CORRECTED

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22 13565

JAMES HARMON, III,

Petitioner Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:19 cv-01080 MMH-LLL

ORDER:

"Appendix G."

James Harmon is a Florida prisoner serving six concurrent life sentences for armed robbery, kidnapping, and second-degree murder. He was originally sentenced to a total of 600 years in prison for these crimes, which he had committed when he was a juvenile, but was resentenced in 2017. Harmon seeks a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition, which challenged his new 2017 sentences on the following grounds: (1) resentencing him pursuant to Florida's new juvenile sentencing laws violated the Ex Post Facto Clause; and (2) Harmon's sentence violates the Eighth Amendment's prohibition on sentencing juveniles to life imprisonment without parole, as well as the prohibition on sentencing juveniles for the purpose of punishment, rather than rehabilitation.

Harmon was convicted in 1981 for crimes he committed over the course of a week-long robbery spree when he was 17 years old. Harmon pled guilty to the second-degree murder of two victims and the armed robbery and kidnapping of two additional victims and was sentenced to 600 years in prison. In 2017, Harmon was resentenced pursuant to Florida's new juvenile sentencing laws, passed in response to *Graham v. Florida*, 560 U.S. 48, 52-53 (2010), which held that sentencing a juvenile to life-without-parole for a non-homicide offense is cruel and unusual punishment, and thus, juveniles convicted of non-homicide offenses are entitled to a meaningful opportunity to obtain release during their natural life. During resentencing, the court considered whether Harmon's age may have affected his maturity and impulsivity at the time of his offenses, but determined that Harmon's crimes were not acts of

youthful impulsivity. It sentenced Harmon to life in prison on each count, with an opportunity for review in 20 years for the non-homicide convictions and 25 years for the homicide convictions.

Harmon filed the instant petition in September 2019. The district court denied Ground 1 because Florida's juvenile sentencing laws did not implicate the Ex Post Facto Clause. The court denied Ground 2 because the resentencing court explicitly considered Harmon's age at the time of his offenses and afforded him an opportunity for meaningful release in 25 years.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant does so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted).

Florida law establishes a series of factors that courts must consider when deciding whether to sentence a defendant to a life sentence or equivalent term of years for an offense committed when the defendant was a juvenile. Courts must consider factors including the defendant's age, maturity, and intellectual capacity at the time of the offense. Fla. Stat. Ann. § 921.1401 (West 2014).

Reasonable jurists would not debate the district court's denial of Ground 1, because Florida's juvenile sentencing law prescribes factors that courts must consider when sentencing a

defendant for crimes that he committed as a juvenile, but does not criminalize conduct that was legal when it was committed, increase the penalty for criminal conduct, or alter any evidentiary rules, and thus, does not implicate the Ex Post Facto Clause. *Slack*, 529 U.S. at 484; Fla. Stat. Ann. § 921.1401 (West 2014); *Magwood v. Warden, Ala. Dep't of Corr.*, 664 F.3d 1340, 1348 (11th Cir. 2011) (describing the categories of laws implicated by the Ex Post Facto Clause).

Reasonable jurists would not debate the district court's denial of Ground 2, because the sentencing court considered Harmon's age at the time of his offenses and was within its discretion to find that the brutality of Harmon's crimes outweighed the mitigating factor of his youth. The court was not required, under *Graham*, to make a finding that Harmon could not be rehabilitated, nor was it disallowed to consider retribution as a relevant factor to crafting an appropriate sentence. *Graham*, 560 U.S. at 52 53 (noting that "[r]etribution is a legitimate reason to punish); *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016) (holding that a court need not make a specific finding that a juvenile is incapable of rehabilitation before imposing a life sentence).

Accordingly, Harmon's motion for a COA is DENIED and his motion to proceed *in forma pauperis* on appeal is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13565

JAMES HARMON, III,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:19-cv-01080-MMH-LLL

Before WILSON and LAGOA, Circuit Judges.

"Appendix I."

BY THE COURT:

James Harmon, III, has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order denying a certificate of appealability in his underlying habeas corpus petition, 28 U.S.C. § 2254. Upon review, Harmon's motion for reconsideration is DENIED because his arguments have already been considered and rejected by this Court.

In the United States Court of Appeals.
for the Eleventh Circuit.

James Harman III,
Petitioner/Appellant.

-Vs-

Case No#
22-13565

Sec. Fla. D.O.C. et. al.,
Respondents/Appellees.

Motion to Reconsider, Vacate, or, modify order denying (COA) and, motion to Proceed in forma Pauperis.

Comes now, Petitioner, James Harman III, Pro-se, hereby motions this court pursuant to: 11th Cir. Rule, 27-2. and files the instant "motion to reconsider, vacate, or modify this court's order denying Petitioner a certificate of Appealability. (COA).

"Appendix H."

I.

The premise of this court's order denying Petitioner a (COA) - 'certificate of Appealability' was the District court's 'highly deferential' standard to habeas review of final State court decisions. (order of court, at p.8. 3).

Harmon filed the instant Petition in september 2019, the District court denied Ground 1 because Florida's Juvenile Sentencing laws did not implicate the ex post facto Clause. the court denied Ground 2 because the resentencing court explicitly considered Harmon's age at the time of his offense and afforded him an opportunity for meaningful release in 25 years.

the Petitioner contends that the premise allowed is wrong, and deliberately worded to conform to that court's 'highly deferential' standard to effect an order of denial, and dismissal with prejudice Petitioner's 2254(2). Petition for writ of Habeas corpus.

No formal inquiry has been conducted to discern the nature and extent of Petitioner's allegations regarding the retroactive application of: Florida Statute, Section 921.1401; Florida Statute, Section 921.1402; (2014), to events that predate it's enactment. and the legal consequences thereof.

the prohibition of ex post facto laws forbids the

enactment of "laws with certain retroactive effects." See; Shenfeld -v- State, 44 So.3d 96 (Fla. 2010). citing; Stogner -v- California, 539 U.S. 607, 610, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003).

Compare; Florida statute, section 921.1401(1); History. -S. 2, Ch. 2014-220; ... upon conviction or adjudication of guilt of an offense ... which was committed on or after July 1, 2014, the court may conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

Compare; Florida statute, section 921.1402(1); History, -S. 3, Ch. 2014-220; S. 97, Ch. 2015-2. For purposes of this section, the term "juvenile offender" means a person sentenced to imprisonment in the custody of the Department of corrections for an offense committed on or after July 1, 2014, and committed before he or she attained 18 years of age.

As a general, almost invariable rule, a legislature makes law for the future, not for the past; Statutes, by contrast to judicial opinions, pronounce what the law becomes when the statutes take effect. This point is basic to Florida's rule of law.

Thus, the new juvenile sentencing laws, as applied, is

unconstitutional, as the new legislation on it's face is plainly forward-looking, to apply to: (offenses committed on or after July 1, 2014).

Petitioner has consistantly maintained that: Florida Statute, section 921.1401(1),(2014), as applied to Petitioner, a former Juvenile offender, is an unconstitutional application of the new legislation for 'Juveniles under the age of 18 at the time of the commission of the 'offense.'

The circuit court, exercising it's inherent authority, retroactively sentenced Petitioner to Life with Judicial Review after 25 years. Accord: Florida Statute, Section 921.1401(1),(2014)., the circuit court considered factors relevant to the offense to inform itself of the appropriate sentence, to wit, Life without Parole, the sentence of 'Life' as applied, came with the consequence of altering the substantive nature of Petitioners crimes ex post facto, from Second Degree murder to murder in the First Degree. to support the maximum sentence of 'Life' as defined therein. Accord: Florida Statute, Section 921.1402(1)(2014). Judicial Review, after 25 years. Judicial Review, as applied, was imposed as a consequence of retroactively altering the substantive nature of the offenses ex post facto, by eliminating Parole eligibility.

As such, an inquiry would reveal that: Florida Statute, Section 921.1401(1)(2014), as applied, violates the principle of Ex post Facto laws, in that: (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. (4) every law that

alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the commission of the offense, in order to convict the offender.

consequently, the 'relevant factors' relied upon, and considered by the circuit court Judge to impose a sentence of Life, did not come into existence until after the offenses was committed, 36 years later as Petitioner was initially sentenced to 600 years in 1981, for the crimes - the same criminal acts, that the circuit court Judge resentenced him to Life for. see; Rodriguez-v- U.S. Parole comm. et al., 594 F.2d 170 (7th Cir. 1979)

Conclusion, the District court, in sustaining the sentences of Life without Parole under the new Juvenile Sentencing Laws, and without Analysis or comparison of the practical operation of the two new statutes, declared that it was 'highly deferential' in it's standard of review of final state court decisions. the Petition for writ of Habeas corpus was denied and, dismissed with prejudice.

Tragically, the 'prohibition' against ex post facto laws "reaches every law ... whereby the act, if a crime, is aggravated in enormity, or punishment"). the Federalist No. 44, P. 301 (J. cooke ed. 1961) (J. madison) Ex Post Facto laws ... are contrary to the first principles of the social compact, and to every principle of sound legislation"). For this reason, ex post facto laws have rightly been described as "Formidable instruments of tyranny," id., No. 84, at 577 (A. Hamilton), and their prohibition a

bulwark in favor of the personal security of the subject", Calder, Supra. at 390, 1 L.Ed. 648 (opinion of Chase, CJ.) Cf. Peugh -v- United States, 569 U.S. 530, 133 S.Ct. 2072, 186 L.Ed.2d 84, (2013). ... Retrospective increase created a sufficient risk of a higher sentence to constitute an ex Post facto violation.

In sustaining the sentences of 'Life', the order denying Petitioner's 2254(d) Petition for writ of Habeas corpus without Analysis, inquiry, or comparison of the practical operation of the two new statutes, declared; Accordingly, this court finds the new juvenile sentencing laws do not violate ex post facto principles.
Defendant is not entitled to relief. (Doc. 14. P.g. 16 of 29).

In sustaining the sentences of 'Life', the order denying Petitioner's 2254(d) Petition for writ of Habeas corpus without analysis, inquiry, or comparison of the practical operation of the two new statutes, declared; ~~i~~ Defendant is not entitled to relief; in regards to the constitutionality of Defendants 'Life' sentences for non-homicide offenses.

Petitioner hereby pray this Honorable court enter an order Vacating the order of denial and reconsider the Preceedings in light of the above.

Certificate of Service

I Hereby certify that a true and correct copy of the foregoing "motion to recousider, vacate, or modify courts order." has been placed in the hands of D.O.C. officials, for mailing, by U.S. mail to: Holly N. Simcox, Asst, Atty, General, Office of the Attorney General, 400 S. Monroe Street, PL-01, the capitol, Tallahassee, Florida. 32399-1050. ON this 30th day of JUNE, 2023.,

Provided to Suwannee Correctional Institution on:
JUN 3 0 2023
for mailing, by: CMH

/s/ James Harmon III #080164
SUWANNEE CORRECTIONAL INST
- ANNEX -
5964 U.S. Hwy 90
Live Oak, Florida. 32060

Declaration

Pursuant to 28 U.S.C. § 1746; and, Fed. R. App. P., 25(a)(2)(A)(iii); I hereby declare the above "motion to recousider, vacate, or modify court's order." is true and correct and, mailed in good faith. on this 30th day of JUNE, 2023.,

/s/ James Harmon III #080164

VII

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES HARMON III,

Petitioner,

v. Case No. 3:19-cv-1080-MMH-LLL

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ORDER

I. Status

Petitioner James Harmon III, an inmate of the Florida penal system, initiated this action on September 27, 2019,[1] by filing a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Petition; Doc. 1).[2] In the Petition, Harmon challenges his 2017 state court (Duval County) sentence of life imprisonment. He raises two claims. See Petition at 5-7. Respondents have submitted a memorandum in opposition to the Petition. See Answer in Response to Order to Show Cause (Response; Doc. 8). They also submitted exhibits. See Docs. 8-1 through 8-23. Harmon filed a brief in reply. See Reply

[1] See Houston v. Lack, 487 U.S. 266, 276 (1988) (mailbox rule).

[2] For purposes of reference to pleadings and exhibits, the Court will cite the document page numbers assigned by the Court's electronic docketing system.

"Appendix E."

(Doc. 9). He also submitted exhibits. See Docs. 9-1 through 9-16. This action is ripe for review.

II. Relevant Procedural History

The state court described the nature and circumstances of the criminal offenses involving Harmon, stating in pertinent part:

> It all began as a plan to get money, but ultimately turned into a week-long crime spree that terrorized the Riverside community in Jacksonville. Defendant and his co-defendant kidnapped and robbed four different individuals over that week in January 1981. Defendant and the co-defendant drove each victim around Jacksonville, taunting the victims with threats of violence while robbing them, showing a wanton disregard for the terror they instilled in each victim of their impending demise. They attempted to murder all four victims[] but were only successful in their plans as to Mr. Langston and Mr. Kennedy. Mr. Chadwick escaped with a wound to his knee, leaving only Mr. Burge physically unharmed.

Docs. 8-1 at 159; 9-9 at 12 (record citations omitted). The United States Court of Appeals for the Eleventh Circuit provided a brief procedural history, stating in pertinent part:

> In 1981, Harmon, who was then 17 years old, pleaded guilty to two counts of second degree murder, one count of armed robbery, and one count of kidnapping.[3] In a separate case, he was convicted by a jury of one count of armed robbery and one count of

[3] Duval County Case Nos. 81-CF-984 (armed robbery and kidnapping; victim Robert Chadwick, Jr.), 81-CF-986 (second degree murder; victim Raymond Kennedy), and 81-CF-987 (second degree murder; victim Clarence Langston, Jr.).

> kidnapping.[4] In total, Harmon was adjudicated guilty of committing six felonies, each "punishable by imprisonment for a term of years not exceeding life imprisonment" pursuant to Sections 782.04(2), 787.01(2), and 812.13(2)(a), Fla. Stat. (1981). When the pleas were taken, the court advised Harmon that the maximum sentence on each count was life imprisonment, but that there was no plea agreement as to the sentence. Instead of life sentences, the court imposed six consecutive terms of one hundred years each and retained jurisdiction to deny him parole during the first one-third of the total sentence, or for two hundred years. Harmon's attorney objected that the court could not legally retain jurisdiction over a period greater than Harmon's actual lifetime, but did not move to withdraw the guilty pleas.
>
> Harmon appealed, arguing that the court erred in sentencing him to six hundred years and retaining jurisdiction for two hundred years because the sentence exceeded the statutory maximum. Harmon requested correction of the sentences, but did not request withdrawal of the pleas. The appellate court affirmed and certified the following issue to the Florida Supreme Court: "[W]hether a sentencing court, authorized to impose for each of six felonies a term of years not exceeding life imprisonment, may impose six consecutive 100-year terms and retain jurisdiction for one-third of each sentence, aggregating 200 years, to review any parole release order of the Parole Commission." The Florida Supreme Court accepted jurisdiction, answered the question affirmatively, and upheld the convictions and sentences. Harmon v. State, 438 So. 2d 369 (Fla. 1983).

Harmon v. Barton, 894 F.2d 1268, 1269 (11th Cir. 1990) (footnotes omitted).

---

[4] Duval County Case No. 81-CF-985 (armed robbery and kidnapping; victim Herman Burge).

On July 19, 2016, Harmon filed a pro se motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800 in Case Nos. 984 and 985. Docs. 8-1 at 24-26; 8-6 at 22-24. In the Rule 3.800 motion, he asserted that he was entitled to resentencing for the non-homicide offenses under Graham v. Florida, 560 U.S. 48 (2010), Florida's 2014 juvenile sentencing legislation, and Henry v. State, 175 So. 3d 675 (Fla. 2015). That same day, he filed a motion for postconviction relief in Case Nos. 986 and 987. Docs. 8-11 at 201-03; 8-12 at 1-12; 8-18 at 57-71. In the postconviction motion, Harmon asserted that his sentences violated the Eighth Amendment and the dictates in Miller v. Alabama, 567 U.S. 460 (2012), and Atwell v. State, 197 So. 3d 1040 (Fla. 2016). The State conceded that Harmon was entitled to resentencing on both counts of second degree murder. Docs. 8-12 at 39; 8-18 at 92. On February 15, 2017, the court granted Harmon's motions and appointed counsel to represent him. Docs. 8-1 at 27-39; 8-6 at 51-61; 8-12 at 43-52; 8-18 at 96-106. Harmon filed a motion for a Faretta[5] inquiry and leave to proceed pro se on July 11, 2017. Doc. 8-1 at 52. After a hearing advising Harmon of the disadvantages of representing himself, the court granted his motion, found that Harmon knowingly and intelligently waived his right to court-appointed counsel, and relieved Harmon's counsel from further representation, effective July 20, 2017.

[5] Faretta v. California, 422 U.S. 806 (1975).

Id. at 60-63.

On October 26, 2017, the court held a resentencing hearing, Docs. 8-4 at 148-206; 8-5 at 1-33, at which Harmon appeared pro se and testified, Doc. 8-5 at 2-5. On December 6, 2017, the court stated in pertinent part:

> All right. Mr. Harmon, I've given much thought to your cases and to you as to what is the appropriate thing to do since this case came to my attention, and certainly since October when we had a sentencing hearing. Instead of going through all the reasons and findings that I made to the sentence that I'm going to impose, I'm not going to do that, they were written in a sentencing order[6] that I'm going to give a copy of to you, the bailiff has that for you now, hopefully it will set out with clarity, that was my intent, to explain why I'm doing what I'm doing. There[] [are] many attachments to that order to back up the findings.
>
> So, pursuant to those findings as to the six counts in the four different cases, I'm going to sentence you to life in prison, give you credit for all the time that you've served, including the jail time.... These sentences are to run concurrently with one [an]other.
>
> As to case numbers ending in 986 and 987, the homicide cases, I'm going to let you know that you have a chance to have the sentence reviewed after 25 years.
>
> As to the cases ending in 984 and 985 [(the non-homicide cases)], you're entitled to a 20 year review.

Doc. 8-5 at 36-37.

---

[6] Docs. 8-1 at 149-70; 9-9.

On December 12, 2017, Harmon filed a pro se motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800. Doc. 8-3 at 208-19. In the motion, he asked for an immediate "sentence review hearing" and asserted that the trial court was biased and vindictive when it sentenced him to life imprisonment, violated Eighth Amendment and ex post facto principles, overlooked rehabilitative evidence provided by Dr. Gregory Prichard, and denied him a meaningful opportunity for early release. Id. The court denied the motion on December 21, 2017. Docs. 8-3 at 220-34; 8-4 at 1-64; 9-11.

On appeal to the First District Court of Appeal (First DCA), Harmon, with the benefit of counsel, argued that the trial court erred when it: (1) found that the primary purpose of sentencing is to punish a juvenile offender; (2) imposed a life sentence; and (3) denied Harmon's pro se motion to correct sentencing error. Docs. 8-5 at 64 (First DCA Case No. 1D18-0111); 8-10 at 292 (1D18-0112); 8-17 at 103 (1D18-0113); 8-23 at 207 (1D18-0114). The State filed answer briefs, Docs. 8-5 at 108; 8-10 at 336; 8-17 at 147; 8-23 at 251, and Harmon filed reply briefs, Docs. 8-5 at 143; 8-10 at 369; 8-17 at 180; 8-23 at 284. The First DCA affirmed on August 30, 2019, Doc. 8-5 at 162, denied Harmon's motion for rehearing, id. at 171, and issued a mandate in each case on March 9, 2020, Docs. 8-5 at 173; 8-11 at 5; 8-17 at 210; 8-23 at 314.

III. One-Year Limitations Period

This action was timely filed within the one-year limitations period. See 28 U.S.C. § 2244(d).

IV. Evidentiary Hearing

In a habeas corpus proceeding, the burden is on the petitioner to establish the need for a federal evidentiary hearing. See Chavez v. Sec'y, Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474 (2007); Jones v. Sec'y, Fla. Dep't of Corr., 834 F.3d 1299, 1318-19 (11th Cir. 2016). "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro, 550 U.S. at 474. The pertinent facts of this case are fully developed in the record before the Court. Because the Court can "adequately assess [Harmon's] claim[s] without further factual development," Turner v. Crosby, 339 F.3d 1247, 1275 (11th Cir. 2003), an evidentiary hearing will not be conducted.

V. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs a state prisoner's federal petition for habeas corpus. See Ledford v.

Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 642 (11th Cir. 2016). "'The purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.'" Id. (quoting Greene v. Fisher, 565 U.S. 34, 38 (2011) (quotation marks omitted)). As such, federal habeas review of final state court decisions is "'greatly circumscribed' and 'highly deferential.'" Id. (quoting Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (quotation marks omitted)).

The first task of the federal habeas court is to identify the last state court decision, if any, that adjudicated the claim on the merits. See Marshall v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1277, 1285 (11th Cir. 2016). The state court need not issue a written opinion explaining its rationale in order for the state court's decision to qualify as an adjudication on the merits. See Harrington v. Richter, 562 U.S. 86, 100 (2011). Where the state court's adjudication on the merits is unaccompanied by an explanation, the United States Supreme Court has instructed:

> [T]he federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.

Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). The presumption may be rebutted by showing that the higher state court's adjudication most likely

relied on different grounds than the lower state court's reasoned decision, such as persuasive alternative grounds that were briefed or argued to the higher court or obvious in the record it reviewed. Id. at 1192, 1196.

If the claim was "adjudicated on the merits" in state court, § 2254(d) bars relitigation of the claim unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Richter, 562 U.S. at 97-98. The Eleventh Circuit describes the limited scope of federal review pursuant to § 2254 as follows:

> First, § 2254(d)(1) provides for federal review for claims of state courts' erroneous legal conclusions. As explained by the Supreme Court in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), § 2254(d)(1) consists of two distinct clauses: a "contrary to" clause and an "unreasonable application" clause. The "contrary to" clause allows for relief only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. at 413, 120 S. Ct. at 1523 (plurality opinion). The "unreasonable application" clause allows for relief only "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id.

> Second, § 2254(d)(2) provides for federal review for claims of state courts' erroneous factual determinations. Section 2254(d)(2) allows federal courts to grant relief only if the state court's denial of the petitioner's claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The Supreme Court has not yet defined § 2254(d)(2)'s "precise relationship" to § 2254(e)(1), which imposes a burden on the petitioner to rebut the state court's factual findings "by clear and convincing evidence." See Burt v. Titlow, 571 U.S. ---, ---, 134 S. Ct. 10, 15, 187 L.Ed.2d 348 (2013); accord Brumfield v. Cain, 576 U.S. ---, ---, 135 S. Ct. 2269, 2282, 192 L.Ed.2d 356 (2015). Whatever that "precise relationship" may be, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'"[7] Titlow, 571 U.S. at ---, 134 S. Ct. at 15 (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849, 175 L.Ed.2d 738 (2010)).

Tharpe v. Warden, 834 F.3d 1323, 1337 (11th Cir. 2016); see Teasley v. Warden, Macon State Prison, 978 F.3d 1349, 1356 n.1 (11th Cir. 2020). Also, deferential review under § 2254(d) generally is limited to the record that was before the state court that adjudicated the claim on the merits. See Cullen v. Pinholster, 563 U.S. 170, 182 (2011) (stating the language in § 2254(d)(1) "requires an examination of the state-court decision at the time it was made").

---

[7] The Eleventh Circuit has described the interaction between § 2254(d)(2) and § 2254(e)(1) as "somewhat murky." Clark v. Att'y Gen., Fla., 821 F.3d 1270, 1286 n.3 (11th Cir. 2016).

Thus, "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 134 S. Ct. 10, 16 (2013). "Federal courts may grant habeas relief only when a state court blundered in a manner so 'well understood and comprehended in existing law' and 'was so lacking in justification' that 'there is no possibility fairminded jurists could disagree.'" Tharpe, 834 F.3d at 1338 (quoting Richter, 562 U.S. at 102-03). This standard is "meant to be" a "difficult" one to meet. Richter, 562 U.S. at 102. A district court's obligation is "to train its attention" on the legal and factual basis for the state court's ruling, not to "flyspeck the state court order or grade it." Meders v. Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1349 (11th Cir. 2019) (citing Wilson, 138 S. Ct. at 1191-92). Thus, to the extent that a petitioner's claims were adjudicated on the merits in the state courts, they must be evaluated under 28 U.S.C. § 2254(d).

VI. Findings of Fact and Conclusions of Law

As ground one, Harmon asserts that his "sentences of life without parole, as applied" to him as a "former juvenile," violate the Ex Post Facto Clause. Petition at 5. As ground two, he states that the life sentences violate his Eighth Amendment right to be free from cruel and unusual punishment. Id. at 7. According to Harmon, when he asked the state court to resentence him "under the new juvenile laws," the court resentenced him to six concurrent life sentences. Id. at 5, 7. Respondents argue that Harmon did not properly exhaust

his claim in ground two in the state courts, and therefore the claim is procedurally barred. Response at 14-17. Harmon did sufficiently exhaust the claims (under grounds one and two) in his December 12, 2017 motion to correct sentencing error. Doc. 8-3 at 208-19. The state court ultimately denied the motion with respect to the claims, stating in pertinent part:

> On October 26, 2017, this Court held a resentencing hearing at which Defendant appeared pro se and testified on his own behalf. Sheila Loizos represented the State and presented the following witnesses: (1) Michael Obringer (former Assistant State Attorney); (2) Laura Tully (Florida Commission on Offender Review); (3) Beverley Jackson-Severance (Defendant's sister); (4) Cheryl Bryan (family member of [the victim] Mr. Langston); (5) Carter Byrd Bryan (family member of Mr. Langston); and (6) Julie Smith (family member of Mr. Langston). On December 6, 2017, this Court resentenced Defendant and entered a sentencing Order that same day. (Exs. F, G.)[8]
>
> In the instant Motion, Defendant raises numerous claims attacking the sentences imposed by this Court on December 6, 2017. Specifically, Defendant alleges his sentences (1) are unconstitutional under the Eighth Amendment; (2) violate ex post facto principles; (3) violate proportionality principles; and (4) demonstrate judicial vindictiveness. Defendant further maintains this Court denied him the appropriate review under [section] 921.1402(2), Florida Statutes.
>
> **Constitutionality of Defendant's Life Sentences**
>
> In Graham, the Court held that for a juvenile who committed a non-homicide offense, the Eighth

[8] Docs. 8-4 at 15-35, Sentencing Order; 36-59, Judgment.

Amendment forbids the sentence of life without parole unless the State allows the juvenile a meaningful opportunity for release. Graham, 560 U.S. at 82. The Florida Supreme Court interpreted Graham to ensure "juvenile non-homicide 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." Henry, 175 So. 3d at 680.

The [United States] Supreme Court later followed with its decision in Miller, holding that for homicide offenses, "mandatory life-without-parole sentences for juveniles" violate the Eighth Amendment's prohibition against cruel and unusual punishment. Miller, 567 U.S. at 470. The Court ruled that the trial court must "follow a 'certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty,' emphasizing that 'youth matters for purposes of meting out the law's most serious punishment.'" Washington v. State, 103 So. 3d 917, 919 (Fla. 1st DCA 2012) (quoting Miller, 567 U.S. at 483). To sentence a juvenile offender, the trial court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, 567 U.S. at 470. Notably, the Supreme Court did not foreclose a court's ability to sentence a juvenile to life in prison without the possibility of parole in homicide cases. Id. at 480.

The Florida Legislature enacted chapter 2014-220 of the Laws of Florida, designed to bring Florida's juvenile sentencing statutes into compliance with the United States Supreme Court's Eighth Amendment juvenile sentencing jurisprudence. Horsley v. State, 160 So. 3d 393, 395 (Fla. 2015). This statute does not foreclose the possibility of sentencing a juvenile to life in prison for homicide and non-homicide offenses, so long as the juvenile receives a review mechanism

within his or her sentence. § 775.082(3)(a), (b), (c), Fla. Stat.

According to Rule 3.781(b),[9] a court must allow the defendant and the State "to present evidence relevant to the offense, the defendant's youth, and attendant circumstances, including, but not limited to those factors enumerated in section 921.1401(2), Florida Statutes." Furthermore, the court is required to allow the defendant and the State "to present evidence relevant to whether or not the defendant killed, intended to kill, or attempted to kill the victim." Fla. R. Crim. P. 3.781(b). The amended statutes now also provide a sentence review mechanism for juveniles sentenced to substantial prison terms. See § 921.1402, Fla. Stat. (2014).

On October 2[6], 2017, this Court held a sentencing hearing in the above-captioned cases and allowed both Defendant and the State to present evidence related to the factors enumerated within section 921.1401(2), Florida Statutes. This Court considered the information presented during that hearing and wrote a sentencing Order to support the sentences it imposed on December 6, 2017. (Ex. F.) This Court's sentences comply with the new juvenile sentencing laws and are, therefore, constitutional. See §§ 775.082(3)(b)2a, (c), 921.1401(2)(a)-(j), Fla. Stat. (2017); see also Graham, 560 U.S. at 82 ("The State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."); Miller, 567 U.S. at 480 ("Although we do not foreclose a sentencer's ability to [impose a life sentence] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably

[9] Florida Rule of Criminal Procedure 3.781, "Sentencing Hearing to Consider the Imposition of a Life Sentence for Juvenile Offenders."

sentencing them to a lifetime in prison."). Defendant is not entitled to relief.

Ex Post Facto

The Constitution prohibits States from enacting ex post facto laws. U.S. Const. Art. I, §10. "The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" Weaver v. Graham, 450 U.S. 24, 28 (1981) (citation omitted).

In response to Miller, the Florida Legislature enacted, and the Governor signed into law, a new juvenile sentencing law, which provided juveniles sentenced for non-homicide and homicide offenses with an opportunity for release. The question presented to the Florida Supreme Court in Horsley was the impact of the newly-enacted legislation on offenders whose offenses predated the new law. Horsley v. State, 160 So. 3d 405 (Fla. 2015). The court held that the new law applied to offenders whose crimes predated its enactment, concluding that because the Legislature had cured the constitutional infirmity, applying the new law was "most consistent with the legislative intent regarding how to comply with Miller." Id. at 406.

As stated by the Fifth District Court of Appeal, the Florida Supreme Court's decision in Hors[le]y "indicate[s] that ex post facto principles generally do not bar applying procedural changes to pending criminal proceedings." State v. Perry, 192 So. 3d 70, 75 (Fla. 5th DCA 2016), reh'g denied (Apr. 20, 2016), review granted, SC16-547, 2016 WL 1399241 (Fla. Apr. 6, 2016), and certified question answered, 210 So. 3d 630 (Fla. 2016).

This Court finds the Fifth District Court of Appeal's reasoning persuasive. It is clear that this new legislation impacts the procedural nature in which sentences for juveniles are imposed – it does not impose a punishment for an act which was not punishable at the time it was committed[,] nor does it impose additional punishment to that which was already prescribed. Accordingly, this Court finds the new juvenile sentencing laws do not violate ex post facto principles. Defendant is not entitled to relief.

Proportionality

Proportionality analysis is objective and guided by "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Jean-Michel v. State, 96 So. 3d 1043, 1045 (Fla. 4th DCA 2012).

As detailed by this Court's sentencing Order, Defendant engaged in a week-long crime spree that terrorized the Riverside community of Jacksonville. (Ex. F.) Defendant's actions resulted in the deaths of Mr. Kennedy and Mr. Langston, and a life-long injury to Mr. Chadwick. The violent nature of Defendant's crimes do[es] not offend the Constitution as "disproportionate." Accordingly, Defendant is not entitled to relief.

Bias and Vindictive Sentencing

Initially, this Court finds Defendant's allegations of vindictive sentencing are not cognizable in a motion to correct sentencing error. Baxter v. State, 127 So. 3d 726, 732 (Fla. 1st DCA 2013) ("We align ourselves, however, with the Second District, which likewise rejects the use of a Rule 3.800(b) motion as a means for raising a judicial vindictiveness claim . . . ." (citing Mendez v. State, 28 So. 3d 948, 950 (Fla. 2d

DCA 2010) ("imposition of a vindictive sentence is fundamental error that may be raised for the first time on appeal."))). In an abundance of caution, however, this Court briefly addresses these claims.

Defendant maintains there is inherent bias and vindictiveness because his sentences violate ex post facto and proportionality principles. As discussed above, this Court finds Defendant's sentences do not violate ex post facto or proportionality principles. As to vindictiveness and bias with regard to mitigation, this Court considered all of the mitigation Defendant presented at the sentencing hearing in the above-captioned case numbers. Defendant specifically alleges this Court did not consider a report by Dr. Gregory Prichard. While this Court granted the State funding for an evaluation completed by Dr. Prichard, the State neither admitted this report during the sentencing hearing nor was the report ever provided to this Court by Defendant. (Ex. H.)[10] Thus, this Court did not review Dr. Prichard's report because it was not before this Court for consideration. As a result, the only information on which this Court could rely to assess the factors within section 921.1401(2)(a)-(j), Florida Statutes, was the information admitted into evidence during the 2017 sentencing hearing, which was comprised of mostly documentation from 1981.

Sentence Review

Defendant alleges he filed a Motion on or about September 20, 2017,[11] requesting a review of his sentence, and subsequently asked for a modification of his sentence after this Court pronounced Defendant's sentence on December 6, 2017. At the December 14, 2017 status hearing, this Court noted that it never received Defendant's alleged September 20, 2017

[10] Doc. 8-4 at 60, Consent Order Granting State's Evaluation of the Defendant.
[11] Doc. 8-3 at 207.

> Motion for Sentence Review, and the Clerk's docket shows no record of this motion.[12]
>
> This Court finds, however, that any allegations related to Defendant's request for a sentence review are moot. As stated at the December 14, 2017 status hearing, this Court will move forward with a sentence review per Defendant's written request received on December 12, 2017. (Ex. I.)[13]

Docs. 8-3 at 222-27 (footnote and selected emphasis deleted); 9-11 at 4-9. The First DCA affirmed the postconviction court's denial of relief per curiam without issuing a written opinion, Doc. 8-5 at 162, and denied Harmon's motion for a written opinion and rehearing on February 17, 2020, id. at 171.

To the extent that the appellate court decided Harmon's claims on the merits, the Court will address the claims in accordance with the deferential standard for federal court review of state court adjudications. After a review of the record and the applicable law, the Court concludes that the state court's adjudication of the claims was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Thus, Harmon is not entitled to relief on the basis of these claims.

---

[12] Doc. 8-5 at 45.

[13] Doc. 8-4 at 61.

Nevertheless, even if the appellate court's adjudication of the claims is not entitled to deference, Harmon's claims are without merit because the record supports the postconviction court's conclusion. In the aftermath of Graham and Miller, the Florida Legislature enacted section 921.1401, titled "Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings," which became effective July 1, 2014. It provides that "the court may conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence." Fla. Stat. § 921.1401(1). Section 921.1401(2) sets forth a non-exhaustive list of ten factors that take into account various aspects of the defendant's youth, background, and offense participation. That section provides:

> In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:
> (a) The nature and circumstances of the offense committed by the defendant.
> (b) The effect of the crime on the victim's family and on the community.
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
> (d) The defendant's background, including his or her family, home, and community environment.
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

> (f) The extent of the defendant's participation in the offense.
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
> (h) The nature and extent of the defendant's prior criminal history.
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
> (j) The possibility of rehabilitating the defendant.

Fla. Stat. § 921.1401(2)(a)-(j).

In the instant action, the trial court held a hearing in October 2017, at which Harmon testified. After the State's argument, Doc. 8-5 at 6-30, Harmon argued as follows:

> It is the defendant's position that a life sentence would be an ex post facto application of the statute for juvenile sentencing as being harsh, mean, and unconstitutional.
>
> With all due respect to the State, the defendant has chosen to remain silent and do[es] not contest anything that's being proffered.
>
> Again, I do apologize for my actions as a child, a juvenile. I was not -- I was anything but -- I'm not a killer, I don't kill women. I never hit my sister. I never threatened my sister.
>
> But it is the defendant's position that he is entitled to receive, okay, 40 years per sentence [to] run concurrent[ly], and for the Court to immediately give a sentence review hearing after that. I've proffered motions to that effect. Again, a life sentence would be just that, cruel and unusual punishment.
>
> As far as what the State presented, they're not the foundation that the defendant is incorrigible,

> uncommon and rare, that rare individual that is worthy of a life sentence. That is unfounded because the last DR [(disciplinary report)] or charge that the defendant received was 31 years ago for an assault or a weapon, and I miraculously went through 31 years without having to repeat that.
>
> I'm not a violent person. I was at one time, and I was a child at one time. I am not a violent person now. I'm not a child now. I have changed. Thank you, sir.

Id. at 30-31.

The court resentenced Harmon a few months later. In a sentencing order, the court described the circumstances of each criminal offense and separately addressed each statutory factor listed in Florida Statutes section 921.1401(2)(a)-(j). Docs. 8-1 at 150-154, 159-68; 9-9 at 3-7, 12-21. The court announced the sentence, stating in pertinent part:

> Based on the information described in each factor above, this Court finds that Defendant did intend to kill Mr. Kennedy and Mr. Langston. While Defendant may not have pulled the actual trigger, this Court finds his active participation in these crimes, as described throughout this Order, demonstrates intent to kill Mr. Kennedy and Mr. Langston. Accordingly, in case numbers 1981-CF-00986 and 1981-CF-00987, Defendant is hereby sentenced to a term of life imprisonment. § 775.082(3)(b)2, Fla. Stat. (2014). As dictated by the new juvenile sentencing laws, Defendant is entitled to a twenty-five-year review of this sentence. §§ 775.082(3)(b)2a, 921.1402(2)(b), Fla. Stat. (2014).
>
> As to case numbers 1981-CF-00984 and 1981-CF-00985, Defendant is hereby sentenced to a term of

> life imprisonment as to each count. § 775.082(3)(c), Fla. Stat. (2014). As dictated by the new juvenile sentencing laws, Defendant is entitled to a twenty-year review of this sentence. §§ 775.082(3)(c), 921.1402(2)(d), Fla. Stat. (2014).

Docs. 8-1 at 168; 9-9 at 21.

As to ex post facto principles, the Eleventh Circuit has stated:

> Article I, Section 9, clause 3 of the United States Constitution states, "No ... ex post facto law shall be passed." The Ex Post Facto Clause prohibits Congress from enacting a law that "appl[ies] to events occurring before its enactment ... [and] disadvantage[s] the offender affected by it[.]" Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (internal quotation marks and citations omitted). An "ex post facto inquiry ... [focuses] not on whether a legislative change produces some ambiguous sort of 'disadvantage,' ... but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Morales, 514 U.S. at 506 n.3, 115 S.Ct. 1597.[14] The Clause does not "forbid[] any legislative change that has any conceivable risk of affecting a prisoner's punishment." Id. at 508, 115 S.Ct. 1597. Instead, the Clause prohibits only those retroactively applied laws that "produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes," id. at 509, 115 S.Ct. 1597, or affects "the quantum of punishment" imposed, Dobbert v. Fla., 432 U.S. 282, 294, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). That prohibition "operates not to protect an individual's right to less punishment, but rather as a means of assuring that an individual will receive fair warning of criminal statutes and the punishments they carry." Hock v. Singletary, 41 F.3d 1470, 1472 (11th Cir. 1995) (citing Dobbert, 432 U.S. at 298, 97 S.Ct. 2290, and

[14] California Dep't of Corr. v. Morales, 514 U.S. 499 (1995).

Weaver v. Graham, 450 U.S. 24, 28–30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).

United States v. Rosello, 737 F. App'x 907, 908 (11th Cir. 2018). Here, Harmon's assertion that the trial court's imposition of life sentences is a violation of ex post facto principles is meritless. See Horsley v. State, 160 So. 3d 393, 405 (Fla. 2015) ("We conclude that applying chapter 2014-220, Laws of Florida, to all juvenile offenders whose sentences are unconstitutional under Miller is the appropriate remedy."). As such, Harmon is not entitled to federal habeas relief as to ground one.

Nor is Harmon entitled to federal habeas relief with respect to his assertion that his life sentences amount to cruel and unusual punishment under the Eighth Amendment. Harmon asserts that his legal arguments are "consistent" with Montgomery v. Louisiana, 577 U.S. 190 (2016),[15] and that life imprisonment "poses a danger of becoming a death sentence" because he is an elderly inmate who feels threatened by "the actual presence of COVID-19" at Union Correctional Institution. Reply at 10. The resentencing court properly applied Florida Statutes section 921.1401 by holding an individualized

[15] The United States Supreme Court stated that "Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and that Miller "rendered life without parole an unconstitutional penalty" for "juvenile offenders whose crimes reflect the transient immaturity of youth." Montgomery, 577 U.S. at 208-09.

sentencing hearing to determine whether a sentence of life in prison or a term of years equal to life imprisonment was an appropriate sentence for Harmon, an offender who was under eighteen years old at the time he committed the crimes. The court made findings relevant to Harmon's youth and attendant circumstances, undoubtedly reflecting that the resentencing court performed the appropriate analysis.

As to the factor concerning the effect of immaturity, impetuosity, or failure to appreciate the risks and consequences on Harmon's participation in the offenses, the court stated:

> While Defendant did not present any evidence as to the science of adolescent brains, this Court is aware of the science and has fully and thoughtfully considered the science on adolescent brain development in deciding an appropriate and constitutional sentence. Higher courts have stated that children are constitutionally different[16] and this Court agrees. Adolescent brain science sheds light on some of the underlying causes of poor judgment and impulsive decision making in youth. Adolescents are more likely to be impulsive, emotional, and unable to appreciate the long-term consequences of their actions. Adolescents are also more likely to give into their impulsive thoughts and engage in risky behavior in order to satisfy their short-term goals.
>
> This Court initially considered the crime against Mr. Chadwick to be more impulsive than the

---

[16] See Miller, 567 U.S. at 480 (stating "we require [the sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison") (footnote omitted); Horsley, 160 So. 3d at 399.

remaining three incidents. There is some evidence in the record that Mr. Chadwick called Defendant and the co-defendant a derogatory term when they asked for a ride home, which may have ignited an impulsive response to the situation as Defendant and the co-defendant did not have a plan once they had Mr. Chadwick in the car. However, Defendant and the co-defendant brought a firearm to the interaction with Mr. Chadwick indicating some thought as to what they wanted to do, which belies the argument that this crime was the impulsive action[] of an adolescent mind.

As to the remaining crimes, however, it is clear that Defendant and co-defendant planned and calculated their actions. For each offense, Defendant and co-defendant approached their victim with the pretense of asking for directions. Defendant and the co-defendant, with the exception of the first victim, chose a vulnerable, older male. Defendant and the co-defendant brought a firearm to each crime and attempted to drive the victims to an isolated area on the Northside with the intent to execute them. Defendant and his co-defendant also went to great lengths to cover-up their involvement in the crimes; backing Mr. Kennedy's car into a parking spot so that the tags would be concealed, fleeing to Miami to avoid detection, and fabricating a story about Giddieup to avoid prosecution for Mr. Kennedy's murder.

While this Court has given adolescent brain science great weight, it finds that Defendant's actions go well beyond the immaturity and impetuosity expected of a juvenile brain. Nothing in the record before this Court supports a conclusion that Defendant was caught up in the moment, or lacked time to thoroughly think about the consequences of his actions. Defendant could have stopped his involvement with his co-defendant after the first incident with Mr. Chadwick. Yet, after the first crime with Mr. Chadwick, Defendant and the co-defendant

> met and decided they would continue down a treacherous path. Defendant made the conscious decision to continue his crime spree and ended or forever changed the lives of the victims.
>
> This Court finds the level of detail and sophistication that went into committing this crime spree in 1981 goes beyond the rash and impulsive nature expected of a juvenile mind, and instead demonstrates how little influence Defendant's youth had on his actions. Indeed, his actions show something more sinister than mere transient youth.

Docs. 8-1 at 164-65; 9-9 at 17-18. After concluding that the statutory factors weighed in favor of imposing life imprisonment, the trial court resentenced Harmon to life in prison.

Notably, Harmon "has not received an inescapable, irrevocable life sentence" because he has a meaningful opportunity for review under Florida Statutes section 921.1402. Bell v. State, 313 So. 3d 1183, 1189 (Fla. 1st DCA 2021) ("Because section 1402 provides a meaningful opportunity for release, a life sentence which is subject to its review does not violate the Eighth Amendment, and a court sentencing a juvenile offender to life under these circumstances need not make any findings of 'irreparable corruption.'") (citing Phillips v. State, 286 So. 3d 905, 909 (Fla. 1st DCA 2019)); see Calabrese v. State, 325 So. 3d 938 (Fla. 5th DCA 2021) (stating "a sentence imposed after proper consideration of the section 921.1401 factors, with the opportunity for a judicial review of the sentence at twenty-five years pursuant to section

921.1402, is constitutional under the Eighth Amendment"). Insofar as Harmon challenges the state court's determination as to the weighing of the statutory factors, "it is the province of the sentencing court to determine how much weight should be given to each" factor during juvenile resentencing. Bell, 313 So. 3d at 1189. Thus, Harmon is not entitled to federal habeas relief as to his assertions under ground two.

VII. Certificate of Appealability Pursuant to 28 U.S.C. § 2253(c)(1)

If Harmon seeks issuance of a certificate of appealability, the undersigned opines that a certificate of appealability is not warranted. The Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this substantial showing, Harmon "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" Miller-El, 537 U.S. at 335-36 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)).

Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find

the district court's assessment of the constitutional claims debatable or wrong. See Slack, 529 U.S. at 484. However, when the district court has rejected a claim on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Upon consideration of the record as a whole, the Court will deny a certificate of appealability.

Therefore, it is now

ORDERED AND ADJUDGED:

1. The Petition (Doc. 1) is **DENIED**, and this action is **DISMISSED WITH PREJUDICE.**

2. The Clerk of the Court shall enter judgment denying the Petition and dismissing this case with prejudice.

3. If Harmon appeals the denial of the Petition, the Court denies a certificate of appealability. Because the Court has determined that a certificate of appealability is not warranted, the Clerk shall terminate from the pending motions report any motion to proceed on appeal as a pauper that may be filed in this case. Such termination shall serve as a denial of the motion.

4. The Clerk of the Court is directed to close this case and terminate any pending motions.

DONE AND ORDERED at Jacksonville, Florida, this 16th day of September, 2022.

Marcia Morales Howard
MARCIA MORALES HOWARD
United States District Judge

Jax-1 3/11
c:
James Harmon III, FDOC #080164
Counsel of Record

Corrected

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Service of Petition for Writ of Habeas Corpus **Case No. 3:09-mc-38-J-MCR**

STANDING ORDER TO SHOW CAUSE
AND
NOTICE TO PETITIONER

THIS CAUSE was initiated upon the filing of a Petition for Writ of Habeas Corpus by the Petitioner. Upon consideration of the Petition (as amended, if applicable) (hereinafter Petition), it is

ORDERED AND ADJUDGED:

Respondents shall have **ONE HUNDRED EIGHTY (180) DAYS**[1] from the date this Order is docketed by the Clerk to respond to the Petition and to show cause why the Petition should not be granted. The response shall address the allegations of the Petition and must comply with Rule 3.01, Local Rules, United States District

---

[1] **RESPONDENTS HAVE ROUTINELY BEEN SEEKING MULTIPLE EXTENSIONS OF TIME TO FILE THEIR RESPONSES TO PETITIONS, NECESSITATING UNPRODUCTIVE WORK FOR THE PARTIES AND THE COURT. TO ADDRESS THIS PROBLEM, THE COURT HAS DETERMINED TO PROVIDE RESPONDENTS 180 DAYS TO FILE THEIR RESPONSE. HOWEVER, THE COURT EXPECTS RESPONDENTS TO TIMELY FILE THE RESPONSE, WITH FURTHER EXTENSIONS BEING RARE. PETITIONER WILL CONTINUE TO HAVE 90 DAYS FOLLOWING RESPONDENTS' RESPONSE TO FILE A REPLY OR NOTICE AS DESCRIBED IN MORE DETAIL BELOW.**

(Corrected)

"Appendix E(1)"

Court, Middle District of Florida.[2] In addition, it shall state whether the Petitioner has exhausted his/her state remedies including any post-conviction remedies available to him/her under the statutes or procedural rules of the state and including also the right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceedings. If it is denied that Petitioner has exhausted his/her state remedies, the response shall contain in detail an explanation of which state remedies are available to the Petitioner.

If the one-year limitation period is applicable to this case, the response shall state whether the Petition was filed within the one-year period of limitation. 28 U.S.C. § 2244(d). The response shall contain a detailed explanation of how the Petition was or was not filed within the one-year limitation period.

The response shall also state whether an evidentiary hearing was accorded Petitioner in a court of the state at either the pre-trial, trial, or post-conviction stage. If such an evidentiary hearing was conducted, the response shall state whether a transcript of the proceedings is presently available and, if not,

---

[2] Unless there is something unique to this particular case, all that is needed is a very brief statement on the standard of review, the law of ineffective assistance of counsel (if applicable) and general habeas corpus law. A more in-depth analysis of the law should be presented only when addressing the merits of the claims and/or exhaustion and procedural default or when asserting untimeliness.

whether and approximately when it may be procured; or, if the transcript is neither available nor procurable, whether a narrative summary of the evidence is available or can be procured within a reasonable time. If the transcript or narrative summary is presently available, or is procurable within the time fixed for filing the response, it shall be filed by the Respondents with the response and the record of the pre-trial, trial, and/or post-conviction proceedings. Otherwise, the response and record shall be filed within that time and the transcript or narrative summary shall subsequently be procured by the Respondents and filed.

Respondents shall submit complete transcripts, not merely portions they deem relevant to the issues presented in the Petition. A complete transcript of the trial and/or plea proceeding should be submitted; however, the voir dire portion of a jury trial is not necessary unless there are issues related to the jury selection. Additionally, with respect to any orders denying any motions for post-conviction relief, all exhibits cited within the order(s) must be submitted for this Court's review.

If the Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the briefs on appeal and of the opinion of the appellate court, if any, shall also be filed by the Respondents with the

response. In addition, the response shall contain the citation(s) to the state court opinion(s) that is (are) reported. The response shall also state whether or not the United States District Court Judge presiding over this case or the United States Magistrate Judge assigned to this case was involved in any of the state court proceedings in the Petitioner's case. Respondents have an ongoing duty to inform the Court of such involvement if the case is hereafter reassigned to another judicial officer.

Respondents shall electronically file the record. The record shall include an electronically bookmarked index with sufficiently detailed bookmarks that identify the title of each exhibit and the page location within the record as electronically filed.

A party who electronically files a document that exceeds twenty-five (25) pages (including exhibits) in length must provide an identical courtesy copy of that document (including exhibits) in paper format to the assigned District Judge's chambers. Further, all submitted exhibits must be tabbed to ease this Court's review of the documentation. For ease in reviewing the exhibits, the parties shall either number or alphabetize their exhibits, but Roman numerals should not be utilized. Both parties shall ensure that all transcripts, briefs and other documentary exhibits accompanying any pleadings which they submit to the Court shall be

individually marked for identification.[3] A table of contents or index shall be included to aid the Court in locating such documentary exhibits. The courtesy copy does not need to be provided simultaneously with the electronic filing of the document; however, the courtesy copy should be submitted within **seven (7) days** of that filing and may be provided via United States mail or other reliable service.

Petitioner shall send a copy of every further pleading, motion, or other paper he/she submits to be filed in this case in the future to Respondents (however, if counsel has appeared on behalf of Respondents, Petitioner shall send one copy directly to counsel for Respondents, rather than sending a copy to each named Respondent). Petitioner shall include with the original pleading or other paper that is submitted to be filed in this case a certificate of service stating the date that an accurate copy of the pleading or other paper was mailed to Respondents or counsel for Respondents. If any pleading or other paper submitted to be filed and considered by the Court does not include such a

[3] The parties shall ensure that paper documents are bound in a manner that permits viewing of the written material on each page. Each volume of documents should be less than two inches thick, so that when the pages are turned, the binder does not collapse and the papers do not dislodge. The parties should not submit a stack of rubber-banded documents for the Court to wade through and assemble. Failure to properly abide may result in the return of documents.

certificate of service, it will be stricken from this case and disregarded by the Court. Petitioner shall advise the Court of his/her current mailing address at all times, especially if the Petitioner is released from custody. Failure to do so may result in the dismissal of this action.

After Respondents file a response, Petitioner, within **NINETY (90) DAYS, shall *either* file a Reply or notify the Court that he/she does not intend to file a Reply, but rather will rely on his/her allegations and claims as stated in the Petition.** If Respondents' response incorporates a motion to dismiss the Petition, *pro se* Petitioner is advised out of an abundance of caution[4] that the granting of this motion would represent an adjudication of this case which may foreclose subsequent litigation on the matter.

If Respondents' response includes documents in support of a request to dismiss/deny the Petition, the Court will construe this request as a motion for summary judgment. In preparing a response, Petitioner should be aware of the provisions of Rule 56 of the Federal Rules of Civil Procedure.

---

[4] See Griffin v. Wainwright, 772 F.2d 822 (11th Cir. 1985), and Milburn v. United States, 734 F.2d 762 (11th Cir. 1984), wherein the court expressed concern about *pro se* litigants in summary judgment cases.

Rule 56 provides that when a motion for summary judgment is supported by affidavits and/or other documents, the party opposing the motion may not depend upon the mere allegations in his pleadings to counter it. Pursuant to Rule 56, the party opposing the motion must respond with counter sworn affidavits and/or documents to set forth specific facts showing that there is a genuine issue of material fact in dispute. If the opposing party fails to respond to the motion or responds, but the response does not comply with the requirements of Rule 56 as stated above, the Court may declare that the facts in the affidavits and/or documents supporting the motion are established as true and that there is no genuine issue of material fact in dispute. In that event, if the applicable law allows, the party or parties who filed the motion will be entitled to have the motion granted and final judgment entered in his/her/their favor based upon the pleadings, affidavits, and other documentation. If the motion is granted, there will be no evidentiary hearing, and the case will be terminated in this Court.

The Clerk of the Court is directed to electronically send a copy of this Order, the Petition, and any memorandum and exhibits that relate to the Petition, to the Respondent(s) and the Attorney

General of Florida. A copy of this Order shall also be served on the Petitioner.

DONE AND ORDERED at Jacksonville, Florida, this 17th day of October, 2018.

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

JAMES R. KLINDT
United States Magistrate Judge

JOEL B. TOOMEY
United States Magistrate Judge

PATRICIA D. BARKSDALE
United States Magistrate Judge

c:
Petitioner
Department of Corrections (via electronic service)
Office of the Attorney General (via electronic service)

Corrected

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES HARMON,

Petitioner,

v.

MARK S. INCH, ET AL.,

Respondent.

CASE NO. 3:19-cv-1080-MMH-JRK

ANSWER IN RESPONSE TO ORDER TO SHOW CAUSE

Respondents (hereinafter referred to as "State"), by and through their undersigned counsel, and pursuant to Rule 5, Rules Governing Section 2254 Cases, respond to this Court's order to show cause and show as follows.

On June 17, 2016, Petitioner filed in this Court a petition for writ of habeas corpus in which he raises two grounds for relief, which the State addresses in this pleading pursuant to McBride v. Sharpe, 25 F.3d 962 (11th Cir. 1994). The State relies solely upon court records for its factual assertions.

(Corrected)

"Appendix E(2)"

STATEMENT OF THE CASE AND FACTS

According to the facts and procedural background of the 1990 Eleventh Circuit Opinion affirming the Middle District of Florida's denial of his petition for writ of habeas corpus, in 1981, Petitioner, who was seventeen years old, pleaded guilty to two counts of second degree murder, one count of armed robbery and one count of kidnapping. In a separate case, he was convicted by a jury of one count of armed robbery and one count of kidnapping. In total, he was adjudicated guilty of committing six felonies, "each punishable by imprisonment for a term of years not exceeding life imprisonment." Sections 782.04(2), 787.01(2) and 812.13(2)(a), Fla. Stat. (1981).

When Petitioner entered his plea, the court advised him that the maximum sentence on each count was life in prison, but there was no plea agreement as to sentence. Instead of life sentences, the trial court sentenced him to six consecutive terms of 100 years each and retained jurisdiction to deny him parole during the first one-third of the total sentence, or for 200 years. Petitioner appealed his sentences, but they were affirmed on appeal. Petitioner filed two postconviction motions, which were denied and affirmed on appeal as well. He

filed a petition for writ of habeas corpus on February 17, 1988, which was also denied. The Eleventh Circuit reviewed Petitioner's case and it affirmed the District Court's Order in Harmon v. Barton, 894 F.2d 1268 (11th Cir. 1990).[1]

In 2016, Petitioner filed a motion pursuant to Florida Rule of Criminal Procedure 3.800 alleging that he was entitled to resentencing in Case Nos 984 and 985 under Graham v. Florida, 560 U.S. 48 (2010). (Ex. A, P. 1-3; Ex. H, P. 174-76; Ex. O, P. 173-87; Ex. V, P. 205-19) He also filed a motion for postconviction relief in Case Nos. 986 and 987 in which he argued his sentences in those cases were illegal pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Atwell v. State, 197 So. 3d 1040, 1050 (Fla. 2016).

---

[1]The records from Petitioner's 1981 case are not in digital format on the District Court of Appeal website. The undersigned attorney, along with the majority of the staff from the Office of the Attorney General, are currently working from home to comply with the county and Statewide Stay at Home orders. In order to provide this Court with documents from Petitioner's original appeals, the State would have to retrieve archived records from various sites and locations. Because of the Statewide Stay at Home orders, gathering all of those old case records would be very difficult. As a result, the undersigned respectfully asks this court to take judicial notice of the files from the State's Response to Petitioner's previous habeas petition, found in case number 3:15-cv-999-BJD-PDB. This habeas petition is authorized due to a resentencing in 2017. All records from the 2017 proceedings are being provided in the Appendix to this Response.

The court granted the motions and appointed counsel to represent him at resentencing. (Ex. A, P. 4-16; Ex. H, P. 203-13; Ex. O, P. 218-26; Ex. V, P. 244-54) Petitioner filed a pro se motion to discharge counsel, which was dismissed as moot. (Ex. A, P. 22-28; Ex. H, P. 220-26; Ex. O, P. 271-77; Ex. V, P. 272-78) He then filed a motion for a Faretta inquiry and leave to proceed pro se, which was granted after a hearing. (Ex. A, P. 29, 37-40; Ex. H, P. 227, 235-38; Ex. O, P. 278, 286-89; Ex. V, P. 279, 287-90) He represented himself at the resentencing hearing on October 26, 2017.

On December 6, 2017, the trial court announced Petitioner sentence in open court, sentencing him to life in prison on all four cases, to run concurrent and entered a written order outlining its findings. The court found that Petitioner was entitled to a judicial review of his sentences after 20 years for cases 984 and 985 and after 25 years for cases 986 and 987. (Ex. A, P. 118-23; Ex. H, P. 433-438; Ex. O, P. 595-600; Ex. V, P. 598-603)

Petitioner filed motions to correct sentencing errors in each of his trial court cases, claiming that his life sentences were vindictive, that the court ignored rehabilitation evidence, that the life sentences violated ex post facto principles, and that he was entitled to a sentencing review hearing. (Ex. A, P. 697-708; Ex. H, P.

922-33; Ex. O, P. 1085-96; Ex. V, P. 1087-98). The trial court entered orders denying Petitioner's motions to correct sentencing orders. (Ex. A, P. 709-87; Ex. H, P. 934-1012; Ex. O, P. 1097-1175; Ex. V, P. 1099-1177).

Petitioner appealed the denials of his motions to correct sentencing orders in First District Court of Appeal Case numbers 1D18-0111, 1D18-0112, 1D18-0113, and 1D18-0114. (Ex. B, Ex. I, Ex. P, Ex. W) The cases were per curiam affirmed on August 30, 2019. (Ex. E, Ex. L, Ex. R, Ex. Z) The Court's mandates were issued on March 9, 2020. (Ex. G, Ex. N, Ex. U, Ex. BB)

Petitioner filed his Federal Petition for Writ of Habeas Corpus on September 27, 2019.

GENERAL PRINCIPLES

Habeas corpus is an extraordinary remedy reserved for defendants who were grievously wronged by the criminal proceedings. Calderon v. Coleman, 525 U.S. 141, 146 (1998). "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc). The state court's factual findings are generally entitled to a presumption of correctness and

may be ignored only if the petitioner shows by clear and convincing evidence that the state court's determination was not fairly supported by the record. Johnson v. Alabama, 256 F.3d 1156, 1169 (11th Cir. 2001)(reviewing a pre-AEPDA habeas petition) (citing Griffin v. Wainwright, 760 F.2d 1505, 1511 (11th Cir.1985) (quoting pre-AEDPA § 2254(d)). This presumption is equally applicable to state appellate court findings of fact. Johnson v. Alabama, 256 F.3d 1156, 1169 (11th Cir. 2001) (citing Sumner v. Mata, 449 U.S. 539, 549 (1981)). These standards "reflect[] the 'presumption of finality and legality' that attaches to a conviction at the conclusion of direct review . . ." Calderon, 525 U.S. at 144-46.

Because the habeas petition was filed after the 1996 effective date of the AEDPA, Petitioner must also meet the strict standards of that statute. *See* Williams v. Taylor, 529 U.S. 420, 429 (2000); Lindh v. Murphy, 521 U.S. at 336-37. The Eleventh Circuit has summarized:

> [P]ursuant to 28 U.S.C. § 2254(d), a petition for a writ of habeas corpus can only be issued if the state court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); *see also Williams v. Taylor*, 120 S. Ct. 1495, 1518 (2000), *cert. denied*, 22 S. Ct. 1367 (2002).

Van Poyck v. Fla. Dep't of Corrections, 290 F.3d 1318, 1321 (11th Cir. 2002). AEDPA's Section 2254(d) provides a highly deferential standard for evaluating state-court rulings. This same standard of deference applies when there is no statement of why the state court ruled as it did. The Supreme Court has explained: "Where a state court's decision is unaccompanied by any explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated." Harrington v. Richter, 131 S.Ct. 770, 783 (January 19, 2011). Furthermore, when a state court is properly presented with a federal claim and the state court is silent as to its reasons for denying a claim, a federal court may presume that the decision was one that was on the merits. *See* id. at 783-784.

The Supreme Court has also explained the procedure by which a habeas court must consider before granting a petitioner's claims, requiring the habeas court to consider all possible rationales for the state court's denial of relief and then explain why each is an unreasonable application of federal law as interpreted by the Supreme Court:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme Court.]

Id. at 786. The Supreme Court has explained that a petitioner's ability to obtain habeas relief was designed to be extremely difficult and requires a showing that no fairminded jurist would have found the way the state court did:

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. . . . If this standard is difficult to meet, that is because it was meant to be. As amended by the AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings . . . It preserves authority to issue the writ in cases where there is *no possibility fairminded jurists could disagree that the state court's decision conflicts with [United States Supreme Court] precedents. It goes no farther.* Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunction in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*

Id. at 786–787 (italics added).

The Petition does not demonstrate that Petitioner has been grievously wronged, that this is one of the "few and far between" cases where a petitioner is entitled to prevail, and Petitioner has not facially overcome the "presumption of finality and legality" of his state court conviction and sentence. Although Respondent addresses select procedural bars and addresses the claims on the merits, **Respondent asserts all available procedural bars.**

The AEDPA also imposed strict timeliness requirements on the filing of a federal habeas petition.

ISSUE I

WHETHER THE STATE COURT'S DENIAL OF PETITIONER'S CLAIM THAT HIS SENTENCES VIOLATE EX POST FACTO PRINCIPLES WAS CONTRARY TO OR AN UNREASONABLE APPLICATION OF FEDERAL CONSTITUTIONAL LAW (Restated)

PETITIONER'S ALLEGATION:

Petitioner argues that the trial court erred in denying his claim that his sentences violated ex post facto principles.

A. EXHAUSTION OF STATE REMEDIES.

In compliance with Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), and 28 U.S.C. § 2254(b), Petitioner exhausted his state court remedies on this ground by presenting this argument in his motions to correct sentencing error. (Ex. A, P. 697-708; Ex. H, P. 922-33; Ex. O, P. 1085-96; Ex. V, P. 1087-98).

B. LEGAL ARGUMENT.

As previously stated "[A] federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) 'contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). In the case at bar, Petitioner claims that the trial court erred in denying his claim that his sentences violated ex post facto principles. However, Petitioner is unable to establish that the state court decision denying that claim for relief was contrary to or an unreasonable application of federal law.

In Graham v. Florida, 560 U.S. 48 (2010), the United States Supreme Court held that for a juvenile who committed a non-homicide offense, the Eight Amendment forbids the sentence of life without parole unless the State allows the juvenile a meaningful opportunity for release. Id. at 82. The Florida Supreme Court interpreted Graham to ensure "juvenile non-homicide 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. Henry v. State, 175 So. 3d 675 (Fla. 2015).

In this case, Petitioner filed a motion to correct his sentence on July 19, 2016 in case numbers 1981-CF-00984 and 1981-CF-000985. In its order of February 15, 2017, the trial court granted Petitioner's motion for resentencing on his non-homicide offenses in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014. Petitioner also filed a motions for postconviction relief in case numbers 1981-CF-00986 and 1981-CF-00987 in which he argued that his sentences in those cases were illegal pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Atwell v. State, 197 So. 3d 1040, 1050 (Fla. 2016). The court granted Petitioner rehearing on his second degree murder cases on February 27, 2017.

On October 26, 2017, the trial court held a resentencing hearing at which Petitioner appeared pro se. On December 6, 2017, Petitioner was resentenced on all counts. Although Petitioner describes his sentences as "without parole" in his petition for writ of habeas corpus, he was sentenced to life in prison with reviews after 25 years for the second degree murder sentences (cases 986 and 987) and after 20 years on the non-homicide offenses (cases 984 and 985). (Ex. A, P. 118-23; Ex. H, P. 433-438; Ex. O, P. 595-600; Ex. V, P. 598-603)

Under this claim for relief, Petitioner argues that his new sentences violated ex post facto principles. His argument is without merit. The Constitution prohibits States from enacting ex post facto laws. U.S. Const. Art. I, §10. "The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" Weaver v. Graham, 450 U.S. 24, 28 (1981).

As noted in the trial court's order denying this claim for relief, in response to Miller, the Florida legislature enacted a new juvenile sentencing law, which provided juveniles sentenced for non-homicide and homicide offenses with an opportunity for release. In Horsley v. State, 160 So. 3d 405 (Fla. 2015), the

Florida Supreme Court considered the impact of that newly enacted legislation on offenders whose offenses predated the new law. The Court held that the new law applied to offenders whose crimes predated its enactment, concluding that, because the Legislature had cured the constitutional infirmity, applying the new law was "most consistent with the legislative intent regarding how to comply with Miller." Id. at 406.

The Florida Supreme Court's decision in Horsley "indicates that ex post facto principles generally do not bar applying procedural chances to pending criminal proceedings." State v. Perry, 192 So. 3d 70, 75 (Fla. 5th DCA 2016), reh'g denied (Apr. 20, 2016), review granted, SC16-547, 2016 WL 1399241 (Fla. Apr. 6, 2016), and certified question answered, 210 So. 3d 630 (Fla. 2016).

In denying this claim for relief, the trial court found that the reasoning of the Fifth DCA was persuasive. It pointed out that the new legislation impacted the procedural nature in which sentences for juveniles were imposed, it did not impose a punishment for an act which was not punishable at the time it was committed, nor does it impose additional punishment to that which was already prescribed. As a result, it held that the new juvenile sentencing laws did not violate ex post facto

principles and denied Petitioner's claim for relief. (Ex. A, P. 709-87; Ex. H, P. 934-1012; Ex. O, P. 1097-1175; Ex. V, P. 1099-1177). It did not err in doing so.

Under the facts of this case, Petitioner cannot establish that the trial court's decision denying this claim for relief was contrary to or on this ground was contrary to or an unreasonable application of federal constitutional law.

ISSUE II

WHETHER PETITIONER FAIRLY PRESENTED HIS CLAIM THAT HIS LIFE SENTENCES AMOUNTED TO CRUEL AND UNUSUAL PUNISHMENT (Restated)

PETITIONER'S ALLEGATIONS:

Petitioner argues that the trial court erred in denying his claim that his life sentences amounted to cruel and unusual punishment.

A. EXHAUSTION OF STATE REMEDIES:

This issue was not properly raised in the trial court below. Petitioner raised claims in his direct appeal and motion to correct sentence that the trial court erred in imposing life sentences in his case based on claims of proportionality principles and vindictiveness. However, he did not raise the claim that he raises here, that his sentences constituted cruel and unusual punishment. As a result, the trial court

never considered the merits of Petitioner's claim and it was not properly exhausted. In order to meet the exhaustion requirement for federal habeas corpus relief, a defendant must present his federal claim to the state court. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The United States Supreme Court stated that:

> If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution, . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Picard v. Connor, 404 U.S. at 276, 92 S.Ct. at 513 (citations omitted). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887, 888 130 L.Ed.2d 865 (1995). Therefore, the Duncan court held that "[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he

must say so, not only in federal court, but in state court. Duncan v. Henry, 115 S.Ct. at 887.

Nevertheless, the two year time period to file a Florida Rules of Criminal Procedure 3.850 motion has long since expired. Therefore, Petitioner cannot properly raise this claim in state court now. Thus, in a technical sense, Petitioner has exhausted his state remedies because the exhaustion requirement may be satisfied if it is clear that the defendant's claims are procedurally barred under state law. Castille v. Peoples, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989)(Submitting a claim to the state court in a procedural context in which its merits will not be considered absent special circumstances does not constitute fair presentation.).

B. LEGAL ARGUMENT:

Because Petitioner failed to properly raise this issue, he must show cause for his failure to raise the claim in state court and prejudice resulting therefrom. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Widdon v. Dugger, 894 F.2d 1266 (11th Cir. 1990). To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts"

to raise the claim previously. Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001).

To show prejudice a petitioner "must show 'not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting this entire trial with errors of constitutional dimensions.'" Id., citing United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982). Petitioner has not offered justifiable cause for his failure to properly present the claim to the state court, nor can he establish the requisite prejudice.

As previously stated "[A] federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) 'contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States.'" Williams v. Taylor, supra. In the case at bar, Petitioner claims that the trial court erred in denying his claim that his life sentences amounted to cruel and unusual punishment. However, Petitioner is unable to show cause for his failure to properly raise the claim in state court. Petitioner is unable to show prejudice either.

As noted under Issue I, Petitioner refers to his sentences as "life without parole" in his petition for writ of habeas corpus. However, after resentencing, he was not sentenced to life without parole. His sentences were to life in prison with reviews after 20 or 25 years. (Ex. A, P. 118-23; Ex. H, P. 433-438; Ex. O, P. 595-600; Ex. V, P. 598-603) He claims that his sentences amount to cruel and unusual punishment. His argument is without merit.

To violate the Cruel and Unusual Punishments Clause, a prison sentence must, at least, be grossly disproportionate to the crime. Adaway v. State, 902 So. 2d 746, 749 (Fla. 2005). A life sentence is not grossly disproportionate to the crime of possession of one and a half pounds of cocaine. Harmelin v. Michigan, 501 U.S. 957 (1991). Nor is a twenty-five years to life sentence grossly disproportionate to the crime of shoplifting three golf clubs after previous convictions of three burglaries and one robbery. Ewing v. California, 538 U.S. 11 (2003). In this case, as noted by the trial court in denying Petitioner's motion to correct sentence with respect to his disproportionality claim, Petitioner was sentenced to life in prison after engaging "in a week-long crime spree that terrorized the Riverside community of Jacksonville. [His] actions resulted in the deaths of Mr. Kennedy and Mr. Langston, and a life-long injury to Mr. Chadwick. The

violent nature of [Petitioner's] crimes do not offend the Constitution as 'disproportionate." (Ex. A, P. 709-87; Ex. H, P. 934-1012; Ex. O, P. 1097-1175; Ex. V, P. 1099-1177). In addition to the evidence of the crimes themselves, the re-sentencing court also considered Petitioner's conduct in prison since he was first sentenced, including extensive disciplinary violations and two additional criminal convictions received since being incarcerated. A life sentence for a non-homicide offense is legal pursuant to Graham and was properly imposed in this case based on the facts of the crimes themselves and Petitioner's conduct since he was originally sentenced.

In Graham v. Florida, supra, the United States Supreme Court found that the imposition of a mandatory life without parole sentence for a juvenile offender who did not commit a homicide offense violated the Eighth Amendment prohibition against cruel and unusual punishment. However, Graham does not eliminate the possibility of a juvenile who committed a non-homicide offense being sentenced to life in prison. A life sentence for a nonhomicide offender is explicitly allowed by Graham which states:

> 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 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 judgement at the outset that those offenders will never be fit to reenter society.

Id. at 75, (emphasis added). The Florida Supreme Court has also held that a juvinilee offender's sentence of life with the possibility of parole after twenty-five years does not violate the Eighth Amendment. State v. Michel, 257 So. 3d 3 (Fla. 2018)(juvenile defendant's life sentence with possibility of parole after 25 years, imposed upon his conviction of first-degree premeditated murder, was not equivalent of life without possibility of parole and, thus, was not cruel and unusual punishment under Eighth Amendment).

Petitioner's resentencing in this case was conducted as required by Graham. Petitioner was given the opportunity for release through parole hearings fifteen times over the course of his incarceration. After those hearings, Petitioner also received the resentencing hearing which is at issue in this case. Pursuant to

Michel, Petitioner is not entitled to resentencing because his original sentence included the opportunity for parole and he received fifteen parole hearings. Plus, he has more parole hearings scheduled for the future. Therefore, even if Petitioner's resentence was vacated, his original sentence should be reimposed because it is no longer illegal.

Nevertheless, the facts of Petitioner's case support the trial court's sentence of life in prison. The record reflects that Mr. Chadwick's deposition, entered into evidence as part of the State's case during resentencing, included information that, during the kidnapping, Petitioner pulled him out of the car and terrorized him by putting a gun to his head and encouraging his co-defendant to kill him. The deposition also detailed how Mr. Chadwick managed to escape Petitioner, despite being shot in the knee. (Ex. O, P. 528-73; Ex. V, P. 462-507)

Even though the evidence did not show that Petitioner was the shooter in any of the crimes, the evidence showed that he was aware that the crimes that he was involved in were homicides or attempted homicides, and that he was an equal participant in the planning and execution of the crimes with his co-defendant. Mr. Obringer, who prosecuted the cases, testified that all four of the cases happened in a one-week period that terrorized the community, particularly because the evidence

showed that Petitioner and his co-defendant deliberately selected vulnerable victims who could be easily controlled. The evidence also showed that Petitioner fled after the final crime. He was apprehended in Miami in the victim's car with the murder weapon. (Ex. A, P. 871-962; Ex. H, P. 1190-1281; Ex. O, P. 1353-1444; Ex. V, P. 1355-1446)

In addition, Petitioner's behavior in prison has not supported his claim that he had been rehabilitated before the resentencing hearing. At the resentencing hearing, the State introduced all of Petitioner's parole records and all of his records from the Department of Corrections. Witness testimony established that several of Petitioner's probation hearings were cancelled due to him accumulating disciplinary reports. Ms. Tully testified that Petitioner had received thirty disciplinary reports in prison, seven of which were related to threats or assaults, eight of them were drugs and alcohol. In addition, Ms. Tully testified that, since Petitioner has been in prison, he was convicted of two new crimes. In December of 1983, Petitioner was convicted of four counts of assault and one count of battery of a law enforcement officer. In May of 1987, Petitioner was convicted of possession of a homemade knife. (Ex. A, P. 897-904; Ex. H, P. 1216-23; Ex. O, P. 1379-86; Ex. V, P. 1381-88)

The sentencing judge's order shows that he fully considered all of the evidence presented at the hearing and that evidence was sufficient to justify the sentences imposed. Petitioner was sentenced within the range proscribed by law. They simply do not rise to the level of cruel or unusual. As a result, even if Petitioner could show cause for his failure to properly present this claim, he is unable to show prejudice. Therefore, this claim must be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully submits that each claim of the petition for a writ of habeas corpus should be denied, without any evidentiary hearing.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Jennifer J. Moore

JENNIFER J. MOORE
Assistant Attorney General
Florida Bar No. 0495921

Office of the Attorney General
Pl-o1, the Capitol
Tallahassee, Fl 32399-1050
Jennifer.moore@myfloridalegal.com
Crimapptlh@myfloridalegal.com
(850) 414-3300
(850) 922-6674 (Fax)

COUNSEL FOR RESPONDENTS
[AGO# L19-1-12943]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, and that I furnished a copy hereof by mail to James Harmon, DC# 080164, Union Correctional Institution (MALE), P. O. Box 1000 Raiford, Florida 32083, this 1st day of May, 2020.

/s/ Jennifer J. Moore

Jennifer J. Moore
Assistant Attorney General

Prelictable.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES HARMON, III
Petitioner,

(Corrected)

v.

CASE NO: 3:19-CV-1080-MMH-JRK.

MARK S. INCH, et. al.,
Respondent.
_____/

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO SHOW CAUSE ORDER

On, September 27, 2019, Petitioner filed in this Court a: 28 U.S.C. Section 2254, Petition For Writ of Habeas Corpus. Affidavit #1.

On, November 19, 2019, by order of the Court, Respondent was given 180 days to respond to Petitioner's Petition For Writ of Habeas Corpus, 28 U.S.C. Section 2254. Affidavit #2.

On, May 1, 2020, Respondent's filed a timely response. Affidavit #3.

(corrected)

"Appendix E(3)"

PROCEDURAL AND FACTUAL HISTORY OF CAUSE OF ACTION

In, 2016, Petitioner filed in the Circuit Court, Fourth Judicial Circuit, Duval County, Florida, a Motion pursuant to: Florida Rules of Criminal Procedure, Rule 3.800(a): Motion To Correct Illegal Sentence. Affidavit #4.

Petitioner alleged therein he was entitled to be resentenced in accordance with the decision announced by the United States Supreme Court in: Graham v. Florida, 560 U.S. 48 (2010), identifying four non-homicide offenses as '*de facto*' Life sentences: Case No: #81-984CF, Count-One (1), Armed Robbery; Count Two (2), Kidnapping, Case No. #81-985CF, Count One (1), Armed Robbery; Count-Two (2) Kidnapping.

Petitioner filed in the Circuit Court, Fourth Judicial Circuit, Duval County, Florida, a Motion pursuant to: Florida Rules of Criminal Procedure, Rule 3.850(b)(2), Motion For Post-conviction Relief. Petitioner alleged therein his sentences were Illegal pursuant to: Miller v. Alabama, 567 U.S. 460 (2012), Case No. #81-987CF, Count-One, (1), Second-degree Murder: Atwell v. State, 197 So. 3d 1040-1050 (Fla. 2016). Affidavit #5. case no#81-986CF, count-one, second degree murder.

On, October 26, 2017, in accordance with State law, the Circuit Court conducted an 'Individualized Sentencing Hearing.' Affidavit #6.

On, December 6, 2017, the Circuit Court entered New Judgments and Sentences. Affidavit #7.

On: December 6, 2017, Transcript of Sentencing Hearing. Affidavit #8.

On, December 6, 2017; Sentencing Order. Affidavit #9.

On, December 12, 2017, Petitioner timely filed a: Florida Rules of Criminal Procedure, Rule 3.800(b), "Motion To Correct Sentencing Errors." Affidavit #10.

On: December 21, 2017, the Court entered an order denying the 'Motion to correct Sentencing Errors.' Affidavit #11.

On: January 3rd, 2018, A Notice of Appeal was filed to the First District Court of Appeals. Case No. #1D18-0111; Case No. #1D18-0112; Case No. #1D18-0113; Case No. #1D18-0114; -- three questions were presented for review:

1. The Court erred in finding that the Primary Purpose of sentencing is to punish a Juvenile offender.

2. The Court erred in imposing a Life Sentence.

3. The Court erred in denying Mr. Harmon's *prò se* Motion to Correct Sentencing Errors.

On, August 30, 2019, the First District Court of Appeals '*per curiam, affirmed,*' the decision of the Circuit Court. Affidavit #12.

On, March 9, 2020, Mandate issued in the cases noted as:
Case No.# 1D18-0111; Case No. #1D18-0112; Case No. #1D18-0113; Case No. #1D18-0114; Affidavit #13. Affidavit #14. Affidavit #15. Affidavit #16.

Whether Petitioner can establish requisite standing within meaning of Article III, to invoke this court's Federal remedial powers? Whether Petitioner, within the meaning of Article III's minimum requirement establish a case-or-controversy?

Article III, Section 2, Clause 1, United States Constitution.

I, the Petitioner, James Harmon III, a citizen of the State of Florida, and within the meaning of Article III of the United States Constitution; I am the proper party to initiate this cause of action, and have a personal stake in the outcome of this controversy as to warrant the invocation of this Federal Court's remedial powers, and to justify those Jurisdictional powers on his behalf. I allege the following:

I, the Petitioner, James Harmon III. I am the proper party in this cause of action, and hereby seek Federal Judicial interference of an actual injury; to wit: The State of Florida's execution of an *ex post facto* Life without Parole sentence. Affidavit #7, Affidavit #8, Affidavit #9, Affidavit #11. The State's execution of an *ex post facto* Life without Parole sentence is an injury that is distinct and palpable, the cause of the injury can be fairly traced to the State's application of: Florida Statute, section 775.082; Florida Statute, section 921.1401 (2017). Accordingly, section 775.082; and section 921.1401, Florida Statute, as applied, is unconstitutional as it's application both increase the level of punishment, and, retroactively deprives Petitioner of Parole eligibility. Hewitt v. Helms, 103 S. Ct. 864 (1983).

The actual injury of the State's execution, of an *ex post facto* Life without Parole sentence, violate 'two' of the four categories of *ex post facto laws* set forth by Justice Chase more than 200 years ago. Calder v. Bull, 3 U.S. (3 Dall), 386, 1 L.

Ed. 648, 3 Dall, 386 (1798):

Category three: "Every Law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed."

Category Four: Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Stogner v. California, 539 U.S. 607 (2003).

Florida Statute, section 775.082, and Florida Statute, Section 921.1401, (as applied) is unconstitutional and it's causal connection can be fairly traced to the challenged action as the effect thereof, to wit: The retroactive application to cause an *ex post facto* Life without Parole sentence or result. The 'Injury-in-fact' would be redressed by an order from this court declaring: Florida Statute, Section 775.082, and Florida Statute, section 921.1401 (2017), as applied, unconstitutional. Montgomery v. Louisiana, 136 S. Ct. 718 (2016). In support of it's holding that a conviction obtained under an unconstitutional law warrants habeas relief, the court cited: *Ex Parte Siebold*. 100 U.S. 371 (1880), "... an unconstitutional law is void, and is as no law." Ibid. A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional.

ISSUE NO# 1

Whether relevant State Court's denial of Petitioner's claim that Sentences of Life without Parole violate *ex post facto* principles, Contrary to or an unreasonable application of Federal Constitutional Law?

As a general Principle:

Any law is *ex post facto* which inflicts a greater punishment than The law annexed to the crime when committed, or which alters The situation of the accused to his disadvantage. Calder v. Bull, 3 Dall, 386, 1. L. Ed. 648.

Throughout the course of these proceedings, Petitioner assert Eighth Amendment Immunity, United States Constitution. Although the State has failed to raise, specifically , the 'cause' of the relevant State Court's denial of this cause of action; the execution of an *ex post facto* Life without Parole sentence, eclipse any affirmative defense the State would present.

The dispute, or controversy, at issue is the State Court's rational that resentencing Petitioner was a matter of Procedure; citing: Weaver v. Graham, 450 U.S. 24, 28 (1981), in addition the State Court, to support it's reasoning, cited: Horsley v. State, 160 So. 3d 405 (Fla. 2015), ... Horsley. "indicates that *ex post facto* principles generally do not bar applying procedural changes to pending criminal proceedings." State v. Perry, 192 So. 3d 70, 75 (Fla. 5th DCA 2016), (rehearing denied). Review granted, SC16-547, 2016 WL 1399241 (April 6, 2016). Certified Question Answered. 210 So. 3d 630 (Fla. 2016). Affidavit #11.

Thus, in citing: Weaver v. Graham, 450 U.S. 24, 28 (1981), the relevant State Court through inference, implied an unreasonable application of Federal Constitutional Law, to wit: that the Juvenile sentencing hearing conducted under: Florida Statute, Section 775.082: Florida Statue, Section 921.1401 (2017), was a (matter of procedure) that the effect of resentencing Petitioner to Life without Parole was (Procedural in nature). Affidavit #6.

Petitioner aver, the State Court's denial of the Rule 3.800(b), 'Motion To Correct Sentencing Errors,' was a ruling on the merits, the order of denial "....involved an unreasonable application of ... clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. Section 2254(d)(1)-(2): Graham v. Florida, 560 U.S. 48 (2010): Miller v. Alabama, 567 U.S. 460 (2012), and, Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

Petitioner's decision in seeking: 28 U.S.C. section 2254, as an adequate remedy, is predicated upon the landmark decision determined in: Montgomery v. Louisiana, 136 S. Ct. 718 (2016), citing: Griffith v. Kentucky, 479 U.S. 314, 328 (1987). Affidavit #1.

The Court, in response to the State of Louisiana's argument that: Miller v. Alabama, 567 U.S. 460 (2012), was procedural, because it did not place any punishment beyond the State's power to impose. That argument, the Court held, "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that "regulate(s) only the manner of determining the defendant's culpability." Miller, the Court held, announced new substantive rules of Constitutional Law that is retroactive in cases on collateral review.

Accordingly, Florida Statute, Section 775.082; and, Florida Statute, Section 921.1401 (2017), as applied is unconstitutional, and violate new substantive rules of Constitutional Law, as said statute(s) were applied to ... effect an *ex post facto* Life without Parole sentence. Affidavit #9.

Ibid. Montgomery, Supra. If however, the constitution establishes a rule and requires that the rule have retroactive application, then a State Court's refusal to give the rule retroactive effect is reviewable by this Court. Cf. Griffth v. Kentucky, 479 U.S. 314, 328 (1987). (holding that on direct review, a new constitutional rule must be applied retroactively "to all cases, State or Federal.") Court's must give retroactive effect to new substantive rules of Constitutional Law. Substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a class of defendant's because of their status or offense." Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

Petitioner's punishment, an *ex post facto* Life without Parole sentence, was imposed because of his status, i.e., a Class of Juvenile offenders whose crimes reflect the transient immaturity of youth, 492 U.S., at 330. Penry.

ISSUE 2

Whether sentence of Life without Parole, as applied violate Eighth Amendment's Prohibition on sentencing Juveniles to Life without Parole cruel and unusual Punishment?

The State raises a lack of exhaustion defense, arguing that Petitioner did not properly raise this issue before the relevant State Court. Affidavit # 3.

In responding to this claim of failure to exhaust; Petitioner assert Eighth Amendment Immunity. The right to invoke immunity vests in the Landmark case of: Montgomery v. Louisiana, 136 S. Ct. 718 (2016). "The ... Possibility of a valid result does not exist where a substantive rule has eliminate a State's Power to proscribe the defendant's conduct or impose a given punishment," "Even the use of impeccable fact finding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally immune from punishment." United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971), nor could the use of flawless sentencing procedures legitimate a punishment where the constitution immunizes the defendant from the sentence imposed. Ibid.

It is obvious, the relevant State Court did not feel ... compelled, to give retroactive effect to a substantive constitutional right, and, the State upon execution of the punishment of Life, as applied, *ex post facto*, approves the decision. Affidavit #9.

See: Griffith v. Kentucky, 479 U.S. 314 (1987). "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates

basic norms of constitutional adjudication." 479 U.S. at 322. (emphasis).

The retroactive application of: Florida statute, Section 775.082; and, Florida statute, section 921.1401 (2017), to punish the Petitioner for criminal conduct committed three and a half decades earlier, shows conclusively, the State never had any intentions on honoring the rights of Petitioner (a Juvenile offender).

Consequently; Florida statute, section 775.082: and, Florida statute, section 921.1401 (2017), as applied is unconstitutional, and imposed contrary to ... clearly established Federal law as determined by the Supreme Court of the United States. Affidavit #6. Affidavit #9.

CONCLUSION: Petitioner's legal argument is consistent with the United States Supreme Court's decisions in: Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012); and, Montgomery v. Louisiana, 136 S. Ct. 718 (2016), controls, as a substantive matter, the outcome of the challenge.

RELIEF REQUESTED: That Florida statute, section 775.082; and, Florida statute, section 921.1401 (2017), as applied, be declared unconstitutional.

Due to the actual presence of Covid-19, the virus is here at Union Correctional Institution, Petitioner's concern is that the State's execution of an *ex post facto* Life without Parole sentence, poses a danger of becoming a death sentence. Petitioner is of a class of elderly prisoners and feel threatened by the actual presence of the virus here at Union Correctional Institution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the forgoing: 'Petitioner's Reply to Respondent's Response to Show Cause Order,' with corresponding Affidavits: has been placed in the hands of prison officials for mailing, by U.S. Mail, to: Honorable Jennifer J. Moore, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida, 32399-1050; this 15 day of June, 2020.

Respectfully submitted,

James Harmon III, #080164
Union Correctional Institution
P.O. Box 1000
Raiford, Florida 32083

DECLARATION

Pursuant to: 28 U.S.C. section 1746, I DECLARE and VERIFY under penalty of perjury, under the Laws of the United States of America, that the foregoing instrument is true and correct. Executed on this 15 day of June, 2020 by the undersigned.

James Harmon III, #080164
Union Correctional Institution
P.O. Box 1000
Raiford, Florida 32083

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Copy
Provided to Suwannee Correctional Institution on:
OCT 14 2022
for mailing, by: CMQ

JAMES HARMON, III,
Petitioner,

-vs- **CASE NO.: _____**

SECRETARY, FLORIDA,
DEPARTMENT OF CORRECTIONS, et al.,
Respondent.
_____/

CERTIFICATE OF APPEALABILITY
PURSUANT TO: 28 U.S.C. § 2253(C)(1)&(2)

COMES NOW, the Petitioner, **JAMES HARMON, III,** *pro se*, hereby petition this Honorable Court for the issuance of a Certificate of Appealability. "A prisoner seeking to appeal a district court's final order denying his Petition for Writ of Habeas Corpus has no absolute entitlement to appeal but must obtain a (C.O.A.) see: 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 183, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009).

"Appendix F."

JRISDICTION

The district court's order dismissing with prejudice Petitioner's § 2254 Petition for Writ of Habeas Corpus, was entered on: 9-16-2022. See attached order of court.

RELEVANT PROCEDURAL HISTORY

Petitioner accepts the district court's "Relevant Procedural History," as procedurally corrected.

STANDARD OF REVIEW

When the district court has rejected a claim on procedural grounds, the Petitioner must show that "Jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that Jurists of reason would find it debatable whether the district court was correct in it's procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Argument supporting issuance of Certificate of Appealability, 28 U.S.C. § 2253(c)(1) & (c)(2).

GROUND ONE

Whether Habeas Corpus Petition state valid claim of denial of constitutional right? Ground One: Ex Post Facto violation. Article 1, section 10, Clause 1, U.S. Const.

Jurists of reason would find it debatable whether resentencing Petitioner to six concurrent natural life without parole sentences, was the result of the state court's discretion to apply procedural changes to pending criminal proceedings. citing: State v. Perry, 192 So.3d 70, 75 (Fla. 5th DCA 2016). SC16-547, 2016 WL 1399241 (Fla. Apr. 6, 2016) certified question answered, 210 So.3d 630 (Fla. 2016), or, Jurists of reason would find it debatable whether resentencing Petitioner was 'procedural' in nature thereby allowing such procedural changes to pending criminal proceedings, or, 'substantive' in nature. See: Montgomery v. Louisiana, 136 S.Ct. 718 (2016) where Jurists of reason settled the debate.

The State of Louisiana argued in Montgomery, supra that: Miller v Alabama, 567 U.S. 460 (2012), was procedural because it did not place any punishment beyond the State's power to impose, ". . . Miller, it is true did not bar a punishment for all juvenile offenders, as the court did in Roper v. Simmons, 543 U.S. 551 [18 Fla. L. Weekly Fed. S131a]: or, Graham v. Florida, 560 U.S. 48 (2010). Miller, did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason Miller, is no less substantive than: Roper or, Graham. Jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, to wit: ex post facto violation.

In 1981, Petitioner was 17 years old, initially sentenced to six consecutive one-hundred year sentences. Harmon v. State, 438 So.2d 369 (Fla. 1983). Petitioner was sentenced and the possibility of parole was an element of the "punishment" annexed to the criminal acts. Florida Statute § 947.16 (1979).

On December 6, 2017, the Postconviction court retroactively resentenced Petitioner to six concurrent natural life without parole sentences under the provisions of: ch. 2014-220 Laws of Florida.

Petitioner, having been parole eligible for (36) years thirty-six years while serving a term of year sentence, now finds himself without the possibility of parole - thus, the sentence of life, as applied, are in truth, 'Life without Parole,' the order of denial would

suggest that, the Petitioner "has not received an inescapable, irrevocable life sentence" because he has a meaningful opportunity for review under Florida Statute § 921.1402.

In nearly five years since Petitioner's resentencing, he has not received a meaningful opportunity for review under § 921.1402, although Petitioner did request one. See: Doc. 8-4 at 61 and pg. 18 of district court's order of denial. Jurists or reason would find it debatable whether the district court was correct in it's procedural ruling.

The presence of discretion does not displace the protections of the ex post facto clause. Garner v. Jones, 529 U.S. at 253, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000). Even where these concerns are not directly implicated, the clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. See: Carmell v. Texas, 529 U.S. 513, 521-525, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000), citing: Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Jurists of reason would find it debatable whether the Petition for Writ of Habeas Corpus states a valid claim of the denial of a constitutional right, to wit: whether retroactively resentencing Petitioner to six concurrent natural 'life without parole' sentences a matter of procedure, or, a matter of substance, Shenfeld v. State, 44 So.3d 96 (Fla. 2010). Citing: Stogner v. California, 539 U.S. 607, 610, 123 S.Ct. 2446, 156

L.Ed.2d 544 (2003) (stating that "after (but not before) the original statute of limitation had expired, a party such as Stogner was not liable to any punishment." and concluding "that a law enacted after expiration of a previous applicable limitations period violates the ex post facto clause when it is applied to revive a previously time-barred prosecution." 539 U.S. at 613, 632-33.

Jurists of reason would find it debatable whether the district court was correct in it's procedural ruling. Florida Statutes § 921.1401(1) (2014), Florida Statute § 775.082(3)(b) (2014). As applied, are substantive in nature. Likewise, Florida Statute § 921.1402(2)(a), (2014), Florida Statute § 775.082(3)(c) (2014), are matters of substance. The effect of the new juvenile sentencing legislation, chapter 2014-220 Laws of Florida, is to make mandatory what was before only the maximum sentence, under the new statute § 921.1402(2)(a); § 775.082(3)(c) (2014), the Petitioner may be held in confinement for an additional 20-25 years or, the entire life sentence - subject to one judicial review hearing conducted some 60-65 years after the commission of the covered crimes, see: Lindsey v. Washington, 81 L.Ed. 1182, 301 U.S. 397-402 (1937).

Under the terms and conditions of Petitioner's original 'term of years' sentence, Petitioner would be eligible to earn gain - time. Florida Statute, section 944.275, 291 (1979) and to be released on parole, Florida Statute, section 947.16 (1979). Although, the circuit court retained jurisdiction for the first one-third of each consecutive sentence,

it could choose to relinquish jurisdiction, thereby making Petitioner eligible to benefit from gaintime or parole. Even if the circuit court were to choose not to relinquish jurisdiction, Petitioner would become eligible to benefit from gaintime or parole if he were to survive the period during which the circuit court retained jurisdiction. Thus, it would be possible for the Petitioner to win an early release under the original sentence scheme, regardless of what his life expectancy may be. Harmon v. State, 438 So.2d 369-370-71 (Fla. 1983). The district court observed that Petitioner Harmon "has not received an inescapable, irrevocable life sentence" because he has a meaningful opportunity for review under Florida Statute § 921.1402. Citing Bell v. State, 313 So.3d 1183, 1189 (Fla. 1st DCA 2021).

Jurists or reason would find this legal observation debatable. The defendant in Bell v. State, supra, was initially sentenced to death then resentenced to a life sentence, upon which, he moved the court to resentence him under the new juvenile sentencing laws. Thus, the resentencing of Bell, was a matter of procedure in that Bell was already serving a (parole eligible) life sentence. The same can not be said regarding the history of Petitioner's life without parole sentences, the circuit court, made the decision that the statutory factors listed in Florida Statute, § 921.1401, weighed in favor of imposing life imprisonment, the circuit court resentenced Petitioner and imposed six natural life without parole sentences.

Consequently, the statutory factors considered by the circuit court, as applied, violates two of the four categories of ex post facto laws set forth by Justice Chase more than 200 years ago: [3] every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed, and, [4] every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. See Shenfeld v. State, 44 So.3d 96 (Fla. 2010), citing Calder v. Bull, [3 U.S. (3 Dall.) 386, 1 L.Ed. 648, 3 Dall. 386 (1798).

Thus, Florida Statute § 921.1401 (2014), as applied, violates category [4] of the ex post facto laws, in that the individualized sentencing hearing; substantively altered the legal rules of evidence, and received less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. Florida Statute § 921.1402 (2014), as applied, violates category [3] of the ex post facto laws. Judicial Review, substantively changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed, in 1981, the time of the offense for which Petitioner was convicted, any "punishment" prescribed included such an opportunity for "parole release." Florida Statute § 947.16 (1979), to earn gain-time, Florida Statute, § 944.275. 291.

The district court, accepting the state court's findings and deferred thereto, contends that chapter 2014-220, Laws of Florida, and the resentencing of Petitioner to six concurrent natural life sentences (without parole), was 'procedural' because, although it established the right to be resentenced under the provisions of chapter 2014-220, Laws of Florida, it does not consider parole eligibility as a suitable alternative to that of Judicial Review. Florida Statute § 921. 1402 S.3. ch. 2014-220; S. 97, ch. 2015-2, see Horsley v. State, 160 So.3d 393, 405 (Fla. 2015) ("we conclude that applying chapter 2014-220 Laws of Florida to all juvenile offenders whose sentences are unconstitutional under Miller, is the appropriate remedy.")

The state contends, and the district court has deferred, that a sentence of life with Judicial Review after 20-25 years was procedural thus, constitutional, citing Horsley, supra. All things considered, this position is well taken in that, as applied, a sentence of life imposed upon a former juvenile offender - retroactively, thirty-six years after the commission of the covered crimes, must pass constitutional muster, thus, Petitioner's original sentences of six consecutive one hundred years was lawful - at the time of imposition. Harmon v. State, 438 So.2d 369, 370-71 (Fla. 1983).

Resentencing Petitioner occurred as a result of Petitioner's pursuit of his statutory right to be sentenced according to applicable to law, i.e., a constitutional change in the law held to apply retroactively. Montgomery v. Louisiana, 577 U.S. 190 (2016): It

follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.

In concluding this argument, Jurists of reason would find, it debatable whether (as herein demonstrated) the petition states a valid claim of the denial of a constitutional right, to wit: ex post facto violation; and that Jurists or reason would find it debatable whether the district court was correct in it's procedural ruling; that, resentencing Petitioner - retroactively to life without parole under the provisions of: Florida Statute, § 921.1401: Florida Statute § 775.082(3)(b)(2), (2014) was procedural.

GROUND TWO

Whether Habeas Corpus Petition state valid claim of denial of constitutional right? Cruel and Unusual Punishment 8th Amendment, U.S. Const.

Jurists of reason would find it debatable whether resentencing the Petitioner to six concurrent natural life without parole sentences was the result of the post conviction court's use of discretion to apply "procedural changes to pending criminal proceedings." Citing: State v. Perry, 192 So.3d 70, 75 (Fla. 5th ;DCA 2016) SC16-547, 2016 WL 1399241 (Fla. Apr. 6, 2016). cert. question answered, 210 So.3d 630 (Fla. 2016), or, Jurists of reason would find it debatable whether resentencing Petitioner was 'substantive' in nature, and that Jurists or reason would find it debatable whether the district court was correct in it's procedural ruling."

In Montgomery v. Louisiana, 136 S.Ct. 718 (2016), this debate was well settled, the State of Louisiana, argued that the ruling in Miller v. Alabama, 567 U.S. 460 (2012), was procedural because it did not place any punishment beyond the state's power to impose. " . . . Miller, it is true did not bar a punishment for all juvenile offenders, as the court did in Roper v. Simmons, 543 U.S. 551 [18 Fla. L. Weekly Fed. S131a], or Graham v. Florida, 560 U.S. 48 (2010). Miller, it was determined, is no less substantive than are Roper and Graham."

Petitioner, was resentenced to six concurrent natural life sentences: (2) homicide, (4) now homicide charges: the position of the district court accepting the state court's findings and deferring thereto are inconsistent with United States Supreme Court precedent: Graham v. Florida, 560 U.S. 48 (2010): see Montgomery v. Louisiana, 136 S.Ct. 718 (2016) "In adjudicating claims under it's collateral review procedures a state may not deny a controlling right asserted under the constitution, assuming the claim is properly presented in the case." Florida follows these basic supremacy clause principles in its postconviction proceedings for challenging the legality of a sentence.

Florida's collateral review procedures are open to claims that a decision of the United States Supreme Court has rendered certain sentence illegal, as a substantive matter, under the 8th Amendment. See Henry v. State, 175 So.3d 675 (Fla. 2015), e.g., Graham v. Florida, 560 U.S. 48 (2010), contrary to the controlling precedent of Graham. Petitioner was still retroactively resentenced to life without parole for the non-homicide convictions. Jurists of reason would find it debatable whether the decision reached in Graham, is procedural, the United States Supreme Court categorically barred a penalty for a class of offenders (juvenile under the age of 18). Jurists of reason would find it debatable whether the decision rendered in Graham is substantive in nature, that substantive rules set forth categorical guarantees that place certain criminal laws and punishments although beyond the state's power to impose.

Jurists of reason would find it debatable whether failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. Cf. Griffith v. Kentucky, 474 U.S. at 322 (1987) (holding that on direct review, a new constitutional rule must be applied retroactively "to all cases State or Federal.") states may not disregard a controlling constitutional command in their own courts. See Martin v. Hunters Lessee, 1 wheat 304, 340-341, 344 (1816).

Jurists of reason would find it debatable whether the Petition states a valid claim of the denial of a constitutional right, and, Jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

CONCLUSION

In concluding, Petitioner hereby pray the instant Certificate of Appealability be and the same., granted and/or that this court of Appeals conclude that the district court erred in: (1) accepting the states court's findings to which it should not have deferred or, (2) modifying or rejecting the state court's findings to which it should have deferred.

Respectfully submitted,

080164

James Harmon, *Pro se*
DC#080164

080164

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing: Certificate of Appealability, with attached order of denial, has been placed in the hands of D.O.C. officials, for mailing, by U.S. Mail to: Hon. Holly N. Simcox, Asst., Attorney General, Office of the Attorney General, 400 S. Monroe Street PL-01, the Capitol, Tallahassee, Florida 32399-1050 on this 14 day of October, 2022.

#080164

James Harmon, *Pro se*
DC#080164
Suwannee Correctional
Institution (Annex)
5964 U.S. Highway 90
Live Oak, Florida 32060

080164

(Corrected)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-13565-C

JAMES HARMON, III,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

The Appellant's motion for leave to file a motion for permission to appeal in forma pauperis and affidavit out of time is GRANTED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

"Appendix F.1."

Copy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Provided to Suwannee Correctional Institution on:
MAR 2 4 2023
for mailing, by:

JAMES HARMON III,
Petitioner/Appellant,

v.
SEC. FLA. D.O.C. el., al.,
Respondent/Appellees.
_____/

CASE NO: 22-13565

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, the Appellant, James Harmon III, pro se files the instant "Motion for Appointment of Counsel" said Appellant states as reasonable cause and justification for filing said "Motion for Appointment of Counsel" is in accordance with:

UNITED STATES CONSTITUTIONAL AMENDMENTS IV

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

"Appendix L"

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Previously, Appellant filed with this court, in conformity with; **11th Cir. R. 26 1-1**, "A certificate of Interested Persons and Corporate Disclosure Statement, C.I.P., **Copy attached**.

All things considered, no responsive pleadings has been ordered or filed in these appeal proceedings. Thus, the Appellee has not been ordered or. Required to adhere to the rule in that the rule specifically provide; "...also all Appellee, intervenors, Respondents, and all other parties to the case or appeal must file a **(C.I.P.)** within (28) days after the date the case or appeal is docketed in this court."

Appellant, although determined competent to represent himself during the resentencing hearing, feel it to be in his best interest to motion this court for the Appointment of Counsel, also, Appellant state that the interest of Justice would best be served were counsel appointed to represent the issues which the District Court have previously ascertained by law in it's order of denial.

CONCLUSION

In concluding the instant **"Motion for Appointment of Counsel,"** Appellant hereby pray this Court of Appeals grant the Motion to which the interests of Justice would be best be served and remedied by same.

/S/ _____
James Harmon III # 080164
Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Appointment of Counsel, has been placed in the hands of D.O.C. Officials, for mailing, by U.S. mail to: Holly N. Simcox, Asst. Att. General, Office of the Attorney General, 400 S. Monroe Street, PL-01, the Capitol, Tallahassee, Florida 32399-1050.

On this 24th day of March, 2023.

/S/ _____
James Harmon III # 080164
Pro Se

Provided to Suwannee
Correctional Institution on:
MAR 24 2023
for mailing, by:

DECLARATION

Pursuant to 28 U.S.C. § 1746; and Fed. R. App. P., 25(a)(2)(A)(iii), I hereby declare the above "Motion for Appointment of counsel," is true and correct and, mailed in good faith.

/S/

James Harmon III/# 080164
Suwannee Correctional Institution Annex
5964 U.S. Highway 90
Live Oak, Florida 32060