

IN THE SUPREME COURT OF FLORIDA

MALIK JIMER WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-2170
LT. No. 2D14-1732

ON DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

ELBA CARIDAD MARTIN
Assistant Attorney General
Florida Bar No. 513342
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax: (813)281-5500
CrimAppTPA@myfloridalegal.com
elba.martin@myfloridalegal.com

COUNSEL FOR RESPONDENT

RECEIVED, 07/06/2017 11:08:26 AM, Clerk, Supreme Court

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
ISSUE ONE	8
WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BASED ON AN ARGUMENT THAT HE ACTED IN SELF-DEFENSE? [RESTATED]	8
ISSUE TWO	13
WHETHER PETITIONER'S CONSECUTIVE SENTENCES FOR FIRST DEGREE PREMEDITATED MURDER AND ATTEMPTED FIRST DEGREE PREMEDITATED MURDER VIOLATED GRAHAM AND MILLER? [RESTATED]	13

CONCLUSION.....	21
CERTIFICATE OF SERVICE	21
CERTIFICATE OF FONT COMPLIANCE	21

TABLE OF CITATIONS

PAGE NO.

Cases

<u>Austin v. State,</u> 127 So.3d 1286 (Fla. 1st DCA 2013)	17
<u>Brown v. State,</u> 454 So.2d 596 (Fla. 5th DCA 1984).....	10
<u>Collins v. State,</u> 189 So.3d 342 (Fla. 1st DCA 2016)	16
<u>Davis v. State,</u> 199 So.3d 546 (Fla. 4th DCA 2016).....	17
<u>Dias v. State,</u> 812 So.2d 487 (Fla. 4th DCA 2002).....	9
<u>Graham v. Florida,</u> 560 U.S. 48 (2011).....	<i>passim</i>
<u>Gridine v. State,</u> 175 So.3d 672 (Fla. 2015).....	16
<u>Guzman v. State,</u> 183 So.3d 1025, 1026 (Fla. 2016).....	16
<u>Henry v. State,</u> 175 So.3d 675 (Fla. 2015).....	16, 19
<u>Hernandez Ramos v. State,</u> 496 So.2d 837 (Fla. 2d DCA 1986)	12, 13
<u>Horsley v. State,</u> 160 So.3d 393 (Fla. 2015).....	19
<u>Jackson v. State,</u> 925 So.2d 1168 (Fla. 4th DCA 2006).....	14

<u>Jenkins v. State</u> , 942 So.2d 910 (Fla. 2d DCA 2006)	12, 13
<u>Jones v. State</u> , 192 So.2d 285 (Fla. 3d DCA 1966)	8
<u>Jordan v. State</u> , 143 So.3d 335 (Fla. 2014).....	19
<u>Kelsey v. State</u> , 206 So.3d 5 (Fla. 2016).....	16, 18, 19
<u>Lynch v. State</u> , 293 So.2d 44 (Fla. 1994).....	8
<u>McDuffie v. State</u> , 970 So.2d 312 (Fla. 2007).....	8
<u>Miller v. Alabama</u> , 132 S.Ct. 2455 (2012).....	<i>passim</i>
<u>Montgomery v. Louisiana</u> , --- U.S. ---, 136 S.Ct. 718 (2016).....	15
<u>Orme v. State</u> , 677 So.2d 258 (Fla. 1996).....	9
<u>Ortiz v. State</u> , 188 So.3d 113 (Fla. 1st DCA 2016)	16
<u>Rasley v. State</u> , 878 So.2d 473 (Fla. 1st DCA 2004)	9, 10, 13
<u>Roper v. Simmons</u> , 543 U.S. 551 (2005).....	4, 14
<u>Sneed v. State</u> , 580 So.2d 169 (Fla. 4th DCA 1991).....	10, 11, 13

<u>St. Val v. State,</u> 174 So.3d 447 (Fla. 4th DCA 2015)	17
<u>State v. Rivera,</u> 719 So.2d 335 (Fla. 5th DCA 1998)	10
<u>Thomas v. State,</u> 177 So.3d 1275 (Fla. 2015)	19
<u>Thomas v. State,</u> 78 So.3d 644 (Fla. 1st DCA 2011)	17
<u>Thomas v. State,</u> 918 So.2d 327 (Fla. 1st DCA 2005)	10
<u>Wardlaw v. State,</u> 832 So.2d 258 (Fla. 2d DCA 2002)	14
<u>Williams v. State,</u> 186 So.3d 989 (Fla. 2016)	18
<u>Williams v. State,</u> 197 So.3d 569 (Fla. 2d DCA 2016)	16

Statutes

Florida Statutes § 775.082	15, 18, 20
Florida Statutes § 921.1401	15
Florida Statutes § 775.087	1
Florida Statutes § 777.011	1
Florida Statutes § 812.13(1)	1
Florida Statutes § 921.1401	18, 20
Florida Statutes § 921.1402	15, 20
Florida Statutes § 782.04(1)	1

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes limited to the instant direct appeal, with the following additions and corrections:

Petitioner was charged by indictment with Count One - first degree premeditated murder and he carried, used displayed, threatened to use or attempted use a firearm, and he actually possessed and discharged the firearm and caused death in violation of Florida Statutes §§ 782.04(1)/775.087(2), Count Three - robbery in violation of Florida Statutes §§ 812.13(1) and (2)(a)/775.087(2), and Count Five - attempted first degree murder and he carried, used displayed, threatened to use or attempted use a firearm, and he actually possessed and discharged the firearm and caused great bodily harm in violation of Florida Statutes §§ 782.04(1)/777.04(1)/775.087(1)/777.011 for offenses committed on February 15, 2013. (R 90-93).

At trial, Symone Watts testified that she observed the bikes all stop, because one of them "pushed the other and everyone fell in the street; then one person got up really fast and pulled a gun out." (T 372). A couple of seconds later that person started shooting. (T 373). She also testified that when this person stood up everyone else was still on the ground. (T 398). No one else had their hand on the gun. She then observed the first muzzle flash. Watts saw the person reach into his pocket, pull something out, and I saw the muzzle flash." (T 399).

Venda Hayward, who arrived at the scene after the shots were fired testified that Johnson, one of the victims, was screaming and hollering and hysterical. (T 406, 409). Johnson stated "why did you shot us? We didn't do anything." (T 409). She observed one of the males that left the scene with a "shiny object in his hand." (T 413).

Johnson testified that he did not have a gun that night. (T 493). Johnson also testified that Brown did not have a gun at any time and he never saw him holding a gun. Johnson testified that he heard the person on the handlebars say "give it up" to Brown. (T 497). Brown and Williams fought. (T 499). Felton tried to grab Brown so Johnson tried to grab Felton's waistline and fought with him. (T 503-504). Johnson heard a gunshot and observed Brown go across the street. (T 506-507). Felton held Johnson down and Petitioner pointed the gun at him. (T 508). Felton stated "Get him. Get him. Shot him. Hurry up." Johnson had his hands up, trying to move away. Petitioner shot Johnson. (T 509). Johnson observed Brown bleeding from his eye. (T 512). Johnson denied attacking Petitioner and Felton. (T 556).

Brown was shot twice, once in the chest and head. (T 726, 732). The shot to the head was at a slightly downward angle. (T 733).

The trial court denied Petitioner's motion for judgment of acquittal for Count One premeditated first degree murder finding:

THE COURT: Based on the testimony and the law with respect to the first count, that is first-degree murder premeditated, there is evidence in the record from which this jury could conclude beyond a reasonable doubt that the defendant intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him, and the jury can make that decision.

(T 1303). The trial court also denied Petitioner's motion for judgment of acquittal for Count Three - attempted murder for the same reason. (T 1304). With respect to Petitioner's motion for judgment of acquittal under self-defense, the trial court held as follows:

THE COURT: On the issue of self-defense, again, the law is clear, first of all, that the defendant is entitled to an instruction on the law, and the evidence of self defense I pointed out came in to The State's case in chief because it chose to introduce the defendant's out-of-court statement, and then there was a lot of cross-examination about the statement which mostly consisted of questions rather than responses.

But be that as it may, especially with respect to Mr. Johnson, Mr. Johnson denied emphatically that any of these acts of violence were precipitated by him or his codefendant.

So The State's case in chief at this juncture sufficiently rebuts the suggestion of self-defense. But is squarely a jury question, so I'll deny the motion for JOA and leave the matter up to the jury to decide.

(T 1304-05).

Petitioner was found guilty of Count One - first degree premeditated murder and he carried, used displayed, threatened to use or attempted use a firearm, and he

possessed and discharged the firearm and caused death, Count Three - theft and Count Five -attempted first degree murder and he carried, used displayed, threatened to use or attempted use a firearm, and he possessed and discharged the firearm and caused great bodily harm. (R 248-50).

Petitioner filed a sentencing memorandum requesting a sentence that allowed for a meaningful opportunity for rehabilitation based on the holdings in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2011) and Miller v. Alabama, 132 S.Ct. 2455 (2012). (R 272-86).

The State filed a memorandum of law seeking a life sentence. (R 296-303).

A sentencing hearing was conducted on February 28, 2014. (R 348).

Petitioner's family members testified. (R 361-367).

Defense counsel requested that the court consider the mitigation provided. (R 368).

The victims testified. (R 369-74).

Petitioner addressed the offenses as follows:

[Petitioner]: The only reason I got remorse but nobody ain't going to have remorse ain't right. God even tell you. You live by the sword you die by the sword. He was living by the gun so they died by the gun. No disrespect but that's part of life. You want to live street that's how it's going to end.

(R 382).

The trial court indicated it had read the memorandum and reserved imposing

sentence. (R 383).

On March 7, 2014, the Court acknowledged that it had reviewed videos that Petitioner had submitted of the victim. (R 550-51).

The Court sentenced Petitioner as follows:

THE COURT: All right. Okay. Anyway, we were here last week and I spent a lot of time pondering this. As we all know, the US Supreme Court has put us all in a conundrum as to what we are supposed to do and legally can do. What I was required to do certainly was look into any mitigation that the defendant may have had to offer, which I have done. It's all part of the record. I've considered it all. I considered the comments of the State, and I've taken into consideration the fact that he was convicted of premeditated first degree-murder.

I'm taking into account the fact that the US Supreme Court had told us sentencing judges throughout the country that it is unconstitutional to sentence the offender under the age of 18 to life in prison without the possibility of parole.

The State has suggested and case law certainly does support the proposition that perhaps this Court can relate back to an earlier statute which would provide that this defendant could be sentenced to life in Florida State Prison with a 25 year minimum mandatory after which he could be paroled.

I think the reality of that is is that I've done this for a long time, I'm personally not aware of any defendant in the old days if you will who was sentenced to life with 25 year minimum mandatory who's actually ever been paroled. I don't know if that's ever happened.

Perhaps the letter of what the Supreme Court is telling us would be satisfied if I were to do that, certainly not the spirit.

This is a serious offense. A young man is deceased, another man shot. This defendant did it. He acknowledged it.

I don't take in to consideration the fact that he did not show remorse. That's a personal matter.

But having said all those things -- And I will tell you very candidly as of last night I still was undecided as to what I should or should not do with this defendant.

And I've pondered many, many things in my mind. So I'll do the following. With respect to Count One, which is first-degree murder, the law today tells me that I'm supposed to sentence him to life in Florida State Prison without the possibility of parole. The United States Supreme Court has told us that is not lawful.

I'm going to sentence him as follows. Having taking into account the matters in mitigation I'm going to sentence you to 35 years Florida State Prison. I will impose a 25 year minimum mandatory because of the fact that the jury also made a specific finding that you possessed, discharged a firearm and caused a death.

As to Count Two, I'll impose a sentence of 25 years Florida State Prison with a 25 year minimum mandatory to be served consecutively to Count One. Count Two will be followed by 10 years of probation.

(R 552-53).

SUMMARY OF THE ARGUMENT

Issue One. The trial court did not err in denying Petitioner's motion for judgment of acquittal based on an argument that the State failed to rebut Petitioner's claim of self-defense. Sufficient evidence was submitted for a jury determination of guilt.

Issue Two. Petitioner's sentences of thirty-five years for first-degree premeditated murder and twenty-five years for attempted first-degree premeditated murder running consecutively do not violate Graham or Miller because they are not life, mandatory life or de facto life sentences. Petitioner, however, is entitled to judicial review under Florida Statutes section 921.1401(2).

ARGUMENT

ISSUE ONE

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL BASED ON AN ARGUMENT THAT HE ACTED IN SELF-DEFENSE? [RESTATED]

Petitioner contends that the trial court erred in denying his motion for judgment of acquittal. Specifically, Petitioner asserts that the State failed to rebut his claim of self-defense. In this case however, sufficient evidence was presented in the State's case-in-chief to rebut Petitioner's claim of self-defense and the trial court did not err in denying Petitioner's motion for judgment of acquittal.

Standard of Review

The standard of review for denial of a Motion for Judgment of Acquittal is *de novo*, but the court must consider the evidence and all inferences from the evidence in a light most favorable to the State. McDuffie v. State, 970 So.2d 312, 332 (Fla. 2007).

Merits

Questions of intent are for the jury to determine. Jones v. State, 192 So.2d 285 (Fla. 3d DCA 1966). Determinations of credibility and the probative value of “conflicting” testimony should not be determined upon a motion for judgment of acquittal and are questions for the jury. Lynch v. State, 293 So.2d 44 (Fla. 1994). If the trial court concludes that there is a prima facie inconsistency between the

evidence and the defense theory or theories, then the finder of fact must resolve the issue. Orme v. State, 677 So.2d 258, 262 (Fla. 1996).

Notably, where the facts supporting a claim of self-defense are disputed, it is well settled that the case should be given to the jury for resolution of the factual issues. Dias v. State, 812 So.2d 487 (Fla. 4th DCA 2002); Rasley v. State, 878 So.2d 473 (Fla. 1st DCA 2004)(where the facts in a self-defense case are disputed, it is for the jury to resolve).

Contrary to Petitioner's assertions, the trial court did not use the wrong standard in this case and directly addressed Petitioner's motion for judgment of acquittal based on self-defense as follows:

THE COURT: On the issue of self-defense, again, the law is clear, first of all, that the defendant is entitled to an instruction on the law, and the evidence of self-defense I pointed out came in to The State's case in chief because it chose to introduce the defendant's out-of-court statement, and then there was a lot of cross-examination about the statement which mostly consisted of questions rather than responses.

But be that as it may, especially with respect to Mr. Johnson, Mr. Johnson denied emphatically that any of these acts of violence were precipitated by him or his codefendant.

So the State's case in chief at this juncture sufficiently rebuts the suggestion of self-defense. But is squarely a jury question, so I'll deny the motion for JOA and leave the matter up to the jury to decide.

The law is clear that the defendant has the burden of going forward with

evidence of self-defense. Brown v. State, 454 So.2d 596, 598 (Fla. 5th DCA 1984). If a defendant establishes a prima facie case of self-defense, the State must overcome the defense by rebuttal, or by inference in its case-in-chief. State v. Rivera, 719 So.2d 335, 337 (Fla. 5th DCA 1998), citing, Sneed v. State, 580 So.2d 169, 170 (Fla. 4th DCA 1991). If the State fails to sustain this burden of proof, the trial court is duty-bound to grant a judgment of acquittal in favor of the defendant. Id., citing, Brown, 454 So.2d at 599.

A self-defense claim is unsupportable where a defendant has an opportunity to escape but instead chooses to engage in the altercation. Thomas v. State, 918 So.2d 327 (Fla. 1st DCA 2005). The State is permitted to rebut a defendant's claim of self-defense either by direct evidence or by permissible inferences drawn from the evidence, all of which must be viewed in a light most favorable to the State. Rasley, 878 So.2d at 473.

Here, the State has sufficiently rebutted Petitioner's self-defense claim. An independent eye witness, Symone Watts, testified that she observed the bikes all stop, because one of them "pushed the other and everyone fell in the street; then one person got up really fast and pulled a gun out." She explained that when the person with the gun stood up, everyone else was still on the ground and no one else had their hand on the gun. She then observed the muzzle flash.

Johnson, a victim, testified that Petitioner and Felton were essentially trying

to take one of the bikes. Johnson repeatedly testified that he did not have the gun and neither did Brown. Johnson repeatedly denied that he or Brown were the aggressors in the incident. Johnson also testified that after Brown was shot, Petitioner then shot him through his hand, after Felton held Johnson down and had told Petitioner, "Get him. Get him. Shot him. Hurry up."

Petitioner shot Brown twice, once in the face and once through the chest. Testimony established that the trajectory of the shot to Brown's face was through the right eye, at a slightly downward angle.

Johnson's version of events was also corroborated by Vanda Hayward, who arrived at the scene after the shots were fired and observed Johnson screaming, hollering and hysterical. Johnson stated "why did you shoot us? We didn't do anything." She also testified that she observed one of the males that left the scene with a "shiny object in his hand."

Petitioner's reliance on Sneed, 580 So.2d at 169, is misplaced. Sneed challenged his conviction for attempted second degree murder and argued that the State failed to rebut his claim of self-defense. Id. at 170. The facts established that Sneed and his roommate, the victim, got into an argument that lasted several hours. Id. The victim had a reputation for violence and was known to carry a knife. Id. Sneed left the apartment and the victim followed him to the parking lot and blocked Sneed from his car. Id. Sneed stated that the victim carried himself as

though he had a knife, rushed towards him and they struggled with the gun going off. Id. No witnesses observed the shooting and the victim did not testify. Id. A knife was found at the scene. Id. The Fourth District Court of Appeal found that the State's witnesses corroborated a majority of Sneed's version of events and the State failed to rebut Sneed's claim of self-defense. Id. at 171.

For similar reasons, the rationale in reversing Hernandez Ramos v. State, 496 So.2d 837 (Fla. 2d DCA 1986), also upon which Petitioner relies, does not apply in this case. The victim began the fight by hitting Hernandez Ramos, Hernandez Ramos tried to leave and he only shot the victim after the victim pulled a knife from his pocket. Id. at 838. Witnesses were not able to testify about what led up to the fight. Id. One witness corroborated Hernandez Ramos' version of the events. Id. The Second District Court of Appeal found that some of the State's evidence corroborated Hernandez Ramos' direct testimony and the State failed to rebut his claim that he acted in self-defense. Id.

Jenkins v. State, 942 So.2d 910 (Fla. 2d DCA 2006), is also readily distinguishable from this case. The victim refused to leave Jenkins property and was loudly threatening Jenkins and his family. Id. at 914. Jenkins reasonably believed he was at risk of great bodily harm. Id. at 915. The Second District Court of Appeal determined that self-defense cases "are intensely fact-specific." Id. at 916. The Jenkins court found that the testimony of the State's witnesses supported

Jenkins claim of self-defense. Id. at 914.

Here, unlike in Sneed, Hernandez Ramos, and Jenkins, witnesses did rebut Petitioner's claim of self-defense in the State's case-in-chief, including Johnson, a victim. The State presented sufficient evidence, both direct and circumstantial, to rebut Petitioner's motion for judgment of acquittal claiming self-defense. The question of whether Petitioner acted in self-defense is disputed, therefore, it is a question for the jury. Rasley, 878 So.2d at 477 (the evidence was susceptible of two views, one justifiable self-defense or an act arising out of jealousy and anger, evidence was sufficient for a jury to conclude Rasley did not act in self-defense). Consequently, the trial court did not err in denying the motion for judgment of acquittal.

ISSUE TWO

**WHETHER PETITIONER'S CONSECUTIVE
SENTENCES FOR FIRST DEGREE
PREMEDITATED MURDER AND ATTEMPTED
FIRST DEGREE PREMEDITATED MURDER
VIOLATED GRAHAM AND MILLER?
[RESTATED]**

Petitioner claims he was sentenced in violation of Graham and Miller because his consecutive sentences totaling 60 years were a de facto life sentence and he should be resentenced. Petitioner also claims that he did not receive judicial review pursuant to Florida Statutes § 775.082(3)(a)5(a).

Petitioner was not sentenced to a de facto life sentence in violation of Graham and Miller. However, Petitioner is entitled to judicial review.

Standard of Review

The legality of a sentence is reviewed *de novo*. Wardlaw v. State, 832 So.2d 258 (Fla. 2d DCA 2002); Jackson v. State, 925 So.2d 1168, 1169 n. 1 (Fla. 4th DCA 2006).

Petitioner's sentence not de facto life

“Few, perhaps no, judicial responsibilities are more difficult than sentencing ...The task is usually undertaken by trial judges who seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society.” Graham, 560 U.S. at 76.

The United States Supreme Court has found mandatory life without parole for juveniles violates the Eighth Amendment. Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010) (Eighth Amendment prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense). Looking to Graham and Roper v. Simmons, 543 U.S. 551 (2005) (Eighth and Fourteenth Amendments forbid imposition of death penalty on offenders who were under the age of 18 when their crimes were committed) the Miller Court explained “children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform ‘they are less deserving of the most severe punishments’.”

Miller, 132 S. Ct. at 2464 (quoting Graham, 560 U.S. at 67). The Court held that the Eighth Amendment requires individualized sentencing for juvenile defendants who face “the most serious penalties” and to separate the "rare" juvenile offender whose crime reflects "irreparable corruption," from the juvenile offender whose crime reflects "transient immaturity." Miller, 132 S. Ct. at 2460; Montgomery v. Louisiana, --- U.S. ---, 136 S.Ct. 718, 734 (2016).

To comply with the United States Supreme Court’s rulings in Miller and Graham, the Florida Legislature amended § 775.082, Florida Statutes (2014) and enacted §§ 921.1401 and 921.1402, Florida Statutes (2014). See Chapter 2014-220, §§ 1-3, Laws of Fla. The Legislative action created a sentencing structure unique to juvenile offenders which permits the sentencing court to impose a life sentence for a homicide or attempted homicide offense committed by a juvenile defendant after the court conducts a hearing in compliance with § 921.1401, Florida Statutes.

Florida Statutes section 775.082(1)(b)1 provides the penalties for the offenses in this case as follows:

Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

(b) 1. A person who **actually killed, intended to kill, or attempted to kill the victim** and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age **shall be punished by a term of imprisonment for life** if, after a

sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person **shall be punished by a term of imprisonment of at least 40 years**. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).

(emphasis added).

This Court has declined to adopt a precise point where a term-of-years sentence transforms into a life sentence. See, e.g., Kelsey v. State, 206 So.3d 5 (Fla. 2016); Guzman v. State, 183 So.3d 1025, 1026 (Fla. 2016); Henry v. State, 175 So.3d 675, 679 (Fla. 2015); Gridine v. State, 175 So.3d 672 (Fla. 2015).

Respondent would note that Petitioner was found guilty of murder and attempted murder consequently, cases involving only nonhomicides in violation of Graham do not apply here.

Besides, the district courts have found that sentences of 55 years with minimum mandatory sentences are not de facto life sentences. Collins v. State, 189 So.3d 342 (Fla. 1st DCA 2016)(aggregate sentence of 55 years for carjacking with a firearm, attempted second degree murder and attempted armed robbery, is not a de facto life sentence); Williams v. State, 197 So.3d 569 (Fla. 2d DCA 2016)(juvenile's 50-year sentence with a twenty-year minimum mandatory was not functional equivalent of a life sentence); Ortiz v. State, 188 So.3d 113 (Fla. 1st DCA 2016)(mandatory sentence of fifty years for home invasion robbery with a

firearm is not a life sentence or functional equivalent); St. Val v. State, 174 So.3d 447 (Fla. 4th DCA 2015) (“In sum, we conclude that a twenty-five year minimum mandatory sentence is unlike a life without parole sentence where the juvenile offender does not have a ‘meaningful opportunity’ for early release and therefore not under the strictures of *Graham* and *Miller*.”); Austin v. State, 127 So.3d 1286 (Fla. 1st DCA 2013) (concluding that a forty-five-year sentence with a forty-five-year minimum mandatory is not a de facto life sentence); Thomas v. State, 78 So.3d 644 (Fla. 1st DCA 2011)(concurrent fifty-year terms for armed robbery and aggravated battery are not the functional equivalent of life). The Fourth District Court of Appeal has found that a 75-year sentence for attempted first degree murder with a firearm, attempted second degree murder with a firearm and aggravated assault with a firearm did not violate the Eighth Amendment. Davis v. State, 199 So.3d 546, 522 (Fla. 4th DCA 2016).

In this case, Petitioner was sentenced to 35-years with a minimum mandatory of 25-years for first degree murder with a finding that he possessed and discharged a firearm. Petitioner was also sentenced consecutively to 25-years with a minimum mandatory of 25-years for attempted murder with a finding that he possessed and discharged a firearm. Petitioner was not sentenced to life, mandatory life or de facto life in violation of Graham and Miller. The record supports the conclusion that the sentencing hearing complied with Florida Statutes

§ 921.1401(2) and Petitioner was provided with an individualized sentencing hearing which took into consideration Petitioner's "youth and attendant circumstances." The sentencing court in this case sufficiently considered the factors set forth in Miller and Graham and a resentencing hearing is not warranted. What is more, Petitioner was not sentenced to life in prison or a term of years equal to life in prison. Therefore, Petitioner's sentence is constitutional.

For the first time, Petitioner raises an issue with his consecutive sentences pursuant to Williams v. State, 186 So.3d 989 (Fla. 2016). In Williams, this Court found that consecutive sentencing is permissible but not mandatory in cases where multiple firearm offenses are committed contemporaneously during which time multiple victims are shot at. Id. at 993. As the trial court in this case was under the mistaken impression that consecutive sentencing was mandatory, the holding in Williams does appear to apply in this case. (R 549-550).

Respondent would note, however, that should this Court determine that a resentencing is appropriate, the resentencing hearing is *de novo* and the State is entitled to seek any lawful sentence, up to and including life sentences on both counts and consecutive sentences, as pronounced in Kelsey and Williams.

Judicial Review

Florida Statutes § 775.082(3)(a)5(a), provides:

A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of

imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

See also Kelsey, 206 So.3d at 10 (Reading together our decisions in Henry, Horsley, and Thomas, it is clear that we intended for juvenile offenders, who are otherwise treated like adults for purposes of sentencing, to retain their status as juveniles in some sense. In other words, we have determined through our reading of the Legislature's intent in passing chapter 2014–220, Laws of Florida, that all juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation)¹.

The State believes that entitlement to review under Florida Statutes section 921.1402, can be added to an existing sentence, as a ministerial act. Section 921.1402 entitles juvenile defendants to a review after a certain number of years, depending on their sentence. Thus, the judicial review is not discretionary. A nondiscretionary 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).

Therefore, this case should be further remanded for resentencing in conformance with chapter 2014–220, Laws of Florida, which has been codified in

¹ Henry v. State, 175 So.3d 675 (Fla. 2015); Horsley v. State, 160 So.3d 393 (Fla. 2015); Thomas v. State, 177 So.3d 1275 (Fla. 2015).

sections 775.082, 921.1401, and 921.1402 of the Florida Statutes and Petitioner granted judicial review.

CONCLUSION

Based upon the foregoing authorities and arguments, Respondent respectfully requests that this court affirm Petitioner's convictions and sentences, but remand the case for the trial court to enter an order granting Petitioner judicial review of his sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Christopher E. Cosden, Post Office Box 9368, Fort Myers, Florida 33902 via the e-portal system at cosdenlaw@att.net this 5th day of July, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Elba Caridad Martin
ELBA CARIDAD MARTIN
Assistant Attorney General
Florida Bar No. 513342
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287 7900
Fax: (813)281-5500
CrimAppTPA@myfloridalegal.com
elba.martin@myfloridalegal.com

COUNSEL FOR RESPONDENT