IN THE SUPREME COURT OF FLORIDA

DANTE RASHAD MORRIS,

Petitioner,

v. **CASE NO.: SC16-2271**

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

MR. MORRIS' REPLY BRIEF ON MERITS

HOWARD L. DIMMIG, II
Public Defender
Tenth Judicial Circuit
863-534-4200
863-534-4355 (fax)

TERRENCE E. KEHOE
Florida Bar No. 0330868
Special Assistant Public Defender
P.O. Box 9000-PD
Bartow, FL 33831-9000
primary email: tekehoelaw@aol.com
secondary emails: mlinton@pd10.org
appealfilings@pd10.org

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PRELIMINARY STATEMENT

In this brief the parties and the record on appeal will be referred to as in Mr. Morris' initial brief on the merits. That brief will be referred to by "IB." The state's answer brief on the merits will be referred to by "AB."

STATEMENT OF THE CASE AND FACTS

Undersigned counsel acknowledges the factual error concerning Mr. Morris' sentence made in the initial brief (IB 1). Mr. Morris is serving concurrent sentences of 30 years (with a 10 year mandatory minimum) on the attempted felony murder count and 15 years (with a 10 year mandatory minimum) on the attempted armed robbery count (1/168-69, 177-81). Counsel apologizes to the court and opposing counsel for any confusion this error may have caused.

The state spends several pages detailing what occurred at Mr. Morris sentencing hearing (AB 2-6). The most important fact that must taken from the sentencing hearing is that the trial court made it clear that it treated Mr. Morris as an adult. On page 5 (and again on page 17) of its answer brief the state quotes the trial court's statement made just before the imposition of the sentence. For the purpose of this appeal, the most important parts of that statement are: **"He was charged as an adult, he's going to be sentenced as an adult. He's out there doing adult things.**

. . . If you're going to act like an adult, you're going to be treated like an adult." (R/168)[1/].

Several other things are important to note about that sentencing hearing, a transcript of which is found at R/138-71. One is that Chapter 2014-220 was already effective on August 1, 2014, when Mr. Morris' sentencing took place. The second is that this law was never acknowledged or discussed at any point in the sentencing by either the trial court, the prosecutor, or the defense attorney. Third, although Graham v. Florida, 560 U.S. 48 (2010), had been on the books for four years, it was not discussed either[2/]. Fourth, the sentencing took place prior to the decision in Henry v. State, 175 So.3d 675 (Fla. 2015), cert. denied, 136 S.Ct. 1455 (2016), so this court's decisions on this issue were not yet on the books. Fifth, the actual sentence imposed does not comply with that 2014 law, as discussed in both the initial brief and this brief.

1/ It must be noted that the state's quotation of the trial court's remarks (AB 5, 17) omits the words "he's going to be sentenced as an adult."

2/ Neither the 2014 law nor Graham were mentioned in the motion for a downward departure (R/131-34) or the motion for a youthful offender sentence (R/135-37) filed by the defense.

ARGUMENT

AS A JUVENILE, MR. MORRIS RECEIVED AN ILLEGAL SENTENCE THAT DID NOT PROVIDE FOR JUDICIAL REVIEW

The bottom line in this appeal is that the trial court treated a 15 year old non-homicide offender as an adult without any consideration of Chapter 2014-220. The trial court expressly rejected efforts to sentence Mr. Morris based on his youth. It handed out a harsh adult sentence and did not provide any mechanism for review of that sentence to allow Mr. Morris to demonstrate his maturity and rehabilitation. The trial court thus clearly erred. The Second District's upholding of that erroneous sentence cannot be squared with Chapter 2014-220 and this court's decisions in Henry v. State, 175 So.3d 675 (Fla. 2015), cert. denied, 136 S.Ct. 1455 (2016), and Gridine v. State, 175 So.3d 672 (Fla. 2015), and Kelsey v. State, 206 So.3d 5 (Fla. 2016), and Johnson v. State, ___ So.3d ___ (Fla. 4/20/17)[42 Fla. L. Weekly S470; 2017 WL 1409660].

The state makes a number of arguments in its answer brief that seem to be contradictory. This starts with its argument on jurisdiction. There the state asserts that the court improvidently granted review and should dismiss this appeal (AB 11). That is clearly wrong, as the state later concedes the Second District's decision in Morris v. State, 206 So.3d 154 (Fla. 2d DCA 2016), is contrary to Kelsey and the one

case Morris relied on is no longer good law (AB 13-14, 20). So it essentially concedes the conflict.

Obviously, this argument is simply an effort to reargue what the state already argued in its brief on jurisdiction. Two of the cases the state relies on in its answer brief were cited to the court in its brief on jurisdiction. All three are cases in which the court simply declined to accept jurisdiction, without providing any reason for that decision. These cases do not provide guidance in Mr. Morris' case.

The state cites no new authority or decision from this court as a basis to decline review. Indeed, all of the cases summarily decided by this court since it accepted jurisdiction in Mr. Morris' case are cases which support his argument. These cases are all cited in his initial brief on the merits (IB 7-8). Most importantly, not one of these cases is acknowledged or addressed by the state in its answer brief.

The contradictory positions are also seen in the state's arguments on the merits. Even though the state spends many pages arguing that this court should affirm Mr. Morris' sentences, the state does concede the main point argued by Mr. Morris: that the decision of the Second District in his case does not properly apply this court's precedents (AB 20). It specifically agrees that the authority relied on by the Second District in Mr. Morris' case is no longer good law (AB 13-14). So its other arguments for affirmance must be rejected.

The state also recognizes that Mr. Morris' sentences do not provide for any future review hearing where he may have a chance to demonstrate his maturity and rehabilitation, and agrees that §775.082(3)(c), Florida Statutes (2014), requires a review hearing in Mr. Morris' case (AB 18). On one hand it seemingly wants this court to find that the failure to provide for a hearing does not matter and instead leave it up to Mr. Morris or the Department of Corrections to seek relief in 17 years (AB 18). Yet the state is forthright enough to recognize that there is no guarantee that will happen (AB 22-23), and thus reliance on someone to correctly figure it out in 17 years provides Mr. Morris with no real assurance that he will ever receive the review that Chapter 2014-220 calls for. So in the end the state does acknowledge that one possible remedy for Mr. Morris in this appeal is a remand to require the trial court to amend the sentences to specifically state that Mr. Morris is entitled to have his sentence reviewed after 20 years (AB 24-25).

One important decision that greatly impacts this case and which was issued after the state filed its answer brief is this court's recent decision in Johnson v. State, ___ So.3d ___ (Fla. 4/20/17)[42 Fla. L. Weekly S470; 2017 WL 1409660]. Johnson clearly shows that Mr. Morris is entitled to the relief he seeks. In that case the Fifth District had affirmed lengthy prison sentences for multiple non-homicide offenses, ruling that Graham did not apply to term-of-years sentences. 42 Fla. L. Weekly at

S470. This court reversed and remanded for resentencing under Chapter 2014-220, ruling that taking Graham v. Florida, 560 U.S. 48 (2010), and Henry and Kelsey together, these cases provide that " . . . juvenile nonhomicide offenders are entitled to sentences that provide a meaningful opportunity for early release based on demonstrated maturity and rehabilitation . . . ," id., and Johnson's sentence did not meet that standard. Id. at S472.

Of direct application to Mr. Morris' case, this court noted that one of the situations to be avoided post-Henry is a case where a juvenile non-homicide offender's sentence provides for release only at the end of the sentence. Id. That, of course, is exactly the situation facing Mr. Morris. There is currently no provision for any hearing to review his sentence and provide for any release prior to the expiration of his 30 year sentence. Johnson thus requires resentencing in Mr. Morris' case.

It must be noted that the state's position on this issue has changed from the Second District to this court. The trial court denied the Rule 3.800(b)(2) motion to correct a sentencing error because Mr. Morris' 30 year sentence was not as lengthy as that in Henry, and thus the trial court concluded that the 30 year sentence afforded Mr. Morris a meaningful opportunity for release (SR3/744-45). Given that ruling, the state took the position in the Second District that because Mr. Morris did not have a de facto life sentence his sentence was legal (State's Answer Brief, Case Number

2D14-4165, pp. 32-34). It argued that he was not entitled to the application of any part of Chapter 2014-220. The Second District agreed, citing one of its prior decisions where it denied a Henry claim because the defendant's sentence was not a de facto life sentence.

Now, faced with the Kelsey v. State, 206 So.3d 5 (Fla. 2016), decision, the state recognizes that Chapter 2014-220 applies even if the sentence involved is not a de facto life sentence (AB 20). So it has changed its argument in this court by attempting to show that the trial court gave Mr. Morris an individualized sentencing, and thus argues that the fact the trial court did not follow the law did not really affect Mr. Morris (AB 14-20). The state's argument that Mr. Morris received an individualized sentencing, even though it was not one conducted under Chapter 2014-220, and therefore no error can be shown, is similar to one rejected by this court in Horsley v. State, 160 So.3d 393 (Fla. 2015). There this court reversed a juvenile's homicide sentence as unconstitutional under Miller v. Alabama, 567 U.S. 460 (2012). In doing so this court remanded for resentencing under Chapter 2014-220, despite the state's claims that the trial court had conducted an individualized sentencing of Horsley and thus essentially complied with the new statute.

It is also important to note that the state's position here is contrary to the position the state has taken in two other appeals pending before the court. One is

Roman v. State, SC 16-2148, which seeks review of Roman v. State, 203 So.2d 1019 (Fla. 2d DCA 2016). There the Second District upheld 55 year sentences. In doing so the Second District cited to the same case as it cited in upholding Mr. Morris' sentences and certified conflict with the same case it cited to with a "but see" in the Morris opinion. In Roman this court issued an order to show cause why in light of Kelsey jurisdiction should not be granted and the case remanded for resentencing. On January 13, 2017, the state filed a response to that order in which it asserted that the sentence was not illegal but said it " . . . can offer no other reasons why [Kelsey's] provisions should not apply in this case."

The second is Ejak v. State, 201 So.3d 1226 (Fla. 2d DCA 2016), a case relied on by the state in its answer brief (AB 20-21). Ejak is a case from the Second District which again fails to comport with Graham and Henry. Review is pending in this court, Case Number SC16-2061. In response to an order to show cause why the Second District's opinion should not be quashed in light of Kelsey, on January 13, 2017, the state filed a response to that order in which it asserted that the sentence was not illegal but said it " . . . can offer no other reasons why [Kelsey's] provisions should not apply in this case."

A resentencing in accord with Henry and Gridine and Kelsey and Johnson must occur in Mr. Morris' case. This court therefore must vacate Mr. Morris' sentences,

and remand for resentencing in accord with Chapter 2014-220.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in Mr. Morris' initial brief on the merits, this Court must vacate the Second District's opinion on the Graham/Henry issue, and remand for resentencing in accord with Chapter 2014-220.

Respectfully submitted this 3d day of May, 2017.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was efiled and that system sent a true copy to counsel for the Appellee: Wendy Buffington, Assistant Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013, on May 3, 2017.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in 14 point TIMES NEW ROMAN proportional space font.

HOWARD L. DIMMIG, II
Public Defender
Tenth Judicial Circuit
863-534-4200
863-534-4355(fax)

TERRENCE E. KEHOE
Florida Bar No. 0330868
Special Assistant Public Defender
P.O. Box 9000-PD
Bartow, Florida 33831-9000
primary email: tekehoelaw@aol.com
secondary emails: mlinton@pd10.org
appealfilings@pd10.org

/s/ Terrence E. Kehoe
TERRENCE E. KEHOE
Florida Bar No. 0330868

COUNSEL FOR PETITIONER