testimony that he *could* remember that his trial counsel never communicated such a low offer as 7 years. Yet, the court refused to credit Mr. Harris' facially sufficient evidence and therefore failed to consider steps 2 through 4 of the *Frye* Test.

"Where denial of the constitutional right to assistance of counsel is asserted, its ***peculiar sacredness*** demands . . . scrupulous[] review. . " *Avery v. Alabama*, 308 U.S. 444, 447 (1940) (emphasis added). As the district court's terse ruling indicates, such a scrupulous review did not occur here. Had the court correctly applied the factors announced in *Frye*, the court would have recognized Mr. Harris did enough on the record to carry his burden of persuasion on this issue. La. C. Cr. P. art. 930.2.

This error must now be corrected. Mr. Harris' conviction must either be reversed or the issue remanded to the district court so the court can correctly apply the analysis required by *Frye*.

In the alternative, Petitioner asks this Court remand this claim to the district court for the court to assess the credibility of the State's new supposition that whatever plea Mr. Harris would have entered into did not come with the promise there would be no habitual offender bill filed. *See* Response by the State

of Louisiana, *State v. Harris* (No. 2018-KH-1012 (filed Aug. 30, 2019), at 2-3. This assertion – that a prosecutor would offer a plea to 7 years without the commitment that there would be no habitual offender bill filed -- is so baldly unbelievable that it tests the measure of fair advocacy.

PRAYER FOR RELIEF

WHEREFORE, for all the reasons given above, and for any other reasons that may occur to this Honorable Court, Mr. Harris respectfully request this Court reverse the judgment of the Louisiana Third Circuit Court of Appeal and the district court and order that his conviction be reversed or, in the alternative, provide him an adequate opportunity to have his ineffective assistance of trial counsel sentencing claims properly considered.

Respectfully Submitted,

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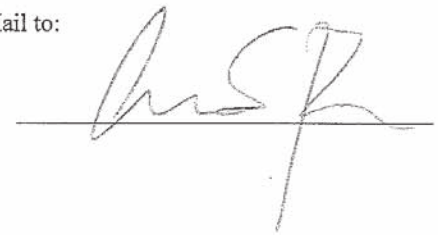
VERIFICATON AND CERTIFICATE OF SERVICE

BEFORE ME, the undersigned authority, personally came and appeared Cormac Boyle who, being duly sworn, deposed and said that he is acting as counsel for Mr. Harris and that the statements contained in the foregoing Original Brief are true and correct to the best of his information, knowledge and belief, and that a copy of the Brief has been forwarded by U.S. Mail to:



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Sworn to and subscribed before me this 4th day of December 2019.

Julie Kimmel #39736
Notary Public