IN SUPREME COURT OF FLORIDA

THOMAS KELSEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-2079

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

# RESPONDENT'S ANSWER BRIEF

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Thomas Kelsey, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of 3 volumes and two supplemental volumes. The record will be referenced as "R," the supplemental record will be referenced as "RS," and the presentence investigation will be referenced as "PSI." Each volume will be followed by any appropriate volume number and page number. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The State accepts Defendant's statement of the case and facts as generally supported by the record, **subject to the following supplementation and corrections:**

Petitioner was charged by amended information with two counts of sexual battery, armed burglary with an assault or battery, and armed robbery. Petitioner's date of birth was listed as 12/10/1986. (R1-27-28). At Petitioner's plea hearing, which was held on March 4, 2010, the prosecutor noted that Appellant had two pending sale charges as well. (R1-153,160). At

the sentencing hearing, the Honorable Judge Elizabeth Senterfitt heard testimony from Petitioner, his father, sister, uncle, and aunt. (R1-163-180). During cross-examination of the Petitioner, he denied that he had a knife when he raped the victim. (R1-180). The record indicated that the victim was pregnant and on bed rest at the time of the sentencing hearing. (R1-182). The prosecutor read a letter from the victim, E.J., which stated as follows:

> "Due to the extremely sensitive, traumatic and stressful nature of this hearing, and the negative effects that it has had and continues to have on my mental and physical health; and in addition to the fact that I am seven months pregnant and have already experienced some difficulties with this pregnancy as a direct result of having to re-live the horrific event of being raped, I will not be attending this hearing. However, I do hope that you will sincerely and earnestly consider the content of this letter as it pertains to the sentencing in this case.
>
> My name is [E.J.] and the intent of this letter is to address the ways in which my life has been affected as a result of the actions of the Defendant Thomas Kelsey. Several years ago, I was raped and robbed by the defendant in the presence of my two small children after he broke into my apartment.
>
> Needless to say, as a result of this violation, I have had to live with the difficulty of living in fear, not knowing who committed this crime (until recently) and whether or not they would return and attempt to bring harm to me or my family again. The fact that this crime was knowingly committed in the presence of my children let me know that he had no real regard for our well being and was capable of committing the most grave and morally depraved acts of violence without any limitations.
>
> Psychologically, the pain and reality of dealing with this has greatly effected my ability to be completely comfortable and at peace in public areas as well as in my own home. Since then, I have trouble sleeping at night and awake at the slightest sound. For this reason, I almost feel as if I am a prisoner of his actions, because I have not been able to enjoy the freedom of feeling completely safe and at ease at all times. Even though I have gotten married since the crime, my marriage has suffered hardships due to the things that I have to live with within my own mind. <u>This is something that I will have to endure the memory for the rest of my life</u> and I can not begin to truly explain how deeply this crime has effected me and my family in so many aspects. Besides this, I

> also have to endure the disturbing possibility of having contracted any sexually transmitted diseases that he may have been infected with as well. These are just a few examples of what I have to deal with mentally everyday of my life. (emphasis in original).
>
> Now that I know who has committed this sick and unfortunate act of violence against me, I can begin to move on with my life. I would however, like to say that because he has had the opportunity to change and has not elected to do so since this crime, that he should be severely punished. This is not a small matter, this is something that if he was ever released or given a lighter sentence that he has shown that he is capable of doing again. Who's to say that he is not a vengeful person as well. This means that I would still never be able to be at peace concerning this case. What's more is that if he is not justly punished that we all face the risk of him doing this to someone else and next time, the outcome could be worse.
>
> As for the defendant Thomas Kelsey, I sincerely hope that he makes the decision to change his life for the better. In the meantime, society can not run the risk nor face the dangers of allowing someone who has a history of such a violent and corrupt nature to be set free. We all have the obligation of being held fully accountable for our actions and accepting the results and consequences of those actions, whatever that may be. This is no different."

(initials in parenthetical added to replace victim's name).(R1-119, 182-185).

**Aside from the charges in the case at bar**, the presentence investigation (PSI) reflected that, in 2003, Petitioner was referred to a youthful offender program for possession of cannabis less than 20 grams and that he subsequently pled to another possession of cannabis less than 20 grams, in which he received a sentence of community control. In 2004, Petitioner pled to the reduced charges of burglary of a structure (X2) and was committed to a program at the Department of Juvenile Justice. In 2005, Petitioner pled to robbery with a nondeadly weapon and attempted armed robbery. Petitioner received 3 years in prison followed by three years probation and then he violated that probation and was sentenced to twenty years in prison. The facts of the

underlying charges (the robberies) included that Petitioner and other codefendants robbed a man and woman who were with their one-year-old child. The man was struck in the face, which knocked him to the ground, and his wife was ordered to the ground while she was holding her daughter. The perpetrators took the man's wallet, the woman's purse, and then they took the keys to the car, which they subsequently stole. Petitioner was then arrested for sale or delivery of cocaine and possession of a controlled substance. (PSI-4-5).

The PSI also reflected that in 2009, Petitioner was charged with battery on an inmate or a visitor in a detention facility, but that the case was still pending at that time of the report. (PSI-5). Under the Assessment & Recommendation section of the PSI, it indicated, "[i]n consideration of the defendant's social, economic, and family history, this writer could not find any mitigating circumstances or issues to justify his criminal behavior. It is apparent that the defendant has chosen on his own accord to commit crimes. What is discerning is his total disregard, treatment, and level of violence displayed throughout his life. This writer respectfully recommends the Court sentence the defendant to life in Florida State Prison as to Counts 1 and 2 and 25 years Florida State Prison as to Counts 3 and 4; all counts to run concurrent." (PSI-10).

Defense counsel argued, at the sentencing hearing, that Petitioner was only 15 years old when the crime occurred and that he was essentially abandoned by his parents as a baby. Defense counsel acknowledged that Petitioner had committed crimes since the offense and that he was currently serving 20 years in prison for one of his other crimes. (R1-186). Defense

counsel argued that Petitioner had gotten his GED while in prison. (R1-187). The prosecutor then noted that Petitioner scored a lowest permissible prison sentence of 19.3125 years and that, even though Petitioner committed his crime in 2002, he was not apprehended until 2009 through a CODIS hit. The prosecutor indicated that, because Petitioner continued to commit crimes, the State was able to determine that he had committed the crime from 2002. (R1-188). The prosecutor stated that Petitioner pled to another robbery and that the trial judge he was in front of gave him mercy by sentencing him to a split youthful offender sentence. The prosecutor noted that Petitioner violated the probationary part of that split sentence. The robbery conviction was what caused Petitioner to get his DNA sent to CODIS and resulted in him being implicated in the case at bar. (R1-189).

The prosecutor indicated that Petitioner committed a heinous crime against the victim by breaking into her window and raping her in front of her two minor children while she begged him not to do it. The victim also begged Petitioner to do it on the floor, so that her children would not see it. The prosecutor indicated that Petitioner had a knife, during the rape, even though he denied that fact when he testified. (R1-189). The prosecutor noted that even the presentence investigation recommended that Petitioner be sentenced to life and that such a recommendation was rare. (R1-190). The trial court sentenced Petitioner to life on counts one and two and to 25 years on counts three and four. The trial court stated that the sentences would run concurrent to one another and to the 20-year sentence Appellant was serving on his other robbery charge. (R1-192).

At the resentencing hearing, held on January 16, 2014, before the Honorable Judge James H. Daniel, the defense presented Dr. Bloomfield. (R2-245,248-249). **In addition to the information in Petitioner's brief**, Defense counsel acknowledged, through his direct examination, that he only provided Dr. Bloomfield with limited information about the case, such as the overall type of offense. Defense counsel specifically asked, "[w]hat I sent you was rather limited, because it was never our intention to get into the facts of the case, would that be fair to say?" Bloomfield responded, "[y]es, it would." Defense counsel then asked, "[a]nd it was your understanding that he pled guilty to the offense, so we weren't looking at it from a tactical standpoint, we were looking at it just for the overall type of offense." Bloomfield responded, "[t]hat's right." (R2-260). When Dr. Bloomfield was asked if the Department of Corrections provided programs to rehabilitate a juvenile, he responded as follows:

> "It provides some. It provides some GED, some vocational stuff, it provides medication, and as he told me that he was on some medication. The DOC is not geared towards the kind of rehabilitation programs that I would foresee, but again, I'm a psychologist, I'm a rehabilitation person. There's too many prisoners, too few resources through the Department of Corrections to provide significant rehabilitation in a meaningful manner." (R2-276).

Bloomfield also stated, "[b]ut it's my opinion that Mr. Kelsey, regardless of the amount of time he's sentenced to, would need a reentry program." (R2-277). Defense counsel asked Bloomfield if the length of a person's prison sentence had any effect on someone's ability to be rehabilitated. Bloomfield responded, "[i]t does. You can't predict it, but the longer a young person is in prison the more institutionalized they become. The prison is trying to keep

people segregated so that people with certain sentences and certain ages don't get involved with more predatory type criminals, but it is sometimes not possible. It's a very hard tightrope to walk in my opinion. But very long sentences, people tend not to commit crimes if they don't have the physical capability to commit certain crimes and they don't have the physical capability to commit certain crimes and they don't have the desire to commit certain crimes, so we see people late in life. Although we see people in their late 60s and early 70s doing crimes." (R2-277-278). Bloomfield further stated that, "[o]bviously the longer anyone is in, and I'm not saying it shouldn't be that way, but the longer someone is incarcerated, the greater the possibility of institutionalization and their distance from the community and what is going on. It depends on the individual, how they're treated when they come out. (R2-278).

Bloomfield stated that IQ typically does not go up as a person ages and that Petitioner's IQ was probably the same as when he was 15 years old. (R2-279-281). When defense counsel asked Bloomfield if he was given sufficient information to evaluate Petitioner, Bloomfield responded that he did the best he could with what he had, but that it would have been nice to have had school records or prison records, which he did not receive, and that it was difficult to evaluate someone in his 20s for something he did at 15. (R2-281).

During cross-examination, the prosecutor asked Bloomfield to explain why he thought that Petitioner had not committed a sexual predator act. Bloomfield responded as follows:

> "Sure, it is a sexual act, and it was a sexual assault act, that's my understanding of it. The question is then does he have a sexual deviance like paraphilia, or was it an act of aggression and violence. It was my opinion based upon the interview and history, you can never be sure of anything, but he's not a sexual predator. He did a sexual act, there's no question. But the literature and the discussion of sexual acts like rape are that, you know, sometimes there are assaults that involve sexual acts versus something like paraphilia or a pedophilia, I was just trying to differentiate between that." (R2-282-283).

The prosecutor followed up by asking Bloomfield if he felt that Petitioner's act was based on dominance and control and Bloomfield stated, "[t]hat's what I would think, yeah." Bloomfield explained that when he made his statements about sexual deviance, he was not talking about the sexual predator laws. (R2-283).

Bloomfield acknowledged to the prosecutor that Petitioner's "tendency was to present himself well, trying to make a good impression in terms of psychopathology." (R2-284-285). Bloomfield stated that he had a hunch that Petitioner was trying to hide something and/or to cover up things. (R2-285-286). Bloomfield indicated that he believed Petitioner functioned at a sixth grade level, but that Petitioner had indicated that he received his GED. (R2-288).

The trial court noted that Petitioner was convicted of armed robbery and that he received a very favorable, youthful offender sentence from another judge, which included 3-years incarceration followed by 3-years probation. The trial court noted that Petitioner was not out for very long when he violated his probation for a sale of narcotics. This violation of probation was the reason Petitioner was serving 20 years in prison. The trial court stated as follows:

> "So, this happens all when he is 18, and he's gone through a period of probation in the Department of Corrections, he's given a light sentence, he's given a second opportunity, he's 21 years old at this point and he commits another pretty serious crime. So, with that, did you take that into--" (R2-289-290).

Bloomfield responded that he did take the chronology into account and that it was undeniable that Petitioner had antisocial traits, but that there might need to be more specific training because of Petitioner's IQ. (R2-291). Bloomfield explained that Petitioner would need special services when he got out and noted that, by looking at Petitioner's history, deterrence had not worked. (R2-292). The trial court reviewed the August 2013 presentence report and the predisposition report from around the same time. (R2-295). The prosecutor informed the trial court that Petitioner scored a guideline sentence of 24.3125 years prison. (R2-296).

On January 17, 2014, the sentencing hearing continued before the Honorable Judge James H. Daniel. The trial court noted that Petitioner agreed to waive a resentencing on the Violation of Probation on the other armed robbery charge from 2005 because he did not want the court to consider his sexual battery charge in determining the sentence. The trial court indicated that Petitioner would have been entitled to a resentencing on that case because of a score sheet error. (R3-304-310). The trial court noted that the other case had included the charges of robbery, armed robbery, and conspiracy to commit. (R3-311). Petitioner presented witnesses at the hearing, which included his aunt and his uncle. **In addition to other testimony presented** in Petitioner's brief, his uncle testified that he was a state volunteer for prison inmates and that people do not get rehabilitated in prison at all. (R3-337-338). The uncle

indicated that prison was solely for punishment and that juveniles did not, in his experience, start to function at the same level as older inmates who are incarcerated. (R3-339). The defense also presented Petitioner's sister. (R3-344-356). Petitioner did not make a statement in this hearing. (R3-357). The prosecutor read the victim's statement to the trial court, which was the same statement read at the initial sentencing. (R3-359-362).

The trial court noted that it had to consider the case law from the First District, which reflected that there were functional life equivalents based on mortality tables. The trial court indicated that it would use 73 years of age as Petitioner's life expectancy. (R3-365,369-371). The prosecutor noted that Petitioner had a little over five years of credit for time served. (R3-373).

Defense counsel argued that Petitioner grew up without his mother and father, that there were drug related issues with various family members, that Petitioner was young when the crime occurred, and that Petitioner had multiple brothers and sisters from different fathers. (R3-377). Defense counsel argued that Appellant had a low IQ and a sixth grade education. (R3-378). Defense counsel acknowledged that Bloomfield stated that Petitioner had special needs, needed vocational rehab, and rather extensive mental health training. Defense counsel noted that our system did not provide that. (R3-379). Defense counsel indicated that Petitioner was now 27 years old. (R3-382,389). Defense counsel noted that courts had been sentencing individuals to 40-year and 50-year sentences, which was common around the state. (R3-385). Defense counsel indicated that he hired Dr. Bloomfield, but did not tell him what to say. (R3-386). Defense counsel asked for a 25-year sentence followed by ten years

probation. (R3-392).

The prosecutor noted that the victim did not want to be present for the hearing. The prosecutor argued that early in the morning, the victim was at home with her four-month-old daughter and her five-year-old son, who were in the bedroom with her. (R3-393). According to the prosecutor, Petitioner broke into the victim's home, had a steak knife in his hand, and a sock on the hand that was holding the knife. Petitioner told the victim that he was going to do her and the victim begged for it to be down on the floor because her children were in the bed with her. Petitioner allowed her to get on the floor and then he put a blanket over her face so that she could not see him. (R3-394-395). Petitioner was nervous at first, but then became more confident in himself as he raped the victim. Petitioner forced "PVI" (penile-vaginal intercourse) on the victim and the victim complied while begging him not to hurt her children. (R3-395). The four-month old child woke up while Petitioner was committing the PVI against the victim's will. The victim begged Petitioner to allow her to put a pacifier in the baby's month, but he said no. Petitioner then inserted his penis into the victim's mouth and forced her to perform oral sex on him. (R3-396).

According to the prosecutor, after the oral rape and the penile-vaginal rape, Petitioner asked the victim for money. At that time, Petitioner made her take him to her purse to get the money. (R3-396). Petitioner told the victim to go back and lie down on her bed and that he would return. Petitioner then left. (R3-396-397). The victim and police were able to determine that the suspect had broken in through the window. (R3-397-398). The victim was only 23

years old at the time and, even though semen was obtained through the SARC examination kit, the case went cold. (R3-399). Years later there was a CODIS hit. (R3-400). Even though police were able to determine that Petitioner had lived at the same apartment complex as the victim when the crime occurred, he denied knowing who the victim was and stated that he did not recognize the apartment complex. (R3-401-402).

The prosecutor argued that, since Appellant committed these crimes at age 15, he went on to commit more heinous, violent crimes, which lead to him being caught in the case at bar. The prosecutor noted that, after being given a youthful offender sentence, Petitioner blew his chance and was now serving 20 years for those crimes. The prosecutor noted that Petitioner had "current incarceration issues." The prosecutor argued that the actions of Petitioner showed that he could not necessarily be rehabilitated. (R3-409-410).

The trial court stated that, based on the nature of the crime, the fact that Petitioner had been given a youthful offender sentence, and his history, it declined to sentence him as a juvenile. (R3-411). The trial court subsequently stated as follows:

> "So what do you do in this case? This was a brutal crime. A sexual battery is, obviously a brutal crime in and of itself. But, you know, the use of a deadly weapon, the planning and the effort it took to get into the house to go do this, the presence of a four-month-old and a four-or five- or six-year-old sitting right there in the same room and, you know, the taking of the blanket and putting it over the victim's head while committing the act, and all of the time she had no idea what was going on, what could happen to her children. It is a brutal crime.
>
> Mr. Kelsey, after committing this crime, when he turned to adulthood or became an adult, committed another very violent act, committed an armed robbery. I believe it was two counts maybe. I can't remember.

> But, anyway, he was given at the time he was originally sentenced, no one knew anything about the 2002 incident, so he basically had a blank slate when he came in front of Judge FryeField. Judge Fryefield gave him a youthful offender sentence of three years and three years probation afterwards, which is an opportunity to an adult to demonstrate rehabilitation, that you want to be rehabilitated, that you want to turn your life around. And very shortly after getting out of the youthful offender prison, Mr. Kelsey is caught selling, I guess cocaine within 1,000 feet of a convenience store or church or whatever, and sentenced to 20 years by Judge- - I believe it was Judge Senterfitt, I believe Judge Senterfitt.
>
> So rehabilitation - - you know, trying to figure out if rehabilitation possible? How does that factor into the sentencing here that I have to follow under the Florida scheme, I have to take into account he had the opportunity, absolutely had the opportunity for rehabilitation as an adult, He was 18, 18 through 21, but he did have the opportunity, and it was wasted.
>
> I understand that he was still young, and I listened to his uncle or his cousin, Mr. Kelsey, who volunteers in the prison system, and I am so very grateful for people like him going in there and doing what they do. And certainly believe that when they are young, they don't realize because they think it's a joke when they are in prison and everything else, but I still can not ignore what happened when he was given the opportunity.
>
> Mr. Kelsey, while he has been incarcerated, committed an act of battery on an inmate. I'm sure that he could sit here for days and say that there was extenuating circumstances and maybe he was provoked. I don't know, but it is a factor."

(R3-413-415).

The trial court indicated that he was comfortable with his decision. The trial court sentenced Petitioner to 45 years prison to run concurrent on all counts. Petitioner would be given credit for time served, which the court believed to be at a minimum of five years. The trial court informed Petitioner that he would only have to serve 38.25 years if he behaved while in prison and that he would be out of prison around age 60 or even younger, which would leave him with 10-12 years of freedom. (R3-416-417).

## SUMMARY OF ARGUMENT

The First District certified a question of great public importance asking whether a defendant whose initial sentence for a nonhomicide crime violates Graham v. Florida, and who is resentenced to concurrent 45-year terms, is entitled to a new resentencing under the framework established in chapter 2014-220, Laws of Florida. The certified question does not need to be reformulated because the underlying issue does not turn more on whether or not there is a judicial review as opposed to a resentencing. Even if this Court answered the certified question in the affirmative, Petitioner should not be able to get the benefit of the 2014 sentencing statute while prohibiting the State from being able to seek a life sentence, which it was precluded from receiving prior to the 2014 sentencing statute. Petitioner is essentially asking to utilize the 2014 sentencing statute in regard to the part that he likes and to dispense with it in regard to the part that he does not like.

Furthermore, nothing in the United States Supreme Court precedent or this Court's precedent indicates that any juvenile sentenced to a somewhat lengthy prison sentence is entitled to an opportunity for early release. The State of Florida has a conformity clause, which indicates that Florida's courts are bound by precedent of the United States Supreme Court on issues regarding cruel and unusual punishment. Since the United States Supreme Court has not indicated that any juvenile sentenced to a somewhat lengthy prison sentence is entitled to an opportunity for early release, then this Court is precluded from expanding such a protection to juveniles. In fact, the entire context of the precedent from this Court shows that this Court only intended for

juveniles, who were sentenced to life or who received functional life equivalents, to be entitled to a review mechanism.

The majority opinion from the First District did not misinterpret this Court's precedent, but correctly determined that this Court only intended for juveniles, who were convicted of capital murder, to be resentenced based on the fact that any sentence less than life was not statutorily authorized prior to the 2014 sentencing statute. There was no indication in this Court's precedent that it intended that all juveniles convicted of nonhomicides, who were originally sentenced to life in prison, to be resentenced pursuant to the 2014 sentencing statute regardless of the sentence that was imposed during the interim. There is also no basis to retroactively apply the 2014 sentencing statute to Petitioner's case because his sentence was not unconstitutional and it was statutorily authorized.

Finally, if Petitioner is entitled to be resentenced, all of the sentencing provisions of the 2014 sentencing statute would apply, not just the judicial review period. Therefore, Petitioner would once again be subject to a potential life sentence. Based on the fact that Petitioner committed an egregious rape in front of the victim's two small children and then continued to commit violent crimes well into his adulthood, he will not likely be rehabilitated and is fortunate to have a guaranteed release date. Just because some juveniles will receive a judicial review or reviews, does not mean that they will be released from prison. As noted by Petitioner's expert, defendants can get worse in prison and the prison system has very few resources for rehabilitation. Defendants, such as Petitioner, who have numerous problems,

aside from youth related characteristics, may never be released. When one considers Petitioner's age at the time of sentencing, credit for time served, and eligibility for gain time, he has the potential to be released around age 60-61, which would leave him with a guaranteed 12-13 years outside of prison according to the mortality rate used by the trial court. If Petitioner is resentenced, he could get a much longer sentence with no guarantee for release.

## ARGUMENT

ISSUE I: WHETHER A DEFENDANT WHOSE INITIAL SENTENCE FOR A NONHOMICIDE OFFENSE VIOLATES GRAHAM V. FLORIDA, AND WHO IS RESENTENCED TO CONCURRENT FORTY-FIVE YEAR TERMS, IS ENTITLED TO BE RESENTENCED UNDER THE FRAMEWORK ESTABLISHED IN CHAPTER 2014-220, LAWS OF FLORIDA? (RESTATED)

### *Standard of Review*

The standard of review is de novo.

### *Preservation*

This issue was preserved for appellate review. (RS2-5-7).

### *Merits*

Petitioner argues that this Court should answer the First District's certified question in the affirmative and indicate that he is entitled to a judicial review and/or resentencing for his concurrent 45-year sentences under the framework established in chapter 2014-220, Laws of Florida. Petitioner further argues that the issue turns more on whether there is a judicial sentencing review than on whether there is a resentencing. (IB-10). The State

respectfully disagrees. Since Petitioner's sentence is statutorily authorized and it does not constitute a de facto life sentence and/or a constitutionally impermissible sentence, then there is no legal basis to apply the 2014 sentencing statute retroactively. The State also disagrees with Petitioner's assertion that, if this Court answered the certified question in the affirmative, he would simply be entitled to a judicial review as opposed to a resentencing.

First, contrary to assertion by Petitioner, the underlying issue does not turn more on whether or not there is a judicial review as opposed to a resentencing and the question does not need to be reformulated. (IB-10). Even if Petitioner was entitled to be resentenced under the 2014 sentencing statute, the remedy would be that he would get a completely new sentencing hearing, not the same sentence with a judicial review, as he was the one who requested to be resentenced under the statute. When a defendant gets a new sentencing hearing, pursuant to his request, he does not get to pick and choose which parts of the 2014 sentencing scheme that he likes and dispense with the parts that he does not like. A defendant has no expectation of finality in a sentence that he requested to change pursuant to the 2014 sentencing statute. Petitioner asks this Court to give him the benefit of the 2014 sentencing statute by providing him with a judicial review, but to deprive the State of its right to request that the trial court impose a life sentence. Essentially, Petitioner wants to have his cake and eat it too.

In Dunbar v. State, 89 So. 3d 901, 905-906 (Fla. 2012), this Court stated as follows:

> "In Harris, the sentencing court originally sentenced Harris and failed to pronounce terms required by the habitual offender statute. Id. at 387 & n. 1. Harris appealed from his convictions on other grounds, and, in the meantime, this Court issued a decision in another case clearly indicating that habitualization should have applied in Harris's case. Id. at 387 n. 1. Therefore, on remand from Harris's successful appeal on other grounds, the sentencing court imposed the term. Id. Harris again appealed, this time arguing that double jeopardy protections precluded a more onerous sentence on remand. Id. **In rejecting his argument, this Court reasoned that 'Harris had no expectation of finality regarding his sentence where he opened the door to the district court's appellate jurisdiction on an issue of law that was clarified while his case was still pending.'** Id. at 388"

(emphasis added).

Petitioner originally received a sentence of life on counts one and two and received a sentence of twenty-five years on counts three and four before the resentencing took place pursuant to Graham v. Florida, 560 U.S. 48 (2010). (R1-192). The trial court was unable to impose the sentence of life with a judicial review after twenty years at the resentencing because that sentencing option was not available to it at the time of the hearing. However, a sentence of life with a review after 20 years would become an available sentencing option if this Court were to answer the certified question in the affirmative because Petitioner opened the door to this Court's jurisdiction and the issue was decided while his case was still pending. Therefore, based on the 2014 sentencing statute, the trial court could sentence Petitioner to life in prison with a judicial review after 20 years, so he should be careful what he wishes for. See section 775.082(3)(c), Florida Statutes.

Second, Petitioner argues that the majority opinion in Kelsey v. State, 40 Fla. L. Weekly D1291, --So. 3d--, 2015 WL 3447138 (Fla. 1st DCA May 29, 2015)(On Motion for Rehearing), rev. granted, No. SC15-2079, 2015 WL 7720518

(Fla. Nov. 19, 2015), misinterpreted this Court's precedent when it affirmed his concurrent 45-year sentences and that all juveniles who are sentenced to somewhat lengthy prison sentences are entitled to an opportunity for early release. However, this Court's precedent is in conformity with Graham and Graham did not indicate that all juveniles sentenced to somewhat lengthy prison sentences are entitled to an opportunity for early release.

In Graham, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a sentence of life without parole on a juvenile offender who did not commit homicide and that the State must give a juvenile nonhomicide offender sentenced to life without parole a meaningful opportunity for release. The language of the Graham opinion makes it abundantly clear that its holding, in regard to juveniles, deals specifically with juveniles sentenced to life without the possibility of parole. In Graham, the issue involved a *categorical challenge* to a term-of-years sentence. Id. 2023. The Graham court noted that, "**life without parole** is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. (emphasis added). The court stated **"[w]ith respect to life without parole for juvenile** nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, see Ewing[1], 538 U.S., at 25,

[1] Ewing v. California, 123 S. Ct. 1179 (2003)

123 S.Ct. 1179 (plurality opinion)—provides an adequate justification." Id. (emphasis added). The Graham Court stated, "[**a] life without parole sentence** improperly denies the juvenile offender a chance to demonstrate growth and maturity." Id. at 2029. (emphasis added).

The Graham court also stated as follows:

> "In sum, penological theory is not adequate to justify **life without parole for juvenile nonhomicide offenders**. This determination; the limited culpability of juvenile nonhomicide offenders; and **the severity of life without parole sentences** all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids **the sentence of life without parole**. This clear line is necessary to prevent the possibility **that life without parole sentences** will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to **life without parole** for a nonhomicide crime."

Id at 2030. (internal citations omitted)(emphasis added). The Graham court further stated as follows:

> "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants **like Graham** some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. **It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.** Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The **Eighth Amendment** does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It **does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.**"

Id. at 2030. (emphasis added).

Moreover, the Graham court stated that, "[**l]ife in prison without the possibility of parole** gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." Id. at 2032. (emphasis added). The court indicated that, "Terrance Graham's sentence **guarantees he will die** in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." Id. at 2033. (emphasis added). Aside from the ones mentioned in this brief, the Graham opinion has numerous other references to the fact the holding relates only to juveniles sentenced to life without the possibility of parole. The opinion does not indicate, in any fashion, that any juvenile sentenced to a somewhat lengthy sentence is entitled to an opportunity for early release.

Third, the precedent from this Court has only indicated that juveniles convicted of nonhomicide offenses cannot be sentenced to life or a functional life equivalent. In Henry v. State, 175 So. 3d 675, 679-680 (Fla. 2015), petition for review pending, this Court stated as follows:

> In response, we hold 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." Graham, 560 U.S. at 75, 130 S.Ct. 2011. **Graham requires a juvenile nonhomicide offender, such as Henry, to be afforded such an opportunity during his or her natural life**. Id. **Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity, that sentence is unconstitutional under Graham.**

(emphasis added). Therefore, this Court correctly determined that Graham required a juvenile to have an opportunity for release *during his natural life*. This court further indicated, in Henry, that because Henry's sentence would require him to be imprisoned until he was at least 95 years old, then he was not afforded an opportunity for release during his natural life. Id. See also, Gridine v. State, 175 So. 3d 672, 675 (2015), petition for review pending,(holding that a 70-year sentence violated Graham because it did not afford the defendant a meaningful opportunity for release during his natural life).

Moreover, Petitioner refers to language in Henry, which he claims supports his argument that this Court intended all juveniles to receive a review mechanism to provide them with an opportunity for early release. The language that Petitioner relies on from Henry reflects as follows:

> 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, 130 S.Ct. 2011.
>
> 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, 130 S.Ct.

> 2011 ("Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.... This reality cannot be ignored."); Roper, 543 U.S. at 553, 125 S.Ct. 1183 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." (citing Stanford, 492 U.S. at 395, 109 S.Ct. 2969)).

Id. at 680. (emphasis added)(**language that is underlined is in this Court's opinion, but not in Petitioner's brief.**)(IB-12-13).

Petitioner, as well as Judge Benton's dissent, overlook that the entire context of this Court's opinion, in Henry, shows that, when it indicated that juveniles were entitled to a review mechanism, this Court was referring to juveniles sentenced to life sentences or to sentences that constituted functional life equivalents. This Court specifically stated in Henry that Graham required a juvenile to be afforded an opportunity for early release *during his or her natural life*. Id. at 679-680. This Court further indicated that Graham did not simply apply to life sentences, but also applied to sentences that, *by their terms*, did not afford a juvenile an opportunity for early release during their natural lives, i.e., a sentence that would keep a person incarcerated until he was at least 95 years of age (a functional life equivalent). Henry, 175 So. 3d at 680. In fact, some of the language omitted by Petitioner in his initial brief, which came right after the discussion about the review mechanism, reflects this Court's reliance on the language from Graham, which indicated that, *under a life sentence*, a juvenile will spend a considerably greater portion of his life in prison than an adult. Henry, 175 So. 3d at 680. The inclusion of this language from Graham shows

that this Court was contemplating a life sentence or a functional life equivalent when it was discussing that juveniles should have a review mechanism. Essentially, this Court stated that juveniles could not be sentenced to life and that juveniles could not be sentenced to term-of-years sentences that were so long that they constituted functional life equivalents.

This Court has never stated that any juvenile sentenced to a somewhat lengthy prison sentence was entitled to a judicial review and such a holding would violate Florida's conformity clause. Pursuant to Article 1, Section 17 of the Florida Constitution, the prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the United States Supreme Court, which interprets the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Article I, Section 17 of the Florida Constitution, states in relevant part:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

"Florida's Constitution expressly mandates that this Court apply the United States Supreme Court's decisions on the cruel and unusual punishment clause of the United States Constitution to any decision [] render[ed] on the meaning of Florida's cruel and unusual punishment constitutional provision." Schwab v. State, 973 So. 2d 427, 431 (Fla. 2007)(Anstead, J., dissenting). Cf. Valle v. State, 70 So. 3d 530, 538-539 (Fla. 2011)(recognizing that under the Conformity Clause, Florida's courts are bound by precedent of the United

States Supreme Court on issues regarding cruel and unusual punishment); cf. Holland v. State, 696 So. 2d 757, 759 (Fla. 1997)(**explaining that the conformity clause prohibits a state court from providing greater protection than what is provided in United States Supreme Court precedent**). (emphasis added). See also Yacob v. State, 136 So. 3d 539, 558 (Fla. 2014)(Canady, J., concurring in part and dissenting in part)(a sentence may be invalidated as cruel and unusual under the Florida Constitution only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual).

As noted in the discussion above, the United States Supreme Court has only determined that juveniles convicted of nonhomicide offenses could not be sentenced from the outset to life in prison, so there is no basis for this Court to provide greater protections to juveniles by requiring that the 2014 sentencing statute apply retroactively to juveniles that have received a sentence that is statutorily authorized and not unconstitutional. The State acknowledges that this Court has determined that there are term-of-years sentences that are so lengthy that they can constitute functional life equivalents, but that is considerably different than indicating that all juveniles sentenced to somewhat lengthy prison sentences are entitled to a judicial review. Such a holding would provide much greater protections than precedent from the United States Supreme Court. By requesting that this Court provide a judicial review to any juvenile sentenced to a somewhat lengthy prison sentence, Petitioner is asking this Court to legislate from the bench.

Fourth, Petitioner argues that this Court has vacated nonlife sentences

for crimes committed before the July 1, 2014, effective date of Chapter 2014-220, Laws of Florida. Petitioner then cites to Thomas v. State, 135 So. 3d 590 (Fla. 1st DCA 2014), review granted, decision quashed, 177 So. 3d 1275 (Fla. 2015). (IB-13). In Thomas, this Court quashed the First District's opinion and cited to Horsley v. State, 160 So. 3d 393, 395 (Fla. 2015). However, as noted in the Kelsey opinion, Thomas included a first degree murder and an armed robbery. Since it involved a homicide that mandated life in prison, it was covered by Miller v. Alabama, 132 S. Ct 2455 (2012), not Graham. As noted in the majority opinion in Kelsey, this Court required any juvenile, who initially received a sentence of mandatory life without parole for a homicide violation of Miller, to be sentenced under the new framework regardless of the sentence they received in the interim. Id. at *2. Judge Winokur, in the concurrence in Kelsey, correctly noted that, even though Thomas received a 40-year sentence, the sentence was not statutorily authorized and that this Court had determined in Horsley v. State that the proper resolution was the retroactive application of the 2014 sentencing law. Id. at *3 (Winokur, J., concurring).

The language in Horsley supports the statements by Judge Winokur. In Horsley, this Court stated as follows:

> "[**i]n light of Miller, all parties agree that Florida's prior sentencing statute that required the imposition of a mandatory sentence of life imprisonment without the possibility of parole for any offender convicted of a capital homicide offense is unconstitutional as applied to juveniles. To remedy this federal constitutional infirmity in the statute**, 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.

Id. at 408.(emphasis added). This Court also stated as follows:

> Accordingly, **presented with this unique situation in which a federal constitutional infirmity in a sentencing statute has now been specifically remedied by our Legislature, we conclude that the proper remedy is to apply chapter 2014-220, Laws of Florida, to all juvenile offenders whose sentences are unconstitutional in light of Miller.**

Horsley, 160 So. 3d at 395. (emphasis added).

Therefore, the language in the Horsley opinion reflects that to rectify the constitutional infirmity in the statute that requires a mandatory sentence of life on a capital homicide offense, all juvenile offenders whose sentences were unconstitutional under Miller would be resentenced under the 2014 sentencing framework. The language from the Horsley opinion shows that Judge Winokur is correct and that Judge Benton, in his dissent in Kelsey, mistakenly determined that this Court intended to treat *all* Graham cases just like the Miller cases. Id. at *5. (Benton, J., dissenting).

The majority opinion in Kelsey also correctly noted that a juvenile convicted of a nonhomicide offense, who was originally sentenced to life prior to Graham, could only be resentenced if the sentence he or she received in the interim was a de facto life sentence in violation of Graham. Id. at *1. See Lambert v. State, 170 So. 3d 74, 76 (Fla. 1st DCA 2015) ("[w]e do not read Henry or Gridine 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**." )(emphasis added). See also, Abrakata v. State, 168 So. 3d 251, 252 (Fla. 1st DCA 2015) ("[w]e affirm the first issue because, **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.**") (emphasis added). The 45-year sentence imposed in the case at bar is not a de facto life sentence.

Fifth, Petitioner argues that several district courts have recognized an entitlement to judicial sentence review independent from sentence imposition. However, notably, none of the three cases cited by Petitioner reflect that the State wanted to have a resentencing. It seems plausible that in the three cases cited by Petitioner, the State was satisfied with the length of the sentence, did not request that there be a resentencing, and therefore, the issue was not addressed in those opinions. For example, in Barnes v. State, 175 So. 3d 380 (Fla. 2015), the defendant received a sentence of sixty years when he was 17 years old, which would have been a functional life equivalent or close to a functional life equivalent without a judicial review. In Blake v. State, 40 Fla. L. Weekly D1591a (Fla. 2d DCA July 10, 2015), the defendant received a life sentence on his first degree murder charge, so it would not have made sense for the State to ask for a resentencing as he already received the maximum penalty. Finally, in Troche v. State, --So. 3d--, 2015 WL8941572 (Fla. 4th DCA December 16, 2015), the opinion does not reflect that the State asked for a resentencing and the court indicated that there was no need for a judicial review because the defendant was already serving a life sentence on

an offense he committed as an adult.

In any event, the State has previously argued that, if Petitioner wants the benefit of the 2014 sentencing statute and this Court were to agree, the State also wants the benefit of the 2014 sentencing statute. A defendant should not be able to request to be resentenced under the 2014 statute, keep the part of the sentence he likes, and prohibit the State from having the benefit of the 2014 statute when it was precluded from asking for a life sentence at the prior hearing.

Sixth, Petitioner argues that juveniles who receive a judicial review are receiving more favorable treatment than juveniles who are not receiving a judicial review. The State *sharply* disagrees with this statement. Just because a defendant receives a judicial review, does not mean he is going to get released from prison, whereas a defendant, such as Petitioner, who was sentenced under the First District precedent prohibiting functional life equivalents, has a guaranteed release date. In the case at bar, Petitioner broke into a young woman's house and raped her in front of her two young children. (R1-119,182-185 & R3-393-402). Petitioner went on to commit two burglaries and was ultimately sent to a commitment program. (PSI-4). Petitioner then committed an armed robbery, in which he and codefendants attacked a couple with a one-year-old baby, battered the man, made the woman go down to the ground with her child, stole the man's wallet, stole the woman's purse, and then stole their car. (PSI-4-5). Petitioner received a lenient youthful offender sentence when he was 18 years of age and then, at around 21 years old, he almost immediately violated his probation by selling

drugs. (R2-290 & R3-414-415). Finally, in 2009, Petitioner received a charge for battering an inmate while in a correctional facility. (R3-415 & PSI-5). Petitioner has done nothing but continue to commit crimes, including violent crimes, well into adulthood and he likely will never be rehabilitated.

In fact, the record reflects that Petitioner is serving 20 years in prison for his violation of probation for another armed robbery and his own expert acknowledged that people often get worse in prison, instead of better because prison is not a rehabilitation facility and defendants can become institutionalized and/or be influenced by other inmates. (PSI-4-5). During the sentencing hearing, Dr. Bloomfield was asked if the Department of Corrections provided programs to rehabilitate a juvenile and he responded as follows:

> "It provides some. It provides some GED, some vocational stuff, it provides medication, and as he told me that he was on some medication. The DOC is not geared towards the kind of rehabilitation programs that I would foresee, but again, I'm a psychologist, I'm a rehabilitation person. There's too many prisoners, too few resources through the Department of Corrections to provide significant rehabilitation in a meaningful manner." (R2-276).

Also, defense counsel asked Bloomfield if the length of a person's prison sentence had any effect on someone's ability to be rehabilitated. Bloomfield responded, "[i]t does. You can't predict it, but the longer a young person is in prison the more institutionalized they become. The prison is trying to keep people segregated so that people with certain sentences and certain ages don't get involved with more predatory type criminals, but it is sometimes not possible. It's a very hard tightrope to walk in my opinion. But very long sentences, people tend not to commit crimes if they don't have the physical capability to commit certain crimes and they don't have the physical

capability to commit certain crimes and they don't have the desire to commit certain crimes, so we see people late in life. Although we see people in their late 60s and early 70s doing crimes." (R2-277-278). Bloomfield further stated that, "[o]bviously the longer anyone is in, **and I'm not saying it shouldn't be that way**, but the longer someone is incarcerated, the greater the possibility of institutionalization and their distance from the community and what is going on. It depends on the individual, how they're treated when they come out. (emphasis added).(R2-278).

Moreover, Bloomfield stated that Petitioner had a lower IQ that would not change and that he would need a reentry program after prison regardless of the sentence imposed. Bloomfield stated, "[b]ut it's my opinion that Mr. Kelsey, regardless of the amount of time he's sentenced to, would need a reentry program." (R2-277). Bloomfield stated that IQ typically does not go up as a person ages and that Petitioner's IQ was probably the same as when he was 15 years old. (R2-279-281). Although this issue was not directly addressed in the hearing, the State questions how successful an offender could be at, for example, sex offender treatment with such a low IQ. Bloomfield's testimony further reflects that he does not believe Petitioner will be fit to reenter society after any prison sentence, but would still need a reentry program.

The record further shows that Bloomfield believed Petitioner's acts against the victim were about dominance and control and the State argues that his issues of dominance and control have extended past his adolescence. During cross-examination, the prosecutor asked Bloomfield to explain why he thought that Petitioner had not committed a sexual predator act. Bloomfield responded

as follows:

> "Sure, it is a sexual act, and it was a sexual assault act, that's my understanding of it. The question is then does he have a sexual deviance like paraphilia, or was it an act of aggression and violence. It was my opinion based upon the interview and history, you can never be sure of anything, but he's not a sexual predator. He did a sexual act, there's no question. But the literature and the discussion of sexual acts like rape are that, you know, sometimes there are assaults that involve sexual acts versus something like paraphilia or a pedophilia, I was just trying to differentiate between that." (R2-282-283).

The prosecutor followed up by asking Bloomfield if he felt that Petitioner's act was based on dominance and control and Bloomfield stated, "[t]hat's what I would think, yeah." Bloomfield explained that when he made his statements about sexual deviance, he was not talking about the sexual predator laws. (R2-283). The State notes that Petitioner subsequently participated in an armed robbery at age 18, where he and others attacked a couple with a young child, so he appears to enjoy exerting his dominance and control over people who fear harm to their children. (PSI-5).

Bloomfield's testimony also showed that he thought, at least to some extent, that Petitioner was *trying* to present himself well and hiding things from him. Bloomfield further admitted that Petitioner had antisocial traits and that deterrence had not worked on him. Bloomfield acknowledged to the prosecutor that Petitioner's "tendency was to present himself well, trying to make a good impression in terms of psychopathology." (R2-284-285). Bloomfield stated that he had a hunch that Petitioner was trying to hide something and/or to cover up things. (R2-285-286). Bloomfield indicated that he believed Petitioner functioned at a sixth grade level, but that Petitioner had indicated that he received his GED and completed tenth grade. (R2-288).

Petitioner's claim that he obtained his GED does not really make sense if he only functioned at a sixth grade level. Bloomfield then acknowledged that Petitioner had antisocial traits. (R2-291). Bloomfield explained that Petitioner would need special services when he got out and noted that, by looking at Petitioner's history, deterrence had not worked. (R2-292).

In addition, the record shows that Bloomfield was not given very much information about Petitioner, including information about what happened in the case at bar, and that he evaluated Petitioner in his 20s for something he did when he was 15 years of age. Defense counsel acknowledged, through his direct examination, that he only provided Dr. Bloomfield with limited information about the case, such as the overall type of offense. Defense counsel specifically asked, "[w]hat I sent you was rather limited, because it was never our intention to get into the facts of the case, would that be fair to say?" Bloomfield responded, "[y]es, it would." Defense counsel then asked, "[a]nd it was your understanding that he pled guilty to the offense, so we weren't looking at it from a tactical standpoint, we were looking at it just for the overall type of offense." (R2-260). When defense counsel asked Bloomfield if he was given sufficient information to evaluate Petitioner, Bloomfield responded that he did the best he could with what he had, but that it would have been nice to have had school records or prison records, which he did not receive, and that it was difficult to evaluate someone in his 20s for something he did at 15. (R2-281). The trial judge also seemed bothered by this because he questioned Bloomfield about whether he was aware of certain things. (R2-290). For these reasons, any conclusions Bloomfield had about Petitioner

being amendable to treatment were not very persuasive.

In reality, despite Petitioner's reliance on the trial court's statement that a judicial review would be good, the trial court did not have to give Petitioner a 45-year prison sentence. Petitioner only scored a little under 25 years prison. (R2-296). If the trial court wanted to cut him a break, it could have easily sentenced him to the 25-year prison sentence and imposed it concurrently to the 20-year prison sentence Petitioner was already serving. The trial judge could have included the ten-year probationary period afterward, which was requested by defense counsel, in order to monitor him further. (R3-392).

However, the trial court did not want to cut Petitioner much of a break. The fact is that Petitioner is a dangerous person who has continued to commit violent crimes well into his adulthood and even while he has been incarcerated. Petitioner was already given a break at age 18 with the youthful offender sentence and he blew that chance. The initial judge that sentenced Petitioner on this case was not willing to cut him a break and, even though the second judge was bound by functional life equivalent case law, he was not willing to cut Petitioner much of a break either. Petitioner's own expert indicated that prison did not offer much rehabilitation, that prisoners often get worse in prison, and that Petitioner would need extensive treatment after prison regardless of what sentence he received. (R2-276-278,292 & R3-379). Petitioner's expert even indicated that we often see people late in life because, at that point, they are often physically incapable of committing crimes. (R2-278). Two different judges, who could be subject to the election

process, were not willing to risk the safety of the public or possibly their careers to release Petitioner while he was still physically able to commit crimes, so how can Petitioner be so sure that his situation would be any different if he had judicial reviews. Defendants do not necessarily "mature" out of crime and Petitioner has a lot more problems than youth related characteristics would account for. Petitioner would likely be better off with a guaranteed release date than a resentencing with a judicial review because the State can request a longer sentence and keep him incarcerated if he does not "mature" out of crime.

The Graham decision may actually result in many juveniles receiving longer sentences than they would have received otherwise. Commonly, prosecutors ask for lengthy sentences on juveniles who have committed heinous crimes and defense attorneys counter by arguing that the trial courts should be more lenient because the crimes were committed at such a young age, which may not reflect the personalities of the defendants in the future. Now, a trial judge does not have to gamble from the outset. A trial judge can give a defendant a very lengthy sentence with judicial reviews. If the defendant "matures" out of crime, he could be released early, but if not, he could be kept in. This will not necessarily help many defendants who, like Petitioner, have numerous other problems, aside from youth related characteristics, which will not be addressed in the punitive prison environment and may even get worse. The State further argues that Petitioner's knowledge of his history and problems, as well as his fear that he will not be rehabilitated, is the reason he requests that this Court provide him with a judicial review instead of an entirely new

resentencing hearing.

Petitioner further relies on Landrum v. State, 163 So. 3d 1261 (Fla. 2d DCA 2015), rev. granted, No. SC15-1071 (Fla. June 18, 2015) and Peters v. State, 128 So. 3d 832 (Fla. 4th DCA 2013) to support his claim that juveniles are receiving inequitable treatment, but these cases are distinguishable from the case at bar. Landrum dealt with a juvenile who committed a homicide and whether Miller applied to a homicide in which a defendant is not facing a mandatory life sentence. In addition, Peters dealt with whether a juvenile could be subject to a lengthier sentence for a first-degree felony under the applicable sentencing scheme than if he had committed a life felony. In the case at bar, Petitioner received 45-year concurrent sentences with a guaranteed release date and, if he had he been sentenced under the 2014 sentencing statute, he could have received a life sentence with judicial reviews and no guarantee that he would be released at all. As noted above, the latter may not be the best option, especially in light of Petitioner's extensive problems.

In conclusion, the trial court did not give Petitioner an unconstitutional sentence or a sentence that was not statutorily authorized, so there is no basis for him to be resentenced pursuant to the 2014 sentencing statute. The trial court appeared to rely on the mortality rates, as argued by defense counsel at the resentencing hearing, and it sentenced Petitioner to concurrent forty-five-year sentences. (R3-365,369-371,416-417). The trial court noted that, based on gain time considerations (must serve 85 percent of sentence) and the over five years of credit Petitioner had, he would be eligible for

release around age 60 if he behaved himself while in prison and he would have at least 11-12 years outside of prison based on the life expectancy of age 73. (R3-371, 416-417). 45 years prison minus the five years of time served equals 40 years prison. 85 percent of 40 years is 34 years prison. Defense counsel stated that Petitioner was 27 at the time of the sentencing, so 27 plus 34 equals 61. (R3-382,389). The credit for time served was actually over five years, so Petitioner could be out of prison when he was 60-61 years of age as stated by the trial judge (**or** 45 years times .85 equals 38.25, 38.25- 5 years of credit for time served is 33.25, and 33.25 plus 27 years of age equals 60.25 years of age). (R3-373,416-417). Petitioner asks this court to consider the release date noted on the Florida Department of Corrections website, but fails to mention that there is a note that indicates, "[r]elease date subject to change pending gain time award, gain time forfeiture, or review. A 'TO BE SET' Release Date is to be established pending review." (last accessed February 29, 2016.) (IB-23).

The State further notes that, while rape is included within the general category of non-homicide offenses, it is also the one of the offenses which the United States Supreme Court chose to write about. The United States Supreme Court stated as follows in Coker v. Georgia, 433 U.S. 584, 597-98 (1977):

> We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. **Short of homicide, it is the 'ultimate violation of self.'** It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the

> capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

(emphasis added). A rape is the type of offense which should permit sentencing to extend towards the outer limits of lengthy term-of-years sentences for juveniles which fall short of life without parole, while still holding out the prospect of some significant possibility of release during the offender's life.

## CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the First District Court of Appeal reported at in Kelsey v. State, 40 Fla. L. Weekly D1291, --So. 3d--, 2015 WL 3447138 (Fla. 1st DCA May 29, 2015)(On Motion for Rehearing) should be approved, and the sentence entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Glenn P. Gifford, Esquire, at GLENN.GIFFORD@FLPD2.COM, on this 3rd day of March, 2016.

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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