



ARGUMENT

**I. This Court Should Issue a Writ of Mandamus Directing Judge Bakalis to Increase Defendant’s MSR Term to the Four Years Mandated by Statute.**

The parties do not dispute the relevant facts. *Compare* St. Br. 3-6 *with* Def. Br. 3-4.<sup>1</sup> Crucially, defendant acknowledges that a mandamus order must issue because a four-year MSR term was statutorily mandated for his offense and because the judge imposed only a one-year MSR term. Def. Br. 5.

Defendant contests only a minor point: While petitioner requested that this Court direct the respondent judge to change defendant’s one-year MSR term to four years, *see, e.g.*, St. Br. 17, defendant asks this Court to direct the judge to vacate the sentencing order and resentence him, *see, e.g.*, Def. Br. 19. In particular, defendant asserts that the respondent judge might exercise his discretion to shorten defendant’s prison term in light of the increased MSR term. *Id.* at 5-10.

But defendant fails to mention that his prison term was discharged as of October 26, 2016, A18; St. Br. 4, and none of defendant’s cited cases in

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<sup>1</sup> Consistent with defendant’s citations, *see* Def. Br. 3 n.1, “St. Br. \_” refers to petitioner’s opening brief and “St. App. \_” refers to its appendix; “Def. Br. \_” refers to defendant Gilio’s responsive brief and “Def. App. \_” refers to its appendix; “A\_” refers to the supporting record attached to the petition for writ of mandamus filed in July; and “Suppl Rec.” refers to the supplemental record filed in August. Defendant’s appendix includes eleven circuit court documents and transcripts, four of which are not contained in either the supporting record or supplemental record. *Compare* Def. App. 1-2, 10, 27-31, 47-50 *with* A1-44; Suppl Rec. Petitioner does not object to the four extra-record items given their apparent authenticity and defendant’s description of their source. Def. Br. 3 n.1.

support of his resentencing argument feature this key factual circumstance. Cases that are factually apposite show that altering the prison term would be inappropriate. In *People v. Porm*, the appellate court held that Porm's due process rights had been violated because he was not admonished that a three-year MSR term would be added to the ten-year prison term imposed pursuant to his fully negotiated guilty plea. 365 Ill. App. 3d 791, 792-93 (1st Dist. 2006). Because Porm had discharged his ten-year prison term, he suggested that the Court calculate the date on which he would have been released from prison had he been credited with the undisclosed MSR term and credit the resulting excess time spent in prison against his MSR term. *Porm*, 365 Ill. App. 3d at 794. The appellate court disagreed, noting that because the prison term had been discharged, it could not be modified and the claim was moot. *Id.* at 795; see also *People v. McNulty*, 383 Ill. App. 3d 553, 557 (1st Dist. 2008) (finding it impossible to sentence defendant to probation with drug treatment in lieu of imprisonment because he had already completed his prison term, mooting the issue). Just as a court could not shorten a discharged prison term to remedy a constitutionally infirm sentence, it should not shorten a discharged prison term to compensate for a statutorily unauthorized low MSR term.

Further, defendant identifies no legal impediment to the imposition of a four-year MSR term while leaving the three-year prison term intact, and one is not apparent. See St. Br. 8-10 (asserting that such correction would

not create grounds for defendant to challenge constitutionality of his guilty plea); Def. Br. 8 (acknowledging same); *see also People ex rel. Alvarez v. Gaughan*, 2016 IL 120110, ¶¶ 20-21 (rejecting defendant Castleberry's argument that increasing sentence through mandamus action raised statutory or jurisdictional concerns).

Accordingly, this Court should issue a mandamus order directing the respondent judge to amend defendant's sentencing order to include a four-year MSR term.

## **II. The Court Should Amend Its Rules to Permit Statutorily Unauthorized Sentences to be Corrected at Any Time by Motion in the Circuit Court.**

In *Castleberry*, the Court declined to amend its rules to address the need to correct statutorily unauthorized sentences because the parties had not argued for a rule change or briefed the matter. *People v. Castleberry*, 2015 IL 116916, ¶ 29. But the Court reserved judgment on the matter "should any amendment be proposed in the future." *Id.* Because this case — like *People v. Vara*, No. 121823 (regarding imposition of unauthorized fines) — is representative of a large class of cases in which a circuit court has imposed a statutorily unauthorized sentence that cannot be readily corrected, in both cases the People have taken up the Court's invitation to propose a rule change. *See* St. Br. 10-17 & 17 n.5; Appellant's Brief, *People v. Vara*, No. 121823, at 17-23.

Defendant offers little reason why defendants and the People should not be allowed to correct statutorily unauthorized sentences in the circuit court. Defendant's claim that such a procedure falls outside the circuit court's jurisdiction, Def. Br. 12-13, misses the point: the rule change would create a new, narrow collateral vehicle to address the problem in the circuit court. And although he suggests that a solution to the problem of sentences that unlawfully omit legislatively mandated fines is to eliminate those fines, Def. Br. 13-14, that argument is properly directed to the legislature; this Court has repeatedly declined to act as a super-legislature, upholding statutes only if it agrees that they are wise. *See, e.g., People v. Minnis*, 2016 IL 119563, ¶ 40.

While defendant also claims that the rule would not serve judicial economy given the resources the Office of the State Appellate Defender would instead devote to filing *Anders* briefs rather than briefs addressing only unauthorized fines or fees, Def. Br. 14-15, defendant overlooks that *Anders* review is necessary, not wasteful, in light of defendants' constitutional right to adequate representation on direct appeal. *See McCoy v. Ct. of App. of Wisconsin, Dist. 1*, 486 U.S. 429, 447 (1988). Judicial resources are better apportioned with the appellate court reviewing *Anders* briefs and objections to them, and the circuit court (not this Court) correcting clerical errors regarding fines and other types of statutorily nonconforming sentences.

Defendant expresses concerns about the process for correcting a statutorily unauthorized sentence by motion, Def. Br. 16-17, but that process could be practically indistinguishable from that by which a defendant currently seeks reconsideration of his sentence, with the exception that it would not be limited to the thirty-day period following his sentence, could be initiated by the People, and would focus on the narrow legal issue of whether a sentence violates a statutory requirement. If the People or a defendant discovered that the defendant's sentence is not authorized by statute — because it includes or omits a statutorily required term or includes a term that is greater or less than authorized — the party would file a motion in the circuit court. The circuit court would then conduct a hearing, with the defendant present and represented by retained or appointed counsel, determine whether the sentence was unauthorized by statute, and correct the sentence as necessary. If the parties disagreed with the court's ruling, they could appeal from that order. That this process will result in some amount of additional appellate litigation does not reduce the benefits to judicial economy, for that briefing would take place in narrow appeals in the appellate court rather than in mandamus actions in this Court.

The People's proposed rule shifts review of statutorily non-conforming sentences from this Court's mandamus docket back to a court in a better position to efficiently make such a determination: the circuit court.

**CONCLUSION**

For these reasons, the People of the State of Illinois request this Court to issue a mandamus order directing respondent, the Honorable George Bakalis, to amend defendant Frank Gilio's sentencing order to include a four-year MSR term as mandated by 730 ILCS 5/5-8-1(d)(6) (2015). This Court should also amend its rules to permit statutorily unauthorized sentences to be corrected at any time by motion in the circuit court.

December 12, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 6 pages.

s/Leah M. Bendik

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                                   )  
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**PROOF OF FILING AND SERVICE**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 12, 2017, the **Reply Brief of Petitioner** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the email addresses of the persons named below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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E-FILED  
 12/12/2017 2:26 PM  
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