IN THE SUPREME COURT OF FLORIDA

CHARLES LEE, **Petitioner,** **v.** **STATE OF FLORIDA,** **Respondent.**	**Case No. SC14-416**

ON DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL, FLORIDA

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Statement of Facts presented by Petitioner for purposes of this appeal, with the following additions, corrections and/or clarifications, or as otherwise argued herein:

The resentencing hearing began with Petitioner presenting testimony from himself and his mother, and approximately 200 pages of records from the Department of Corrections which included things such as "test data" and evidence of trade classes Petitioner had taken. (2011 Resentencing Hrg., R. 411-413, 419). Petitioner's mother highlighted that Petitioner had matured and taken responsibility for his actions. (2011 Sentencing Hrg., R. 416-417). She related that Petitioner expressed an interest in his younger nephews and in rejoining the church community upon release. (2011 Sentencing Hrg., R. 416-417). The court referenced this testimony in ruling. (2011 Sentencing Hrg., R. 449).

Petitioner testified and admitted that he "was in drugs and hanging with the wrong people and, [] living a life of crime." (2011 Sentencing Hrg., R. 419). He admitted to shooting the victim and assumed full responsibility for the shooting that rendered the victim disabled. (2011 Sentencing Hrg., R. 419, 423, 425-426).

In closing, the prosecutor related a statement from the

victim that he cannot work and is disabled. (2011 Sentencing Hrg., R. 443). The prosecutor also quoted the original sentencing record which reflected that the shooting occurred during a drug deal. (2011 Sentencing Hrg., R. 441).

In ruling, the trial court stated that it had reviewed the trial and sentencing hearing transcripts, as well as the evidence presented on resentencing. (2011 Sentencing Hrg., R. 445-448). While receiving evidence, the court questioned the attorneys to ensure it understood the facts. (2011 Sentencing Hrg., R. 445-447). The court even inquired of the parties whether there was evidence that the shooting was execution style or an accidental discharge. (2011 Sentencing Hrg., R. 445-447). The court looked to whether there were co-defendants and to look for the "possible influence of older person[s] involved" but found "none was a factor here." (2011 Sentencing Hrg., R. 445).

The court accepted the DOC documents provided by the defense, but gave them little weight. (2011 Sentencing Hrg., R. 444-445). The court did not consider Petitioner's age enough of a mitigating factor, given the offense. (2011 Sentencing Hrg., R. 448-449). The court noted that that Petitioner had shot the victim in the arm and did "significant damage, nearly fatal damage." (2011 Sentencing Hrg., R. 445).

The court relied on the prior judge's ruling which reflected that Petitioner's actions were regardless of the

victim and undertaken for his own "selfish purposes." (2011 Sentencing Hrg., R. 442). The appellate record confirms that a PSI was prepared in conjunction with the April 2001 sentencing. (R. 796-802). The record from the Second District further reflects that the trial court reviewed and considered that PSI in sentencing Petitioner in 2001. (2001 Sentencing Hrg., R. 16, L. 9-10).

The original sentencing court found, and the resentencing court agreed, that Petitioner shot the victim because he "didn't care what happened to somebody else. Somebody else was going to get away without paying you the few dollars for the drugs which you were involved [in selling]." (2011 Sentencing Hrg., R. 442; 448-449).

SUMMARY OF THE ARGUMENT

Petitioner received a hearing in which the sentencing court weighed the individualized sentencing considerations required by section 921.1401, Florida Statutes. After weighing those considerations, the court properly rejected Petitioner's 25-year sentence and imposed a 40-year sentence for the attempted felony murder. Given that Petitioner received a full resentencing hearing under Graham v. Florida, 560 U.S. 48 (2010), no basis exists for rehearing under Kelsey v. State, 206 So. 3d 5 (Fla. 2016).

ARGUMENT

ISSUE I

WHETHER THE PETITIONER IS ENTITLED TO BE RESENTENCED PURSUANT TO THE PROVISIONS OF CHAPTER 2014-220, LAWS OF FLORIDA. (As restated by Respondent).

Charles Lee is presently serving 40 years in prison with a 25-year minimum mandatory term, for an attempted first-degree murder he committed when he was a 15-year-old. The Petitioner in this case, having been resentenced in 2011 under Graham v. Florida, 560 U.S. 48 (2010), now seeks a second resentencing hearing under Florida Statute section 921.1401. The legality of a prison sentence is a question of law subject to de novo review. Martinez v. State, No. SC15-1620, 2017 WL 728098, at 1 (Fla. Feb. 23, 2017).

Petitioner argues that, despite having been resentenced under Graham, he is entitled to a new resentencing hearing under Section 91.1401, Florida Statutes, which was enacted in 2014, but applies retroactively. Henry v. State, 175 So. 3d 675 (Fla. 2015), reh'g denied (Sept. 24, 2015), cert. denied, 136 S. Ct. 1455 (2016). Further resentencing is unnecessary in this case since, even without the benefit of the statute, Petitioner received a hearing in which the sentencing court weighed the individualized sentencing considerations set forth in section 921.1401. After weighing those considerations, the court rejected the Petitioner's requested 25-year sentence and imposed

a 40-year sentence for the attempted felony murder. At this 2011 resentencing, Petitioner was 27 years old.

A review of Petitioner's April 1, 2011, resentencing hearing reflects that it was in conformity with the 2014 juvenile sentencing statute. Petitioner got a hearing in which the sentencing court considered the factors listed in section 921.1401, Florida Statutes:

> (a) The nature and circumstances of the offense committed by the defendant.
> (b) The effect of the crime on the victim's family and on the community.
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
> (d) The defendant's background, including his or her family, home, and community environment.
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
> (f) The extent of the defendant's participation in the offense.
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
> (h) The nature and extent of the defendant's prior criminal history.
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
> (j) The possibility of rehabilitating the defendant.

§921.1401(2), Fla. Stat. (2014).

As the Second District indicated in its opinion below, the trial judge was very conscientious in resentencing Petitioner. The judge announced that Lee's was her first Graham

resentencing. The State and defense counsel were, likewise, new to resentencing under Graham. As Judge Altenbernd observed, the parties "[t]o their credit, [ ]cooperated with one another in fashioning an appropriate procedure for the hearing." Lee v. State, 130 So. 3d 707, 709–10 (Fla. 2d DCA 2013).

The resentencing hearing transcript reflects that the court, applying Graham, considered the factors set forth under section 921.1402. With regard to (2)(a), the nature of the offense, the hearing transcript makes clear that the court went through the transcript, causing it to inquire deeper to ensure it understood the facts. The court even inquired of the parties whether there was evidence that the shooting was execution style or an accidental discharge.

As for (2)(b), the effect on the victim's family and the community, the court heard a statement from the victim, delivered by the prosecutor, that the victim cannot work and is disabled. The court noted that that Petitioner had shot the victim in the arm and did "significant damage, nearly fatal damage." As for the community, the original sentencing record, which the prosecutor quoted on resentencing, reflected that the shooting occurred during a drug deal.

Regarding (2)(c), the defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense, the court noted that it did not consider

his age enough of a mitigating factor, given the offense. The court also received testimony from Petitioner on this attitude and state of mind at the time of the offense.

Evidence under subsection (2)(d), the defendant's background, was presented via Petitioner's mother's testimony and referenced by the court in ruling. Her testimony reflected that Petitioner had matured and taken responsibility for his actions. He expressed an interest in his younger nephews and in rejoining the church community upon release. Petitioner also testified as to his background.

The record shows that the court considered (2)(f) and (g) when it reviewed the transcript to determine whether the shooting was accidental, whether there were co-defendants and to look for the "possible influence of older person[s] involved" but found "none was a factor here." The court also received evidence from Petitioner who took sole responsibility for shooting the victim.

A review of the record, including the PSI, and the additional evidence presented by the defense, satisfied the court's obligation under (2)(h) to consider Petitioner's criminal history. This evidence, which the court considered along with Petitioner's own recitation of his rehabilitation, presented proof of Petitioner's conduct during the intervening ten years between sentencing hearings, and was relevant to

subsection (2)(j).

While the court did not expressly state its conclusions regarding subsections (2)(e) and (i), the effect, if any youthful immaturity, impetuosity, or failure to appreciate risks, which led to the offense, the court did rely on the prior judge's ruling which reflected that Petitioner's actions were regardless of the victim and undertaken for his own "selfish purposes." The original sentencing court found, and the resentencing court agreed, that Petitioner shot the victim because he "didn't care what happened to somebody else. Somebody else was going to get away without paying you the few dollars for the drugs which you were involved [in selling]." The court also received evidence on these points from Petitioner who testified and admitted that he "was in drugs and hanging with the wrong people and, [] living a life of crime." Lee v. State, 130 So. 3d at 709-10(Petitioner "admitted that he had committed the crime, took responsibility for his actions, and described his efforts to improve himself during the decade that he had spent in prison.").

In addition to this testimony, defense counsel presented Petitioner's lengthy prison record. Based on the progress reflected in those documents, counsel argued for a twenty-five-year prison sentence. In making her ruling, the trial judge "stated that she had reviewed portions of the trial transcript

and had more thoroughly reviewed the original sentencing transcript." Lee v. State, 130 So. 3d at 709–10. "She explained that her discretionary decision was based more on the facts that had influenced Judge Swanson than on matters that had occurred more recently." Lee v. State, 130 So. 3d at 709–10.

Given that the resentencing hearing in this case satisfied the dictates of Graham and section 921.1401, no further resentencing is required. Respectfully, the State urges that this Court decline relief.

Petitioner bases his alleged entitlement to resentencing on this Court's ruling in Kelsey v. State, 206 So. 3d 5 (Fla. 2016). In Kelsey, this Court determined that resentencing was appropriate, even though Kelsey had already been resentenced under Graham. Kelsey, 206 So. 3d at 6. Rejecting the First District's conclusion that "[b]ecause the concurrent resentences at issue in this case do not violate Graham, we are constrained to deny relief," this Court reasoned that resentencing was necessary to ensure the review period provided for in the statute. Kelsey, 206 So. 3d at 7. Reading together Henry, Horsley, and Thomas, as well as "the Legislature's intent in passing chapter 2014-220, Laws of Florida," this Court determined that "juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation." Kelsey, 206 So.

3d at 10 citing Henry v. State, 175 So. 3d 675, 680 (Fla. 2015), reh'g denied (Sept. 24, 2015), cert. denied, 136 S. Ct. 1455 (2016); Horsley v. State, 160 So. 3d 393 (Fla. 2015); Thomas v. State, 135 So.3d 590 (Fla. 1st DCA 2014). Concurring, Justice Pariente also referenced "the benefit of judicial review of the sentence as set forth in section 921.1402(2), Florida Statutes (2014)," in expressing her belief that Kelsey should be resentenced. Kelsey, 206 So. 3d at 12.

The Kelsey decision's reasoning clearly linked the need for resentencing with the availability of the review provision under section 921.1402. The State believes that entitlement to review under section 921.1402, can be added to an existing resentence, as a ministerial act. Section 921.1402 entitles juveniles defendants to a review after the passage of time, depending on their sentence. Thus, the review is not discretionary. A discretionary amendment to a sentence is a ministerial act for which no hearing need be held and for which a defendant need not be present. Jordan v. State, 143 So. 3d 335, 338 (Fla. 2014).

When a juvenile has been resentenced, and, as here, when that resentencing hearing has considered the factors in Graham and section 921.1401, a third sentencing hearing is unnecessary. The aims expressed in Kelsey, entitlement to review after the passage of time to consider the question of a defendant's "maturation and rehabilitation," can be accomplished without a

denovo sentencing hearing.

However, should this Court determine that resentencing under section 921.1401, is appropriate, the hearing is de novo and the State is entitled to seek any lawful sentence, up to and including a life sentence, as reflected in Kelsey.

ISSUE II

THE TRIAL COURT NEED NOT CONSIDER AN UPDATED PRESENTENCE INVESTIGATION REPORT. (As restated by Respondent).

Petitioner next argues that, during his resentencing hearing, the trial court erred in not considering an updated presentence investigation report. The Second District properly concluded that no updated PSI was required:

> 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, 130 So. 3d at 710.

The claim that an updated PSI was required must be evaluated based on the benefit inherent in such a document. The pre-sentence investigation is a report, generated by the

Department of Corrections. Fla. R. Crim. P. 3.710. The report is required if the defendant is a juvenile or convicted of a first-degree felony. Fla. R. Crim. P. 3.710. Otherwise, it is a report which, when faced with a discretionary sentence, a trial court "may" request. Fla. R. Crim. P. 3.710.

In preparing a pre-sentence investigation report, the Department of Corrections gathers information "including but not limited to the defendant's education, prior occupation, prior arrests, prior convictions, military service," and "any physical or mental evaluations of the defendant." Fla. R. Crim. P. 3.713(b). The full report shall include:

> (a) A complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript. . . and, at the offender's discretion, his or her version and explanation of the act;
> (b) . . .whether the offender is a first offender, habitual offender, or youthful offender or is currently on probation;
> (c) prior record;
> (d) educational background;
> (e) employment background and "occupational capabilities";
> (f) financial status;
> (g) social history, including family relationships, marital status, interests, and related activities.
> (h) residence history;
> (i) medical and psychiatric history;
> (j) residence and environment upon release and any post-incarcerative plans for employment and treatment;

> (k) resources available to assist the offender;
> (l) A view of the defendant's motivation in committing the offense;
> (m) explanation and version of events of his criminal history;
> (n) the extent of the victim's loss or injury and
> (o) A recommendation as to disposition by the court, including an evaluation of the viability of supervision and availability of community programs.

§921.231, Fla. Stat. (2016).

In this case, defense counsel presented approximately 200 pages of records from Petitioner's incarceration with the Department of Corrections. Further, the trial court had the benefit of the PSI previously prepared by the Department of Corrections. Petitioner does not argue that a new PSI would have included evidence beyond what he presented at his original resentencing hearing.

While resentencing hearings are conducted denovo, the PSI statute contemplates that an entirely new PSI report need not be prepared. State v. Fleming, 61 So. 3d 399, 408 (Fla. 2011) ("As explained above, (1) when a sentence is vacated, the defendant is resentenced at a new proceeding subject to the full panoply of due process rights, and (2) the decisional law in effect at the time of a de novo resentencing or before that resentencing is final applies to those proceedings and the issues raised on appeal."). Section 921.231(2) provides that "[i]n those

instances in which a presentence investigation report has been previously compiled, the department may elect to complete a short-form report updating the above information. §921.231, Fla. Stat. (2016).

Section 985.565(3)(a), Florida Statutes (2016), to which Petitioner cites, also does not require an additional PSI. This section relates to the limited role the Department of Juvenile Justice plays in providing information for a PSI. This section compels the trial court to receive comment from the Department of Juvenile Justice. However, this rule limits the scope of the comment. When faced with a juvenile, PSI must include as assessment as "to the suitability of the offender for disposition as an adult or as a juvenile." §985.565, Fla. Stat. (2016). This assessment must include "a comments section prepared by the Department of Juvenile Justice, with its recommendations as to disposition." §985.565, Fla. Stat. (2016). Where, as here, this question is not at issue, section 985.565(3)(a), Florida Statutes is of limited value in analyzing the question before the Court.

Rather than basing his argument on any alleged harm associated with the absence of an updated PSI, Petitioner relies on the Fourth District's decision in Albarracin v. State, to support his claimed entitlement to an updated report. Albarracin v. State, 112 So. 3d 574 (Fla. 4th DCA 2013). Albarracin is a

brief, per curiam, opinion which remanded for resentencing following a conviction for aggravated child abuse. In so doing, the court instructed that a presentence investigation report be prepared before re-sentencing. There is no indication in Albarracin that the defendant, unlike the defendant in this case, had already been resentenced, and that the court had considered the information typically represented in a PSI.

The Albarracin Court merely reasoned that given the defendant's status as a "first-time felony offender, Florida Rule of Criminal Procedure 3.170(a) required the trial court to first order a PSI before sentencing appellant to more than probation." Albarracin, 112 So. 3d at 575. The Court also reasoned that "because appellant was eligible for Youthful Offender sentencing, section 958.07, Florida Statutes (2011), required the trial court to order a PSI before sentencing appellant." Albarracin, 112 So. 3d at 575.

The language in Albarracin makes it appear as though that defendant never received a PSI prior to sentencing. This reading of the opinion is supported by the Court's reference to the mandatory nature of a PSI when a defendant faces a sentence which is "more than probation." Albarracin, 112 So. 3d at 575. Further the language in footnote one of the opinion suggests that no PSI was ever ordered or considered:

> The trial court's failure to consider a

> mandatory presentence investigation report before sentencing a defendant is a sentencing error that can be preserved via the filing of a rule 3.800(b) motion.

Albarracin, 112 So. 3d at 575.

In contrast to Albarracin, Petitioner had a full resentencing hearing which included testimony from Petitioner and his mother, as well as approximately 200 pages of records from the Department of Corrections which included things such as "test data" and evidence of trade classes Petitioner had taken. The appellate record confirms that a PSI was prepared in conjunction with the April 2001 sentencing. The record from the Second District further reflects that the trial court reviewed and considered that PSI in sentencing Petitioner in 2001. There is also an indication that the resentencing judge at least consulted the original sentencing transcript's reference to the PSI, if not the PSI itself.

Further, Albarracin does not stand for the proposition that a new PSI is required upon resentencing. Rather, Albarracin stands for the proposition that a PSI must be prepared prior to sentencing. There is no rationale presented that a resentencing cannot utilize the information from the previously prepared PSI. This is particularly so in a case such as this one where any information which would have arisen in the intervening years was presented by defense counsel in support of a reduced sentence.

Albarracin is distinguishable from the present case and presents no conflict on the face of the opinion which would entitle Petitioner to review by this Court. Wilson v. State and Grayson v. State, which contained insufficient PSIs, are, likewise, distinguishable. Wilson v. State, 696 So. 2d 528, 529 (Fla. 4th DCA 1997)("Because a complete PSI is necessary for an informed sentencing decision, we must remand this cause to the trial court for re-sentencing."); Grayson v. State, 671 So. 2d 855 (Fla. 4th DCA 1996)("Here, the trial court did not receive a report and recommendation from the Department of Corrections regarding the suitability of the offender for disposition as an adult, a juvenile, or a youthful offender. . .[and the report], did not include a comments section prepared by the Department of Juvenile Justice. . ..").

There is nothing in the statue, or in the holing in Albarracin that requires an updated PSI prior to a Graham resentencing. Based on the foregoing, Petitioner is not entitled to relief from this Court. The State respectfully maintains that the Second District's decision must be affirmed.

ISSUE III

A TWENTY-FIVE-YEAR MINIMUM MANDATORY SENTENCE FOR CRIMES INVOLVING A FIREARM DOES NOT VIOALTE THE EIGHTH AMENDMENT AS APPLIED TO PETITIONER. (As restated by Respondent).

Petitioner also raises an Eighth Amendment claim based on the imposition of a twenty-five-year minimum mandatory sentence.

When presented at the Second District, Petitioner challenged the minimum mandatory sentence as cruel and unusual punishment and argued that the sentence was unauthorized because the jury made no specific finding which would support the sentence. Finding that the forty-year sentence was not unconstitutional, the Second District made no specific finding as to the sentence's minimum mandatory provision. Lee, 130 So. 3d at 710.

While it recognizes that "once the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court, the State submits that the Court should decline to exercise its jurisdiction on this point. State v. T.G., 800 So. 2d 204, 211 (Fla. 2001). As argued below, the mandatory minimum sentence for the possession or discharge of a firearm does not present an Eighth Amendment violation.

Considered substantively, an application of section 775.087, Florida Statutes does not violate the Eighth Amendment. First, a twenty-five-year sentence has not been held to violate the Eighth Amendment. Courts have upheld longer sentences as consistent with Graham. Earlier this year, this Court declined to accept jurisdiction in three cases involving sentences at or above twenty-five years: Hill v. State, SC15-1667, 2017 WL 24659 (Fla. January 3, 2017)(a 14-year-old juvenile sentenced to 35 years in prison); Abrakata v. State, SC15-1325, 2017 WL 24657

(Fla. Jan. 3, 2017)(a 17-year-old juvenile sentenced to 25 years); and McCullom v. State, SC15-1770, 2017 WL 24756 (Fla. Jan. 3, 2017)(a 16-year-old defendant sentenced to an aggregate 50 years in prison).

In St. Val v. State, the Fourth District addressed the very issue presented herein. In St. Val v. State, the "Appellant want[ed the] court to. . .find that the mandatory penalty scheme for which appellant was sentenced violates Graham and Miller, and thus, the Eighth Amendment." St. Val v. State, 174 So. 3d 447, 450 (Fla. 4th DCA 2015), reh'g denied (Sept. 30, 2015). Faced with the question presented herein, the Court reasoned:

> Although Miller looked disapprovingly at mandatory sentencing schemes, it limited its disapproval to those schemes that resulted in sentences of life without parole. . . Thus, under Graham and Miller, the minimum mandatory schemes that violate the Eighth Amendment are those sentences like life without parole where the sentencer is effectively deciding that a "juvenile offender forever will be a danger to society" and the court is determining that the offender is "incorrigible." Id. at 2465 (quoting Graham, 560 U.S. at 72, 130 S.Ct. 2011).

St. Val v. State, 174 So. 3d at 450.

The Fourth District went on to consider this Court's recent precedent in Henry and Gridine, wherein this Court "concluded that Graham requires juvenile non-homicide offenders be sentenced to prison terms that afford "a meaningful opportunity

to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation." St. Val v. State, 174 So. 3d at 450 (internal citations omitted); Henry v. State, 175 So. 3d at 680; Gridine v. State, 175 So. 3d 672 (Fla. 2015). The Fourth District reasoned:

> Although a long and significant sentence, a minimum sentence of twenty-five years would not result in a juvenile being classified as "forever [ ] a danger to society," nor would that result in a finding of the offender being "incorrigible." Miller, 132 S.Ct. at 2465 (citation omitted). Clearly a minimum mandatory sentence does not "share some characteristics with death sentences that are shared by no other sentences." Id. at 2466 (quoting Graham, 560 U.S. at 69, 130 S.Ct. 2011). Unlike life without parole and death sentences, appellant's twenty-five-year mandatory minimum sentence is not permanent and affords definite release.

St. Val v. State, 174 So. 3d at 450.

Thus, "[u]nlike in Henry and Gridine, [St. Val's] twenty-five-year mandatory minimum sentence [did] not deny appellant a meaningful opportunity to obtain release." St. Val v. State, 174 So. 3d at 450. The Fourth District's reasoning applies in the present case. See also Abrakata v. State, SC15-1325, 2017 WL 24657, at *1 (Fla. Jan. 3, 2017) (Pariente, J. dissenting) ("While I agree that his twenty-five-year sentence does not amount to a de facto life sentence, I would apply section 921.1402(2)(c) to Abrakata's sentence to allow for judicial

review after fifteen years.").

Second, the new juvenile sentencing statute, section 921.1402, includes a review period of twenty years, for a non-homicide offense, and twenty-five years, for a homicide offense. A ruling which found a minimum mandatory sentence which is equivalent to the juvenile sentence review period, unconstitutional, would nullify the terms of the statute.

Finally, Petitioner fails to demonstrate how application of section 775.087 prohibits the sentencing court from considering the unique factors of youth which it is compelled to consider under section 921.1401. Section 775.087 must be interpreted in pari materia which section 921.1401. Fla. Dep't of State v. Martin, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of in pari materia is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent."). Thus, the statute cannot be read to prevent the trial court from conducting a sentencing hearing under section 921.1401.

During a juvenile sentencing hearing, a court receives evidence from both sides regarding the statutory factors which relate to the pertinent attributes of youth. At the close of the hearing, following receipt of the evidence concerning the relevant factors, the trial court imposes a sentence for a term

of years. If a firearm is used, the court additionally imposes the minimum mandatory sentence. If the sentence is equivalent to the minimum mandatory sentence, as Petitioner requested, a defendant would serve the full term.

As reflected above, application of section 775.087 does not prohibit the trial court from applying section 921.1401. Nor does imposition of a minimum mandatory sentence effect the review provision under section 921.1402. Section 921.1402 ties the review period to the length of a sentence and the crime for which a defendant was convicted. Thus, a sentence for murder or attempted murder which exceeds twenty-five years, calls for review after twenty-five years. A non-homicide offense which receives a sentence of twenty years or more is reviewed after twenty years. A mandatory minimum sentence for the discharge of a firearm is twenty years. Discharge of a firearm resulting in great bodily injury or death carries a twenty-five-year minimum mandatory. This correlation ensures that the review period is consistent with the minimum mandatory sentence faced by a juvenile offender.

The only way in which a minimum mandatory sentence could present a problem would be if a juvenile is sentenced to a minimum sentence that extends beyond the review period. However, this only presents a problem if the juvenile also meets the criteria to make him eligible for release upon review. The

review period does not guarantee that a defendant will be released. Graham, 560 U.S. at 75, 130 S.Ct. 2011("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). Thus, only if a defendant 1) receives a minimum mandatory sentence, 2) commits a crime that entitles him to review prior to the minimum mandatory sentence being served ***and*** 3) satisfies the criteria for release at his review hearing, would section 775.087 present a potential constitutional issue as applied to that defendant.

In this case, Petitioner discharged a weapon causing great bodily harm to his victim. This criminal act required imposition of a twenty-five-year minimum mandatory sentence. It also entitled him to review after twenty-five years. This scenario does not result in Petitioner being incarcerated in contravention of constitutional provisions.

ISSUE IV

THE MINIMUM MANDATORY SENTENCE IS CONSISTENT WITH THE EVIDENCE PRESENTED IN THIS CASE. (As restated by Respondent).

Petitioner's final issue argues that the evidence presented at trial did not support imposition of a twenty-five-year minimum mandatory sentence. When a defendant discharges a

firearm during an offense, resulting in death or great bodily harm to the victim, his prison sentence must include a twenty-five-year term which must be served. Section 775.087, Florida Statutes (1999).

As charged in the Information, Petitioner attempted to "kill and murder and inflict [ ] mortal wounds [on the victim] by shooting with a firearm." Lee, 130 So. 3d at 710). As Petitioner concedes, this allegation establishes his discharge of a firearm. Moreover, as the Second District determined, this language also satisfied the element of "great bodily harm." Lee, 130 So. 3d at 710).

The verdict form in this case allowed the jury to find that Petitioner committed attempted first-degree murder "with a firearm as charged in the information." Lee, 130 So. 3d at 711. While, a sentence enhancement under section 775.087 requires a "clear jury finding regarding the factual basis for enhancement, this element can be "established by a verdict and information." Lee, 130 So. 3d at 710. No interrogatory verdict form is required. Lee, 130 So. 3d at 710.

Relying on the Fourth District's interpretation of this Court's decision in Galindez v. State, the Second District concluded that "even though the language is not precise, we are convinced beyond a reasonable doubt that the actual jury made a clear finding that Mr. Lee discharged a firearm causing great

bodily harm." Lee, 130 So. 3d at 711 citing Galindez v. State, 955 So. 2d 517 (Fla. 2007).

In Galindez, this Court found that a trial court's assessment of victim injury points for sexual penetration, if an Apprendi violation was harmless error beyond a reasonable doubt. Galindez v. State, 955 So. 2d at 523–24; Apprendi v. New Jersey, 530 U.S. 466 (2000). The Galindez Court reasoned that, in light of the evidence, including the victim's testimony at trial and Galindez's consent defense, that "no reasonable jury would have returned a verdict finding there was no penetration." Galindez v. State, 955 So. 2d at 523–24.

Based on this analysis, the Fourth District in Gentile v. State, held that, an "'as charged' verdict unambiguously reflect[ed] the jury's finding that a deadly weapon was used and [was] sufficient to support the reclassification. Gentile v. State, 87 So. 3d 55, 57 (Fla. 4th DCA 2012). Given the evidence against Gentile, "any error in the jury's failure to make a more specific finding [was] clearly harmless because of the overwhelming evidence that [Gentile] used a deadly weapon." Id. at 58.

Relying on Gentile, the Second District applied a harmless error test to the present claim. This conclusion is consistent with this Court's decision in Galindez. It is also consistent with the evidence presented at the resentencing hearing

regarding the victim's permanent disability which prevented him from working and adversely impacted his home life. The Second District properly denied Petitioner relief on this point.

CONCLUSION

Based on the foregoing, the State asks this Court to decline to exercise its jurisdiction as it did in Abrakata, Hill and McCullom. Petitioner has received a sentence which complies with Graham and the 2014 juvenile sentencing statute. Should a full resentencing hearing be required, the State is entitled to pursue any lawful sentence, including life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Matthew Bernstein, Esq., Assistant Public Defender, Office of the Public Defender, and filed via the eportal system on this 5th day of May, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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