IN THE SUPREME COURT OF FLORIDA

THOMAS KELSEY,

Petitioner,

v. CASE NO. SC15-2079

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

In a two-to-one decision, the First District Court of Appeal denied Thomas Kelsey resentencing on his 45-year sentences for sexual battery, burglary, and robbery he committed at age 15. Because of the structure of the 2014 sentencing laws crafted by the Legislature and made retroactive by this Court, the First DCA's decision also precludes Thomas from seeking sentence review after 20 years to show he has been rehabilitated and is reasonably believed to be fit to reenter society. Denying him this opportunity while it is extended to other juvenile offenders convicted of equivalent or greater offenses constitutes cruel and unusual punishment prohibited by the U.S. and Florida Constitutions.

In this brief, the record is cited by volume and page number. The Presentence Investigation Report is cited as "PSI" and the Predisposition Report as "PDR."

STATEMENT OF THE CASE AND FACTS

Thomas Kelsey was born December 10, 1986. At six months of age—before he could walk—Thomas went into state custody after his mother left him and his two young sisters home alone. (R-3.318, 332) Their grandmother retrieved them from foster care. (R-3.318, 332) She lived in low-income housing and began raising Thomas and his sisters after raising seven children of her own. (R3-320) Thomas' mother, a drug user, never regained custody. (R-3.19) She had seven children in total. Thomas' sister, Keshara, who is one year older, recalled their mother dropping off three more of her children, saying she had AIDS. (R-3.345) His aunt, Tania Kelsey, recalled Thomas' mother saying she wanted Tania to have her children because she was on cocaine and couldn't take care of them. (R-3.319) She died in 2011. (PDR-1) Thomas' father also used drugs and did not participate in raising Thomas or his siblings. (R-3.333-34, 347) He has been in and out of county jail and state prison most of his life. (PDR-1) No other male role model stepped in. Tania Kelsey acknowledged, "We all kind of dropped the ball." (R-3.322)

Thomas was quiet and intellectually slow. (R-3.317-18, 331) He failed first grade and attended special education classes. (R-3.335, 349) His uncle, Sylvester Kelsey, characterized Thomas as a follower. (R-3.335) Dr. Stephen

Bloomfield, who evaluated Thomas in 2013, testified that he functions between the third and sixth grades in comprehension and has an IQ of 80, which Bloomfield characterized as "borderline intellectual function." (R-2.262-66)

According to Keshara, Thomas began acting out at age 11 or 12 after an elder sister ran away. (R-3.354) He made friends with other boys who fought and got suspended, and stayed with the same social group through middle school. (R-3.350) Keshara recalled that most of her siblings had trouble in school, most have been in the prison system, and most are on antidepressants. (R-3.351) Thomas started to skip school and get suspended in middle school, then began committing illegal acts in high school. (R-3.351) He played basketball for Forrest High School. (PDR-2) At age 17 he moved in with Keshara, who had her own apartment. (R-3.356) He worked one summer, then dropped out of school. (R-3.356) Thomas lived with Keshara until they were evicted following a drug bust. (R-3.356)

Dr. Bloomfield testified that during adolescence, a person has poor decision-making ability because the frontal lobe and executive function are not fully developed. (R-2.266) Bloomfield observed that juveniles with borderline intellectual function often escape ostracism by acting out, because they would rather be called bad than dumb. (R-2.267)

Although not directly pertinent here, in 2002 Thomas received community sanctions for two misdemeanor cannabis offenses committed at age 16. (PSI-4) In 2004, he was charged as a juvenile with three counts of burglary committed when he was 17. The state placed him in a low-risk residential commitment. (PSI-4) In Duval Co. No. 2005-4733, the state charged him as an adult with robbery with a weapon and attempted robbery allegedly committed March 2, 2005, when he was 18 years, 3 months of age. (PSI-4) He pled guilty and received a youthful offender sentence of three years in prison and three years on probation. (PSI-4). He violated probation and, on July 2, 2009, received a prison sentence of 20 years.

The presentence investigation report reflects that on November 6, 2002, a woman named E.W. reported being raped by a black male who broke into her apartment and brandished a knife. (PSI-2) E.W. was awakened while sleeping in her bed with her infant and small child. (PSI-2) The assailant allowed E.W. to get onto the floor before engaging in penile-vaginal intercourse and attempting fellatio. He took $30 she retrieved from her purse and left. (PSI-2). Thomas Kelsey was not identified as the perpetrator until six years later, in 2008, via a DNA match. (PSI-3) He lived in the same apartment complex at the time of the crimes. (R-3.401)

Based on the DNA match, in 2009 the state charged Thomas with two counts of armed sexual battery, armed burglary, and armed robbery for the 2002

crimes involving E.W. (R-1.27-28) He pled guilty as charged. (R-1.44-46) Circuit Judge Elizabeth Senterfitt accepted the plea in a March 4, 2010, hearing. (R-1.153-60) The court imposed sentence on March 26, 2010. Following testimony by several family members and Thomas, who apologized to E.W. and her family, the state recommended a sentence of life in prison. (R-1.190) The court followed the recommendation and sentenced Kelsey to life. (R-1.192)

On April 23, 2010, appointed defense counsel Amanda Kuhn filed a timely motion to withdraw the plea under Florida Rule of Criminal Procedure 3.170*(l)*. In the motion, counsel asserted that the assistant state attorney who negotiated the plea agreed that the state would not make a sentence recommendation, but the state violated the agreement when a different prosecutor appeared at sentencing and recommended life in prison. (R-1.66-67) Kuhn also moved to withdraw from representation of Kelsey on grounds of conflict of interest stemming from the plea negotiations and sentencing. (R-1.68)

On May 17, 2010, the U.S. Supreme Court decided Graham v. Florida, 560 U.S. 48 (2010). The Court held that a sentence of life without possibility of parole for a crime other than homicide committed by a person under 18 violates the Eighth Amendment to the U.S. Constitution. More than three years later, following a hearing on November 1, 2013, (R-2.199-23) Circuit Judge James H. Daniel denied the April 2010 motion to withdraw the plea but ordered Thomas

resentenced. (R-1.100-03) According to Randall K. Erler, who was appointed to represent Kelsey in the resentencing, the delay occurred because the court and parties were awaiting legislative direction. (R-3.385-86)

Judge Daniel presided in a January 16-17, 2014, resentencing hearing. At that point the Legislature was considering a bill that eventually became Chapter 2014-220, Laws of Florida. Defense counsel referred to the then-pending Senate bill, and the parties addressed the sentencing criteria later codified in Chapter 2014-220. Dr. Bloomfield testified that Thomas suffers from depression, a chaotic lifestyle and borderline intelligence, but has no "paraphernalias of sexual deviance." (R-2.273) According to Dr. Bloomfield, his commission of sexual battery at age 15 in this case stemmed from issues of power, control, and aggressiveness, not sexual deviance. This increases Thomas' prospects for rehabilitation. (R-2.271) Bloomfield noted that Thomas obtained his GED certificate while in prison and received mental health services. (R-2.259) Dr. Bloomfield found nothing in Thomas' psychological makeup to prevent him from becoming a prosocial, functioning member of society. (R-2.277) He concluded that Thomas is amenable to rehabilitation both during and after his prison sentence. (R-3.274) Dr. Bloomfield thought Thomas would need the re-entry program offered by the Department of Corrections. (R-3.277)

Thomas' Criminal Punishment Code scoresheet yielded a minimum sentence of 24.3125 years. (R-3.315) The court imposed 45-year sentences, concurrent to one another and concurrent to the 20-year sentence Thomas is serving following probation revocation for the crimes he committed at age 18. (R-1.109-12, 3.416) The court also imposed five years of sex offender probation. Judge Daniel stated that, in addition, "if there was a parole system in place, which seems to be what Graham kind of writes toward, … and there could be meaningful review in 25 years, .. that would be a good thing." (R-3.418)

Thomas appealed. Briefing preceded this Court's decision in Henry v. State, 175 So. 3d 675 (Fla. 2015). Thomas argued for either parole eligibility or a declaration that section 921.1402, Florida Statutes (2014), applies to him and he "is eligible for a sentence review after serving 20 years of his sentences." Initial brief at 11. In an opinion on rehearing, the First DCA panel addressed Henry and affirmed the sentence in a two-to-one vote, with a concurring opinion by Judge Winokur and a dissenting opinion by Judge Benton. Kelsey v. State, 40 Fla. L. Weekly D2523a (Fla. 1st DCA Nov. 9, 2015). The court certified a question of great public importance:

> Whether a defendant whose initial sentence for a nonhomicide crime violates Graham v. Florida, and who is resentenced to concurrent forty-five year terms, is entitled to a new resentencing under the framework established in chapter 2014-220, Laws of Florida?

SUMMARY OF THE ARGUMENT

A resentencing compelled by Graham v. Florida during the four-year interim when Florida had no legislative remedy for a Graham violation should not foreclose the chief benefit of that legislation: judicial sentence review. Kelsey falls within this window. Although the resentencing court considered his youth, immaturity, and background as required by Graham, the sentencing order has no provision for judicial sentence review because it preceded enactment of Chapter 2014-220 and this Court's decisions making that legislation retroactive.

In several decisions in 2015, this Court signaled that all juvenile offenders with sentences exceeding the statutory review period—including those whose sentences fall within their life expectancy— are entitled to a section 921.1402 review. Three district courts have recognized a right to sentence review separate from sentence imposition. Because these decisions confer a right to sentence review on others convicted of equivalent or greater offenses committed before age 18, Kelsey must receive the same opportunity.

For a nonhomicide offender such as Kelsey, chapter 2014-220 provides for review at 20 years. Because his 45-year sentence exceeds 20 years, he is entitled to sentence review at 20 years, and, if denied then, again 10 years later. He asks that this Court answer the certified question in the affirmative and remand with

directions to amend the sentencing order to specify that his sentence is imposed under section 775.082(3)(c), Florida Statutes (2014), making him eligible to seek sentence review as specified in section 921.1402(2)(d) and Florida Rule of Criminal Procedure 3.802(b)(2).

Denial of judicial sentence review to Kelsey and others in his position would frustrate legislative intent in creating this remedy, undermine this Court's precedent making chapter 2014-220 retroactive, and result in cruel and unusual punishment prohibited by the state and federal constitutions.

ARGUMENT

Kelsey should be resentenced under section 775.082(3)(c), Florida Statutes (2014),to qualify for a 20-year sentence review hearing under section 921.1402 and enable him to seek release by demonstrating maturity and rehabilitation.

Standard of review: This case is before the Court on a certified question of great public importance:

> Whether a defendant whose initial sentence for a nonhomicide crime violates Graham v. Florida, and who is resentenced to concurrent forty-five year terms, is entitled to a new resentencing under the framework established in chapter 2014-220, Laws of Florida?

Kelsey v. State, 40 Fla. L. Weekly D2523a (Fla. 1st DCA Nov. 9, 2015). Review is de novo. Gridine v. State, 175 So. 3d 672, 674 (Fla. 2015).

Because the underlying issue turns more on judicial sentence review than on resentencing and should not hinge on a specific term of years, the question should be reformulated as follows:

> Is a juvenile nonhomicide offender entitled to judicial review under section 921.1402, Florida Statutes, on a prison term imposed on resentencing required because the initial sentence violated Graham v. Florida?

Discussion: The Court should answer the certified question in the affirmative and hold that a juvenile offender whose sentence was reduced after Graham from life to a term of years that exceeds the review period under section 921.1402, Florida Statutes, must receive judicial sentence review.

In the argument that follows, Kelsey will explain why offenders in his position, resentenced within the window between the decisions in Graham v. Florida and Henry v. State, are entitled to judicial sentence review; discuss district court opinions recognizing the necessity of judicial sentence review on otherwise lawful sentences; identify precedent supporting sentence review for all juvenile offenders whose sentences exceed the initial review period; and specify why an amended sentencing order, rather than a full resentencing hearing, provides adequate relief in this case.

A. Nonhomicide offenders with nonlife sentences imposed after the Graham decision, for crimes committed before the effective date of Chapter 2014-220, Laws of Florida, are entitled to sentence review.

The question certified by the First DCA, as well as the discussion in the majority, concurring, and dissenting opinions below, concerns a narrow class of juvenile offenders: those resentenced from life to a term of years short of their life expectancy after the decision in Graham, for crimes committed before the July 1, 2014, effective date of Chapter 2014-220, Laws of Florida. The Supreme Court decided Graham on May 17, 2010. Kelsey, initially sentenced to life on March 26, 2010, for crimes committed in 2002 when he was 15 years old, was resentenced to 45 years in prison on January 17, 2014. The First District majority observed that

> a wide range of valid term of years sentences are available for juveniles whose original sentences were unconstitutional under Graham. If those resentences

> themselves violate Graham by providing no meaningful opportunity for release (as in Henry and Gridine), the supreme court requires resort to the 2014 legislative remedies. But the supreme court has not yet held that all resentencings and re-resentencings under Graham must also comply with the recent legislation.

40 Fla. L. Weekly at D2524. Although "constrained to affirm in this case," the majority "recognized the need for clarity on this category of Graham cases." Id. Judge Winokur found "no compelling reason to overturn Kelsey's constitutional, statutorily-authorized sentence." He concluded that "any other interpretation [of Henry] erodes the finality of sentences that were legally imposed and in compliance with Graham." Id.

Judge Winokur misinterpreted Henry and failed to grasp the Eighth Amendment implications of his position. As Judge Benton recognized in his dissenting opinion, Henry requires relief in this case. Id. at D2525. This Court determined in Henry that all juvenile offenders with sentences exceeding the statutory review period are entitled to a section 921.1402 review. The Court stated:

> 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. Thus, we believe that the Graham Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of "life in prison." Instead, we have determined that Graham applies to ensure that juvenile nonhomicide offenders **will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release** based on a demonstration of maturity and rehabilitation. See Graham, 560 U.S. at 75.
>
> In light of Graham, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences **that lack a review mechanism for evaluating this special class of offenders** for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.

Henry, 175 So. 3d at 680 (emphasis supplied). Judge Benton correctly discerned that this Court ruled Henry's sentence unconstitutional not because it was functionally a life sentence "but because it did not afford any meaningful opportunity for release based on demonstrated maturity and rehabilitation." Kelsey, 40 Fla. L. Weekly at D2525 (Benton, J., dissenting). He recognized that this passage in Henry encompasses all juvenile offenders sentenced to adult prison terms, not merely those who received *de facto* life sentences.

Consistent with Judge Benton's reading of Henry, this Court has vacated nonlife sentences for crimes committed by a juvenile before the July 1, 2014, effective date of Chapter 2014-220, Laws of Florida. In Thomas v. State, 135 So. 3d 590 (Fla. 1st DCA 2014), the First DCA affirmed 40- and 30-year sentences for

first-degree felony murder and armed robbery by a juvenile. This Court granted review, quashed the First DCA decision, and remanded for resentencing "in conformance with the framework established in chapter 2014-220, Laws of Florida, which has been codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes." (https://efactssc-public.flcourts.org/casedocuments/2014/961/2014-961_disposition_132852.pdf). In accord with its decision in Falcon v. State, 162 So. 3d 954 (Fla. 2015), this Court has also vacated a life sentence for first-degree murder imposed on a juvenile in a similar order in Gonzalez v. State, No. SC13-16 (http://jweb.flcourts.org/pls/docket/ds_docket?p_caseyear=2013&p_casenumber=16&psCourt=FSC&psSearchType=),quashing Gonzalez v. State, 101 So. 3d 886 (Fla. 2012).

In his concurring opinion below, Judge Winokur viewed this Court's disposition in Thomas merely as a determination that the 40-year sentence for first-degree murder was not authorized by statute. 40 Fla. L. Weekly at D2524. However, this Court did not so state, and the First DCA had affirmed Thomas' 40-year sentence for first-degree felony murder. See Thomas v. State, 135 So. 3d at 590-91; see also Washington v. State, 103 So. 3d 917, 922 (Fla. 1st DCA 2012) (Wolf, J., concurring) (concluding, in case decided before enactment of Chapter

2014-220, that the best sentencing option for first-degree murder committed by a juvenile is a term-of-years sentence without possibility of parole).

In addition, the Court's remand for resentencing in Thomas encompassed his conviction for robbery with a firearm or deadly weapon, a first-degree felony punishable by life. § 812.13(2)(a), Fla. Stat. (2002). Thirty years was a legal, statutorily authorized prison term for that crime. § 775.082(3)(b), Fla. Stat. (2002). Petitioner views the Thomas order as a determination that resentencing is necessary to qualify Thomas for judicial sentence review on both sentences because both exceeded the section 921.1402 review period. As noted by Judge Benton, the Kelsey and Thomas cases are "indistinguishable" in that "the sentences … received on resentencing were not themselves life sentences or their equivalents." Kelsey, 40 Fla. L. Weekly at D2526 (Benton, J., dissenting).

B. Three District Courts have recognized an entitlement to judicial sentence review independent from sentence imposition.

In the months following this Court's juvenile sentencing decisions in March and April 2015, three district courts recognized that judicial sentence review may be detached from sentence imposition. In Blake v. State, 40 Fla. L. Weekly D1591a (Fla. 2d DCA July 10, 2015), the trial court conducted "an individualized sentencing hearing" and "considered the factors outlined in Miller and now codified in section 921.1401" before imposing a life sentence for first-degree

murder. The appellate court affirmed the sentence, finding that Blake "received the … hearing discussed in Horsley [v. State 160 So. 3d 393 (Fla. 2015)]." However, the court also remanded for the trial court to determine whether he is entitled to sentence review after 25 years. In Barnes v. State, 175 So. 3d 380 (Fla. 5th DCA 2015), the appellate court, reviewing cumulative sentences totaling 60 years for a juvenile convicted of nonhomicides, remanded for the trial court to "amend the sentencing documents to provide for judicial review after twenty years' incarceration." Id. at 382. In Troche v. State, 40 Fla. L. Weekly D2762b (Fla. 4th DCA Dec. 16, 2015), the Fourth DCA suggested it would have remanded for the trial court to authorize judicial sentence review if the offender were not also serving life without parole for crimes committed as an adult. "Therefore," the appellate court concluded, "the review would have no purpose." In none of these cases did the courts condition entitlement to a 20- or 25-year review on the initial sentence constituting life without parole.

C. The proportionality principle in the Eighth Amendment requires judicial sentence review on all sentences exceeding the review period.

If judicial sentence review is extended to offenders such as Thomas, Gonzalez, and others convicted of first-degree murder and lesser offenses, the remedy must not be denied to Kelsey and others serving sentences longer than the initial review periods for their crimes but shorter than their life expectancies. See

Kelsey, 40 Fla. L. Weekly at D2526 n. 6 (Benton, J., dissenting) ("Under the majority opinion's view, juvenile homicide offenders would be treated more favorably than juvenile nonhomicide offenders."). Offenders initially sentenced to life will be released after 15, 20, or 25 years upon a showing of maturity and rehabilitation while others will serve their entire three-, four-, or five-decade terms regardless of their self-improvement while in prison. See, e.g., Hill v. State, 172 So. 3d 491 (Fla. 1st DCA 2015), rev. pending, No. SC15-1667 (affirming 35-year sentence without judicial review for armed (via gun theft) burglary committed by 14-year-old). To deny them an opportunity for earlier release would contravene legislative intent in creating judicial sentence review for this special class of offenders, undermine this Court's precedent making the remedial juvenile sentencing laws enacted in 2014 retroactive, and result in cruel and unusual punishment prohibited by the state and federal constitutions. See U.S. Const., Amends. VIII and XIV; Art. I, § 17, Fla. Const.

Several district courts have addressed inequities comparable to the denial of review for offenders such as Kelsey resulting from the First DCA decision. In Landrum v. State, 163 So. 3d 1261 (Fla. 2d DCA 2015), rev. granted, No. SC15-1071 (Fla. June 18, 2015), the district court noted that neither Graham nor Miller ban, on Eighth Amendment grounds, a life sentence for second-degree murder committed by a juvenile. The Second DCA recognized that consequently,

offenders serving life sentences for first-degree murder would receive "eventual review" but offenders serving life for second-degree murder would not. Id. at 1263. The court certified a question of great public importance:

> Because there is no parole from a life sentence in Florida, does Miller v. Alabama, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), require the application of the procedures outlined in sections 775.082, 921.1401, and 921.1402, to juveniles convicted of second-degree murder and sentenced to a non-mandatory sentence of life in prison before the effective date of Chapter 2014-220, Laws of Florida?

Landrum, 163 So. 3d at 1263-64.

In Peters v. State, 128 So. 3d 832 (Fla. 4th DCA 2013), the appellate court ruled concurrent 99-year prison terms for armed robberies committed by a juvenile disproportionately unconstitutional. The sentencing provisions in effect at the time of the crimes, limited by Graham's prohibition on a life sentence for a nonhomicide committed by a juvenile, permitted a life sentence for a first-degree felony punishable by life but only a 40-year sentence for a life felony committed between 1983 and 1995. Id. at 852. The Fourth DCA observed that Peters "would have been better situated had he committed a life felony, a more serious crime under the legislative framework, than the crime he committed. This is an affront to the Constitution that cannot stand." Id. at 855. The court ruled the 99-year sentence for a first-degree felony punishable by life unconstitutional and ordered resentencing to no more than 40 years. Id.

The concern for unconstitutionally disproportionate sentences that yielded the certified question in Landrum and the decision in Peters arises here as well. In the cases already decided by this Court, judicial sentence review will be extended to the juvenile offenders in Gridine, Henry, Thomas, Gonzalez, Falcon, Horsley, and Lawton v. State, 40 Fla. L. Weekly S195 (Fla. Apr. 9, 2015). Also entitled to review will be all juvenile offenders serving life sentences and sentences exceeding their life expectancies in cases that are final, if they waited to challenge their sentences until after the mandate in Falcon. See Falcon, 162 So. 3d at 956 (giving affected juveniles two years from issuance of mandate to challenge sentences via rule 3.850(b)(2)). Finally, offenders whose crimes occur after July 1, 2014, will receive first a section 921.1401 hearing assessing their "moral culpability," Graham, 560 U.S. at 50, before imposition of sentence, and second a section 921.1402 hearing gauging their maturation and rehabilitation after serving 15, 20, or 25 years. This includes juvenile offenders who, like Kelsey, did not commit murder.

D. An amended sentencing order is necessary to make Kelsey eligible for judicial sentence review.

Under the sentence imposed in January 2014 and affirmed by the First DCA, Kelsey will not receive judicial sentence review. Because the Legislature had not yet enacted chapter 2014-220 and this Court had not yet ruled it retroactive, the sentencing judge lacked authority to impose sentence under section 775.082(3)(c),

a prerequisite to judicial sentence review. Section 921.1402(2)(d) specifies that a "juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) is entitled to a review of his or her sentence after 20 years." If review is denied at that point, the offender is entitled to another review 10 years later. The court rule adopted to effectuate section 921.1402, provides in pertinent part:

> (b) Time for filing. An application for sentence review may not be filed until the juvenile offender becomes eligible pursuant to section 921.1402(2). A juvenile offender becomes eligible:
>
> …
>
> (2) after 20 years, if the juvenile offender is sentenced to a term of 20 years or more under section 775.082(3)(c), Florida Statutes.

Fla. R. Crim. P. 3.802(b)(2). Without an amended sentencing order specifying that sentence was imposed under section 775.082(3)(c), neither section 921.1402 nor rule 3.802 authorizes Kelsey to seek judicial sentence review.

A new sentencing hearing is unnecessary in this case. In Kelsey's January 2014 resentencing hearing, defense counsel presented evidence and argument on the criteria later codified in section 921.1401. Counsel cited Senate Bill 384 (R-3.385) which, in its original version filed two months before the sentencing hearing, contained all 10 criteria for determining an appropriate sentence made part of section 921.1401 later in the 2014 Session. (https://www.flsenate.gov/Session/Bill/2014/0384/BillText/__/PDF) During the two-day hearing, a licensed psychologist who had evaluated Kelsey testified at

length and submitted his report into evidence. Three of Kelsey's family members described his deplorable early childhood and difficulty keeping up in school. The prosecutor presented a statement by the victim. Defense counsel discussed Kelsey's background, intellectual capacity, and the possibility of rehabilitation. Circuit Judge Daniel expressly considered the section 921.1401 factors in imposing sentence. (R-3.412-16) Kelsey having received a de facto section 921.1401 hearing, all that remains at this point is to specify that his sentence was imposed under section 775.082(3)(c) and that he is entitled to seek judicial sentence review after serving 20 years.

A new sentencing hearing may also be unnecessary for other offenders who received an individualized sentencing hearing that included consideration of the sentencing criteria in section 921.1401. Those who did not receive the individualized sentencing hearing must receive a new hearing "in which the trial court shall consider the enumerated and any other pertinent factors 'relevant to the offense and [Falcon's] youth and attendant circumstances.'" Falcon, 162 So. 3d at 963 (quoting Ch. 2014-220, § 2).

Accordingly, this Court should answer the reformulated certified question in the affirmative and hold that juvenile offenders whose initial sentences violated Graham and who were resentenced to a term of years that exceeds the section 921.1402 judicial review period are entitled to judicial sentence review. This

result necessitates amended sentencing orders specifying that sentences were imposed under subsections 775.082(1)(b)2, (3)(a)5.b., (3)(b)2.b., or (3)(c), Florida Statutes (2014).

CONCLUSION

Thomas Kelsey, the child of parental neglect and abandonment, must not be abandoned yet again, this time by society, for crimes he committed at 15 years of age. In imposing a 45-year prison term, Judge Daniel estimated Kelsey's likely release date at around age 60. Kelsey's Department of Corrections web page reflects a current release date of 2053, when he will be 66 years of age. (http://www.dc.state.fl.us/ActiveInmates/detail.asp?Bookmark=2&From=list&SessionID=429965075, accessed Dec. 18, 2015) To a young offender, this sentence amounts to the very denial of hope and disregard of character improvement that led the U.S. Supreme Court to outlaw life without parole for juvenile nonhomicide offenders. The legislatively prescribed remedy of judicial sentence review after serving 20 years restores hope, encourages good behavior, and fosters character improvement.

Based on the arguments contained herein and the authorities cited in support, Kelsey requests that this Court answer the reformulated certified question in the affirmative, quash the First District decision, and remand with directions to amend his sentencing order to reflect that he was sentenced under section 775.082(3)(c) Florida Statutes, and is entitled to seek judicial sentence review under section 921.1402(2)(d) and Florida Rule of Criminal Procedure 3.802(b)(2).

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, and to all amicus counsel who have filed amicus notices, this 8th day of January, 2016. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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THOMAS KELSEY, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D14-518. Opinion filed November 9, 2015. An appeal from the Circuit Court for Duval County. James H. Daniel, Judge. Counsel: Nancy A. Daniels, Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Pamela Jo Bondi, Attorney General, and Virginia Chester Harris, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

[Original Opinion at 40 Fla. L. Weekly D1291b]

(PER CURIAM.) On March 26, 2010, Thomas Kelsey was sentenced to two life sentences and two concurrent twenty five year terms for the four nonhomicide offenses he committed in 2002 at the age of fifteen: armed burglary with an assault or battery, armed robbery, and two counts of sexual battery. A few months later, the Supreme Court announced its decision in *Graham v. Florida*, 560 U.S. 48 (2010), pursuant to which Kelsey was resentenced to concurrent forty-five year sentences for each offense. The issue presented is whether he is entitled to be resentenced again under *Graham* and its progeny including recent juvenile sentencing legislation and decisions of our supreme court. We initially answered that question in the negative, but Kelsey has asked that we reconsider our legal analysis, which we have done, concluding that he is not entitled to resentencing again.

While this appeal was pending, the Florida Supreme Court decided *Henry v. State*, 40 Fla. L. Weekly S147 (Fla. Mar. 19, 2015),[1] holding that "the constitutional prohibition against cruel and unusual punishment under *Graham* is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'
" *Id.* (citing *Graham*, 560 U.S. at 75). The court stated that "*Graham* requires a juvenile nonhomicide offender . . . to be afforded such an opportunity during his or her natural life." *Id.* Because Henry had been resentenced after *Graham* to ninety years, requiring that he be imprisoned "until he is at least ninety-five years old," our supreme court concluded his aggregate sentence -- which did not afford him the "meaningful opportunity" for release that *Graham* requires during an offender's

"natural life" -- was unconstitutional and that he "should be resentenced in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch. 2014-220, Laws of Fla." *Id.*; *cf. Thomas v. State*, 78 So. 3d 644 (Fla. 1st DCA 2011) (concurrent fifty-year terms without possibility of parole is not the functional equivalent of a life sentence). Though Henry's crimes occurred prior to the effective date of the legislation, its remedial aspects were judicially extended to him. *SeeHorsley v. State*, 160 So. 3d 393 (Fla. 2015).

Kelsey requests the same relief afforded to Henry, but we may do so only if his forty-five year prison term is a *de facto* life sentence in violation of *Graham*, which it is not under our Court's precedents. *See Abrakata v. State*, 168 So. 3d 251, 252 (Fla. 1st DCA 2015) ("absent a violation of *Graham*, there is no legal basis to retroactively apply section 921.1402 (or any other provision of the juvenile sentencing legislation enacted in 2014) to the 2011 offense in this case."); *Lambert v. State*, 170 So. 3d 74, 76 (Fla. 1st DCA 2015) ("Here, unlike the sentences in *Henry* (90 years) and *Gridine* (70 years), the 15-year sentence Lambert received on count 2 does not amount to anything close to a *de facto* life sentence."). Because the concurrent resentences at issue in this case do not violate *Graham*, we are constrained to deny relief.

We note that our supreme court recently quashed this Court's decision in *Thomas v. State*, 135 So. 3d 590 (Fla. 1st DCA 2014), *review granted, decision quashed*, 40 Fla. L. Weekly S479f (Fla. Sept. 4, 2015), a case involving a homicide offense. Thomas was convicted of armed robbery and first-degree murder and sentenced to mandatory life term without parole, but was resentenced in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) to concurrent thirty- and forty-year sentences. This Court upheld those resentences, but the supreme court "remanded for resentencing in conformity with the framework established in chapter 2014-220, Laws of Florida, which has been codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. *See Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015)." *Thomas*, 40 Fla. L. Weekly S479f. In effect, the supreme court appears to require that any juvenile initially sentenced to mandatory life without parole for a homicide in violation of *Miller* be sentenced under the new framework regardless of what resentence may have been imposed in the interim.

But this is a *Graham* case, not a *Miller* case; Kelsey's crimes were nonhomicides for which a range of lawful punishments was available. As to *Graham* defendants, the supreme court has required re-resentencing only where the initial resentence is life or de facto life, as in *Henry* (ninety years) and *Gridine v. State*, 40 Fla. L. Weekly S149 (Fla. Mar. 19, 2015) (seventy years). For example, in *Henry* because the supreme court "determined that Henry's sentence *is unconstitutional under* Graham, we conclude that Henry should be resentenced in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch.2014-220, Laws of Fla." 40

Fla. L. Weekly S147 (citing*Horsley*) (emphasis added). Unlike *Miller* cases for which *no* valid remedy on resentencing was available until the recent legislation, a wide range of valid term of years sentences are available for juvenile's whose original sentences were unconstitutional under *Graham*. If those resentences themselves violate *Graham* by providing no meaningful opportunity for release (as in *Henry* and *Gridine*), the supreme court requires resort to the 2014 legislative remedies. But the supreme court has not yet held that all resentencings and re-resentencings under *Graham* must also comply with the recent legislation. Our precedents have not held that a forty-five year sentence for a nonhomicide is a *de facto*life term to which *Graham* applies; nor has our supreme court. We are thereby constrained to affirm in this case, but recognizing the need for clarity on this category of *Graham* cases certify the following question as one of great public importance:

Whether a defendant whose initial sentence for a nonhomicide crime violates *Graham v. Florida*, and who is resentenced to concurrent forty-five year terms, is entitled to a new resentencing under the framework established in chapter 2014-220, Laws of Florida?

AFFIRMED. (MAKAR, J., CONCURS; WINOKUR, J., CONCURS WITH OPINION; BENTON, J., CONCURS IN CERTIFIED QUESTION BUT DISSENTS ON MERITS WITH OPINION.)

(WINOKUR, J., concurring.) I concur in the majority opinion. I write separately because I see no compelling reason to overturn five years of constitutional,[2] legally-authorized resentences imposed following *Graham v. Florida*, 560 U.S. 48 (2010). That would be the result if Kelsey prevailed in this appeal.

While Kelsey's original sentence violated *Graham*, rather than *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *Miller* is the starting point of this analysis. *Miller* prohibits a mandatory life without parole sentence for an offense committed by a juvenile. *Miller* presented a significant difficulty in Florida because, as the majority opinion notes, no valid remedy on resentencing was available. The Florida Supreme Court resolved the matter in *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). Under the "unique" (a term the Court used four times) circumstances presented by offenders whose sentences were unconstitutional but had no legal resentencing alternatives available, the Court ordered the extraordinary remedy of retroactive application of a new sentencing law, despite that law's terms limiting its application to offenses "committed on or after July 1, 2014." Ch. 2014-220, §§ 2, 3, at 2872-73, Laws of Fla. (codified at §§ 921.1401(1); 921.1402(1), Fla. Stat. (2014)). In reaching this conclusion, the Court rejected the argument that this remedy violated Article X,

section 9 of the Florida Constitution, the so-called "Savings Clause," (generally prohibiting the retroactive application of a sentencing law), because "in this unique context" where the sentencing statute itself is unconstitutional, "the requirements of the federal constitution must trump those of our state constitution." *Horsley*, 160 So. 3d at 406.

Thomas v. State, 40 Fla. L. Weekly S479f (Fla. Sept. 4, 2015), a case on which the dissent heavily relies, involved an offender whose life sentence violated *Miller*. The trial court resentenced Thomas to concurrent 40- and 30-year terms of imprisonment, which this Court affirmed prior to the *Horsley* decision. *Thomas v. State*, 135 So. 3d 590 (Fla. 1st DCA 2014). In a two-sentence unpublished order, the Supreme Court quashed this Court's decision and ordered resentencing "in conformance with the framework established in chapter 2014-220, Laws of Florida," consistent with its opinion in *Horsley*. *Thomas*, 40 Fla. L. Weekly at S479.

In my view the *Thomas* order only recognizes that the 40-year resentence was impermissible. The sentencing court could not simply choose a sentence without statutory authority in an effort to comply with *Miller*.[3] Because the Supreme Court had already ruled in *Horsley* that the proper resolution was retroactive application of the 2014 sentencing law, the defendant in *Thomas* was entitled to that remedy.

Kelsey's resentence, in contrast to Thomas's, was both constitutional *and* statutorily authorized.[4] Retroactive application of the 2014 law to Kelsey would mean that every *Graham* defendant who has been resentenced since *Graham*was decided in 2010 gets a second resentencing, even though the first resentence was consistent with *Graham* and applicable sentencing statutes. Given the "unique circumstances" occasioning the retroactive application of the 2014 law in *Horsley*, I do not believe that the Supreme Court meant to disrupt the finality of legal sentences imposed years earlier by applying a later-enacted law to them.

I recognize that the Supreme Court in *Henry v. State*, 40 Fla. L. Weekly S147, S149 (Fla. Mar. 19, 2015), ruled that Henry, a *Graham* defendant, should be resentenced under the 2014 law, even though the "unique circumstances" present with *Miller* defendants do not seem to be present with *Graham* defendants. *See also Gridine v. State*, 40 Fla. L. Weekly S149 (Fla. Mar. 19, 2015) (holding that *Graham* prohibits a 70-year sentence for a juvenile nonhomicide offender). In my view *Henry* does not apply to Kelsey because Henry's 90-year sentence (as well as Gridine's 70-year sentence) violated the Eighth Amendment pursuant to *Graham*. While Kelsey's original sentence violated *Graham*, his current sentence does not. *C.f. Horsley*, 130 So. 3d at 394 n. 1, 397 (noting that the issue presented there was the proper remedy for sentences that are "*now* unconstitutional" under *Miller* (emphasis added)). As stated above, no compelling reason exists to

overturn Kelsey's constitutional, statutorily-authorized resentence. I would limit the *Henry* remedy to defendants whose current sentences violate *Graham*, which generally means any sentence that is so long that it does not afford the offender an "opportunity for release based on demonstrated maturity and rehabilitation during his or her natural life." *Henry*, 40 Fla. L. Weekly at S149. Any other interpretation unnecessarily erodes the finality of sentences that were legally imposed and in compliance with *Graham*.

In summary, I find that neither *Henry* nor *Thomas* supports resentencing here. Henry was permitted resentencing under the 2014 law because his sentence was unconstitutional. Thomas was permitted resentencing under the 2014 law not because his first resentence was unconstitutional, but because it was not statutorily authorized. Because Kelsey's resentence is both constitutional and statutorily authorized, neither case applies and he is not entitled to a second resentencing. Accordingly, I concur in the majority opinion.

(BENTON, J., dissenting.) I respectfully dissent on the merits of the appeal. Under controlling precedent, the appellant is entitled to be "resentenced in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch. 2014-220, Laws of Fla." *Henry v. State*, 40 Fla. L. Weekly S147, S149 (Fla. Mar. 19, 2015), *reh'g denied*, No. SC12-578 (Fla. Sept. 24, 2015). I concur in certifying the question posed in the majority opinion.

The appellant was sentenced in 2010 to life in prison without parole for nonhomicide offenses he committed as a juvenile in 2002. These sentences violated the prohibition later handed down in *Graham v. Florida*, 560 U.S. 48, 82 (2010), against "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." After the original sentences were vacated, appellant was resentenced in 2014 to concurrent 45-year sentences. The resentencing that took place in the wake of *Graham*, while not the equivalent of life in prison, did not conform to the new juvenile sentencing legislation.[5]

The appellant now seeks either resentencing under section 921.1402, Florida Statutes (2014), or judicial abolition of parole ineligibility. He maintains we "should invalidate either the statutory provisions that prohibit parole and require offenders to serve 85 percent of their sentences, or the provision in the new sentence review law for juveniles making review available only for offenses committed on or after July 1, 2014." Under *Henry*, he is entitled to resentencing under section 921.1402, Florida Statutes, enacted last year, ch. 2014-220, Laws of Fla., § 3, but not to the invalidation of the statutory provisions he seeks in the alternative.

We did not originally "read *Henry* or *Gridine*[*v. State*, 40 Fla. L. Weekly S149 (Fla. Mar. 19, 2015),] to require that all juveniles convicted of nonhomicide crimes must be given an opportunity for early release by parole or its equivalent from their term-of-years sentences. Rather, we read those cases to simply hold that juvenile offenders convicted of nonhomicide crimes cannot be sentenced to an individual or aggregate term-of-years sentence that amounts to a *de facto* life sentence that does not afford the offender a meaningful opportunity for release during his or her natural life." *Lambert v. State*, 170 So. 3d 74, 76 (Fla. 1st DCA 2015).

But it is now clear that so-called *Graham* cases are to be treated just like cases revisited under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and that an initial resentencing that, even though not a life sentence (or the equivalent) itself, does not conform to the requirements of *Henry* and section 921.1402 must be set aside and reimposed "in light of the new juvenile sentencing legislation." *Henry*, 40 Fla. L. Weekly at S149; *see Thomas v. State*, 40 Fla. L. Weekly S479, S479 (Fla. Sept. 4, 2015) (requiring a second resentencing "in conformance with the framework established in chapter 2014-220, Laws of Florida").

In *Horsley v. State*, 160 So. 3d 393, 405 (Fla. 2015), the Florida Supreme Court had to fashion appropriate relief for "juvenile offenders whose sentences are unconstitutional under *Miller*." *See Miller*, 132 S.Ct. at 2469 (holding "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"). In the aftermath of *Miller*, the trial court had resentenced Horsley to life without parole, albeit after individualized consideration. *Horsley*, 160 So. 3d at 396-97. On direct review of his resentencing, our supreme court concluded that chapter 2014-220, Laws of Florida, (now codified as sections 775.082, 921.1401, and 921.1402 of the Florida Statutes) should be applied to Horsley (and "all juvenile offenders whose sentences are unconstitutional under *Miller*") even though Horsley's offense was committed prior to the effective date of the new juvenile sentencing legislation. *Id.* at 405, 408 (saying "the Legislature has now provided that all juvenile offenders must receive individualized consideration before the imposition of a life sentence and that most juvenile offenders are eligible for a subsequent judicial review of their sentences").

On the same day *Horsley* was decided, our supreme court held that the new juvenile sentencing legislation also applies to nonhomicide offenders whose sentences are unconstitutional under *Graham*. *See Henry*, 40 Fla. L. Weekly at S149 (citing *Horsley*); *see also Gridine*, 40 Fla. L. Weekly at S151 (remanding "to the sentencing court to conduct proceedings in accordance with *Henry*" where juvenile nonhomicide offender originally received a seventy-year prison sentence). Henry was a juvenile who had been convicted of multiple nonhomicide offenses for which he was originally sentenced to life plus sixty years' imprisonment. *Henry*, 40 Fla. L.

Weekly at S148. He was resentenced in the wake of *Graham*, and received an aggregate sentence of ninety years' imprisonment. *Id*.

The Florida Supreme Court ruled that Henry's ninety-year sentence was unconstitutional under *Graham*, not because the resentencing was a life sentence equivalent, but because it did not "afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' " during his natural life. *Id.* at S149 (quoting *Graham*, 560 U.S. at 75). The *Henry* court stated:

We conclude that *Graham* prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain*future early release* during their natural lives based on their demonstrated maturity and rehabilitation.
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. Thus, we believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of "life in prison." Instead, we have determined that *Graham*applies to ensure that *juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation*. *See Graham*, 560 U.S. at 75.
In light of *Graham*, and other Supreme Court precedent, *we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult*. *See id.* at 70-71 . . . .

Id. (emphasis added). Just as in the present case, Henry's original sentence did not comply with the dictates of *Graham*. Just as the supreme court ordered Henry to be resentenced under chapter 2014-220, Laws of Florida, *id.*, an intervening resentencing notwithstanding, we should order resentencing in the present case under section 921.1402(2)(d) (as the same provision is now codified). The supreme court's decision in *Thomas* makes clear that the length of Henry's initial resentencing is not controlling.

As the majority and concurring opinions note, the Florida Supreme Court recently quashed our decision in *Thomas v. State*, 135 So. 3d 590 (Fla. 1st DCA 2014), and remanded for a second resentencing "in conformance with the framework established

in chapter 2014-220, Laws of Florida." *Thomas*, 40 Fla. L. Weekly at S479. This was despite the fact that Thomas, who was a juvenile convicted of first-degree murder and initially sentenced to mandatory life without parole, had already been resentenced in the wake of *Miller* to concurrent thirty- and forty-year sentences. *See Thomas*, 135 So. 3d at 590. Our supreme court ruled that Thomas was entitled to be resentenced under the new juvenile sentencing legislation, even though the sentences he received on resentencing were not themselves life sentences or the equivalent. Kelsey's situation is indistinguishable from Thomas's in this regard.

The majority opinion makes much of the fact the concurrent forty-five-year sentences Kelsey received for nonhomicide offenses on resentencing are not the life sentences that *Graham* condemned.[6] Even so, appellant is entitled to a review of his concurrent forty-five-year sentences pursuant to section 921.1402(2)(d), Florida Statues, which provides:

A juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) [applicable to a juvenile convicted of an offense that is not under the murder statute but is "a life felony or is punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment" (or an offense reclassified as such)] is entitled to a review of his or her sentence after 20 years. If the juvenile offender is not resentenced at the initial review hearing, he or she is eligible for one subsequent review hearing 10 years after the initial review hearing.

See § 775.082(3)(c), Fla. Stat. (2014). In *Horsley*, our supreme court explained:

[J]uvenile offenders sentenced to a term of imprisonment of more than twenty years for a nonhomicide offense are entitled to a subsequent judicial review of their sentences. Ch. 2014-220, §§ 1, 3, Laws of Fla. [codified at sections 775.082 and 921.1402, Fla. Stat.] This class of nonhomicide offenders is also eligible for "one subsequent review hearing 10 years after the initial review hearing," if the juvenile nonhomicide offender is not resentenced at the initial review hearing. Ch. 2014-220, § 3, Laws of Fla. [codified at section 921.1402, Fla. Stat.] This is the only class of juvenile offenders entitled to more than one subsequent sentence review.

160 So. 3d at 404-05. Under *Henry*, Kelsey is entitled to a review of his concurrent forty-five-year sentences after twenty years of incarceration (and to a second review hearing in another ten years should he not be resentenced at the initial hearing). *See* § 921.1402(2)(d), Fla. Stat.

Accordingly, I would reverse Kelsey's sentences and remand for resentencing, "in conformance with the framework established in chapter 2014-220, Laws of

Florida," *Thomas*, 40 Fla. L. Weekly at S479, while joining the majority opinion as to the certified question.

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[1]*Henry* was released after the filing of the initial and answer briefs, but before the time for filing of the reply brief, in this case.

[2]I am presuming that Kelsey's 45-year sentence is constitutional under *Graham*. My opinion addresses the issue of whether Kelsey is entitled to a second resentencing pursuant to the 2014 sentencing statute because his *original*sentence violated *Graham*.

[3]The Supreme Court said as much in *Horsley*, ruling that such sentences "ignore the primary role of the Legislature in criminal sentencing by crafting a remedy without a statutory basis." *Horsley*, 160 So. 3d at 405.

[4]Sexual battery is a life felony, punishable by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment. §§ 794.011(3); 775.082(3)(a)3., Fla. Stat. (2002). Armed robbery, and armed burglary with an assault or battery, are first-degree felonies punishable by imprisonment for a term of years not exceeding life imprisonment. §§ 812.13(2)(a); 810.02(2)(a) & (b); 775.082(3)(b), Fla. Stat. (2002).

[5]In affirming Kelsey's sentences, the majority opinion cites *Abrakata v. State*, 168 So. 3d 251 (Fla. 1st DCA 2015), and *Lambert v. State*, 170 So. 3d 74 (Fla. 1st DCA 2015), both of which are distinguishable: Neither involved a violation of *Graham v. Florida*, 560 U.S. 48 (2010). In *Abrakata*, the juvenile defendant was convicted of attempted second-degree murder with a firearm (a first-degree felony), and sentenced to twenty-five years in prison with a twenty-five-year mandatory minimum. 168 So. 3d at 251, 251 n.1. On appeal to this court, Abrakata argued he was entitled "to a review of his sentence after 15 years under section 921.1402(2)(c), Florida Statutes." *Id.* at 251. This court rejected Abrakata's argument, reasoning, "absent a violation of *Graham*, there is no legal basis to retroactively apply section 921.1402 (or any other provision of the juvenile sentencing legislation enacted in 2014) to the 2011 offense in this case." *Id.* at 252. In the present case, Kelsey's initial sentence was plainly a violation of *Graham*.

In *Lambert*, which was briefed before *Henry v. State*, 40 Fla. L. Weekly S147 (Fla. Mar. 19, 2015), was decided, the juvenile defendant argued that his fifteen-year sentence for aggravated fleeing or attempting to elude "should be amended to reflect that he [wa]s entitled to parole eligibility pursuant to the reasoning in *Graham* and Judge Padovano's concurring opinion in *Smith v. State*, 93 So. 3d 371 (Fla. 1st DCA

2012).” 170 So. 3d at 75. This court rejected that argument, stating: “We do not read *Henry* or *Gridine*[*v. State*, 40 Fla. L. Weekly S149 (Fla. Mar. 19, 2015),] to require that all juveniles convicted of nonhomicide crimes must be given an opportunity for early release by parole or its equivalent from their term-of-years sentences.” *Id.* at 76. We concluded, moreover, Lambert's fifteen-year sentence afforded him “a meaningful opportunity for release during his natural life,” because it did “not amount to anything close to a *de facto* life sentence.” *Id.* Whether *Henry* applies to sentences for offenses committed before July 1, 2014, that are not resentences required under (*Miller v. Alabama*, 132 S.Ct. 2455 (2012), or) *Graham* is not before us.

6The majority opinion contends that *Thomas v. State*, 40 Fla. L. Weekly S479 (Fla. Sept. 4, 2015), is distinguishable from the present case because *Thomas* is a *Miller* case “for which no valid remedy on resentencing was available until the recent legislation.” *Ante* at 5. Because “Kelsey's crimes were nonhomicides for which a range of lawful punishments was available,” *ante* at 4, the majority opinion maintains that, in his and other *Graham* cases, a second resentencing is not required unless the first resentencing results in the imposition of a life or *de facto* life sentence. This overlooks the fact that the Florida Supreme Court rejected such a distinction between *Miller* and *Graham* cases in*Henry*, where it ruled the new juvenile sentencing legislation applied to juvenile nonhomicide offenders, even though “a wide range of valid term of years sentences [we]re available for juvenile[s] whose original sentence[s] were unconstitutional under *Graham*.” *Ante* at 5. Under the majority opinion's view, juvenile homicide offenders would be treated more favorably than juvenile nonhomicide offenders.

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