IN THE SUPREME COURT OF FLORIDA

DANTE RASHAD MORRIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-2271

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner Dante Rashad Morris's statement of the case and facts with the following exception and additions:

Exception

Morris states he is serving concurrent 30-year sentences. (IB at 1) This is a misstatement. He was sentenced to 30 years in prison on count 1, attempted felony murder, a life felony under s. 782.051, Fla. Stat. (2012); and a concurrent 15 years in prison on count 2, attempted armed robbery, a second-degree felony under s. 812.13, Fla. Stat. (2012). (1/174-181; 168-169)

Additions

These crimes occurred on November 24, 2012, (4/430-431), when Morris and five co-perpetrators attempted to rob 80-year-old farmers' market vendor, Ralph Harper, who sold guns, coins and jewelry. (4/429-433) Harper was shot in the process. (4/433-435)

Morris was sentenced on August 1, 2014, (1/138), one month after the effective date of the 2014 juvenile sentencing statutes (ch.2014-220, Laws of Fla.) passed in response to Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183

L.Ed.2d 407 (2012). He sought a downward departure and youthful offender sentence arguing his age (15 at the time of these crimes) and mental condition (learning disabled) merited such treatment. (1/ 131-137)

Sentencing hearing

At his sentencing hearing, Patricia Miller, a licensed mental health counselor who treated Morris shortly before (on November 7, 2012), and after (on November 29, 2012), these crimes explained she saw Morris because he was having behavior problems at home and at school. (1/144) He had been off his Attention Deficit Hyperactivity Disorder (ADHD) medication (Adderall) for some time. (1/144-145) Morris was an ESE[1] student in the eighth grade. (1/145) Miller could not render an opinion as to whether Morris needed specialized future treatment because she had not seen him in a couple years. (1/146; 148) She agreed that his ADHD diagnosis suggested he may need assessment by a neurologist and agreed counseling would benefit him. (1/146-147) The last time Miller saw Morris (five days after these crimes), "he was going through a little depression spazz" and Miller thought he still needed services. (1/147)

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[1] ESE stands for Exceptional Student Education. See http://www.fldoe.org/academics/exceptional-student-edu/ese-eligibility, visited on March 9, 2015.

Morris's mother testified to his ability to respond well to punishment. She was too broken up to further testify. (1/150-152) Morris apologized to the victim and asked for another chance at life. (1/159)

The defense argued Morris's age at the time of the crimes, and the fact that he was a special needs child who had never been found guilty of any felony, though he had received some diversions in juvenile court, merited leniency. Recognizing Morris did not qualify for youthful offender sentencing because of the attempted felony murder, the defense argued Morris did not have the mental capacity to appreciate his conduct. The defense asked the court to consider treating Morris as a juvenile and noted he was remorseful. (1/153-158)

The State pointed out the victim, Ralph Harper, was 80 years old and that Morris had chosen to participate in this brazen violent crime against him. (1/160) Harper had testified to his physical and mental injuries from this crime which prevented him from working and drastically affected the quality of his life. (1/161-162) The evidence showed the gunmen were heavily armed and planned this robbery and that Morris was in on the planning. (1/161) After Harper was shot, Morris fled, without any concern for Harper, thinking only of himself and getting away. (1/161) His conduct in wiping the shells showed his consciousness of

guilt. (1/162) To protect society, the State asked for 60 years on the attempted felony murder plus a consecutive 15 years on the armed robbery. (1/163)

Defense counsel responded by asking the court to consider juvenile sanctions or the bottom of the guidelines while recognizing the ten-year minimum mandatories applied. (1/165) Again focusing on Morris's age, the defense suggested ten years would give Morris an opportunity to think about what he had done. (1/165)

The court pronounced sentence reflecting consideration of the facts of the case:

> This is truly a tragic situation. There are no winners here. I mean, you have Ralph Harper, who, with whatever life he has left, has been seriously, seriously altered at this point in time. I've heard from him. He told me he underwent tremendous pain, was left there pretty much to die, to this day he still lives with pain, no longer is able to run his business. As I recall, he testified that he had to sell his house because he could no longer financially work and keep up with his home. He didn't deserve that.

(1/166)

The court went on to note Morris's mother was also a victim of this situation, trying to support her family and instead of getting help from Morris, as the oldest of the children, by setting a good example in going to school, doing the right thing, getting good grades, he was doing poorly in school and would not answer his mother's phone calls. He often came home

just to eat and sleep. In his taped statement, Morris admitted to being part of a gang called the Hood Boys. (1/167) The court observed there were "a bunch of 16-year-olds running around heavily armed, robbing people, you know, shooting people, and he's part of it." Though Morris had multiple opportunities to not be involved, he chose to join in on that Saturday morning. (1/168)

In rejecting the State's requested aggregate 75-year sentence, the court stated:

> ***I don't believe 70 years in prison will do justice in this case, because at the end of the day you're dealing with a 16-year-old that had no criminal history whatsoever,*** that obviously got caught up with the wrong crowd and did something that he shouldn't have done.
>
> That being said, the flip side is, I'm not going to treat this defendant as a youthful offender. He was charged as an adult. He's out there doing adult things. He's out there hanging out with gang members. He's out there armed, you know, to the hilt, and he's out there, you know, with people that are pointing guns at people, and when they don't give them what they want, they shoot them. If you're going to act like an adult, you're going to get treated like an adult.
>
> So he's not going to be sentenced as a youthful offender, ***Likewise, I'm not going to go below the guidelines. It would not serve justice in this matter.***
>
> All right. That being said, as to Count Number 1, you were found, Mr. Morris, guilty of attempted felony murder. The jury also found that you possessed a firearm during the commission of said offense. That offense there carries a ten-year minimum mandatory. You're going to be sentenced to 30 years Florida State Prison on Count Number 1 with a ten-year minimum mandatory. That's going to run concurrent with any other outstanding Florida State Prison sentence.

(1/ 168-169; Emphasis added.)

The court imposed a concurrent 15-year sentence on count two which also carried a ten-year minimum mandatory. (1/169)

Rule 3.800(b)(2) Motion to Correct Sentence

Morris moved the trial court to correct his sentence arguing "The sentences on both counts are unconstitutional because they do not afford Mr. Morris a meaningful opportunity for early release." (3rd Supp./ 739) He relied primarily on Henry v. State, 175 So.3d 675 (Fla. 2015), cert. denied __ U.S. __, 136 S.Ct. 1455, 194 L.Ed.2d 552 (2016); and Gridine v. State, 175 So. 3d 672 (Fla. 2015). (3rd Supp./740)

The trial court denied his motion and his reliance on Henry stating:

> The present case can be distinguished from Henry. In Henry, the juvenile was sentenced to 90 years in prison. In the present case, the Defendant received a thirty year sentence. The Trial Court has afforded the Defendant a meaningful opportunity for early release.

(3rd Supp./ 744)

Direct Appeal

On appeal, Morris argued his sentences on both counts were unconstitutional because it was uncontested he was a juvenile; and that he was not the shooter. He argued the sentences did not provide for early release and there was "no review mechanism ordered in this sentence." (AB at 24) He claimed he was entitled

to resentencing under the 2014 statutes based on Henry and Gridine.

The Second District disagreed concluding:

> In denying Mr. Morris' rule 3.800(b) motion, the trial court also rejected Mr. Morris' argument that pursuant to Henry v. State, 175 So.3d 675 (Fla. 2015), cert. denied, --- U.S. ----, 136 S.Ct. 1455, 194 L.Ed.2d 552 (2016), he was entitled to resentencing under the framework established by chapter 2014-220, Laws of Florida. We affirm that aspect of the trial court's order on the authority of this court's decision in Williams v. State, 197 So.3d 569 (Fla. 2d DCA 2016). But see Peterson v. State, 193 So.3d 1034 (Fla. 5th DCA 2016).

Morris v. State, 206 So. 3d 154, 155 (Fla. 2d DCA 2016).

[In Williams, the defendant was sentenced to 50 years in prison for a life felony committed when he was 13. He sought post-conviction relief based on Graham. The postconviction court denied relief finding Williams's 50-year sentence was "not an unconstitutional de facto life sentence." Williams at 571. The Second District agreed:

> The postconviction court correctly denied Williams' claim. Williams would be entitled to be resentenced only if his sentence violated Graham. See Kelsey, 183 So.3d 439. Because his fifty-year sentence is not a de facto life sentence in violation of Graham, Williams is not entitled to relief and we affirm the denial of his postconviction motion.

Williams at 572.]

This Court's Jurisdiction

Morris sought this Court's discretionary jurisdiction arguing the Second District opinion expressly and directly conflicted with other district court opinions and opinions from this Court.

The State argued against this Court's jurisdiction observing this Court, post-Kelsey v. State, 206 So.3d 5 (Fla. Dec. 8, 2016), declined to exercise jurisdiction over similarly situated juveniles in Ryan Hill v. State, 2017 WL 24659 (Fla. January 3, 2017), (a 14-year-old juvenile sentenced to 35 years), Justice Pariente dissenting in an opinion in which Justice Quince concurs; and Abrakata v. State, 2017 WL 24657 (Fla. Jan. 3, 2017), (a 17 year-old juvenile sentenced to 25 years in prison), Justice Pariente dissenting in an opinion in which Justice Quince concurs. The State argued a Graham violation is not triggered by this 15-year-old juvenile's 30-year prison sentence.

On February 24, 2017, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Firstly, the State believes jurisdiction has been improvidently granted based on this Court's declining to accept jurisdiction over similarly situated juvenile defendants in Taylor Ryan Hill v. State, SC15-1667, 2017 WL 24659 (Fla. January 3, 2017), (a 14-year-old juvenile sentenced to 35 years); Edema Abrakata v. State, SC15-1325, 2017 WL 24657 (Fla.

Jan. 3, 2017), (a 17-year-old juvenile sentenced to 25 years in prison); and Shamar Lavone 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). All three cases were decided after this Court issued its opinion in Kelsey v. State, 206 So.3d 5 (Fla. Dec. 8, 2016).

Secondly, though without reference to the statute, Morris got a hearing in which the sentencing court weighed the individualized sentencing considerations the new statute requires in determining whether to impose life imprisonment or a "term of years equal to life". After weighing those considerations, the court rejected the State's requested 75-year sentence and imposed a 30-year sentence for the attempted felony murder. Everything about the hearing complied with the new statute which also provides that Morris will be entitled to sentence review in 20 years under s. 775.082(3)(c), Fla. Stat. (2014). Nothing in the statute requires the sentencing court to make a finding the juvenile defendant will be entitled to that review. The process is triggered when the defendant submits an application to the court for review. The district court was correct to affirm the sentence even if for the wrong reason. Alternatively, if it is unclear that the new statute applied to Morris who was sentenced after its effective date for crimes

committed before that date, this case should be remanded solely for the ministerial correction of his sentence to add the 20-year review provision of ss. 921.1402(2)(d) and 775.082((3)(c), Fla. Stat. (2014).

Lastly, should this Court disagree and conclude Morris's current sentence is illegal and he must be resentenced under the 2014 statute, because he has no expectation of finality in an illegal sentence, the State could again seek a higher sentence, including up to life.

ARGUMENT

ISSUE I: WHETHER PETITIONER MORRIS'S 30-YEAR SENTENCE IS AN ILLEGAL SENTENCE REQUIRING RESENTENCING UNDER THE 2014 JUVENILE SENTENCING STATUTE, CHAPTER 2014-220, LAWS OF FLORIDA ?

Jurisdiction

The State believes jurisdiction has been improvidently granted. This Court has declined to accept jurisdiction over similarly situated juvenile defendants in Taylor Ryan Hill v. State, SC15-1667, 2017 WL 24659 (Fla. January 3, 2017), (a 14-year-old juvenile sentenced to 35 years in prison); Edema Abrakata v. State, SC15-1325, 2017 WL 24657 (Fla. Jan. 3, 2017), (a 17-year-old juvenile sentenced to 25 years); and Shamar Lavone 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 each case, Justice Pariente dissented in opinions in which Justice Quince concurred. All three cases were decided *after* this Court issued its opinion in Kelsey v. State, 206 So.3d 5 (Fla. Dec. 8, 2016). But compare Smith v. State, 119 So.2d 530 (Fla. 5th DCA 2013), (17-year-old's 40-year sentence is not a de facto life sentence violating Graham) quashed by this Court and remanded for resentencing in light of Kelsey, SC13-1816, 2016 WL 7217234 (Fla. Dec. 13, 2016).

Kelsey

In Kelsey v. State, the defendant was 15 years old when he broke into the pregnant victim's home and sexually battered her in front of her two small children. He was sentenced to two concurrent life terms and two concurrent 25-year terms for these crimes. After Graham, his life sentences were vacated and he was resentenced to concurrent 45-year terms. Kelsey at 6-7. On appeal, Kelsey claimed he was entitled to resentencing under the 2014 statute. The First District disagreed "because Kelsey's forty-five-year prison term did not constitute a de facto life sentence in violation of Graham." Kelsey at 7. The First District certified a question to this Court which this Court reframed as:

> Is a defendant whose original sentence violated Graham v. Florida, 560 U.S.48 [130 S.Ct. 2011, 176 L.Ed.2d 825] 2010, and who was subsequently resentenced prior to July 1, 2014, entitled to be resentenced pursuant to the provisions of chapter 2014-220, Laws of Florida?

Kelsey at 6.

This Court answered that question, "yes." Id.

In its analysis, after discussing Graham, this Court reviewed its opinions in: Henry v. State, 175 So.3d 675 (Fla. 2015) (aggregate 90-year sentence imposed after a Graham resentencing was still unconstitutional and juvenile was entitled to be resentenced under the 2014 statute to ensure his sentence was

subject to a review mechanism); and Horsley v. State, 160 So.3d 393 (Fla. 2015) (remedy for juvenile's unconstitutional sentence was to resentence the juvenile defendant under the 2014 sentencing statute). Kelsey at 9-10. This Court noted its application of Graham was not limited to life sentences nor "de facto" life sentences. Kelsey at 10. Instead, the focus was on the status of the juvenile offender and providing an opportunity for early release for these offenders. Kelsey at 9. This Court concluded:

> In Henry, we determined that the Legislature's remedy was the appropriate remedy in these cases, and the Legislature has determined that the "means and mechanisms for compliance" with Graham are to provide judicial review for juvenile offenders who are sentenced to terms longer than twenty years. Therefore Kelsey is entitled to resentencing under those provisions. We therefore answer the rephrased question in the affirmative and remand for further proceedings consistent with this opinion.

Kelsey at 11.

This Court, therefore, rejected the First District's analysis in Kelsey v. State, 183 So.3d 439 (Fla. 1st DCA 2015), affirming Kelsey's 45-year sentence because it was not a de facto life sentence. The First District's Kelsey opinion was cited with approval by the Second District in Williams, the precedent the Second District relied on in this case.

A. Standard of review

Morris claims his sentence is illegal. The legality of a sentence is a question of law subject to de novo review. See generally Martinez v. State, No. SC15-1620, 2017 WL 728098, at 1 (Fla. Feb. 23, 2017) ("Whether a claim of error may be raised in a motion to correct illegal sentence under rule 3.800(a) is a pure question of law subject to de novo review.")

B. The Merits

This Case

Despite the Second District's reliance on Williams and this Court's rejection of the Williams holding ("Because his fifty-year sentence is not a de facto life sentence in violation of Graham, Williams is not entitled to relief…") in Kelsey, this Court should nevertheless not exercise its jurisdiction in this case because Morris was sentenced in all ways in conformity with the 2014 juvenile sentencing statute. Here, Morris got a hearing in which the sentencing court, though without reference to the 2014 statute, weighed the individualized sentencing considerations the statute directs courts to consider in determining whether to impose life imprisonment or a "term of years equal to life":

> (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.

s. 921.1401(2), Fla. Stat. (2014).

As set forth in the State's statement of the case and facts, the court's sentence reflects these considerations:

> This is truly a tragic situation. There are no winners here. I mean, you have Ralph Harper, who, with whatever life he has left, has been seriously, seriously altered at this point in time. I've heard from him. He told me he underwent tremendous pain, was left there pretty much to die, to this day he still lives with pain, no longer is able to run his business. As I recall, he testified that he had to sell his house because he could no longer financially work and keep up with his home. He didn't deserve that.

(1/166)

This finding reflects consideration of factors (a), the nature and circumstances of the offense; and (b), its effect on the victim. The court thereafter considered Morris's home life and

his failure to cooperate with his mother, who tried to supervise him while supporting her family, (1/167), a consideration articulated under (d), the defendant's background and home environment. The court also observed that Morris was part of a group of teens "running around heavily armed, robbing people, … shooting people" and remained involved despite multiple opportunities to not be involved. (1/168) These findings address (f), the extent of Morris's participation; and implicate (g), the effect of peer pressure. The effect of peer pressure was also considered in the court's finding, quoted below, that Morris "got caught up with the wrong crowd and did something that he shouldn't have done." (1/168) This finding also encompasses factors (e), the effect of immaturity and the failure to appreciate the consequences of his participation; and (i), the effect of Morris's youth on his judgment.

In rejecting the State's requested aggregate 75-year sentence, the court also considered (c), Morris's "age, maturity, intellectual capacity, and mental and emotional health at the time of the offense." Because the court's findings were made after the court received evidence of Morris's mental health and learning disabilities, the court's findings implicitly encompass these factors in rejecting the State's request. The court expressly considered Morris's lack of a prior record,

under factor (h), and implicitly the possibility of rehabilitation, under (j), by imposing a significantly lower sentence than the State sought based on Morris's age, lack of history and his being caught up with the wrong crowd:

> ***I don't believe 70 years in prison will do justice in this case, because at the end of the day you're dealing with a 16-year-old that had no criminal history whatsoever, that obviously got caught up with the wrong crowd and did something that he shouldn't have done.***

(1/168; Emphasis added.)

> That being said, the flip side is, I'm not going to treat this defendant as a youthful offender. He was charged as an adult. He's out there doing adult things. He's out there hanging out with gang members. He's out there armed, you know, to the hilt, and he's out there, you know, with people that are pointing guns at people, and when they don't give them what they want, they shoot them. If you're going to act like an adult, you're going to get treated like an adult.
>
> So he's not going to be sentenced as a youthful offender, Likewise, I'm not going to go below the guidelines. It would not serve justice in this matter.

(1/ 168; Emphasis added.)

Therefore, this record shows that the trial court considered all the factors articulated in the 2014 statute that a court should consider in deciding whether to impose life or "a term of years equal to life." After considering these factors, the court did not impose such a sentence. Everything about the hearing complied with the new statute which also provides that Morris will be entitled to sentence review in 20 years:

> (c) Notwithstanding paragraphs (a) and (b), ***a person convicted of an offense that is not included in s. 782.04 [Murder] but that is an offense that 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 that was reclassified as a life felony … , which was committed before the person attained 18 years of age ***may be punished by a term of imprisonment for life or a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401*** and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence. ***A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(d).***

s. 775.082(3)(c), Fla. Stat. (2014); Emphasis added.

Section 921.1402(d) provides for review after 20 years. Notably, there is no provision requiring the court to specifically make a finding the juvenile defendant is entitled to this review after 20 years. Instead, the statute provides the Department of Corrections shall notify qualified defendants of their right to review 18 months before they are entitled to such review. See s.921.1402(3), Fla. Stat. (2014). It also provides that the juvenile must submit an application for the review. See s. 921.1402(4), Fla. Stat. (2014).

The State acknowledges that Kelsey's 45-year sentence was deemed unconstitutional because it did not provide a review mechanism contrary to the State's argument herein that Morris's sentence need not specifically reference Morris's right to review in 20 years. The distinction between Kelsey and Morris,

however, is that Kelsey's sentencing was not clearly subject to the 2014 statute. He had already been resentenced once under Graham when his life sentences were reduced to 45 years in January of 2014, before the new statute took effect. Similarly, in Tyson v. State, 199 So.3d 1087 (Fla. 5th DCA 2016), the Fifth District concluded Tyson's 45-year sentence violated Graham and directed that on resentencing, the sentence "must include the requirement that Appellant is entitled to review of his sentence after serving 20 years. See s. 921.1402(2)(d), Fla. Stat. (2014)." Tyson, like Kelsey, involved a sentencing which occurred before the new statute's effective date. Here, Morris was sentenced after the statute's effective date.

Under the 2014 statute, the only review findings trial courts must make are for juveniles convicted under the murder statute, s. 782.04, Fla. Stat. (2014). For those juveniles, the sentencing court must make a written finding under ss. 775.082(3)(a)5.c. or 775.082(3)(b)2.c. indicating whether the juvenile offender is eligible for sentencing review under 921.1402(2)(b), which provides for review after 25 years, or (2)(c), which provides for review after 15 years. The distinction turns on a finding as to whether the juvenile defendant "actually killed, intended to kill, or attempted to kill the victim". See ss. 775.082(3)(a)5.c.; 775.082(3)(b)2.c.;

921.1402(2)(b) and (c). [Juveniles who have been previously convicted of enumerated violent felonies are ineligible for review. See s. 921.1402(2)(a), Fla. Stat. (2014)] Nothing in the statute requires that Morris's judgment and sentence reflect he is entitled to review. See s. 775.082(3)(c); and 921.1402 (d), Fla. Stat. (2014).[2] Such review will be initiated by Morris in 20 years when he submits an application. s. 921.1402(4), Fla. Sat. (2014).

Therefore, there is no need to resentence Morris under the 2014 sentencing statute regardless of whether Kelsey shows the Second District's reliance on Williams and its holding that sentences which are not de facto life sentences are not reviewable as Graham violations was in error. See Ejak v. State, 201 So.3d 1228 (Fla. 2d DCA 2016).

Ejak was 17 when he was convicted of murder and sentenced to life. His sentencing occurred after Miller but before the 2014 sentencing statute was passed. Being aware of Miller, the trial court held a sentencing hearing which addressed the Miller factors. (These factors were subsequently included in the 2014

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[2] The State's answer brief in the Second District mistakenly relied on the murder provisions of the statute [s.775.082(3)(a)5.c. and 775.082(3)(b)2.c., Fla. Stat. (2014)] in asserting the trial court had failed to comply with this aspect of the statute. That assertion was in error because Morris was not sentenced for a murder under 782.04.

statute.) Ejak subsequently moved to correct his sentence under Rule 3.800(b)(2), Fla. R. Crim. P. arguing he was entitled to a resentencing under the new statute. The trial court granted this motion to the extent that it made the required finding for capital felony murder defendants under s. 775.082(1)(b)3. That provision requires a written finding as to whether the defendant is entitled to review after 25 years or not. Capital felony juvenile offenders who have previously been convicted of certain enumerated violent felonies under s. 921.1402(2)(a), Fla. Stat. (2014), are not entitled to the 25-year review. The court otherwise denied the motion. On appeal, the Second District found no error because Ejak got everything that Miller and the Florida juvenile sentencing statute require: particularized findings addressing the Miller criteria as subsequently codified in the statute which justified the life sentence without parole. Because Ejak "received everything he was constitutionally or statutorily entitled to", the court affirmed the trial court's denial of a new sentencing hearing.

That same analysis applies here where the Second District properly affirmed Morris's sentence even if, in light of Kelsey, it was for the wrong reason. There is no remedy this Court can offer Morris. At best, this Court could direct the trial court to add a provision—not required by the statute—reflecting Morris

is entitled to review of his sentence in 20 years. At worst, Morris could receive a lengthier sentence at a new sentencing hearing. See Kelsey:

> Because we determine that resentencing is the appropriate remedy, the trial courts may embrace all of the provisions of chapter 2014-220 and are not required to limit themselves to only applying the judicial review provision. This would mean that if the State seeks a life sentence, the trial court's determination would have to be informed by individualized sentencing considerations.

Kelsey at 4.

The Court went on to observe that Kelsey, who had received a 45-year-sentence, had no expectation of finality in this unconstitutional sentence which did not provide review. Kelsey at 5. Therefore, jeopardy had not attached. Here, too, Morris could face a stiffer sentence if resentenced. This Court should decline to exercise its discretionary jurisdiction in this case.

The only caveat to the above analysis is whether a reviewing court or the Department of Corrections in 20 years will understand that the statute applied to Morris. The statute on its face defines a "juvenile offender" as "a person sentenced to imprisonment … *for an offense committed on or after July 1, 2014*, and committed before he or she attained 18 years of age." s. 921.1402(1), Fla. Stat. (2014), emphasis added. Morris committed his crimes before the new statute's effective date but was sentenced after it took effect. The federal rule is that the

law in effect at sentencing controls absent an ex post facto violation. See U.S. v. Grimes, 142 F.3d 1342, 1351-1352 (11th Cir. 1998). But in Florida, the state constitution's "Savings Clause" ensures the statute in effect at the time the crime was committed applies, even when the subsequent sentencing statute is more lenient. See Castle v. State, 330 So.2d 10 (Fla. 1976) (where ten-year sentence was the maximum punishment at the time of the offense but was reduced to five years at the time of sentencing, the defendant was not entitled to the later more lenient sentence). In Horsley, this Court refused to apply the Savings Clause to preclude retroactive application of the new statute to affected juveniles:

> As this Court has previously acknowledged, the purpose of the "Savings Clause" is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime. *See Castle v. State,* 330 So.2d 10, 11 (Fla.1976). Here, however, the statute in effect at the time of the crime is unconstitutional under *Miller* and the federal constitution, so it cannot, in any event, be enforced. The "Savings Clause" therefore does not apply.

Horsley at 406.

Horsley makes clear that the statute applies retroactively to juveniles whose sentences are unconstitutional under Miller. But that holding has not ensured retroactive application of the statute to all juveniles who may be entitled to it. See Collins v. State, 189 So.3d 342 (Fla. 1st DCA 2016), and Judge Bilbrey's specially concurring opinion which addresses this issue.

Collins had been resentenced after Graham, and his life sentence was reduced to an aggregate 55-year sentence. The First District, relying on their precedent in Kelsey, now overruled by this Court, affirmed this sentence because it was not a de facto life sentence. Despite this affirmance, Judge Bilbrey maintained that Collins was nevertheless entitled to the new statute's review provision which was in effect when he was resentenced. Collins at 345. However, because Collins committed his crimes before the statute's effective date, Judge Bilbrey observed "a question arises as to whether he gets the benefit of the sentence review provided in section 921.1402(2)(d)." Collins at 345. Based on varied principles of statutory and constitutional construction, Judge Bilbrey concluded he did. Collins at 345-348. That conclusion is consistent with this Court's opinion in Kelsey. Therefore, if it is questionable that the new statute and its review provision apply to Morris because he committed his crimes before it took effect, his sentence should be corrected solely to clarify that he is entitled to review on count one in 20 years. This would be a ministerial correction for which the trial court would have no discretion and Morris need not be present. See generally Jordan v. State, 143 So.3d 345 (Fla. 2014), citing with approval case law holding that where the trial court has no discretion in correcting a

sentence, the defendant need not be present for this sentence correction.

CONCLUSION

Based on the foregoing, the State asks this Court to decline to exercise its jurisdiction as it did in Abrakata, Hill and McCullom because Morris has received a sentence which complies with Graham and the 2014 juvenile sentencing statute. Alternatively, the State asks this Court to remand this case solely to direct the ministerial correction of Morris's sentence to add the 20-year review provision of ss. 921.1402(2)(d) and 775.082((3)(c), Fla. Stat. (2014) to his sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Terrence E. Kehoe, Special Assistant, Public Defender's Office, 10th Judicial Circuit, PO Box 9000--Drawer PD, Bartow, FL 33831, appealfilings@pd10.org; tekehoelaw@aol.com; mlinton@pd10.org by filing through the Florida Courts E-Filing Portal this 12th day of April, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12-point font.

Respectfully submitted and certified,
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