IN THE SUPREME COURT OF FLORIDA

CHARLES LEE,	:	
Petitioner,	:	
vs.	:	Case No. SC14-416
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On January 3, 2000, the State Attorney filed an information charging Mr. Lee with one count of attempted first-degree murder. The information alleged that Mr. Lee "did attempt to kill and murder and inflict upon [the victim] mortal wounds by shooting with a firearm." At the time of the offense, Mr. Lee was 15 years old. (V1/R1)

After a jury trial, Mr. Lee was convicted as charged. (SV/R455-695) The trial court sentenced Mr. Lee to life in prison. (V1/R10-20) (In its opinion below, the Second District summarized the facts of the case: "Mr. Lee was on a street and got into a disagreement with two people who were in a van attempting to purchase cocaine." Lee v. State, 130 So. 3d 707, 708 (Fla. 2d DCA 2013). "The nature of the disagreement is not entirely clear, but there is evidence that Mr. Lee thought he was owed forty dollars. Mr. Lee threatened to shoot the driver if he drove away. When the driver attempted to leave, Mr. Lee carried through with his threat." Id.)

In 2010, Mr. Lee filed a Motion to Correct Illegal Sentence. Mr. Lee, citing Graham v. Florida, 560 U.S. 48 (2010), alleged that the "Court has held that a juvenile offender who did not commit a homicide may not be sentenced to life without parole." (V1/R2-3)

The trial court held a resentencing hearing. (V3/R406-452) During the resentencing hearing, Mr. Lee's mother testified.

(V3/R414-418) Also, Mr. Lee testified. (V3/R418-428) Prior to resentencing Mr. Lee, the trial court stated: "I looked through the sentencing transcript and -- I did not go through the entire trial transcript. I went through a great deal of it." (V3/R445) The trial court continued: "I, again, went through the sentencing, original counsel, there really was no mitigation offered other than the Defendant's age, so that's all I have here today. And the PSI was relied upon and Judge Swanson [the original sentencing judge] made it perfectly clear that he found no mitigation whatsoever in that." (V3/R448)

The trial court resentenced Mr. Lee to 40 years in prison. The trial court also imposed a 25-year mandatory minimum term pursuant to section 775.087, Florida Statues (1999). (V3/R450)

After a notice of appeal was filed, Mr. Lee filed a Motion to Correct Sentencing Error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). In this motion, Mr. Lee alleged: (1) Mr. Lee's 40-year sentence and 25-year minimum mandatory term violate both the Eighth Amendment and article 1, section 17, of the Florida Constitution; (2) the trial court erroneously imposed a 25-year minimum mandatory term; (3) the trial court erred by failing to consider an updated presentence investigation report; (4) because Mr. Lee maintained that the trial court must resentence him, Mr. Lee requested that the trial court become acquainted with what transpired at trial; and (5) the trial court failed to check the prison credit box on the amended sentencing

form. (SV/R813-898)

The trial court granted this motion in part; the trial court agreed that the written sentence failed to award Mr. Lee prison credit. The trial court denied the remainder of the motion. (SV/R899-907) The trial court filed an amended sentencing form. (SV/R908)

On appeal to the Second District, Mr. Lee argued the following issues in his brief: (1) Mr. Lee's 40-year sentence and 25-year minimum mandatory term violate both the Eighth Amendment and article 1, section 17, of the Florida Constitution; (2) the trial court erroneously imposed a 25-year minimum mandatory term; (3) the trial court erred by failing to consider an updated presentence investigation report.

The Second District "reject[ed] all of these arguments." Lee, 130 So. 3d at 709–710. As to the whether the trial court erred by failing to consider an updated PSI, the Second District stated the following:

> Concerning the claim that the trial court failed to order and consider an updated PSI, we first note that the record does not contain any request by Mr. Lee for such an update. He has not cited any law that would compel the trial court to obtain such an update. His counsel, of course, updated the record with nearly two hundred pages of information documenting Mr. Lee's experiences in prison. Mr. Lee testified about his experiences between the two sentencing hearings. It is difficult to imagine that an update to the original PSI would contain anything that is not already in this record.

Id. at 710.

Mr. Lee filed a motion for rehearing and rehearing en banc in the Second District, again arguing that because "the information in this case fails to allege the element of great bodily harm, the 25-year mandatory minimum remains unlawful." The Second District denied this motion.

SUMMARY OF THE ARGUMENT

The trial court originally sentenced Mr. Lee to life in prison. However, after the Supreme Court issued its decision in Graham v. Florida, 560 U.S. 48 (2010), the trial court resentenced Mr. Lee to 40 years in prison with a 25-year minimum mandatory term.

Pursuant to Kelsey v. State, 41 Fla. L. Weekly S600 (Fla. Dec. 8, 2016), Mr. Lee is entitled to be resentenced pursuant to the provisions of chapter 2014–220, Laws of Florida. Further, on remand, the trial court must consider an updated presentence investigation report before resentencing Mr. Lee.

Also, while the trial court imposed a 25-year minimum mandatory term pursuant to section 775.087, section 775.087 remains unconstitutional and violative of the Eighth Amendment as applied to Mr. Lee; section 775.087 unconstitutionally curtails the trial court's duty to craft an appropriate sentence.

ARGUMENT

ISSUE I

PETITIONER IS ENTITLED TO BE RESENTENCED PURSUANT TO THE PROVISIONS OF CHAPTER 2014-220, LAWS OF FLORIDA.

In this case, a jury found Mr. Lee guilty of attempted first-degree murder with a firearm. Mr. Lee committed this offense when he was a 15-year-old child. The trial court originally sentenced Mr. Lee to life in prison. However, after the Supreme Court issued its decision in Graham v. Florida, 560 U.S. 48 (2010), the trial court resentenced Mr. Lee to 40 years in prison with a 25-year minimum mandatory term.

Like Kelsey v. State, 41 Fla. L. Weekly S600 (Fla. Dec. 8, 2016), Mr. Lee "represents a narrow class of juvenile offenders, those resentenced from life to term-of-years sentences after Graham, for crimes committed before chapter 2014–220's July 1, 2014, effective date." Therefore, like Kelsey, Mr. Lee remains entitled to "the judicial review granted to other defendants who, like him, were sentenced to terms that will not provide them a meaningful opportunity for relief in their respective lifetimes." Id. This Court should quash the decision below and remand for resentencing.

In Kelsey, the offenses "occurred on November 6, 2002, when fifteen-year-old Kelsey burglarized an apartment and raped the pregnant victim at knifepoint in the presence of her two small children." Id. "In 2009, Kelsey was charged with two counts of

armed sexual battery, armed burglary, and armed robbery, and he pleaded guilty. On March 26, 2010, a trial court sentenced Kelsey to two life sentences and two concurrent twenty-five-year terms for four nonhomicide offenses." Id. "After the United States Supreme Court decided Graham v. Florida, 560 U.S. 48 (2010), Kelsey sought to withdraw his plea, which was denied. At the resentencing held in January 2014, the trial court imposed concurrent sentences of forty-five years." Id. (footnote omitted). "[T]he First District opined that it was precluded from providing Kelsey ... relief ... because Kelsey's forty-five-year prison term did not constitute a de facto life sentence in violation of Graham." Id. (citation omitted). This Court held that Kelsey was entitled to resentencing, as this Court answered the following question in the affirmative: "Is a defendant whose original sentence violated Graham v. Florida, 560 U.S. 48 (2010), and who was subsequently resentenced prior to July 1, 2014, entitled to be resentenced pursuant to the provisions of chapter 2014-220, Laws of Florida?"

In Kelsey, this Court emphasized that its "focus has not been on the length of the sentence imposed but on the status of the offender and the possibility that he or she will be able to grow into a contributing member of society." Id. This Court held that juveniles who are serving lengthy sentences are entitled to periodic judicial review:

> Reading together our decisions in Henry [v. State, 175 So. 3d 675 (Fla. 2015)], Horsley

> [v. State, 160 So. 3d 393 (Fla. 2015)], and Thomas [v. State, 177 So. 3d 1275 (Fla. 2015)], it is clear that we intended for juvenile offenders, who are otherwise treated like adults for purposes of sentencing, to retain their status as juveniles in some sense. In other words, we have determined through our reading of the Legislature's intent in passing chapter 2014-220, Laws of Florida, that juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation. It would be antithetical to the precept of Graham and chapter 2014-220, Laws of Florida, to interpret them so narrowly as to exclude a juvenile offender who happens to have been resentenced before this Court issued Henry.

Id.

This case remains indistinguishable from Kelsey. Like Kelsey, Mr. Lee's original sentence of life in prison violated Graham. Further, like Kelsey, Mr. Lee was subsequently resentenced prior to July 1, 2014. Therefore, like Kelsey, Mr. Lee is entitled to be resentenced pursuant to the provisions of chapter 2014-220, Laws of Florida. This Court should quash the decision below and remand with directions that Mr. Lee be resentenced pursuant to the provisions of chapter 2014-220, Laws of Florida.

ISSUE II

THE TRIAL COURT MUST CONSIDER AN UPDATED PRESENTENCE INVESTIGATION REPORT.

At the resentencing hearing in this case, the trial court failed to consider an updated presentence investigation report. The Second District found no error:

> Concerning the claim that the trial court failed to order and consider an updated PSI, we first note that the record does not contain any request by Mr. Lee for such an update. He has not cited any law that would compel the trial court to obtain such an update. His counsel, of course, updated the record with nearly two hundred pages of information documenting Mr. Lee's experiences in prison. Mr. Lee testified about his experiences between the two sentencing hearings. It is difficult to imagine that an update to the original PSI would contain anything that is not already in this record.

Lee v. State, 130 So. 3d 707, 710 (Fla. 2d DCA 2013).

However, the Fourth District has held that the failure to consider a mandatory PSI pursuant to Florida Rule of Criminal Procedure 3.710 constitutes reversible error. This Court should quash the decision below, approve the decisions of the Fourth District, and order that on remand the trial court consider an updated PSI before resentencing Mr. Lee.

Florida Rule of Criminal Procedure 3.710(a) states the following:

> In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the Department of Corrections for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any

> defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the Department of Corrections received and considered by the sentencing judge.

Section 985.565(3)(a), Florida Statutes (2016), also requires that the trial court consider comments prepared by the Department of Juvenile Justice as part of the PSI:

> At the sentencing hearing the court shall receive and consider a presentence investigation report by the Department of Corrections regarding the suitability of the offender for disposition as an adult or as a juvenile. The presentence investigation report must include a comments section prepared by the Department of Juvenile Justice, with its recommendations as to disposition. This report requirement may be waived by the offender.

Resentencings remain de novo in nature. See State v. Fleming, 61 So. 3d 399, 408 (Fla. 2011) ("[T]his Court has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings ... are de novo in nature.").

Therefore, an updated PSI was required before resentencing Mr. Lee. See also Wilson v. State, 696 So. 2d 528, 529 (Fla. 4th DCA 1997) ("We find that the trial court erred in sentencing appellant as an adult where the presentence investigation report (PSI) lacked both a recommendation by the Department of Corrections regarding appellant's suitability for disposition as a juvenile or a youthful offender, as well as a comments section

prepared by the Department of Juvenile Justice with its disposition recommendations as required under section 39.059(7), Florida Statutes (1995)."); Grayson v. State, 671 So. 2d 855 (Fla. 4th DCA 1996).

Petitioner acknowledges that this Court, in State v. Brunson, 369 So. 2d 945, 947 (Fla. 1979), held that "[a] presentence investigation is only required when probation is an alternative sentence available to the trial judge." However, as the Fourth District found in Hernandez v. State, 137 So. 3d 542, 544 (Fla. 4th DCA 2014), Brunson does "not expressly or necessarily hold that rule 3.710 is inapplicable in sentencing ... where a court retains wide ranging sentencing discretion."

Further, Rule 3.710 and section 985.565(3)(a) unequivocally mandate that the trial court consider a PSI. See also Peer v. State, 983 So. 2d 34, 35 (Fla. 1st DCA 2008) ("Rule 3.710(a) clearly mandates that the trial court first order a PSI before sentencing a first felony offender to more than probation."); Albarracin v. State, 112 So. 3d 574 (Fla. 4th DCA 2013) ("[W]e vacate the sentence and remand with instructions to order a presentence investigation report (PSI) before re-sentencing appellant." (footnote omitted)).

Therefore, this Court should quash the decision of the Second District, approve the decisions of the Fourth District, and order that on remand the trial court consider an updated presentence investigation report before resentencing Mr. Lee. See

also Fla. R. Crim. P. 3.781(b) (requiring the "examination of any presentence reports").

ISSUE III

THE 25-YEAR MINIMUM MANDATORY TERM VIOLATES THE EIGHTH AMENDMENT.

The trial court in this case resentenced Mr. Lee to 40 years in prison with a 25-year minimum mandatory term. The trial court imposed this 25-year minimum mandatory term pursuant to section 775.087, Florida Statutes (1999).

Section 775.087(2)(a)3, Florida Statutes (1999), provides:

> Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., regardless of whether the use of a weapon is an element of the felony, and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

However, section 775.087 remains unconstitutional and violative of the Eighth Amendment as applied to Mr. Lee. Mr. Lee raised this issue in both the trial court and in the Second District. (SV/R813-898; Appellant's Br. at 8-9.) This Court has jurisdiction to consider this issue. See Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982) ("[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process, as though the case had originally come to this Court on appeal."); State v. T.G., 800 So. 2d 204, 210 n.4 (Fla. 2001) ("Although this issue was not the basis of

conflict jurisdiction, once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court.").

In Graham v. Florida, 560 U.S. 48, 76 (2010), the Court noted that "[a]n offender's age is relevant to the Eighth Amendment, and ***criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed***." (Emphasis added.) Further, in Miller v. Alabama, 132 S. Ct. 2455, 2467-2468 (2012), the Court stated:

> [M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other — the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses — but really, as Graham noted, a greater sentence than those adults will serve.

(Footnote omitted.)

Also, this Court has noted that it has "consistently followed the spirit of Graham and Miller rather than a narrow, literal interpretation." Atwell v. State, 197 So. 3d 1040, 1046 (Fla. 2016). "In light of the United States Supreme Court's long-held and consistent view that juveniles are different — with respect to prison sentences that are lawfully imposable on adults convicted

for the same criminal offenses — we conclude that, when tried as an adult, the specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated." Henry v. State, 175 So. 3d 675, 680 (Fla. 2015).

In this case, section 775.087 precluded the trial court from taking into account Mr. Lee's age (15) and the characteristics attendant to it before imposing a 25-year minimum mandatory term. Therefore, section 775.087 unconstitutionally abrogates the trial court's authority (and its constitutional duty under the Eighth Amendment) to craft an appropriate sentence. See also State v. Lyle, 854 N.W.2d 378, 398-400 (Iowa 2014) (concluding that "mandatory minimums [do] not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability" and holding that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional" under the Iowa constitution). But see St. Val v. State, 174 So. 3d 447, 448 (Fla. 4th DCA 2015) ("We disagree and decline to find that a twenty-five-year minimum mandatory sentence for a non-homicide offense committed when appellant was seventeen violates the Eighth Amendment.").

Because section 775.087 precluded the trial court from taking into account Mr. Lee's age (15) and the characteristics attendant to it before imposing a minimum mandatory term, section 775.087

violates the Eighth Amendment and remains unconstitutional as applied to Mr. Lee.

ISSUE IV

THE TRIAL COURT ERRONEOUSLY IMPOSED THE 25-YEAR MINIMUM MANDATORY TERM BECAUSE THE INFORMATION DOES NOT ALLEGE GREAT BODILY HARM.

Section 775.087(2)(a)3, Florida Statutes (1999), provides:

> Any person who is convicted of a felony or an attempt to commit a felony listed in sub-subparagraphs (a)1.a.-q., ... and during the course of the commission of the felony such person discharged a "firearm" or "destructive device" as defined in s. 790.001 and, as the result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison.

The information in this case alleged that Mr. Lee "unlawfully and from a premeditated design to effect the death of [the victim], a human being, did attempt to kill and murder and inflict upon him mortal wounds by shooting with a firearm." (V1/R1) The information in this case, however, fails to allege that Mr. Lee caused great bodily harm. Because the information does not allege great bodily harm, the 25-year minimum mandatory term remains unlawful.

Mr. Lee raised this issue in the trial court, in his initial brief in the Second District, and in a motion for rehearing. (SV/R820; Appellant's Br. at 11.) This Court has jurisdiction to consider this issue. See Savoie v. State, 422 So. 2d 308, 312 (Fla. 1982) ("[O]nce this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in

the appellate process, as though the case had originally come to this Court on appeal."); State v. T.G., 800 So. 2d 204, 210 n.4 (Fla. 2001) ("Although this issue was not the basis of conflict jurisdiction, once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court.").

In its opinion below, the Second District found the following: "The information charged the he did 'inflict upon [the victim] mortal wounds by shooting with a firearm.'" Lee v. State, 130 So. 3d 707, 710 (Fla. 2d DCA 2013).

Mr. Lee does not dispute that the information in this case, by alleging "shooting with a firearm," adequately alleges the element of discharge. However, the information in this case does *not* allege the element of great bodily harm. The information states that Mr. Lee "unlawfully and from a premeditated design to effect the death of [the victim], a human being, did ***attempt*** to kill and murder and inflict upon him mortal wounds by shooting with a firearm." (V1/R1) (Emphasis added.) The word "attempt" in the information modifies the words "kill," "murder," and "inflict upon him mortal wounds." Thus, the information alleges that Mr. Lee did "attempt to ... inflict upon him mortal wounds." The information does not allege, as Second District found, that Mr. Lee *did* inflict upon him mortal wounds.

Further, if Mr. Lee, as the Second District found, did inflict upon the victim mortal wounds, then the State would have

charged Mr. Lee with murder and not *attempted* murder; the word "mortal" means causing death, and an individual cannot inflict "mortal" wounds upon another without causing death. See State v. Baker, 253 P. 221, 223 (Kan. 1927) ("***To say that one inflicted upon another a mortal wound is to say that he killed him***. A mortal wound is a death-producing wound. The words 'murder' and 'mortal' are both derived from the Latin 'mors.'" (emphasis added)); Payne v. Commonwealth, 75 S.W.2d 14, 19 (Ky. 1934) ("The terms 'mortally wounded' and 'mortal wound,' as here used, means 'deadly,' 'death-producing,' and is defined by Webster as 'destructive to life, causing or occasioning death.'").

For example, an individual can *attempt* to inflict mortal wounds upon another by discharging a firearm. However, the bullet may entirely miss; therefore, the individual *attempted* to inflict mortal wounds, but failed to inflict any wound at all. In this case, the information does not allege that Mr. Lee caused any wounds to the victim; the information only alleges that Mr. Lee *attempted* to cause mortal wounds by shooting with a firearm.

Because the information in this case fails to allege the element of great bodily harm, the 25-year mandatory minimum remains unlawful. See McKenzie v. State, 31 So. 3d 275, 276 (Fla. 2d DCA 2010) ("Although the jury found McKenzie guilty of two counts of attempted second-degree murder during the commission of which he discharged a firearm resulting in great bodily harm to the victims, the element of great bodily harm was not alleged in

the amended information. A jury finding cannot cure this defect in the amended information."); Lewis v. State, 177 So. 3d 64, 66 (Fla. 2d DCA 2015) (same); Young v. State, 86 So. 3d 541, 543 (Fla. 2d DCA 2012) ("[I]n order for a court to enhance a defendant's sentence based on section 775.087(2), the grounds for enhancement must be clearly charged in the information." (citing Adams v. State, 916 So. 2d 36, 37 (Fla. 2d DCA 2005)).

Further, this defect in the information cannot be cured by a jury finding and cannot be considered harmless. See Lewis, 177 So. 3d at 65.

Therefore, assuming, arguendo, that this Court upholds the constitutionality of section 775.087 as applied to Mr. Lee (Issue III), Mr. Lee respectfully requests that this Court remand with directions that, because the information in this case fails to allege the element of great bodily harm, the trial court reduce the mandatory minimum term in this case from 25 years to 20 years. See § 775.087(2), Fla. Stat. (1999).

CONCLUSION

Mr. Lee respectfully requests that this Court, pursuant to Kelsey, quash the decision of the Second District and remand with directions that Mr. Lee be resentenced pursuant to the provisions of chapter 2014-220, Laws of Florida. Further, on remand, the trial court must consider an updated presentence investigation report before resentencing Mr. Lee.

Also, because section 775.087 remains unconstitutional and violative of the Eighth Amendment as applied to Mr. Lee, the trial court can no longer sentence Mr. Lee to a 25-year minimum mandatory term of imprisonment. If this Court, however, does not find that section 775.087 is unconstitutional as applied to Mr. Lee (or if this Court chooses not to address this issue), Mr. Lee respectfully requests that this Court remand with directions that the trial court, on resentencing, reduce the minimum mandatory term from 25 years to 20 years.

CERTIFICATE OF SERVICE

I certify that a copy has been served via the portal to CERESE TAYLOR, A.A.G., at Cerese.Taylor@myfloridalegal.com and CrimappTPA@myfloridalegal.com, on this 6th day of February, 2017.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

/s/ Matthew D. Bernstein

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APPENDIX