No. __________

IN THE
SUPREME COURT OF THE UNITED STATES

FELIX OMAR PUSEY,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to Florida's Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether section 790.23(1)(b), Florida Statutes, which criminalizes the possession and ownership of a firearm by people under the age of 24 who have previously been adjudged delinquent for a felony offense as a juvenile, violates the Second Amendment.

2. Whether the Sixth Amendment requires a twelve-person jury to try a criminal defendant accused of a felony offense.

3. Whether the imposition of a lengthy mandatory minimum prison sentence upon a juvenile offender violates the Eighth Amendment.

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PETITION FOR WRIT OF CERTIORARI

Felix Omar Pusey petitions for a writ of certiorari to review the decision of Florida's Fifth District Court of Appeal.

OPINIONS BELOW

Following Pusey's convictions and sentence, Pusey appealed to Florida's Fifth District Court of Appeal. On October 29, 2024, the Fifth District issued a *per curiam* opinion affirming Petitioner's convictions and sentences. The Fifth District's opinion did not explain its reasoning for affirming Petitioner's convictions and sentences. Petitioner timely filed a motion for written opinion and/or to certify a question of great public importance so that he could petition the Florida Supreme Court for certiorari review. The Fifth District denied the motion on November 15, 2024. A copy of the opinion, motion for written opinion and/or to certify a question of great public importance, and the order denying is attached as Appendix A, B, and C.

JURISDICTION

The Fifth District Court of Appeal affirmed Pusey's convictions and sentences without written opinion. The Florida Supreme Court has no discretionary jurisdiction to review a *per curiam* affirmance without written opinion. See Jackson v. State, 926 So. 2d 1262, 1265 (Fla. 2006). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Sixth Amendment to the United States Constitution provides:

> 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 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.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 790.23(1)(b), Florida Statutes provides:

> (1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or device, if that person has been:
>
>> (b) Found, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult and such person is under 24 years of age.

STATEMENT OF THE CASE

The State of Florida charged Pusey with two counts of attempted murder in the first-degree, one count of possession of a firearm by a juvenile delinquent less than twenty-four years of age who had previously been found to have committed a felony act as a juvenile, and one count of discharging a firearm from a vehicle. Pusey was a juvenile on the date the offenses were allegedly committed.

At trial, the State presented evidence that Pusey possessed a firearm and discharged the firearm in the direction of two alleged victims from a vehicle. Pusey's defense was that he fired the gun in self-defense because one of the alleged victims was approaching Pusey's vehicle in a threatening manner and appeared to be pulling a gun from his pocket.

A six-person jury convicted Pusey of one count of attempted first-degree murder, one count of attempted second-degree murder, one count of possession of a firearm by a juvenile delinquent less than 24 years of age found to have previously committed a felony act, and one count of discharging a firearm from a vehicle. Pusey was sentenced to forty years in prison with a twenty-year mandatory minimum term for discharging a firearm pursuant to section 775.087(2)(a)2, Florida Statutes. Petitioner is eligible for a judicial sentence review after twenty-five years, pursuant to section 921.1402(2)(b), Florida Statutes.

Pusey raised five issues on appeal to Florida's Fifth District: (1) that there was insufficient evidence to sustain the attempted murder convictions; (2) that section 790.23(1)(b), Florida Statutes, the statute that criminalized the possession of a firearm by a former juvenile delinquent under the age of 24, violated the Second Amendment; (3) that his trial by a six-person jury violated the Sixth and Fourteenth Amendments; (4) that state law required a judicial sentence review after twenty years instead of twenty-five years; and (5) that the imposition of the twenty-year mandatory minimum sentence for discharging a firearm violated the Eighth and Fourteenth Amendments because Pusey was a juvenile when the offenses occurred and the trial court had no discretion to consider his individual characteristics and circumstances in order to impose a sentence less than the twenty-year minimum mandatory term.

REASONS FOR GRANTING THE PETITION

I. The statute under which Pusey was convicted, section 790.23(1)(b), Florida Statutes, violates the Second Amendment.

In Florida, the facial unconstitutionality of a statute may be raised for the first time on appeal. See, e.g., Delancy v. Tucker, 88 So. 3d 1036 (Fla. 1st DCA 2012). Petitioner's trial attorney did not raise this issue in the trial court. The issue was raised for the first time on appeal.

The Second Amendment of the United State's Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. The Fourteenth Amendment applies the Second Amendment to the State of Florida.

A new standard for Second Amendment cases has emerged, calling the constitutionality of section 790.23(1)(b) into question. See New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022). Bruen held unconstitutional New York's 1911 Sullivan Act, which required a license and demonstration of a "proper cause" to possess and carry a concealable firearm. Id. This opinion clarified the Supreme Court's understanding of the Second Amendment from the previous decisions in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010). Importantly, Bruen abandoned the two-part approach to Second Amendment cases

that had been applied by courts following Heller and McDonald. Bruen at 2126. In doing so, Bruen gave a clear, unambiguous standard for courts to apply in Second Amendment cases:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'

Id.

Bruen reiterated that the standard for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen at 2129–30.

"In other words, Bruen requires two distinct analytical steps." Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 672 F.Supp. 3d 118, 126 (E.D. Va. 2023). "First, it must be determined if 'the Second Amendment's plain text covers an individual's conduct.'" Id. quoting Bruen at 2126. "If it does, 'the Constitution presumptively protects that conduct.'" Id. "Second, if the conduct is presumptively protected, 'the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.'" Id. "To do so, the Government 'must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.'" Id. quoting Bruen at 2127. Any law, regulation, or government policy affecting the "right of the people to keep and bear arms" can only be constitutional if the government demonstrates an analogous restriction deeply rooted in American history, evidenced by historical materials contemporaneous with the adoption of the Bill of Rights in 1791. Bruen at 2129–30. "When establishing that analytical construct, Bruen explicitly prohibited courts from engaging in any means-end scrutiny." Fraser at 5. "The Supreme Court also 'expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" Id.

quoting Bruen at 2129. "Bruen marks a sea-change in Second Amendment law, throwing many prior precedents into question." Id. at 126. See ("Bruen clearly fundamentally changed our analysis of laws that implicate the Second Amendment").

A. The Second Amendment's plain text covers the conduct proscribed in section 790.23(1)(b), Florida Statutes.

Section 790.23(1)(b) makes it "unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm" if that person has been "found, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult and such person is under 24 years of age." §790.23(1)(b), Fla. Stat. Thus, a person under the age of 24 years of age who has previously been found to have committed, as a juvenile, a delinquent act that would have been a felony cannot possess a firearm, even for self-defense.

This statute impinges on conduct protected by the Second Amendment's plain text. The Second Amendment's reference to "arms" obviously contemplates firearms, and this "reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.'" Bruen at 2132, quoting Heller at 582. The "Amendment's operative clause— 'the right of the people to keep and bear Arms shall not be infringed'— 'guarantee[s] the individual right to possess and carry

weapons in case of confrontation' that does not depend on service in the militia." Id. at 2127, quoting Heller at 592. The holder of the right is "the people." Heller at 581. The right to "keep" arms was "simply a common way of referring to possessing arms, for militiamen *and everyone else*." Id. at 583 (emphasis in original). The right to "bear arms" refers to the right to "wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." Id. at 584.

Persons under the age of 24 who have previously been found to have committed a delinquent act that would have been a felony if committed by an adult are part of "the people" for constitutional purposes. They retain First Amendment and Fourth Amendment protections for their freedom of speech, freedom of assembly, freedom of religion, and freedom from unreasonable search and seizure as part of "the people." They are eligible to vote assuming they are at least eighteen years of age. They are not convicted felons. The Supreme Court has noted that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." Heller at 580. There is "a strong presumption that it belongs to all Americans." Id. at 581. "[W]here the Constitution extends its protections to only a

subset of “the people” and excludes those convicted of crimes, it says so.” Simpson v. State, 368 So. 3d 513, 524-25 (Fla. 5th DCA 2023) (Jay, J. concurring). See Amend. XIV, section 2, U.S. Const. (exempting states’ disenfranchisement “for participation in rebellion, or other crime,” from its reduced-representation penalty.) In his concurring opinion in Simpson, Judge Jay opined that an unincarcerated felon is a member of “the people” for Second Amendment purposes. Simpson at 30, citing Range v. Att’y Gen., 69 F.4th 96, 103 (3d Cir. 2023) (en banc). If un-incarcerated convicted felons are members of “the people,” then certainly people less than 24 years of age who had previously been found to have committed a delinquent act that would have been a felony if committed by an adult retain their second amendment constitutional protections as members of “the people.” The State alleged that Petitioner had been adjudicated delinquent as a juvenile of burglary of a structure, a non-violent low-level felony.

The plain text of the Second Amendment therefore protects the right to possess arms of persons under the age of 24 who have previously been adjudicated delinquent as a juvenile of an offense that would have been a felony. A blanket prohibition on this class of “the people” from possessing firearms for any potentially lawful purposes, including self-defense, invokes the Second

Amendment. This is because "individual self-defense is 'the central component' of the Second Amendment right." McDonald at 767, quoting Heller at 599.

It is evident that the statute in question prohibits conduct covered by the plain text of the Second Amendment: the keeping and bearing of arms by a class of "the people."

B. The State cannot meet its burden of demonstrating that a prohibition for people under the age of 24 who have previously been found to have committed a delinquent act as a juvenile that would have been a felony if committed as an adult is part of this Nation's historical tradition of firearms regulation.

The United States Supreme Court has held that the State has the burden to prove the constitutionality of a statute infringing on a constitutional right. Bruen at 2130; see also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000) ("[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Bruen used this approach for cases invoking the Second Amendment. Bruen at 2130.

> [T]he burden falls on [the state] to show that [the statute] is consistent with this Nation's historical tradition of firearm regulation. Only if [the state] carr[ies] that burden can [it] show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect [the] course of conduct.

Bruen at 2135.

"[T]o carry that burden, the government must generally point to historical evidence about the reach of the [] Amendment's protections." Bruen at 2130 (citing United States v. Stevens, 559 U.S. 460, 468–471 (2010)). This historical approach requires analogical reasoning to determine whether a modern regulation is "relatively similar" to a ratification-era historical analog. Id. at 2132 (quoting C. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993)). On this, the Court said:

> To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, *courts should not "uphold every modern law that remotely resembles a historical analogue," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted."* Drummond v. Robinson, 9 F.4th 217, 226 (CA3 2021). On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.

Id. at 2133 (additional emphasis added).

While discussing historical analysis to show whether a firearm regulation is part of this Nation's historical tradition of firearm regulation, Bruen highlighted that "not all history is created equal." Id. at 2136. "The Second Amendment was

adopted in 1791; the Fourteenth in 1868." Id. "Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years." Id. Similarly, courts "must also guard against giving postenactment history more weight than it can rightly bear." Id. "[P]ost-Civil War discussions of the right to keep and bear arms [which] "took place 75 years after the ratification of the Second Amendment, [] do not provide as much insight into its original meaning as earlier sources." Id. at 2137. For example, in Heller, the Court's interest in historical evidence from the "mid-to-late-19th-century commentary was secondary" and was considered "only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions." Bruen at 2137. The "19th-century evidence was treated as mere confirmation of what the Court thought had already been established." Id. (internal quotation omitted). Consequently, "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." Id. at 2154.

Bruen mentioned the existence of a scholarly debate as to whether courts should primarily rely on the historical understanding of rights at the founding in 1791 or when the Fourteenth Amendment was adopted in 1868. Id. at 2138. The court did not resolve that debate, finding that "the public understanding of the right

to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." Id. However, it is clear that the meaning of an amendment, including the Second Amendment ratified in 1791, is "fixed according to the understandings of those who ratified it." Id. at 2132.

Therefore, the State has the burden to demonstrate that Florida's prohibition on forearm possession in section 790.23(1)(b) is consistent with the Nation's historical tradition of firearm regulation. The State must show that the blanket prohibition on keeping and bearing firearms by this particular class of people is a part of "American tradition," stemming from those who ratified the Second Amendment in 1791. Id. at 2156.

Bruen held that "[t]he Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions." Id., quoting Heller at 581. Based on the historical record presented in Bruen, the Court stated that "[t]hose restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials." Id. Consequently, the Court found no justification in American tradition for citizens to "demonstrate a special need for self-protection distinguishable from that of the general community," which

New York required to obtain a carry permit. Id. As a result, the Court overturned New York's 1911 Sullivan Law. Courts should "not 'stake [an] interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public." Bruen at 2153, quoting Heller at 632.

There is no ratification-era tradition or historical support for a legislative power to prohibit those under the age of 24, who "have been found, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult," from possessing firearms. There is a dearth of historical evidence for such a ban.

C. Section 790.23(1)(b), Florida Statutes, is facially unconstitutional under the Bruen standard.

Here, the State alleged in its charging document that Pusey possessed a firearm. Such an act is commonly done by Americans for self-defense or other lawful purposes.[1] Such implements are in common lawful use and are beneficial to the preexisting, natural right of self-preservation. See Heller at 594. Pusey testified

[1] See Bruen at 2158-59 (Alito J., concurring) (noting that "[o]rdinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year."

at trial that he carried the firearm for protection because he had seen numerous people shot and killed in his neighborhood.

The State has the burden of proving that the prohibition on those under the age of 24 who “have been found, in the courts of this state, to have committed a delinquent act that would be a felony if committed by an adult” from possessing firearms is a part of the historical tradition of firearms regulation in this country. The State cannot carry this burden. Section 790.23(1)(b) cannot survive the test outlined by the Supreme Court in Bruen.

The constitutional right to keep and bear arms “is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” Bruen at 2156, quoting McDonald at 780. If the government enacted a law prohibiting those under the age of 24 who “have been found in the courts of this state to have committed a delinquent act that would be a felony if committed by an adult” from engaging in unpopular speech or the free exercise of religion it would be no less repugnant to the Constitution than the law here. This Court should find that section 790.23(1)(b) is facially unconstitutional post-Bruen.

II. Florida violated Pusey's Sixth and Fourteenth Amendment rights when Pusey was convicted by a jury of less than twelve members.

This case tests whether the Court's holding in Williams v. Florida, 399 U.S. 78 (1970), that the Sixth Amendment right to a trial by jury does not compel a twelve-member jury is still tenable following the Court's more recent decisions in which it has discarded the functional approach to jury trials in favor of the practice of trial by jury as it existed at common law. Petitioner raised this issue for the first time on appeal.

In Williams, the Court dismissed the common law practice of impaneling a jury of twelve members when it determined "that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that [the] refusal to impanel more than the six members provided for by Florida law did not violate [a defendant's] Sixth Amendment rights as applied to the States through the Fourteenth [Amendment]." Williams at 86. The Court undertook a functional analysis of jury size, concluding that twelve is no better than six for reaching a reliable verdict in criminal cases. Id. at 99-100.

Thereafter, the Court again rejected historical norms in assessing the issue of jury unanimity in state court criminal proceedings. Much like its analysis in Williams, the Court concluded that jury unanimity is not required under the Sixth

Amendment – at least when juries are ten or larger – because it does not materially contribute to the exercise of [jurors'] commonsense judgment." Apodaca v. Oregon, 406 U.S. 404, 410 (1972). Applying a "functional" approach again, a plurality "perceive[d] no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one" such that "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" whether unanimity is required or not. Id. at 410-11. The various opinions, concurring and dissenting, reflected no consensus on a coherent analytical approach.

In Johnson v. Louisiana, 406 U.S. 356, 364 (1972), the Court addressed a tiered jury system where "less serious crimes [are] tried by five jurors with unanimous verdicts, more serious crimes required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated." In upholding a 9-3 verdict, the Court concluded that the differential jury system served a rational interest, the state legislature "obviously intend[ing] to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." Id. at 365.

The Court invalidated a five-member jury in Ballew v. Georgia, 435 U.S. 223 (1978), but no coherent framework emerged for analyzing jury size under the Sixth Amendment. Two justices (Blackmun and Stevens) posited that juries of less than six members substantially threatened the constitutional guarantee of the jury trial right, notwithstanding the cost-saving and time-saving arguments that Georgia advanced. Their analysis reflected that most of the major premises underlying the functional approach in Williams were inaccurate. Justice White asserted that the requirement that a jury be a fair cross-section of the community would be violated with juries of less than six members. And three justices (Chief Justice Burger and Justices Powell and Rehnquist) agreed that a conviction for serious offenses by juries of five members "involves grave questions of fairness" and that "the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." Id. at 245-46. Finally, three justices (Brennan, Stewart, and Marshall) concurred only in the holding that "the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons." Id. at 246. The Ballew Court raised five key inadequacies of a smaller jury:

> First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the

> common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.
> …
> Second, the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person… rises as the size of the jury diminishes.
> …
> Third, the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense.
> …
> Fourth, what has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decision making, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. … The exclusion of elements of the community from participation contravenes the very idea of a jury… composed of the peers or equals of the person whose rights it is selected or summoned to determine.
> …
> Fifth, several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries such that standard variances in smaller juries were greater.

Ballew at 232-39.

In Burch v. Louisiana, 441 U.S. 130 (1979), the Court again noted the less-than-satisfactory nature of its functional approach, this time considering whether a

conviction for a non-petty state offense by a non-unanimous six-person jury was constitutional. The Court stated:

> As in Ballew, we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved.

Id. at 137.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court rejected a functional approach to the right to a jury trial in favor of the "practice" of trial by jury as it existed "at common law":

> As we have, unanimously, explained . . . the historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's]equals and neighbours . . . " 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). See also Duncan v. Louisiana, 391 U.S. 145, 151-154 (1968).

Apprendi at 477.

In Blakely v. Washington, 542 U.S. 296 (2004), in which the Court applied Apprendi and clarified the definition of the "statutory maximum" for any offense, the Court repeated its reference to the "suffrage of twelve" and then re-emphasized the critical nature of trial by jury:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Id. at 305-06.

The Court in Blakely focused on "the Framers' paradigm for criminal justice." Id. at 313. This shift in constitutional perspective calls into question the Court's holding in Williams, which was based on the functional approach to the right to a jury trial.

Florida courts have also questioned the Williams holding. The Florida Supreme Court noted that the empirical studies Ballew relied upon actually supported the use of a twelve-person jury:

> Interestingly, this analysis and the social studies on jury size and small group dynamics cited by the Court also provide support for the traditional twelve-person jury, a requirement the Court had refused to mandate in Williams v. Florida.

Blair v. State, 698 So. 2d 1210, 1216 (Fla. 1997). Building upon the Court's Ballew holding, Florida's Second District Court of Appeal cited to additional empirical studies and other scholarly sources demonstrating the superiority of the twelve-person jury in Gonzalez v. State, 982 So. 2d 77, 82-84 (Fla. 2d DCA 2008):

> Mr. Gonzalez is not alone in arguing that advances in the understanding of small group decision-making and trends in the law of other states support another examination of the *Williams* rationale. In 1995, the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States proposed that the Federal Rules of Civil Procedure be amended to require twelve-person juries in civil cases. *See Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence,* 163 F.R.D. 91 (transmitted by the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States for Notice and Comment, September 1995). The text of the proposed committee note to follow the proposed amended rule explained:
>
> > Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are

> strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science. *Id.* at 147.

On February 14, 2005, the American Bar Association House of Delegates approved *Principles for Juries and Jury Trials,* a document prepared by the American Jury Project after an October 2004 symposium. Principle 3 is entitled "Juries Should Have Twelve Members" and calls for twelve-person juries in any criminal case that might result in a penalty of confinement of over six months. Moreover, as mentioned at the beginning of this opinion, Florida is one of only two states that now consistently allow serious felony cases to be decided by juries with as few as six members. *See* David B. Rottman & Shauna M. Strickland, *State Court Organization 2004,* United States Department of Justice, Bureau of Justice Statistics, Table 42 at 233, available at http://www.ojp. usdoj.gov/bjs/abstract/sco04.htm (last visited Mar. 18, 2008).

The extensive development in the study of small group decision-making since 1970 is well beyond the scope of this opinion. There clearly is more scientific evidence today than in 1970 that a twelve-person jury may be superior to a six-person jury to accomplish the functions, purposes, and goals identified by the *Williams* court. Ensuing scholarship has criticized the empirical authorities upon which the *Williams* court relied, *see* Robert H. Miller, Comment, *Six of One Is Not a Dozen of the Other: A Re-Examination of Williams v.*

> *Florida and the Size of State Criminal Juries,* 146 U. Pa. L. Rev. 621, 652 (Jan. 1998), and collected more empirical studies that contradict the conclusions of the Court, *see, e.g.,* Michael Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size,* 21 L. & Hum. Behav. 451 (1997). The scholarship and evidence in this regard, however, are not undisputed, and the various scientific theories are not necessarily cohesive.
>
> In Mr. Miller's article, *Six of One is Not a Dozen of the Other: A Re-examination of Williams v. Florida and the Size of State Criminal Juries,* the author concludes:
>
>> As the *Ballew* Court admitted, we now know that six- and twelve-person juries are not functionally equivalent, as the *Williams* Court assumed. We know that recall of facts, testimony, and in-court observations are compromised significantly when a six-person jury is used in place of a twelve-person jury. We know that the rate of hung juries declines and the rate of conviction rises when smaller juries are used. We know that minority representation, community representativeness, and quality of deliberation all decrease when six-person juries are used. Finally, we know that six-person juries are less reliable than twelve-person juries, because they are less consistent in rulings on similar cases and because they decide all cases at greater variance from larger community preferences.
>
> 146 U. Pa. L. Rev. at 682-83 (footnotes omitted).

Gonzalez at 82-84 (footnotes omitted).

The Court's holding in Ramos v. Louisiana, 140 S.Ct. 1390 (2020), continues the Court's trend of discarding the functional approach to jury trials and again casts doubt on the continued viability of Williams. Ramos held that the Sixth Amendment right to a jury trial requires that state court verdicts in criminal cases be unanimous, overruling contrary precedents from the early 1970s (Apodaca and Johnson). Justice Gorsuch wrote in Ramos:

> There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

Ramos at 1397.

"On similar reasoning, if the Sixth Amendment right to jury trial requires a twelve-member jury to support a criminal conviction – as is done in every federal court (and almost every state court)[2] – it isn't much of a stretch to conclude that 'it

---

2 Lessard v. State, 232 So. 3d 13, 16–17 (Fla. 1st DCA 2017) (Makar, J., concurring) ("The vast majority of states still choose twelve-person, unanimous juries to convict in serious criminal cases. Forty-five states require twelve

requires no less in state court.'" Phillips v. State, 316 So. 3d 779, 787 (Fla. 1st DCA 2021) (J. Makar, concurring). Following Ramos, "[i]t seems a small step from the demise of the reasoning in Apodaca and Johnson as announced in Ramos to conclude that the reasoning in Williams, upon which both decisions relied, is also in jeopardy." Phillips at 788 (J. Makar, concurring). "For that reason… the issue of jury size under the Sixth Amendment may be ripe for re-evaluation." Id.

This case presents the Court with the opportunity to clarify its jurisprudence regarding the Sixth Amendment's jury size requirement for the trial of felony offenses. The functional approach to jury size, upon which the Court's opinion in Williams stands, has seemingly been eroded by the Court's more recent opinions. The Court should now return to the longstanding precedent in place before Williams, which focused on the meaning of the word "jury" as understood by the founders at the time of the adoption of the Constitution:

> Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original

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unanimous jurors to convict for any felony (federal felony trials require twelve jurors); a few states permit six to eight for specified felonies." (footnotes omitted). The "only other state [besides Florida] with six-person juries in felony cases is Connecticut. All other state and federal felony prosecutions require twelve-person juries." Alisa Smith & Michael J. Saks, *The Case For Overturning Williams v. Florida and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 443 (2008).

constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. (Citation omitted.) This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' (Citation omitted.) In Bac. Abr. tit. 'Juries,' it is said: 'The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of the being devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.' It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah – which was under the complete jurisdiction of the United States for all purposes of government and legislation – the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

Thompson v. State of Utah, 170 U.S. 343, 349-50 (1898).

Justice Gorsuch, arguing the Constitution requires 12-member juries, wrote, "Williams was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts." Khorrami v. Arizona, 143 S.Ct. 22, 23 (2022) (Gorsuch, J., dissenting from denial of certiorari). Justice Gorsuch has recently reiterated his position that the Constitution requires a jury of twelve to try criminal cases:

> For almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community. [citation omitted]. Acutely concerned with individuals and their liberty, the framers of our Constitution sought to preserve this right for future generations. [citation omitted]. Yet today, a small number of States refuse to honor its promise. Consider this case: A Florida court sent Natoya Cunningham to prison for eight years on the say of just six people. Florida does what the Constitution forbids because of us. In *Williams v. Florida*, this Court in 1970 issued a revolutionary decision approving for the first time the use of 6-member panels in criminal cases. 399 U.S. 78, 103. In doing so, the Court turned its back on the original meaning of the Constitution, centuries of historical practice, and a battery of this Court's precedents. [citation omitted]. Before *Williams*, this Court had said it was not open to question that a jury should consist of twelve. Patton v. United States, 281 U.S. 276, 288 (1930). We had understood the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at

> common law, of twelve persons. Thompson v. Utah, 170 U.S. 343, 349 (1898). Really, given the history of the jury trial right before *Williams*, it was nearly unthinkable to suggest that the Sixth Amendment's right to a trial by jury is satisfied by any lesser number. Yet *Williams* made the unthinkable a reality. In doing so, it substituted bad social science for careful attention to the Constitution's original meaning. Pointing to academic studies, *Williams* tepidly predicted that 6-member panels would probably deliberate just as carefully as 12-member juries. [citation omitted]. But almost before the ink could dry on the Court's opinion, the social science studies on which it relied came under scrutiny. [citation omitted]. Soon, the Court was forced to acknowledge empirical data suggesting that, in fact, smaller juries are less likely to foster effective group deliberation and may not produce as reliable or accurate decisions as larger ones. [citation omitted]. All in all, *Williams* was an embarrassing mistake – wrong the day it was decided.

Cunningham v. Florida, 602 U.S. ___ (2024) (Gorsuch, J., dissenting from denial of certiorari).

The Sixth and Fourteenth Amendments to the Constitution required a twelve-person jury for trial of Petitioner's felony offenses.

III. Florida's imposition of a twenty-year minimum mandatory sentence for a juvenile offender was unconstitutional under the Eighth and Fourteenth Amendments.

This case tests whether a lengthy mandatory minimum prison sentence can be constitutionally imposed upon a juvenile offender where the sentencing court has no discretion to consider the juvenile's individual characteristics and circumstances in deciding whether to impose the lengthy mandatory minimum prison sentence.

Children are different. Miller v. Alabama, 567 U.S. 460 (2012). That difference has constitutional ramifications. Graham v. Florida, 560 U.S. 48, 76 (2010) ("An offender's age is relevant to the Eighth Amendment," so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."). Juveniles are less deserving of the most severe punishments because they have lessened culpability. Id. at 68. "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." Id. "Juvenile offenders cannot with reliability be classified among the worst offenders." Id. Youth is "a time of immaturity, irresponsibility, impetuousness, and recklessness." Miller at 476. It is "a condition of life when a person may be most susceptible to influence

and to psychological damage." Id. Youth's "signature qualities are all transient." Id.

"[A] sentencing rule permissible for adults may not be so for children." Id. at 481. "[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." Id. A mandatory sentence gives no consideration to "the mitigating qualities of youth." Id. at 475-76. Mandatory minimum sentencing schemes, while constitutionally valid for imposing increased punishment for adult offenders, should be declared unconstitutional as applied to juveniles. Sentencing courts should have discretion to consider mitigating circumstances associated with the youth of a juvenile defendant when fashioning a sentence. The minimum mandatory provision prevents a sentencing judge from imposing a sentence shorter than the minimum mandatory term even where the sentencing judge feels the shorter term is appropriate based on the juvenile's individualized sentencing factors.

The Washington Supreme Court has held that mandatory minimum sentences for juveniles violate the Eighth Amendment. State v. Houston-Sconiers, 188 Wash. 2d 1, 20, 391 P.3d 409, 420 (2017) ("[W]e see no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with

consideration of mitigating factors" when a juvenile is facing a mandatory minimum sentence for possessing a firearm while committing an offense). The Iowa Supreme Court has held that mandatory minimum sentences for juvenile offenders constitute cruel and unusual punishment. State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014) ("Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles."). See also State v. Taylor G., 315 Conn. 734, 110 A.3d 338 (Conn. 2015) (the legislature may wish to revisit whether mandatory terms are appropriate for juveniles); State v. Williams-Bey, 333 Conn. 468, 477-480, 215 A.3d 711, 717-718 (Conn. 2019) (J. Ecker dissenting). Florida's Fifth District Court of Appeal has held that mandatory minimum prison sentences for juvenile non-homicide offenders would be violative of the Eighth Amendment if it were not for the availability of judicial sentence review. Montgomery v. State, 230 So. 3d 1256, 1263 (Fla. 5th DCA 2017) ("[W]e hold that the mandatory minimum twenty-five-year mandatory minimum sentence at issue in this case does not constitute cruel and unusual punishment when applied to a juvenile offender as long as he or she gets the mandated judicial review."). In Montgomery, the juvenile was eligible for judicial sentence review **before** he had served all of the mandatory minimum term.

Here, Pusey should have received individualized sentencing consideration with a resulting sentence that was not predetermined by the constraints of a twenty-year mandatory minimum prison sentence. As a result of his sentence, Pusey will serve every day of the twenty-year mandatory minimum prison sentence before he receives a judicial review[3] of his sentence where his individual characteristics and circumstances can be considered by the trial court. The Eighth and Fourteenth Amendments required that the trial court have discretion to sentence Pusey, a juvenile offender, to less than the twenty-year mandatory minimum prison sentences. Instead, the trial court had to impose the mandatory minimum term regardless of Pusey's individual characteristics and circumstances.

CONCLUSION

Pusey respectfully requests that the Court grant a writ of certiorari to review the judgment of Florida's Fifth District Court of Appeal.

[3] Pusey is eligible for a judicial review of his sentence after twenty-five years.

/s/ *Barbara Busharis* _

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Member of the Bar of this Court

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APPENDIX A

FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D2023-0192
LT Case No. 16-2020-CF-7710

FELIX PUSEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Adrian G. Soud, Judge.

Jessica J. Yeary, Public Defender, and Victor D. Holder, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Virginia Chester Harris, Senior Assistant Attorney General, Tallahassee, for Appellee.

October 29, 2024

PER CURIAM.

AFFIRMED.

EDWARDS, C.J., and MAKAR and LAMBERT, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

APPENDIX
B

Filing # 210630860 E-Filed 11/10/2024 04:17:35 AM

IN THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT OF FLORIDA

FELIX PUSEY,

Appellant

v.

DCA CASE NO. 5D23-0192
L.T. NO. 2020CF7710

STATE OF FLORIDA,

Appellee.
_________________________/

MOTION FOR WRITTEN OPINION AND/OR TO CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE

Rule 9.330(a)(2)(D), Florida Appellate Procedure, permits an appellant to request a written opinion when he believes that the opinion will provide a legitimate basis for review by the Florida Supreme Court. A motion for written opinion may be filed within fifteen days of the Court's order or within such other time set by the court. Fla. R. App. P. 9.330(a). Appellant, pursuant to Florida Rule of Appellate Procedure 9.330(a)(2)(D), moves for a written opinion on the following grounds.

In Issue II of the initial and reply briefs, Appellant raised the argument that section 790.23(1)(b), Florida Statutes, is facially unconstitutional because it violates the Second and Fourteenth Amendments. This Court affirmed Appellant's conviction for

violating section 790.23(1)(b) without a written opinion on October 29, 2024. An argument that a criminal statute is facially unconstitutional may be raised for the first time on appeal, so the Court's decision to affirm is not based on a lack of preservation.

Necessarily, the Court decided on the merits that section 790.23(1)(b) is a valid statute that does not offend the Second and Fourteenth Amendments to the Constitution. A written opinion explaining that conclusion would provide grounds for Florida Supreme Court review because it would expressly construe the Federal Constitution and it would expressly declare a state statute valid.

Expressly Declaring a State Statute Valid:

Rule 9.030(a)(2)(A)(i), Florida Rules of Appellate Procedure, and Article V, section 3(b)(3) of the Florida Constitution permit the Florida Supreme Court to exercise jurisdiction over a decision from a district court of appeal that expressly declares valid a state statute.

Here, an opinion on the validity of section 790.23(1)(b), Florida Statutes, (raised in Issue II of Appellant's initial brief) would provide a legitimate basis for Florida Supreme Court review.

Expressly Construing the State or Federal Constitution:

Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, and Article V, section 3(b)(3) of the Florida Constitution permit the Florida Supreme Court to exercise jurisdiction over a decision from a district court of appeal that expressly construes a provision of the state or federal constitution.

Here, an opinion holding that section 790.23(1)(b) does not violate the Second Amendment (raised in Issue II of Appellant's initial brief) would provide a legitimate basis for Florida Supreme Court review.

Certifying a Question of Great Public Importance:

There is no case issued either before or after New York State Rifle Ass'n v. Bruen, 597 U.S. 1 (2022), that addresses whether section 790.23(1)(b), which criminalizes firearm possession by people under the age of 24 who have previously been found

delinquent for a felony offense, violates the Second Amendment. The State was unable to supply in the answer brief any historical analogues to justify the statute's restriction on citizens' Second Amendment right to possess firearms. Following Bruen, there is a significant possibility that section 790.23(1)(b) violates the Second and Fourteenth Amendments to the Constitution.

Appellant respectfully requests that this Court certify the following question of great public importance to the Florida Supreme Court:

> Following the United States Supreme Court's decision in New York State Rifle Ass'n v. Bruen, 597 U.S. 1 (2022), does section 790.23(1)(b), Florida Statutes, violate the Second and Fourteenth Amendments to the Federal Constitution?

WHEREFORE, Appellant asks this Court to issue a written opinion on the validity of section 790.23(1)(b), which will provide a legitimate basis for Florida Supreme Court review.

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via the Florida Courts E-Filing Portal, to Virginia Harris,

Assistant Attorney General, at virginia.harris@myfloridalegal.com, on November 10, 2024.

Respectfully submitted,

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Victor Holder
VICTOR HOLDER
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APPENDIX
C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Felix Pusey,

Appellant(s),

v.

State of Florida,

Appellee(s).

Case No.: 5D2023-0192
L.T. No.: 16-2020-CF-7710

Date: November 15, 2024

BY ORDER OF THE COURT:

ORDERED that Appellant's "Motion for Written Opinion . . . ," filed November 10, 2024, is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

5D2023-0192 11/15/2024

SANDRA B. WILLIAMS, CLERK

Panel: Judges Edwards, Makar and Lambert

cc:

Tallahassee Attorney General
Virginia Chester Harris
Victor D. Holder
Jessica J. Yeary

APPENDIX D

Filing # 170143935 E-Filed 03/31/2023 11:22:22 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

v.

Circuit Case 2020CF7710
5th DCA Case No. 5D23-0192

FELIX OMAR PUSEY,

Defendant.
_______________________/

SECOND MOTION TO CORRECT SENTENCING ERROR UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(b)(2)

Defendant/Appellant, FELIX OMAR PUSEY, hereby moves this Court to correct errors in the sentence imposed in this case and as grounds states:

1. Defendant was convicted of attempted first-degree murder with a firearm, attempted second-degree murder with a firearm, possession of a firearm by a juvenile who has committed a felony, and discharging a firearm from a vehicle (R 347-52) [1]. Defendant was a juvenile at the time of the offenses. A sentencing hearing was held on July 22, 2022, where the Court sentenced Defendant to

[1] Citations are to the record on appeal and will be cited as "R" followed by the appropriate page number, all in parentheses.

ACCEPTED: DUVAL COUNTY, JODY PHILLIPS, CLERK, 04/04/2023 02:59:19 PM

forty years in prison with a twenty-year mandatory minimum on the attempted first-degree murder count and a sentence review after twenty-five years; thirty years in prison with a twenty-year mandatory minimum on the attempted second-degree murder count; and fifteen years on each of the remaining two felonies (R 626-27). All counts were imposed concurrently (R 626).

2. Defendant has appealed his conviction and sentence in Fifth District Court of Appeal Case No. 5D23-0192. No initial brief has been filed in the district court as of this date. Undersigned counsel has filed a Notice of Pending Motion to Correct Sentencing Error in the Fifth District Court of Appeal as required by Florida Rule of Criminal Procedure 3.800(b)(2).

3. Defendant was represented at the sentencing hearing by attorney Julie Schlax, 200 East Forsyth Street, Jacksonville, Florida, 32202. Undersigned appellate counsel does not intend to represent Defendant in the trial court. Defendant therefore requests that Ms. Schlax represent Defendant at all appearances and hearings on this motion as necessary, pursuant to Florida Rule of Criminal Procedure 3.111(3). It is requested that all papers

relative to or concerning this motion be served upon appellate counsel for Defendant and the State, as well as trial counsel.

4. A calendar call should be held within 20 days, an evidentiary hearing (if needed) should be held within 40 days, and a ruling should be issued within 60 days. See Fla. R. Crim. P. 3.800(b)(1)(B). The Court has jurisdiction to extend the 60-day time limit if the extension is granted before the 60 days expires. Davis v. State, 887 So. 2d 1286 (Fla. 2004). Unless it is necessary that another judge preside, this motion should be heard by the sentencing judge, the Honorable Adrian Soud. See Fla. R. Crim. P. 3.700(c); Kramer v. State, 970 So. 2d 468 (Fla. 2d DCA 2007).

5. For the reasons set forth in the following memorandum of law the Court erred by failing to include in the written sentencing order that Defendant, a juvenile offender, was entitled to a sentence review in Count I, by failing to order a sentence review for Count II, and by imposing minimum mandatory prison sentences in Counts I and II.

MEMORANDUM OF LAW

I. The Court erred by failing to include in its written sentencing order that Defendant, a juvenile offender, was entitled to a sentence review.

A trial court is required to enter a written order providing that a juvenile defendant is entitled to sentence review pursuant to section 921.1402, Florida Statutes. See Walker v. State, 288 So. 3d 694, 695 (Fla. 5th DCA 2019); James v. State, 258 So. 3d 468, 469 (Fla. 4th DCA 2018). Even where the trial court orally pronounces at sentencing a defendant's entitlement to a sentence review, the trial court must also enter a written order to that effect. Walker at 695. See, also, Barnes v. State, 175 So. 3d 380, 382 (Fla. 5th DCA 2015) (remanding for the trial court to amend the sentencing documents to include the sentence review provision).

In the instant case, the Court orally pronounced at sentencing that Defendant was entitled to a sentence review in Count I (R 626), but the Court did not enter a written order to that effect or include in the written sentencing order that Defendant was entitled to a

sentence review (R 393-98).

Pursuant to Walker and James, Defendant requests that the Court amend the written sentencing order to include his eligibility for sentence review in Count I.

II. The Court erred by failing to include a sentence review in Count II.

A juvenile offender convicted of attempted second-degree murder with a firearm is eligible for sentence review under section 921.1402 after serving twenty-five years. See State v. Davis, 342 So. 3d 709 (Fla. 1st DCA 2022) (holding that a juvenile offender convicted of attempted second-degree murder with a firearm and sentenced to thirty years in prison was eligible for a sentence review after serving twenty-five years). The trial court must enter a written order providing that a juvenile defendant is entitled to sentence review pursuant to section 921.1402. Walker at 695; James at 469.

Here, like the defendant in Davis, Defendant was convicted of attempted second-degree murder with a firearm in Count II and sentenced to thirty years in prison. The Court did not orally pronounce at sentencing Defendant's entitlement to sentence review

on Count II[2] or issue a written order providing for Defendant's sentence review eligibility.

Defendant respectfully requests that the Court amend the written sentencing order to provide for Defendant's sentence review eligibility in Count II.

III. The imposition of the 10-20-Life minimum mandatory sentences in Counts I and II for Defendant, a juvenile offender, was unconstitutional under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, section 17 of the Florida Constitution.

Precedent:

Multiple Florida state courts have held, contrary to Defendant's argument, that minimum mandatory sentences are constitutionally permissible. Defendant must raise this issue in the sentencing court in order to preserve it for future federal habeas proceedings.

The Florida Supreme Court has held that non-life sentences for juveniles do not implicate Miller v. Alabama, 567 U.S. 460

[2] The Court orally pronounced Defendant's sentence review eligibility in Count I.

(2012). See Pedroza v. State, 291 So. 3d 541, 545 (Fla. 2020). Several district courts of appeal have held that minimum mandatory sentences for juveniles are constitutionally permissible because of the availability of sentence review: Martinez v. State, 256 So. 3d 897, 900 (Fla. 4th DCA 2018) (stating that "a sentence with a non-life minimum mandatory imposed against a juvenile offender facing a potential life sentence does not violate ... Miller so long as the juvenile was afforded an individualized sentencing hearing pursuant to section 921.1401 and is later afforded periodic judicial review of his or her sentence as provided in section 921.1402); Bailey v. State, 277 So. 3d 173 (Fla. 2d DCA 2019) (minimum mandatory for juvenile was not unconstitutional where the juvenile was eligible for sentence review); Montgomery v. State, 230 So. 3d 1256, 1263 (Fla. 5th DCA 2017) (minimum mandatory for juvenile was not unconstitutional because the juvenile was eligible for sentence review).

Argument:

Mandatory minimum sentencing schemes, while constitutionally valid for imposing increased punishment for adult

offenders, are and should be declared unconstitutional as applied to juveniles. Defendant should have received individualized sentencing consideration at sentencing with a resulting sentence that was not informed by the immutable constraints of a mandatory minimum term. This claim of unconstitutionality follows in the wake of Miller v. Alabama, 132 S. Ct. 2455 (2012). The validity of a mandatory minimum sentence is "far from certain," as explained in a definitive article by Sara E. Fiorillo in Mitigating After *Miller: Legislative Considerations and Remedies for the Future of Juvenile Sentencing,* B.U. Law Rev. 2095, 2127 (2013) (citing Douglas A. Berman, *Graham and Miller and the Eighth Amendment's Uncertain Future,* 27 CRIM. JUST. 19, 19-20 (2013)).

The conclusion that 10-20-Life minimum mandatory sentences are unconstitutional when applied to juveniles is informed by a trilogy of Supreme Court cases that drastically changed the criminal justice treatment of juvenile offenders. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012). These cases along with state decisions have developed actionable precedent

leading to the demise of juvenile mandatory sentences. The Iowa Supreme Court in State v. Lyle, 854 N.W.2d 378 (Iowa 2014), provides the prime example.

Roper's 17-year-old defendant who planned and committed murder was tried once he turned eighteen. Roper, 543 U.S. at 557. The prosecution presented aggravating factors supporting imposition of the death penalty. The defense focused on defendant Simmons' lack of convictions and his capacity to care for and love his siblings and grandmother. Reversing the death sentence, the U.S. Supreme Court identified three differences between juveniles and adults that confirmed juvenile offenders cannot be classified as the worst offenders justifying the death penalty. Id. at 569: (1) juveniles do not possess the level of responsibility or maturity as adults. Id. (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); (2) juveniles are more susceptible to "negative influences and outside pressures, including peer pressure." Id. (citing Eddings v. Oklahoma, 455 U.S. 104,115 (1982)); and (3) juvenile character and personality are not developed to the same extent as an adult. Id. at 570.

Graham was a non-homicide case involving a 16 year-old who was sentenced to a 12-month probationary period for pleading guilty to attempted armed robbery and armed burglary. Graham, 560 U.S. at 53. Less than six months later, the defendant violated probation by committing a home invasion and admitting his involvement in several other crimes. The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges, sentencing him as an adult to life without parole. Graham, 560 U.S. at 57. As in Roper, the Supreme Court acknowledged that the differences between juveniles and adults must be taken into account when developing sentencing guidelines for youth. Id. at 68-72 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993) ("Because juveniles' lack of maturity and undeveloped sense of responsibility... often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions.")). The Court concluded that because "[a] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability," life without parole sentences (LWOP) were unconstitutionally harsh for juveniles. Id. at 69-71.

Miller combined two companion cases each involving 14-year-olds convicted of murder and sentenced to mandatory life without parole. The Court examined two lines of Eighth Amendment-based precedent: categorical bans on sentencing practices for youth, and the requirement of individualized consideration before imposition of a death sentence. Id. at 2463-64 (plurality opinion) ("Here, the confluence of these two lines of precedent leads to the conclusion that mandatory [LWOP] sentences for juveniles violated the Eighth Amendment."). Miller sought to create a "certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty." Id. at 2471. Justice Kagan explained for the 5-4 majority that, in both Miller and Jackson, state law "mandated that each juvenile die in prison even if a judge or jury thought that [their] youth and its attendant characteristics, along with the nature of [their] crime" called for something other than a LWOP sentence. Miller, 132 S. Ct. at 2460.

Combined with categorical bans on particular sentencing practices for youth and the requirement of individualized consideration, the Miller Court held that the Eighth Amendment

prevents a state from mandating life without parole (LWOP) sentences for juveniles, and that individualized consideration needs to be given to each juvenile offender before imposition of such a sentence. Id. (citing Miller, 132 S. Ct. at 2470). The Miller decision underscores how "youth matters for purposes of meting out the law's most serious punishments." Miller, 132 S. Ct. at 2464, 2471. As a result of Miller, mandatory LWOP sentences for juveniles are unconstitutional, and "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Id. at 2475.

Since the Miller decision, legislative responses have been inconsistent. The Supreme Court of Iowa, in Lyle, has led the way for all jurisdictions: the abolition of all juvenile mandatory minimum sentences. Lyle provides a template for compliance with the Supreme Court's juvenile sentencing trilogy.

In 2011, 17-year-old Andre Lyle was convicted of second degree robbery for taking a small bag of marijuana from another student during an altercation at his high school. On his eighteenth birthday, Lyle was sentenced to a mandatory prison term not to

exceed ten years, requiring service of seventy percent before parole eligibility. Lyle, 854 N.W.2d at 381. Lyle objected to the mandatory minimum sentence as a violation of the U.S. Constitution's Eighth Amendment and the Iowa Constitution's guarantee against cruel and unusual punishment as applied to youthful offenders.

The Iowa Supreme Court's painstaking review of the history of juvenile jurisprudence led to its ultimate conclusion that minimum mandatory sentences were unconstitutional:

> Upon exercise of our independent judgment, as we are required to do under the constitutional test, we conclude that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability. See Graham, 560 U.S. at 71-75, 130 S. Ct. at 2028-30). First and foremost, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed. See Null, 836 N.W.2d at 70; see also Bruegger, 773 N.W.2d at 885 (recognizing that youth applies broadly to diminish culpability)). Of course, scientific data and the opinions of medical experts provide a compelling and increasingly ineluctable case that from a neurodevelopment standpoint, juvenile culpability does not rise to the adult-like standard the mandatory minimum provision of section 902.12(5) presupposes. Thus, this prevailing medical consensus continues to inform and influence our opinion today under the constitutional analysis we are required to follow. As

> demonstrated by our prior opinions and the recent opinions of the United States Supreme Court, however, we can speak of youth in the commonsense terms of what any parent knows or what any former child knows, and so, surely, we do not abdicate our constitutional duty to exercise independent judgment when we determine Lyle does not have adult-like culpability.

Lyle at 398. See also State v. Zarate, 908 N.W.2d 831 (Iowa 2018) (abuse of discretion by imposing an additional ten years based on belief taking a life demands a minimum prison sentence even for juveniles); State v. Houston-Sconiers, 391 P.3d 409, 188 Wn. 2d 1, 21 (Wash. 2017) (sentencing courts have complete discretion to impose sentence below guideline range, overruling statute barring discretion for juveniles); State v. Delbosque, 195 Wn.2d 106, 130, 456 P.3d 806, 819 (Wash. 2020) (upholding Lyle and Houston-Sconiers, but finding no error in resentencing 17-year-old to life without parole because court independently weighed Lyle and statutory factors and did not rely on questionable testimony to exclusion of other record evidence).

The evolution of Atwell v. State, 128 So. 3d 167, 169 (Fla. 4th DCA 2013) (Miller applies only to mandatory sentence of life without

the possibility of parole), is instructive. In 2013, the Fourth District upheld a mandatory sentence of life imprisonment without the possibility of parole for 25 years for the capital offense of first-degree murder. Id. The Florida Supreme Court granted review, Atwell v. State, 160 So. 3d 892 (Fla. 2014), affirming the first-degree murder conviction but remanding for re-sentencing with the individualized sentencing consideration Miller required. Id. at 1041.

In a later review of the life sentence in Atwell v. State (Atwell II), 197 So. 3d 1040, 1044-1047 (Fla. 2016), the Florida Supreme Court critically analyzed the evolution of juvenile sentencing by examining State v. Lyle, 854 N.W.2d 378, 399 (Iowa 2014) alongside then-existing Florida law, leading to its conclusion that the sentence was unconstitutional under Miller because, when he was sentenced for first-degree murder at 16 years old, the trial court was unable to consider how children were different and how those differences counseled against irrevocably sentencing them to a lifetime in prison. Even though that defendant was sentenced to life with the possibility of parole after 25 years, under Florida's existing parole system, the earliest release date calculated by the objective

parole guidelines was 140 years after the crime, the effective equivalent of a mandatorily imposed life without parole sentence. Under this structure, that defendant did not receive the type of individualized sentencing consideration Miller required.

The Atwell II Court embraced Lyle's analysis by pointing out its consistency in following the spirit of Graham and Miller rather than resorting to a narrow, literal interpretation. Atwell II, 197 So. 3d at 1046. Citing its decisions in Henry v. State, 175 So. 3d 675 (Fla. 2015) (quashing sentence of life plus 60 years for non-homicide offenses in light of new 2014 juvenile sentencing legislation), and Gridine v. State, 175 So. 3d 672 (Fla. 2015) (quashing 70-year sentence for attempted first-degree murder and 25 years for attempted armed robbery conviction, both with 25-year minimum mandatory sentences where no meaningful opportunity for future release based on demonstrated maturity and rehabilitation), the Florida Supreme Court reaffirmed its recognition, as the U.S. Supreme Court itself had done, that "[c]ategorical rules tend to be imperfect" and accordingly determined Graham had "no intention of limiting its new categorical

rule to sentences denominated under the exclusive term of life in prison.'" Atwell II, 197 So. 3d at 1046 (citing *Henry,* at 679-680). Moreover, the Atwell Court acknowledged the unconstitutionality of a juvenile sentence under Miller is not as simple whether it is "with or without parole." Id.

The Florida Supreme Court understood "that lengthy term-of-years sentences can implicate Graham as unconstitutional for juveniles if those sentences fail to provide for the critical mechanism - a meaningful opportunity for release - at the heart of the Graham holding." Atwell II, 197 So. 3d at 1047. The Court explained:

> Indeed, we did so even though those sentences were not technically labeled as "life in prison." See Henry, 175 So. 3d at 680; Gridine, 175 So. 3d at 674-75. This Court also acknowledged in Horsley that Miller stands for the proposition that "youth matters for purposes of meting out the law's most serious punishments" and that the Eighth Amendment categorically prohibits certain punishments without "considering a juvenile's 'lessened culpability' and greater 'capacity for change.'" Horsley, 160 So. 3d at 398-99 (quoting Miller, 132 S. Ct at 2460).

Atwell II at 1047.

The Supreme Courts in Iowa and Florida both agree that

"nothing [the United States Supreme Court] has said [about children] is 'crime-specific,' suggesting the natural concomitant that what it said is not punishment-specific either." Lyle, 854 N.W.2d at 399. Because the mandatory sentence imposed on a juvenile offender is contrary to the law and policy in Florida concerning treatment of juveniles, this Court should adopt Lyle and rule that the mandatory minimum sentence for this juvenile offender is contrary to Florida law as unconstitutional.

"Taken together, Graham and Miller establish that 'children are different'; that 'youth matters for purposes of meting out the law's most serious punishments'; and that 'a [trial] judge.... must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'" Atwell II, 197 So. 3d at 1045. The Graham and Miller concern is not punishment-specific, but offender directed. Mandatory minimums cannot be constitutionally applied to juveniles. State v. Means, 872 N.W.2d 409 (Iowa Ct. App. 2015). As applied to juveniles, mandatory minimums limit the trial court's allowable discretionary considerations before the imposition of a harsh sentence.

Other states have also questioned the constitutionality and appropriateness of minimum sentences for juveniles. See State v. Taylor G., 315 Conn. 734, 110 A.3d 338 (Conn. 2015) (legislature may wish to revisit whether mandatory terms are appropriate for juveniles); State v. Williams-Bey, 333 Conn. 468, 477-480, 215 A.3d 711, 717-718 (Conn. 2019) (J. Ecker dissenting).

However, since Atwell II the Florida Supreme Court has held that a juvenile's sentence does implicate Graham and Miller "unless it meets the threshold requirement of being a life sentence or the functional equivalent of a life sentence." Pedroza at 548.

Conclusion:

A 10-20-Life minimum mandatory sentence for a juvenile offender is unconstitutional because it removes the individualized sentencing discretion that the Eighth Amendment and Article I, section 17 require. Here, the trial court's individualized sentencing discretion was unconstitutionally limited by the necessity to impose the twenty-year minimum mandatory prison sentences pursuant to section 775.087(2)(a) in Counts I and II. Defendant will serve his full twenty-year minimum mandatory sentences before he receives

his sentencing review at twenty-five years. The federal Constitution requires that trial courts have complete individualized sentencing discretion to sentence juvenile offenders without the constraints of one-size-fits-all minimum mandatory sentences.

Defendant respectfully requests that this Court strike the twenty-year minimum mandatory sentences from Counts I and II.

WHEREFORE, Defendant respectfully requests that the Court amend the written sentencing order to specifically provide for Defendant's eligibility for sentence review in Counts I and II, and that the Court strike from Defendant's sentences in Counts I and II the unconstitutional mandatory minimum terms.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Assistant Attorney General, at crimapptlh@myfloridalegal.com; to the Honorable Adrian Soud

through the e-filing portal; to Julie Schlax, at julie@esalawgroup.com; and to Leah Owens, Assistant State Attorney, at laowens@coj.net, on this date, March 31, 2023.

Respectfully submitted,

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APPENDIX E

Filing # 171027963 E-Filed 04/14/2023 01:21:56 PM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2020-CF-07710-AXXX

DIVISION: CR-A

STATE OF FLORIDA

v.

FELIX OMAR PUSEY,
Defendant.
_______________________/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S SECOND MOTION TO CORRECT SENTENCING ERROR

This cause comes before this Court on Defendant's "Second Motion to Correct Sentencing Error Under Florida Rule of Criminal Procedure 3.800(b)(2)," filed on March 31, 2023.

On May 25, 2022, a jury convicted Defendant of Attempted First Degree Murder (Count One), Attempted Second Degree Murder (Count Two), Possession of a Firearm by a Juvenile Delinquent Felon (Count Three), and Discharging a Firearm from a Vehicle (Count Four). On July 22, 2022, this Court sentenced Defendant to a forty-year term of imprisonment as to Count One and a thirty-year term of imprisonment as to Count Two, both of which carry twenty-year minimum mandatories pursuant to section 775.087(2)(a), Florida Statutes (2022), and fifteen-year terms of imprisonment as to Counts Three and Four. Defendant filed a notice of appeal but has not yet filed his initial appellate brief.

Defendant files the instant Motion pursuant to rule 3.800(b)(2), which allows a defendant to correct a sentencing error during the pendency of an appeal so long as the motion is filed prior to the first appellate brief. See Fla. R. Crim. P. 3.800(b)(2).

ACCEPTED: DUVAL COUNTY, JODY PHILLIPS, CLERK, 04/19/2023 10:59:21 AM

Defendant asserts two claims. First, Defendant argues this Court improperly failed to include the juvenile sentence review period on his Judgment and Sentence form as to Counts One and Two. Defendant is entitled to a written order specifying his entitlement to a twenty-five-year juvenile sentence review. Walker v. State, 288 So. 3d 694, 695 (Fla. 4th DCA 2019).

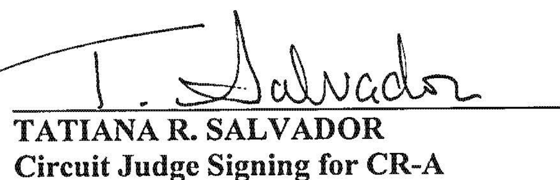
Defendant's second claim is that imposition of the twenty-year minimum mandatories on Counts One and Two constitute impermissible cruel and unusual punishment under federal and state constitutions. Controlling precedent holds otherwise. Montgomery v. State, 230 So. 3d 1256, 1263 (Fla. 5th DCA 2017) ("[T]he mandatory [10-20-Life] minimum sentence . . . does not constitute cruel and unusual punishment when applied to a juvenile offender as long as he or she gets the mandated judicial review.").

Accordingly, it is **ORDERED** that:

1. Defendant's "Motion to Correct Sentencing Error Under Florida Rule of Criminal Procedure 3.800(b)(2)," filed by counsel on March 30, 2023, is **GRANTED IN PART** and **DENIED IN PART.**

2. The Clerk of the Court is directed to notate *nunc pro tunc* on page nine of Defendant's Judgment and Sentence form that Defendant is entitled to a twenty-five-year juvenile sentence review under section 921.1402(2)(b), Florida Statutes, as to Counts One and Two.

DONE AND ORDERED in Jacksonville, Duval County, Florida on April 14, 2023.



TATIANA R. SALVADOR
Circuit Judge Signing for CR-A

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to all legal counsel for both parties via the addresses listed above and Defendant via U.S. Mail on ______________________________, 2023.

______________________________,
Deputy Clerk

Case Nos.: 16-2020-CF-007710-AXXX
/tbc