IN THE SUPREME COURT OF FLORIDA

THOMAS KELSEY,

Petitioner,

v. CASE NO. SC15-2079

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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ARGUMENT

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

Respondent asks this Court to approve the First DCA decision affirming Kelsey's sentence of 45 years in prison without judicial sentence review. The state asserts that (1) to obtain judicial sentence review, Kelsey must again face the prospect of a life sentence, (2) U.S. and Florida Supreme Court precedent precludes relief on sentences short of life without eventual sentence review, and (3) sentence review will probably be wasted on Kelsey in light of his record of crimes up to age 23, psychological profile, and expert testimony on the lack of opportunities for rehabilitation in Florida prisons.

The state's arguments incorrectly reflect constitutional bars on the increase in a lawful sentence already underway, fail to recognize that the sentencing court has already decided against a longer sentence, misapply the Conformity Clause of Article I, Section 17 of the Florida Constitution, misinterpret this Court's post-Graham decisions, and offer an unrealistically narrow and short-sighted view of the potential for rehabilitation by offenders who commit crimes into their early twenties.

A. An increase in Kelsey's 45-year sentence, which neither party challenges and is well underway, would constitute double jeopardy.

The state cautions Kelsey to be careful what he wishes for, because eligibility for judicial sentence review must come with a price: *de novo* resentencing in which he will again face the prospect of a life sentence. Its position would result in an unconstitutional increase in a lawful sentence that the defendant does not challenge and is already underway.

A sentencing court cannot increase a sentence on which an offender has an expectation of finality and has already served in part. Dunbar v. State, 89 So. 3d 901, 905 (Fla. 2012). Kelsey has a reasonable expectation of finality in his 45-year prison term. The sentence is lawful apart from its failure to provide an opportunity for early release based on demonstrated maturity and rehabilitation. This single shortcoming has been remedied by the Legislature's enactment of Chapter 2014-220, Laws of Florida, and this Court's extension of that legislation to offenders such as Kelsey.

Kelsey appealed only the failure of his sentence to provide for early release based on demonstrated maturity and rehabilitation. In district court briefing that commenced in 2014 and concluded on April 6, 2015, he sought resentencing, but only insofar as a new sentence would render him eligible for parole or sentence review under section 921.1402. Apart from its failure to provide for judicial

sentence review, Kelsey did not contest the term-of-years sentence. In limiting his challenge to the failure to provide an opportunity for release based on demonstrated maturity and rehabilitation, Kelsey is in the same position as a defendant who challenges one sentence while leaving uncontested another sentence imposed in the same proceeding. "Under Florida law, [a] defendant is permitted to pick and choose which sentences to challenge in a multicount judgment, either on appeal or by way of a motion to correct sentencing error, without affecting the finality of the other sentences." Delemos v. State, 969 So. 2d 544, 549 (Fla. 2d DCA 2007).

Imposition of a sentence longer than 45 years on remand would amount to an unlawful increase, even with 20-year judicial sentence review. For double jeopardy purposes, denial of release in a parole review is neither imposition nor increase in punishment. See Mahn v. Gunter, 978 F.2d 599, 602 n. 7 (10th Cir.1992) (parole denial that did not lengthen original sentence did not result in double punishment); Alessi v. Quinlan, 711 F.2d 497, 501 (2d Cir.1983) (denial of parole "is neither the imposition nor the increase of a sentence, and it is not punishment for purposes of the Double Jeopardy Clause"). Judicial sentence review is no different. Section 921.1402 (7) authorizes release only upon a finding that the offender has "been rehabilitated and is reasonably believed to be fit to reenter society." The provision requires that any releasee serve at least five years on probation, which can be revoked and a life sentence imposed. As Respondent

notes (Ans. brf. at 35), Kelsey faces a difficult burden in seeking release in either a 20- or 30-year sentence review, and could serve his entire sentence.

Respondent relies on Dunbar and Harris v. State, 645 So. 2d 386 (Fla. 1994), (Ans. brf. at 17-18) but unlike the offenders in those cases, Kelsey has a reasonable expectation of finality in his 45-year sentence. The sentencing court in Harris omitted a habitual offender designation later determined to be required. The court in Dunbar neglected to impose a mandatory minimum term for possessing a firearm under section 775.087(2), Florida Statutes, an issue appealed by the state. Here the court exercised its discretion to impose a term of years authorized by statute. The state did not appeal. In his appeal, Kelsey did not claim that the term of years was excessive. An increase in that sentence at this point would violate the Double Jeopardy Clauses of Article I, Section 9 of the Florida Constitution and the Fifth Amendment to the U.S. Constitution.

B. The trial court has rejected a longer sentence in a hearing comporting with section 921.1401, Florida Statutes.

When the trial court resentenced Kelsey on January 17, 2014, the law of the First District permitted imposition of a sentence upon a juvenile offender of up to 70 years. Gridine v. State, 89 So. 3d 909 (Fla. 1st DCA 2011). At sentencing, the prosecutor noted that a 50-year sentence had been upheld in Thomas v. State, 78 So. 3d 644 (Fla. 2011). Nonetheless, as the state acknowledges (Ans. brf. at 37),

the sentencing court imposed a 45-year sentence knowing that it could result in Kelsey's release at age 60-61, with more than a decade of life expectancy remaining.

In short, the sentencing court has already decided against the longer sentence that the state wants to continue to pursue. Further, the court imposed the 45-year sentence after considering the factors later codified in section 921.1401, Florida Statutes, then pending in the Legislature as part of what became Chapter 2014-220. The state has not argued that Kelsey's sentencing hearing failed to comport with section 921.1401.

C. Graham and this Court's post-Graham decisions support judicial sentence review for Kelsey.

Respondent asserts that under the Conformity Clause in Article I, Section 17, Graham v. Florida, 560 U.S. 48 (2010), precludes relief. Not so. The Court in Graham held only that a state cannot determine at the outset that a juvenile nonhomicide offender will never be fit to reenter society. It did not rule decades-long sentences that fall within an offender's life expectancy but with no opportunity for early release based on rehabilitation constitutionally permissible. The state has not cited any U.S. Supreme Court decision holding early release for juveniles given decades-long adult sentences constitutionally unnecessary. In fact,

Kelsey seeks only to avail himself of the state remedies prescribed by the Court in Graham:

> 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.

560 U.S. at 75.

In Gridine v. State, 175 So. 3d 672 (Fla. 2015), cert. denied, 2016 WL 854312 (U.S. Mar. 7, 2016), this Court applied Chapter 2014-220 to a term-of-years sentence that the First DCA had determined was not the same as a life sentence. According to the district court, Gridine's 70-year sentence, imposed for crimes he committed at age 14, was not the functional equivalent of a life sentence. Gridine, 89 So. 3d at 911.[1] This Court left that aspect of the lower court decision intact in holding that Gridine's "seventy-year prison sentence is unconstitutional because it fails to provide him with a meaningful opportunity for early release based upon a demonstration of his maturity and rehabilitation." 175 So. 3d at 674-75.

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1. Gridine was 14 years, 5 months of age at the time of his offense. Assuming he serves 85 percent of a 70-year sentence commencing on the offense date, he would be released at age 74. The 2011 life expectancy of black males 16 to 17 years of age reflects a life expectancy of 57.4 years, making Gridine 73.4 to 74.4 years old when released. National Vital Statistics Reports, Vol. 64, No. 11 (Sept. 22, 2015), United States Life Tables, 2011, at 11 (http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_11.pdf).

Perhaps one can read too much into this facet of Gridine.[2] Nonetheless, it is consistent with the language in Henry v. State, 175 So. 3d 675 (Fla. 2015), discussed in the initial brief, that focuses on the opportunity for early release rather than on sentence duration, as well as this Court's order remanding 40- and 30-year sentences for application of Chapter 2014-220 in Thomas v. State, 177 So. 3d 1275 (Fla. 2015) (Table Decision) (No. SC14-961).

As a case pending direct appeal when Henry and Gridine were decided, Kelsey must receive the benefit of those decisions applying Chapter 2014-220 to sentences for offenses committed before July 1, 2014. See Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (Florida Supreme Court decision announcing new rule of law must be applied to every case pending on direct review). The legislation has two components: an individualized sentencing decision under section 921.1401 that includes consideration of the mitigating circumstances of youth, and eligibility for judicial sentence review under section 921.1402. Kelsey has already received the first of these statutory benefits, resulting in a lawful sentence. He is now entitled to be declared eligible for the remaining benefit, sentence review.

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2. In Guzman v. State, 41 Fla. L. Weekly S21 (Jan. 28, 2016), this Court declined to answer a certified question on the point at which a term-of-years becomes a de facto life sentence under Graham. In a concurring opinion, Justice Pariente cautioned that the Court's "decision to discharge jurisdiction does not indicate that a sixty-year sentence for a juvenile non-homicide offender is constitutional under Graham."

D. Judicial sentence review is necessary to achieve the constitutionally mandated goal of rehabilitation of juvenile offenders sentenced as adults.

Graham establishes that to survive Eighth Amendment scrutiny, adult sentencing of juvenile offenders must find justification in four penological justifications, one of which is rehabilitation. 560 U.S. at 71. Making Kelsey eligible for release via judicial sentence review after serving 20 years of his sentence furthers that goal. A straight 45-year sentence subject only to 15 percent gain time for avoiding disciplinary reports in prison provides no incentive for rehabilitation.

Relying on Dr. Bloomfield's report and Kelsey's criminal record, Respondent argues that he probably cannot be rehabilitated. To the extent that the state's argument relies on the observation that few opportunities for rehabilitation exist in prison, we can reasonably expect that Graham, Miller v. Alabama, 132 S.Ct. 2455 (2012), Montgomery v. Louisiana, 136 S.Ct. 718 (2016), and Chapter 2014-220 will spur greater opportunities—though litigation if necessary. In addition to any educational, behavioral, and vocational programs provided by the Department of Corrections, Kelsey can rehabilitate and reconcile himself with society through visits, phone calls, and correspondence with family, and programs of self-education and spiritual development. Nor does Kelsey's record of offenses through age 23 preclude rehabilitation. Research shows that the human brain does

not reach full maturity until one's mid-twenties. Ferris Jabr, "Neuroscience of 20-Somethings: 'Emerging Adults' Show Brain Differences," Aug. 29, 2012 Huffington Post (http://www.huffingtonpost.com/2012/08/29/neuroscience-of-20-somethings-brain-young-adults_n_1840495.htm); J.N Giedd et al., "Anatomical brain magnetic resonance imaging of typically developing children and adolescents," 48 J. Am. Acad. Child Adolesc. Psychiatry 465-70 (May 2009).

The state's argument that Kelsey is likely beyond redemption is reminiscent of the First DCA decision in Graham:

> While the United States Supreme Court has noted that juveniles in general are more amenable to successful rehabilitation, the particular facts of this case cut against rehabilitation for appellant. As the trial court noted in its sentencing colloquy, appellant was given an unheard of probationary sentence for a life felony, he wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and he had a strong family structure to support him. However, appellant rejected his second chance and chose to continue committing crimes at an escalating pace.
>
> It is the tested theory of rehabilitation on appellant that sets this case apart from other challenges to a juvenile's life sentence. There is record evidence to support appellant's inability to rehabilitate-evidence that is usually not available upon an original sentencing proceeding. The trial court balanced the possibility of appellant's rehabilitation with the safety of society in determining his sentence and was well within its discretion to do so. Accordingly, while appellant is correct that a true life sentence is typically reserved for juveniles guilty of more heinous crimes such as

> homicide, none of the cases cited by appellant involved a tested theory of rehabilitation.

Graham v. State, 982 So. 2d 43, 52-53 (Fla. 1st DCA 2008). The United States Supreme Court's rejection of this rationale establishes that recidivism and probation violation by a young offender cannot preclude further opportunities for rehabilitation as the offender gains greater maturity.

CONCLUSION

Kelsey has received a section 921.1401 hearing in which the trial court opted not to impose the maximum authorized sentence. Double jeopardy precludes an increase in that sentence, which he has been serving since its imposition in January 2014. The sentencing order is defective only in that it omits a provision for the 20-year judicial sentence review commanded by the Legislature and this Court. This flaw can be easily remedied in an amended sentencing order citing section 775.082(3)(c), a ministerial task that does not require Kelsey's presence.

Petitioner requests that this Court quash the decision of the district court and remand with directions to enter an amended sentencing order making Kelsey eligible for judicial sentence review under section 921.1402, Florida Statutes.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate and Virginia Harris, Assistant Attorneys General, the Capitol, PL-01, Tallahassee, FL 32399-1050, and to amicus counsel Jonathan Greenberg, Paolo Annino, Marsha Levick, and Justin Karpf, this 22nd day of March, 2016. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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