FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-878

CHRISTINE LASHAY ROGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Stephen A. Pitre, Judge.

May 1, 2020

ON MOTION FOR REHEARING EN BANC

ROWE, J.

The State moved for rehearing en banc of our decision in this appeal, *Rogers v. State*, 45 Fla. L. Weekly D357 (Fla. Feb. 13, 2020). For the reasons that follow, we grant the motion, withdraw the panel opinion, and substitute this opinion in its place.

I. Factual and Procedural Background

On July 5, 2003, law enforcement officers responded to a report of a stabbing on Belmont and Q Streets in Pensacola. When officers arrived on the scene, they found the fifteen-year-old victim lying in the middle of the street in a pool of blood.

Witnesses reported that Christine Lashay Rogers and the victim had been arguing earlier. Rogers accused the victim of hitting her with fireworks. Rogers left and returned with a butcher-style knife. The victim was standing in her yard when Rogers approached her, armed with the knife. When the victim saw Rogers, she ran, but Rogers pursued her. The victim stopped near a car and tried to punch Rogers. But Rogers stabbed the victim twice in the upper chest with the knife. One of the wounds was four inches deep and penetrated the victim's lung. Rogers fled, taking the knife with her. The victim was rushed to the hospital, but she did not survive the attack.

Rogers was thirteen years old at the time of the stabbing. She was charged and convicted of second-degree murder with a weapon. She received a forty-five-year prison sentence, with five years suspended. But we reversed her conviction and sentence because the trial court failed to conduct a competency hearing. *Rogers v. State*, 954 So. 2d 64, 65 (Fla. 1st DCA 2007). On remand, the trial court found her competent to proceed and retried her. The jury found her guilty, and we affirmed her judgment and sentence. *Rogers v. State*, 75 So. 3d 726 (Fla. 1st DCA 2011) (unpublished table decision).

In 2017, Rogers moved for postconviction relief under Florida Rule of Criminal Procedure 3.800(a). She argued that she was entitled to resentencing under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010). Rogers asserted that her forty-year sentence was a de facto life sentence that violated the Eighth Amendment.[1] The State conceded error. The trial court granted Rogers' motion and ordered resentencing.

A year later, when Rogers still had not been resentenced,[2] the State filed an "addendum" to its earlier concession. Citing new decisions from this Court and the Florida Supreme Court, the

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[1] In her motion, Rogers refers to her sentence as a forty-year sentence. Stated more accurately, it is a forty-five-year sentence, with five years suspended.

[2] The record does not reveal the reasons for the delay.

State argued that Rogers' sentence was not a de facto life sentence and did not violate the Eighth Amendment. The State urged the trial court to vacate its order granting resentencing. In 2019, the trial court entered an amended order, vacating its earlier order and denying Rogers' claim of an illegal sentence.

Rogers appealed. Citing our decision in *Jordan v. State*, 81 So. 3d 595 (Fla. 1st DCA 2012), Rogers argued that the trial court lacked authority to rescind the original order granting relief under rule 3.800(a) because the State did not timely seek rehearing or appeal. Based on our decision in *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DCA 2019), we reversed the trial court's order vacating its order granting Rogers relief. *Rogers*, 45 Fla. L. Weekly at D357. The State seeks rehearing en banc.

II. Basis for En Banc Rehearing

The State urges this Court to rehear this case and recede from *Simmons*. The State contends that *Simmons* misapplied the law governing a trial court's jurisdiction to reconsider an order granting postconviction relief under rule 3.800(a) when resentencing has not yet occurred. The State argues we should recede from *Simmons* for three reasons. First, an order granting a rule 3.800(a) motion is not a final order. Second, the State cannot appeal an order granting a rule 3.800(a) motion until resentencing has occurred. And third, the trial court has inherent authority to reconsider an order granting a rule 3.800(a) motion if resentencing has not occurred. We agree with all three arguments.[3]

[3] As noted by Judge Bilbrey in his concurring opinion, the State in *Simmons* did not advance several arguments it now presents to support rehearing in *Rogers*. As a member of the *Simmons* panel and the author of that opinion, I find that the State's arguments on rehearing here are well taken. *See Ramos v. Louisiana*, No. 18-5924 (U.S. Apr. 20, 2020) ("Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.").

We followed *Jordan* in *Rogers* and *Simmons*. In *Jordan*, we determined that a trial court lacked jurisdiction to reconsider an order granting relief under rule 3.800(a) when the State did not challenge the order by timely moving for rehearing or appealing. 81 So. 3d at 596. Both *Simmons* and *Jordan* misapplied the law. We now conclude that orders granting relief under rule 3.800(a) are not final or appealable, and so the trial court retains its inherent authority to reconsider such orders.[4]

En banc rehearing is appropriate[5] because this case presents issues of exceptional importance. *See* Fla. R. App. P. 9.331(a) ("En

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[4] Judge Tanenbaum suggests that the *Rogers* panel could have affirmed the order on appeal without receding from *Simmons*. We disagree. *Simmons*, *Jordan*, and *Rogers* all involved trial courts rescinding orders granting resentencing under rule 3.800(a), and all held that the trial court lacked authority to do so. *See Sims v. State*, 260 So. 3d 509, 514 (Fla. 1st DCA 2018) (observing that "[e]ach panel decision is binding on future panels, absent an intervening decision of a higher court or this court sitting en banc"); *In re Rule 9.331, Determination of Causes by a Dist. Court of Appeal En Banc, Fla. R. App. P.*, 416 So. 2d 1127, 1128 (Fla. 1982) ("[T]he suggestion that each three-judge panel may rule indiscriminately without regard to previous decisions of the same court is totally inconsistent with the philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district.").

[5] Judge Makar argues that prudential concerns counsel against rehearing this case en banc because the supreme court is considering "the identical issue." We disagree. The Florida Supreme Court has accepted review in *State v. Frances*, SC20-252 and *State v. Jackson*, SC20-257—both death penalty appeals. In both cases, the defendants sought postconviction relief under Florida Rule of Criminal Procedure 3.851, seeking to set aside their death sentences based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In each case, the lower courts initially granted relief. But before a new penalty phase began, the Florida Supreme Court decided *State v. Poole*, 45 Fla L. Weekly S41 (Fla. Jan. 23, 2020). Following that decision, the State moved to reinstate the death sentences in both cases. But the State's motions were denied.

banc hearings and rehearing shall not be ordered unless the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions."). In the eleven months since this Court decided *Simmons*, we have followed *Simmons* in nine cases. The Fourth and the Fifth Districts have also adopted the reasoning of *Simmons*. *See Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019); *Magill v. State*, 287 So. 3d 1262 (Fla. 5th DCA 2019). Statewide, seventeen opinions have issued citing *Simmons* to reverse trial court orders.[6] Because of the continuing effect of *Simmons* on resentencing proceedings throughout

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Based on *Simmons*, the lower courts ruled that they lacked authority to reconsider or vacate their earlier orders granting the defendants' rule 3.851 motions. Deciding the issues raised in those two death penalty appeals may require consideration of some of the issues addressed here. But the supreme court would not be required to address the State's authority to appeal an order granting resentencing under rule 3.800(a), the finality of an order granting a rule 3.800(a) motion, or the trial court's inherent authority to reconsider such an order. For these reasons, our consideration of *Rogers* en banc is not a "race" to compete with the supreme court. Rather, our consideration of this case provides an opportunity to correct several errors in our postconviction jurisprudence.

[6] *Rogers v. State*, 45 Fla. L. Weekly D357 (Fla. 1st DCA Feb. 13, 2020); *Melton v. State*, 45 Fla. L. Weekly D357 (Fla. 1st DCA Feb. 13, 2020); *Earley v. State*, 289 So. 3d 573 (Fla. 1st DCA 2020); *Albritton v. State*, 45 Fla. L. Weekly D283 (Fla. 1st DCA Feb. 6, 2020); *Baldwin v. State*, 45 Fla. L. Weekly D197 (Fla. 1st DCA Jan. 22, 2020); *Magill v. State*, 287 So. 3d 1262 (Fla. 5th DCA 2019); *Price v. State*, 286 So. 3d 922 (Fla. 5th DCA 2019); *Keebler v. State*, 286 So. 3d 385 (Fla. 5th DCA 2019); *White v. State*, 284 So. 3d 1096 (Fla. 4th DCA 2019); *German v. State*, 284 So. 3d 572 (Fla. 4th DCA 2019); *Wintill v. State*, 283 So. 3d 1283 (Fla. 1st DCA 2019); *Scott v. State*, 283 So. 3d 1280 (Fla. 4th DCA 2019); *Henderson v. State*, 280 So. 3d 1132 (Fla. 1st DCA 2019); *Wehr v. State*, 279 So. 3d 340 (Fla. 5th DCA 2019); *Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019); *Barnes v. State*, 278 So. 3d 321 (Fla. 1st DCA 2019); *State v. Jackson*, 276 So. 3d 488 (Fla. 1st DCA 2019).

Florida, we consider this case en banc as one of exceptional importance and recede from *Simmons*, *Jordan*, and the decisions from this Court following those cases.

III. Simmons

Lester Simmons was fifteen years old when he raped an adult woman. He was convicted in 1967, after pleading guilty in exchange for the prosecutor's agreement not to recommend a sentence of death.[7] *See Simmons*, 274 So. 3d at 469. At the sentencing hearing, the victim recounted how Simmons surreptitiously entered her home and raped her. Simmons was sentenced to life with the possibility of parole.

Simmons was granted parole *twice* and spent nearly eighteen years on parole, before his parole was revoked for a second time. *Id*. In 2016, nearly fifty years after his sentence became final, Simmons moved for postconviction relief under rule 3.800(a). Simmons argued that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment, citing *Graham* and *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016).

The State conceded error. *See id.* at 470. The trial court granted Simmons' motion and ordered resentencing. But before resentencing occurred, this Court decided *Currie v. State*, 219 So. 3d 960 (Fla. 1st DCA 2017). There, we held that a sentence of life with the possibility of parole, like the one Simmons received, was not the functional equivalent of a life sentence without the possibility of parole when the defendant was in fact released on

[7] At the time, the death penalty could be imposed for the offense. Ten years later, the United States Supreme Court held that a death sentence for rape of an adult woman was unconstitutional. *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Then in 2005, the Court held unconstitutional the imposition of the death penalty on an offender who was under the age of eighteen when he committed the offense. *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005).

parole.[8] *See id.* at 960. Based on this change in the law, the trial court rescinded its original order and denied the rule 3.800(a) motion. *Simmons*, 274 So. 3d at 470.

Simmons appealed. He argued that because the State did not challenge the original order by timely moving for rehearing or appealing, the trial court lacked jurisdiction to rescind the order. *See id.* The State countered that because resentencing had yet to occur, the original order was not final and the trial court retained the inherent authority to revisit the ruling. *Id.* at 471. We rejected the State's argument and held that the trial court lacked procedural jurisdiction to rescind its order granting relief under rule 3.800(a) because the order became final when neither party moved for rehearing or appealed. *Id.* at 471–72. In so holding, we relied on our decisions in *Jordan* and *Slocum v. State*, 95 So. 3d 911 (Fla. 1st DCA 2012), and the supreme court's decision in *Taylor v. State*, 140 So. 3d 526 (Fla. 2014). As explained below, we erred in relying on *Taylor* and *Slocum* because neither case involved an order granting relief under rule 3.800(a). And although *Jordan* did involve an order granting relief under rule 3.800(a), we now conclude that the *Jordan* court misapplied the law.

IV. Orders Granting Relief Under Rule 3.800(a) Are Not Final

In *Simmons*, we held that a trial court lacks jurisdiction to reconsider an order granting relief under rule 3.800(a) because such an order becomes final when the State fails to appeal or seek rehearing. 274 So. 3d at 471–72. In concluding that an order granting relief under 3.800(a) is a final order, we cited our earlier decision in *Jordan*.

Jordan involved an order granting a postconviction motion filed under rule 3.800(a). Before resentencing occurred, the trial

[8] The Florida Supreme Court reached a similar conclusion in *State v. Michel*, 257 So. 3d 3 (Fla. 2018). The court held that a juvenile's life sentence with the possibility of parole after twenty-five years was not the equivalent of life without the possibility of parole and thus was not cruel and unusual punishment under the Eighth Amendment. *Id.* at 7.

judge passed away and a successor judge was appointed. *See Jordan*, 81 So. 3d at 596. The successor judge granted the State's motion for reconsideration and denied Jordan's rule 3.800(a) motion. *Id.*

Jordan appealed, arguing that the successor judge lacked jurisdiction to reconsider the original ruling because that order was final. *See id.* The State conceded error, admitting "that the motion for reconsideration was untimely and the court was therefore without jurisdiction to rule upon it." *Id.* The *Jordan* court accepted the State's concession. *Id.* It concluded that the original order granting the rule 3.800(a) motion was final "because it brought the postconviction proceedings to an end" and because resentencing was a de novo proceeding. *Id.* In reaching this conclusion, the court determined that the State could challenge the order "only by way of a *timely* motion for rehearing or an appeal." *Id.* (emphasis in original). Because the State's motion for rehearing was untimely, the *Jordan* court held that the successor judge lacked jurisdiction to vacate the original order granting the rule 3.800(a) motion. *See id.*

In so holding, the *Jordan* court cited *State v. White*, 470 So. 2d 1377 (Fla. 1985). *Jordan*, 81 So. 3d at 595. But *White* addressed an order granting a Florida Rule of Criminal Procedure 3.850 motion, not a rule 3.800(a) motion. 470 So. 2d at 1378. There, the State appealed an order granting White's rule 3.850 motion and vacating White's death sentences as constitutionally impermissible. *Id.* The *White* court held that it had jurisdiction to hear the State's appeal because rule 3.850 "by its own terms" considered orders entered on those motions as final judgments. *Id.* at 1378–79.

As this Court did in *Simmons*, the *Jordan* court failed to appreciate the differences between rules 3.800(a) and 3.850.[9] Rule 3.800(a) does not address the finality of any order entered on such

[9] The Second District recently discussed the differences between the rules and held that a postconviction court lacked jurisdiction to rescind an order granting a rule 3.850 motion. *See Croft v. State*, 45 Fla. L. Weekly D711 (Fla. 2d DCA Mar. 25, 2020).

a motion, while rule 3.850 does.[10] For this reason, the *Jordan* court incorrectly relied on *White* to hold that an order granting a rule 3.800(a) motion was a final order. Our reliance on *Jordan* in *Simmons* was similarly misplaced. Instead, in *Jordan* and *Simmons*, we should have applied the traditional test for finality to determine whether an order granting a rule 3.800(a) motion is a final order:

> [T]he test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected.

State v. Gaines, 770 So. 2d 1221, 1223–24 (Fla. 2000) (quoting *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974)).

While "there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein," this point is not reached until resentencing occurs. *Austin Tupier Trucking v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979). An order granting relief under rule 3.800(a) does not bring an end to the judicial labor required to provide relief, so the order does not become final until resentencing has occurred. *See Farina v. State*, 191 So. 3d 454, 459 (Fla. 2016) (Canady, J., dissenting) ("The order granting the Defendant's 3.800(a) motion is not a final order, as judicial labor, i.e., resentencing, is still required.") (quoting *State v. Delvalle*, 745 So. 2d 541, 542 (Fla. 4th DCA 1999)); *Morgan v. State*, 45 Fla. L. Weekly D791 (Fla. 2d DCA Apr. 3, 2020) ("This court has held that a 'rule 3.800(a) motion d[oes] not create a new, separate proceeding.'") (quoting *State v. Rudolf*, 821 So. 2d 385, 386 (Fla. 2d DCA 2002)). And so, we conclude that an order granting a rule

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[10] *See Judge v. State*, 596 So. 2d 73, 76–77 (Fla. 2d DCA 1991) (on rehearing en banc) (explaining the differences between rule 3.800(a) and rule 3.850 and discussing the narrower application of rule 3.800(a)).

3.800(a) motion is not a final order. *See Adams v. State*, 949 So. 2d 1125, 1126 (Fla. 3d DCA 2007). We recede from our decisions in *Jordan* and *Simmons* holding to the contrary.

V. Orders Granting Rule 3.800(a) Motions Are Not Appealable

In *Simmons*, we also held that the State could have appealed the trial court's order granting relief under rule 3.800(a). 274 So. 3d at 470. We relied on the Florida Supreme Court's decision in *Taylor* to support our holding. That reliance was misplaced.

In *Taylor*, the trial court entered an order partially granting and partially denying Taylor's postconviction motion filed under rule 3.850. *See* 140 So. 3d at 527. While Taylor's motion for rehearing on the denial of his claims was pending, the trial court proceeded with resentencing. *See id.* at 528. Taylor timely appealed his new sentence, and it was affirmed. Later, Taylor filed an amended motion for rehearing because the lower court never ruled on his previous motion. That motion was denied, and Taylor appealed. The Fifth District dismissed the appeal for lack of jurisdiction. The court held that Taylor "should have raised any issues related to the disposition of his other postconviction claims [in his first] appeal after resentencing." *Id.* at 528. Taylor sought review in the Florida Supreme Court.

The issue before the supreme court was whether "an order disposing of a postconviction motion which partially denies and partially grants relief is a final order for purposes of appeal, when the relief granted requires subsequent action in the underlying case, such as resentencing." *Id.* at 527. The court determined that such an order was "final for purposes of appeal." *Id.* In making that determination, the court cited a recent amendment to rule 3.850 that added subdivision (f)(8)(C). That section provided that "[t]he order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal." *Id.* at 529.

In *Simmons*, we relied on the *Taylor* court's "final for purposes of appeal" statement to hold that an order granting relief under 3.800(a) is likewise final for purposes of appeal. On closer examination of *Taylor*, we conclude that our reliance on that

decision was misplaced and that the cases are distinguishable for three reasons.[11]

First, *Taylor* addressed whether an order partially denying a rule 3.850 motion was appealable. The *Taylor* court never addressed the part of the order granting relief. *Id.* Nor did the court suggest any limitation on the trial court's authority to reconsider its ruling between issuing the order and resentencing the defendant.

Second, two separate rules of procedure address the appealability of an order granting relief under rule 3.850, while no procedural rule authorizes an appeal from an order granting relief under rule 3.800(a). Florida Rule of Appellate Procedure 9.140(c) describes the orders in criminal cases that the State may appeal. Under the rule, the State may appeal orders "granting relief under Florida Rules of Criminal Procedure 3.801, 3.850, 3.851, or 3.853." Fla. R. App. P. 9.140(c)(1)(J). And as the *Taylor* court observed, Florida Rule of Criminal Procedure 3.850(f)(8)(C) provides that an order granting postconviction relief after an evidentiary hearing is final for purposes of appeal.

But unlike orders granting relief under rule 3.850, no rule or statute authorizes the State to appeal an order granting relief under rule 3.800(a). The Florida Statutes limit the State's right to appeal a criminal ruling. *State v. Odom*, 24 So. 3d 1266, 1268 (Fla. 1st DCA 2009) (discussing the statutory limitations on the State's right to appeal). Section 924.066(2), Florida Statutes, allows "[e]ither the State or a prisoner in custody" to "obtain review" of "a trial court's adverse ruling granting or denying collateral relief." But this statute necessarily applies only to final orders because the supreme court has "the sole authority of deciding when appeals may be taken from interlocutory orders." *Gaines*, 770 So. 2d at 1225 (quoting *R.J.B. v. State*, 408 So. 2d 1048, 1050 (Fla. 1982));

[11] Our reliance on our earlier decision in *Slocum* was similarly misplaced. Like *Taylor*, *Slocum* involved an appeal from an order partially granting and partially denying relief under rule 3.850. *Slocum*, 95 So. 3d at 912.

Art. V, § 4(b), Fla. Const. (vesting the supreme court with the authority to adopt rules to allow review of interlocutory orders).

And so, for the State to appeal an order granting relief under rule 3.800(a)—a nonfinal order—the rules of criminal or appellate procedure must authorize the appeal. But no such authority exists. Although Florida Rule of Appellate Procedure 9.140(b)(1)(D) allows a defendant to appeal an order denying or dismissing a rule 3.800(a) motion, it does not authorize either party to appeal an order *granting* a rule 3.800(a) motion. *See also* Fla. R. Crim. P. 3.800(a)(4) (requiring all orders denying or dismissing motions to contain a notice of the right to appeal). Instead, the State may appeal only after resentencing, and only those orders "imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines." Fla. R. App. P. 9.140(c)(1)(M).

And because an order granting relief under rule 3.800(a) is not final or appealable, we conclude that a trial court does not lose procedural jurisdiction after granting a rule 3.800(a) motion but before resentencing the defendant. *See 14302 Marina San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd.*, 92 So. 3d 320, 321 (Fla. 1st DCA 2012) (Ray, J., concurring) (defining procedural jurisdiction as the court's authority to act in a particular case). Our holdings in *Jordan* and *Simmons* to the contrary were incorrect.

VI. Orders Granting Relief Under Rule 3.800(a) May Be Reconsidered if the Defendant Has Not Been Resentenced

In *Simmons* and *Jordan*, we also concluded that a trial court lacks authority to reconsider an order granting rule 3.800(a) relief even when resentencing has not yet occurred. This conclusion was incorrect for two reasons.

First, as explained above, an order granting relief under rule 3.800(a) is a nonfinal order. A trial court may reconsider an order granting a rule 3.800(a) motion just as it can reconsider other nonfinal orders, until resentencing is complete. *See Farina*, 191 So. 3d at 459 (Canady, J., dissenting) (holding that an order is not final if "judicial labor is still required to effectuate a termination of the case"); *Rudolf*, 821 So. 2d at 386 (holding that an order granting a

rule 3.800(a) motion "is essentially a nonfinal order entered after the entry of an appealable final order").

Second, a trial court has the inherent authority to reconsider an order until it becomes final. In *Simmons*, the State cited Florida Rule of Criminal Procedure 3.192 to argue that the trial court retained its inherent authority to reconsider an order granting relief under rule 3.800(a). This rule provides that "[n]othing in this rule precludes the trial court from exercising its inherent authority to reconsider a ruling while the court has jurisdiction of the case." Fla. R. Crim. P. 3.192. We rejected the State's argument on the retention of the trial court's inherent authority based on our reading of the preceding sentence, which provides, "This rule shall not apply to postconviction proceedings pursuant to rule 3.800(a), 3.801, 3.851, or 3.853." Fla. R. Crim. P. 3.192. Our reading of rule 3.192 was flawed.

The better reading of the limitation in rule 3.192 is that the procedural requirements for rehearing outlined in rule 3.192 do not apply to rehearing motions filed under rules 3.800(a), 3.801, 3.851, or 3.853. Indeed, several of these rules provide their own timelines for rehearing.[12] So understood, the last sentence of rule 3.192 clarifies that the rule does not infringe on the trial court's inherent authority to revisit its nonfinal rulings. *See Schultz v. State*, 289 So. 3d 921, 924 (Fla. 4th DCA 2020) (recognizing a trial court's inherent authority to reconsider its ruling on a motion to withdraw); *Oliver v. Stone*, 940 So. 2d 526, 529 (Fla. 2d DCA 2006) ("It is well established that a trial court may reconsider and modify interlocutory orders at any time until final judgment is entered.").

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[12] *See* Fla. R. Crim. P. 3.800(b)(1)(B) (authorizing rehearing of "any signed, written order entered under subdivisions (a) and (b) of this rule"); Fla. R. Crim. P. 3.801(e) (implementing the same rehearing procedures as found in rule 3.850); Fla. R. Crim. P. 3.850(j) (allowing a party to file a motion for rehearing within fifteen days of service); Fla. R. Crim. P. 3.851(f)(7) (authorizing a motion for rehearing within fifteen days of the date of rendition); Fla. R. Crim. P. 3.853(e) (requiring motions for rehearing to be filed within fifteen days after service of the order denying relief).

And so, until resentencing occurs, a trial court has the inherent authority to reconsider an order granting a rule 3.800(a) motion.[13]

VII. Application to Rogers

Rogers moved for postconviction relief under rule 3.800(a), arguing that her forty-year sentence was a de facto life sentence and that she was entitled to resentencing under *Graham* and *Miller*.[14] After the State conceded error, the trial court granted Rogers' motion and ordered resentencing. But before resentencing, this Court decided *Hart v. State*, 255 So. 3d 921 (Fla. 1st DCA 2018). In *Hart*, we held that a juvenile offender's fifty-year sentence did not violate the Eighth Amendment or *Graham*. *See id.* at 927.

Based on *Hart*, the State asked the trial court to reconsider the order granting resentencing. The State argued that Rogers' forty-year sentence did not violate *Miller* or *Graham* because her sentence was not a de facto life, life, or mandatory sentence. The State asserted that Rogers would have a meaningful opportunity for release during her lifetime. Using the gain-time formula, the State calculated that Rogers could obtain release by the time she was forty-two years old. After hearing from the parties, the court granted the State's motion and rescinded its order granting Rogers' rule 3.800(a) motion.

On appeal, Rogers argues that the State's motion for reconsideration was untimely because it was filed over a year after the trial court rendered its order granting her postconviction motion. Rogers then asserts that the State's failure to appeal that order divested the trial court of jurisdiction to rescind it. Finally,

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[13] In his concurrence, Judge B. L. Thomas makes sound arguments to support a trial court's inherent authority to reconsider any nonfinal order in a criminal case. Even so, we confine our analysis to the question presented here—the authority of a trial court to reconsider an order granting resentencing under rule 3.800(a).

Rogers argues that even if the court retained jurisdiction to revisit its original order, the court erred in denying relief under rule 3.800(a). She claims she is entitled to resentencing because her sentence provides for release only at the end of her sentence and allows for no opportunity to obtain early release based on a showing of maturity and rehabilitation.

We disagree. Because resentencing had not yet occurred, the trial court retained jurisdiction to reconsider its original ruling. The trial court properly applied the law as it existed when it considered the motion to reconsider and did not err in denying Rogers relief under rule 3.800(a). *Hart*, 255 So. 3d at 927. Rogers was sentenced to forty-five years' imprisonment, with five years suspended. This is not a de facto life sentence. She was fifteen years old when her sentence was imposed. Even if she serves her entire sentence, she would be released before the age of fifty-five (assuming the other five years of her sentence remain suspended). Because Rogers' sentence affords her a meaningful opportunity for release during her natural life, the trial court correctly found that her sentence does not violate *Graham*, and it properly denied her rule 3.800(a) motion.[15] *See Hart*, 255 So. 3d at 927.

VIII. Conclusion

An order granting postconviction relief under rule 3.800(a) is not final or appealable until resentencing has occurred. Until then, the trial court retains jurisdiction and has the inherent authority to reconsider an order granting relief under rule 3.800(a). For these reasons, we recede from *Simmons* and *Jordan* and affirm the trial court's order finding that Rogers was not entitled to postconviction relief.

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[15] The supreme court reached a similar conclusion in *Pedroza v. State*, 45 Fla. L. Weekly S93 (Fla. Mar. 12, 2020). The supreme court clarified that "a juvenile offender's sentence does not implicate *Graham*, and therefore *Miller*, unless it meets the threshold requirement of being a life sentence or the functional equivalent of a life sentence." *Id.*

As noted above, the Fourth and Fifth Districts have followed *Simmons* and held that a trial court may not reconsider or vacate an order granting relief under rule 3.800(a), even when resentencing has not occurred. *See Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019); *Magill v. State*, 287 So. 3d 1262 (Fla. 5th DCA 2019). Based on our holding here, we certify conflict with *Jones* and *Magill*.

AFFIRMED; CONFLICT CERTIFIED.

RAY, C.J., and WOLF, LEWIS, ROBERTS, OSTERHAUS, BILBREY, WINOKUR, M.K. THOMAS, and NORDBY, JJ., concur.

B.L. THOMAS, J., concurs specially with opinion, in which ROBERTS, WINOKUR, JAY, and M.K. THOMAS, JJ., join.

BILBREY, J., concurs with opinion.

TANENBAUM, J., concurs in the result, with opinion.

MAKAR, J., dissents from the denial of motion for dissolution with opinion, in which KELSEY, J., concurs as to result only.

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

B.L. THOMAS, J., concurring specially.

The State's motion for rehearing en banc correctly expressed the foundational principle at issue here: "Absent finality of judgment, it is the notice of appeal – not the passage of time – that removes a trial court's jurisdiction to revisit its ruling." *Prior to final judgment*, the trial court can *and should* correct its own previous incorrect appealable rulings which a party has not appealed. In fact, the supreme court has held that a trial court retains jurisdiction even *after* it has entered final judgment:

> We . . . hold that when a court incorporates a settlement agreement into a final judgment or approves a settlement agreement by order and retains jurisdiction to enforce its terms, the court has the jurisdiction to enforce the terms of the settlement agreement *even if the terms are outside the scope of the remedy sought in the original pleadings*.

Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797, 803 (Fla. 2003) (emphasis added) (footnote omitted). Logically, if a court retains jurisdiction to enforce a settlement agreement after entering final judgment, a court retains jurisdiction to reconsider a previous, appealable order now rendered invalid by intervening precedent or the trial court's reconsideration of a prior erroneous appealable ruling not appealed by the parties *before entering final judgment.*

And, in fact, the supreme court has long recognized that a trial court has the inherent power and authority to reconsider its interlocutory orders before entering final judgment: "As the District Court held, it is well settled that a trial court has the inherent authority to control its own interlocutory orders prior to final judgment." *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 851 (Fla. 1962) (citation omitted). Logically, the trial court must also possess the power and authority to control its prior appealable decisions not classified as "interlocutory" *if the party adversely affected does not appeal that prior decision* before the trial court enters final judgment. The principle of law that a trial court retains authority to "control its own interlocutory orders prior to final judgment" does not *exclude* the trial court's inherent authority to "control" all its orders prior to final judgment.

To hold otherwise leads directly to illogical and unlawful results. If prior to final judgment, a trial court cannot reconsider its own prior appealable decisions, then that trial court could be required to disobey subsequent supreme court precedent merely based on the failure of a *party* to exercise its right to appeal. For example, assume that a trial court granted a motion for a new trial based on a rule of law which was later overruled by the supreme court. Also, assume that the adversely affected party did not timely appeal that order. Under the illogical proposition in *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DCA 2019), the trial court is

prohibited from reconsidering its prior erroneous order granting the new trial even though that order is now contrary to a binding supreme court decision. *See Frazier v. Seaboard RR Inc.*, 508 So. 2d 345 (Fla. 1987) (holding that orders granting new trial are *not* interlocutory in nature and are final orders not subject to motion for rehearing, clarifying *Bowen v. Williard*, 340 So. 2d 110 (Fla. 1976)); Fla. R. App. P. 9.110(a)(3); Philip J. Padovano, *2 Florida Appellate Practice* § 23:7 (2019 ed.)*.

Other examples of reviewable orders issued during discovery and trial are readily apparent. For example, where a trial court erroneously orders the disclosure of privileged material, such an order is reviewable by the appellate court:

> We may review an interlocutory order that is not appealable under Florida Rule of Appellate Procedure 9.130 by petition for certiorari only when the petitioner establishes (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal. . . . It is well established that "[c]ertiorari review 'is appropriate in cases that allow discovery of privileged information.

Butler v. Harter, 152 So. 3d 705, 709–10 (Fla. 1st DCA 2014) (citations omitted). In *Butler*, we granted the writ for certiorari to prevent disclosure of confidential work product. And, although a party may not seek extraordinary review due to cost, delay, or other considerations, a party may reiterate to the court that although it does not seek review, the judge's ruling is error and will cause irreparable harm.

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* Although an order granting a new trial is a nonfinal order, it is reviewable by the procedures that apply to appeals from *final orders*. Rule 9.110(a)(3) of the Florida Rules of Appellate Procedure includes new trial orders within the class of orders that are appealable under Rule 9.110, and Rule 9.130(a)(4) clarifies this *unique classification* by stating that "orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in Rule 9.110." (Emphasis added).

Now assume the trial court decides after the time for review has expired that its prior ruling was error—perhaps after researching the matter, reading *Butler*, or otherwise deciding that its ruling will be a departure from the essential requirements of law, cause great embarrassment by the disclosure of confidential information, and cannot be remedied on direct appeal. Under *Simmons*, the trial court is *precluded* from revisiting its order and reversing itself because the party harmed by the prior order did not seek timely review by this Court. This illogical result is based on the fiction that somehow, the trial court "lost jurisdiction" to reconsider a prior appealable order which a party failed to challenge on appeal. However, the trial court does not lose jurisdiction until it enters a final judgment, and perhaps not even then under *Paulucci*.

Another example of a trial court's appealable interlocutory ruling is venue. Fla. R. App. P. 9.130(a). This decision can be complex, subject to two different standards of review by the appellate court:

> Cedar urges us to review the trial court's venue decision under an abuse of discretion standard. . . . [T]here are at least two different types of venue decisions a trial court may be asked to make, *each requiring a different standard of review*. For example, when a party moves to transfer venue for the convenience of the parties, the trial court is faced with more than one legally acceptable venue and must chose a good location. The trial court exercises discretion in making this venue decision. The trial court's selection will not be disturbed by an appellate court absent an abuse of discretion. *If the trial court transfers venue to a location where the action could not have been brought, such a transfer is probably both an error of law and an abuse of discretion.*
>
> By contrast, when a trial court is presented with a motion to transfer venue based on the impropriety of the plaintiff's venue selection, the defendant is arguing that, as a matter of law, the lawsuit has been filed in the wrong forum. In order to rule on such a motion, the trial court needs to resolve any relevant factual disputes and then

> make a legal decision whether the plaintiff's venue selection is legally supportable. A trial court's factual decisions in this context are reviewed to determine whether they are supported by competent, substantial evidence or whether they are clearly erroneous. The trial court's legal conclusions are reviewed de novo.

PricewaterhouseCoopers LLP v. Cedar Res., Inc., 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999) (emphasis added) (citations omitted).

It is not surprising that a trial court may reconsider such a ruling before trial commences, long after the party seeking the venue change declined to seek appellate review. But the trial court may later determine it made a legal error in denying the venue change. Under our holding in *Simmons*, the trial court is deemed to have "lost jurisdiction" because the party could have appealed but failed to do so. However, this principle is incorrect because the trial court certainly did not lose jurisdiction, subject matter or otherwise, and the trial court retains the authority to revisit that decision rather than be permanently bound by its prior, incorrect decision merely because a party failed to seek review under Fla. R. App. P. 9.130. *ATM Ltd. v. Caporicci Footwear, Corp.*, 867 So. 2d 413, 413–14 (Fla. 3rd DCA 2003).

Thus, I would expand the holding in Judge Rowe's opinion to hold that every trial court has the inherent authority *prior to entering final judgment* to reconsider its own prior appealable decisions which a party failed to appeal. It matters not whether the prior appealable decision was rendered in a rule 3.800 or a 3.850 proceeding, a civil suit, or any other case in which final judgment has not been entered.

Furthermore, our holding in *Simmons* cannot be squared with the rule of law that trial courts possess jurisdiction to reconsider prior incorrect appealable rulings, before entering final judgment:

> Since the trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action, *see North Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 851 (Fla. 1962); *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615,

> 616 (Fla. 2d DCA 1997), the motion for a new trial filed by the coplaintiff, if granted, could have affected Silvestrone's rights and liabilities. Therefore, Silvestrone's rights or liabilities were not finally and fully adjudicated until the presiding judge resolved these matters and recorded final judgment and this final judgment became final.

Silvestrone v. Edell, 721 So. 2d 1173, 1175 (Fla. 1998).

As then-Judge Ray previously wrote in a concurring opinion addressing a post-final judgement ruling:

> Subject matter jurisdiction is a court's constitutional or statutory power "to deal with a class of cases to which a particular case belongs," *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 801 n. 3 (Fla. 2003), and a challenge to such jurisdiction cannot be waived, *Tabb ex rel. Tabb v. Fla. Birth–Related Neurological Injury Compensation Ass'n*, 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004). There is no doubt that a circuit court has subject matter jurisdiction over the type of foreclosure action in this case. Art. V, § 5(b), Fla. Const.; §§ 26.012(2)(a), (c), (g), 34.01(1)(c), Fla. Stat. (2010). . . . Thus, subject matter jurisdiction was not absent below.
>
> The type of jurisdiction the court lacked was its "power ... over a particular case that is within its subject matter jurisdiction," as determined by reference to the case's *procedural posture*. *See T.D. v. K.D.*, 747 So. 2d 456, 457 n. 2 (Fla. 4th DCA 1999). This species of jurisdiction is termed "case jurisdiction" or "continuing jurisdiction" by some courts. It has also been referred to as "procedural jurisdiction," meaning a court's authority to act in a particular case.

14302 Marina San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd., 92 So. 3d 320, 321 (Fla. 1st DCA 2012) (Ray, J., concurring) (emphasis added) (footnote omitted). In *Marina*, this Court held that a trial court lacked jurisdiction to award fees and assessments three months *after* it had entered final judgment, where the moving party had failed to timely seek rehearing or relief from

judgment under Rule of Civil Procedure 1.540. But the concurring opinion correctly noted that the circuit court there did *not* lack subject-matter jurisdiction.

One case cited in this concurring opinion explained that a circuit court may lose "case jurisdiction" when a *final dismissal* is entered, but the court retains jurisdiction otherwise. Judge Schwartz wrote for the Third District and stated:

> We do not, however, agree with the contention that the judgment is infirm on the ground that the trial court lost jurisdiction over the cause as a whole when it entered an order of dismissal pursuant to Florida Rule of Civil Procedure 1.070(j) some two years before the judgment. It is true that, after the *final* dismissal of a claim or complaint, either with or without prejudice, the trial court is without further "case jurisdiction" and cannot render a judgment of any kind in the case. This rule does not apply here, however because the cited order, which states that the cause "shall stand dismissed" in the absence of an appropriate "motion showing good cause" why "service was not effectuated" is not a final order under this doctrine. *See United Water Fla., Inc. v. Florida Pub. Serv. Comm'n,* 728 So. 2d 1250 (Fla. 1st DCA 1999) (holding that order which purported to become final on a certain future date in the absence of a petition for a formal hearing was not a final order); *Department of Transp. v. Post, Buckley, Schuh & Jernigan*, 557 So. 2d 145 (Fla. 1st DCA 1990) (holding that order, which purported to dismiss cause for failure to prosecute subject to reinstatement for good cause shown by motion, was not final order dismissing the case). *See Newman v. Newman*, 858 So. 2d 1273 (Fla. 1st DCA 2003). See generally, *Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51 (Fla. 3d DCA 1982), *review denied,* 424 So. 2d 763 (Fla. 1982). Because the court therefore retained jurisdiction to enter the final judgment on appeal, as against Mohamed, the judgment is affirmed.

ATM Ltd. v. Caporicci Footwear, Corp., 867 So. 2d 413, 413–14 (Fla. 3rd DCA 2003) (emphasis in original) (footnote omitted) (some citations omitted).

Again, logically, if a circuit court retains jurisdiction in this example and under the facts in *Paulucci*, to take further action, it cannot "lose" any jurisdiction, subject matter or "case" jurisdiction, where the case is not concluded by final judgment or dismissal. Thus, here and in any case, a court can revisit any prior ruling, regardless if the prior ruling could have been appealed by a party but was not. This is especially correct where a judge in an ongoing proceeding must now change a prior ruling to *comply with intervening and applicable precedent*.

And the distinction between a case involving a motion seeking relief under rule 3.850 rather than rule 3.800 cannot deprive a trial court of *jurisdiction* so that it must *disobey* intervening supreme court precedent merely because the State failed to appeal the prior incorrect 3.850 ruling granting resentencing. In fact, a defendant seeking relief under rule 3.850 is entitled to assert *more* grounds for relief:

> The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:
>
> (1) the judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida;
>
> (2) the court did not have jurisdiction to enter the judgment;
>
> (3) the court did not have jurisdiction to impose the sentence;
>
> (4) the sentence exceeded the maximum authorized by law;
>
> (5) the plea was involuntary; or

> *(6) the judgment or sentence is otherwise subject to collateral attack*.

Fla. R. Crim. P. 3.850 (emphasis added).

Compare this provision for collateral attack with the narrow grounds authorized in Florida Rule of Criminal Procedure 3.800: "A court may at any time correct an *illegal sentence* imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, when it is affirmatively alleged that the *court records demonstrate on their face an entitlement to that relief*[.]" (Emphasis added).

Thus, the proposition that the more narrow ground for relief asserted under rule 3.800—that the sentence is illegal on its face—allows the trial court to revisit its prior incorrect ruling but the broader collateral attack under rule 3.850, which allows several independent grounds for a new trial *and* a new sentence, does not allow a trial court to revisit its prior incorrect rulings because a party failed to appeal that ruling, is illogical. This was tacitly recognized recently by the Second District, which held that the trial court could not revisit its ruling granting relief under rule 3.850 but would likely (and, in fact, be *required*) to enter or *impose the same sentence on remand*:

> We are mindful that Mr. Croft may have won a pyrrhic victory, *see Franklin*, 258 So. 3d at 1241; *Michel*, 257 So. 3d at 6, because "the decisional law effective at the time of the resentencing applies." *State v. Fleming*, 61 So. 3d 399, 400 (Fla. 2011). Hence, upon resentencing, Mr. Croft may yet receive the same sentence.

Croft v. State, No. 2D18-5109, 2020 WL 1444973, at *2 (Fla. 2d DCA Mar. 25, 2020).

Trial courts have broad authority to reconsider prior rulings in pending cases, as this Court has recognized:

> Despite the lack of a specific rule permitting a court to rehear its denial, courts have the inherent authority to *reconsider* most matters. *See generally Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 292 (Fla. 1st DCA 2013) (construing unauthorized motion

> for rehearing as motion for reconsideration and explaining general ability of trial court to *reconsider* matters it could not otherwise rehear) (citing *Monte Campbell Crane Co., Inc. v. Hancock*, 510 So. 2d 1104 (Fla. 4th DCA 1987)); *see also Silvestrone v. Edell* 721 So. 2d 1173, 1175 (Fla. 1998) (citing *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 851 (Fla. 1962) ("[I]t is well settled that a trial court has the inherent authority to control its own interlocutory orders prior to final judgment.")).
>
> Yet, this inherent authority is limited to non-final, interlocutory orders rendered prior to final judgment. *See Panama City Gen. P'ship*, 109 So. 3d at 292 ("any order entered prior to the rendition of final judgment in the cause."); *see also Silvestrone*, 721 So. 2d at 1175 ("any of its nonfinal rulings prior to entry of the final judgment or order terminating an action"); *N. Shore Hosp.*, 143 So. 2d at 851 ("control its own interlocutory orders *prior to final judgment*"). An order denying a motion for relief from judgment is not interlocutory or non-final. *See Fla. Rules of Appellate Procedure*, 2 So. 3d 89, 92–93 (Fla. 2008) (explaining "unique nature" of order denying relief from judgment and amending Rule 9.130 title to include "specified final orders"). *And the denial comes after final judgment*, thus limiting the jurisdiction and authority of the trial court to Rules 1.530 and 1.540. *See Shelby Mut. Ins. Co. v. Pearson*, 236 So. 2d 1, 3–4 (Fla. 1970); *Buckman v. Beighley*, 128 So. 3d 133, 134 (Fla. 1st DCA 2013). Because the denial was not interlocutory or non-final, and because it was subject to the strict limits and manner of rule and statute, the court was without inherent authority to reconsider its decision. Instead, Appellant's mechanism for review was timely appeal to this Court.

Helmich v. Wells Fargo Bank, N.A., 136 So. 3d 763, 765–66 (Fla. 1st DCA 2014) (emphasis added in part).

In *Panama City General Partnership,* we stated the correct rule of law regarding a trial court's inherent authority to reconsider its prior rulings:

> Furthermore, while "a legally insufficient motion to vacate a default cannot be corrected as a matter of *right* by a motion for reconsideration or hearing, a trial court does have the inherent *discretionary* power to reconsider *any order entered prior to the rendition of final judgment* in the cause." *City of Hollywood v. Cordasco*, 575 So. 2d 301, 302 (Fla. 4th DCA 1991) (emphasis in original); *Monte Campbell Crane Co., Inc.*, 510 So. 2d 1104 (Fla. 4th DCA 1987) (holding that unauthorized motion for rehearing to set aside default heard by trial court will be considered as motion for reconsideration); *see generally,* James H. Wyman, *Reconsideration or Rehearing: Is There a Difference,* Fla. B.J., 83, June 2009, at 79. Because the trial court exercised its discretionary power and reached the merits of Appellant's motion, we do so as well.

109 So. 3d at 292 (second emphasis added).

We should hold and clearly state that *prior to final judgment*, a trial court has the inherent authority to reconsider a prior incorrect appealable ruling, where a party failed to appeal that prior ruling. As part of this analysis, it is important to be precise by what is meant by the proposition that "judicial labor is complete." A *factual* understanding of the proposition that "judicial labor is complete" must accommodate reality: in a collateral case involving a previous decision to grant resentencing, or the order granting a new trial described above, judicial labor is obviously *not complete*: further proceedings must be conducted, and it is during that period when a trial court logically must have the authority to reconsider a prior incorrect decision. We have previously held:

> Our conclusion in this regard is influenced by the generally recognized test for determining the finality of a judgment, which is "whether the judicial labor is at an end." *Slatcoff v. Dezen*, 72 So. 2d 800, 801 (Fla.1954). *Accord Financial International Life*

Insurance Co. v. Beta Trust Corporation, Ltd., 405 So. 2d 306 (Fla. 4th DCA 1981); *The Travelers Indemnity Co. v. Walker*, 401 So. 2d 1147 (Fla. 3d DCA 1981); *Palardy v. Igrec*, 388 So. 2d 1053 (Fla. 4th DCA 1980). As we have previously observed:

> The traditional test usually employed by the courts of this state in determining the finality of an order, judgment, or decree is whether the order in question marks the end of the judicial labor in the case, and *nothing further remains to be done by the court to fully effectuate a termination of the cause as between the parties directly affected. Hotel Roosevelt Co. v. City of Jacksonville*, 192 So. 2d 334, 338 (Fla. 1st DCA 1966). *Accord Chan v. Brunswick Corp., 388 So. 2d 274, 275 (Fla. 4th DCA 1980)* (order final when all judicial labor *required* or *permitted* is complete).

Pruitt v. Brock, 437 So. 2d 768, 773–74 (Fla. 1st DCA 1983).

As the State correctly argues in its Motion for Rehearing En Banc, the classification of an order as "appealable" does not necessarily correlate to a classification of an order where continued judicial labor is necessary. Thus, the supreme court's decision in *Taylor v. State*, 140 So. 3d 526 (Fla. 2014) does not hold that a trial court *cannot reconsider a decision to grant a resentencing*. Nothing in that opinion addresses a trial court's authority to reconsider a prior appealable ruling that was *not appealed*. There, the State argued the defendant *could not appeal*. The court in *Taylor* said:

> The certified conflict issue presented in this case is whether an order disposing of a postconviction motion which partially denies and partially grants relief is a final order for purposes of appeal, when the relief granted requires subsequent action in the underlying case, such as resentencing. For the reasons explained below, we hold that an order which partially denies and partially grants postconviction relief *is a final order for purposes of appeal, even if the relief granted requires subsequent action in the underlying case.*

140 So. 3d at 527 (emphasis added) (footnote omitted).

In other words, rather than require a defendant to wait until the continued judicial labor is, *in fact*, "complete," the defendant may appeal that portion of the order entered in a rule 3.850 proceeding denying relief in part. Thus, the court held that because a resentencing is a "new, independent proceeding," allowing "an appeal from the underlying postconviction proceeding does not foster *piecemeal* litigation or waste judicial resources." *Taylor*, 140 So. 3d at 529 (emphasis added). But no one could persuasively argue that under *Taylor,* because the trial court had previously denied relief on some grounds, that the trial court could not *revisit* that ruling when addressing only a sentencing claim, if hypothetically, the trial court decided that the defendant had received ineffective assistance of counsel and was entitled to a new trial. That is, *merely because the defendant could have but did not appeal that portion of the order previously denying the ineffective claim* does not establish that the trial court lacked the authority to reconsider certain rulings that would significantly grant the defendant *additional relief* on resentencing, including ordering a new trial. Upon entering an amended order granting a new trial, the State could appeal that ruling on the merits but not on the illogical ground that the trial court *lacked jurisdiction* solely because *the defendant failed to appeal the appealable adverse prior ruling*.

To decide that trial courts cannot reconsider their rulings, even appealable rulings, because a party failed to avail itself of an appeal, *during continued judicial labor*, is contrary to Article V, common law, and common sense. Such a rule would empower the litigant that fails to timely appeal or seek rehearing to strip the trial court of its constitutional authority to resolve an ongoing dispute, which must necessarily include the authority of a trial court to reverse itself during a pending case. *See Silvestrone v. Edell, 721 So. 2d at 1175; N. Shore Hosp., Inc. v. Barber, 143 So. 2d at 851; Panama City Gen. P'ship v. Godfrey Panama City Inv, LLC, 109 So. 3d at 292.* This would deny the trial court the power and flexibility to change course during litigation even where an intervening decision of a higher court mandates the trial court's reconsideration merely because a litigant declined to appeal the previous appealable order.

Nothing in our organic law lends support to such a proposition. *See* Art. V, §§ 1, 5, Fla. Const. And, no statute provides such a limitation on judicial power. *See* §§ 25.012(2)-(3), .012(5), Fla. Stat. Our holding today should be much broader to comport with long-established law recognizing a trial court's jurisdiction to revisit its rulings prior to final judgment where no notice of appeal has divested the trial court of its jurisdiction.

BILBREY, J., concurring.

I concur in the majority opinion. In *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DC A 2019), we were bound by *Jordan v. State*, 81 So. 3d 595 (Fla. 1st DCA 2012). *See Wanless v. State,* 271 So. 3d 1219, 1223 (Fla. 1st DCA 2019) ("We are of course bound to follow our own decisions unless and until an intervening decision from the Florida Supreme Court, the United States Supreme Court, or this court sitting en banc compels otherwise."); *see also In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure*, 416 So. 2d 1127, 1128 (Fla. 1982) (noting that "if intra-district conflict is not resolved within the districts courts by en banc decision, totally inconsistent decisions could be left standing and litigants left in doubt as to the state of law").[1]

[1] I respectfully reject any contention that a subsequent panel of three judges can overrule or disregard a prior panel decision, even if the prior decision was erroneous. *Wanless* and various other cases discuss the limited circumstances under which a three-judge panel can disregard our prior precedent. *See, e.g., Sims v. State*, 260 So. 3d 509 (Fla. 1st DCA 2018). The application of *stare decisis* only applies to a district court when considering whether to overrule prior precedent en banc. When a three-judge panel of this court is faced with prior precedent from this court which has not been overruled en banc or by a higher court, that panel has no choice but to let the decision stand. The prospect of any three-judge panel being able to overrule any previous panel could lead to chaos. *See In re Rule 9.331*, 416 So. 2d at 1128. The trial courts and litigants in Florida need to know the current status of the law to be able to reach the best possible decisions. The case law arising from *Little v. State*, 206 So. 2d 9 (Fla. 1968), which provides that

Additionally, in *Simmons* the State did not argue the distinction made here between motions under rule 3.800 and rule 3.850, Florida Rules of Criminal Procedure. *Compare Croft v. State*, 45 Fla. L. Weekly D711, 2020 WL 1444973 (Fla. 2d DCA Mar. 25, 2020) (holding trial court lacked jurisdiction to enter an order rescinding prior order granting resentencing after time to appeal under rule 3.850, Florida Rules of Criminal Procedure, had expired), *with Morgan v. State*, 45 Fla. L. Weekly D791a, 2020 WL 1646798 (Fla. 2d DCA Apr. 3, 2020) (holding trial court retained jurisdiction to enter an order rescinding prior order granting resentencing since the order under rule 3.800, Florida Rules of Criminal Procedure, granting resentencing was not an appealable final order). We are correct to overrule *Simmons* and *Jordan*.[2, 3]

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in the event of a conflict between cases from the same district court the more recent case prevails, is to give instruction in the event of inconsistent decisions. The line of cases from *Little* is not a grant of permission for one three-judge panel to disregard the previous decision of this court; rather it is an instruction for trial courts on how to reconcile seemingly inconsistent cases in the event a district court does not acknowledge a previous, apparently contrary decision.

[2] Judge Makar reasonably questions why we should reconsider the *Simmons* holding en banc when the Florida Supreme Court has the same issue before it. Having been on the *Simmons* panel, I feel a responsibility to correct our error there. Additionally, if we could know that a dispositive ruling was imminent, perhaps we would be wise to forego addressing our error from *Simmons*. But given that it may understandably be some months before the Florida Supreme Court is able to address the issue, I think we act appropriately in correcting our earlier errors.

[3] Judge B. L. Thomas raises interesting points in his concurrence, citing various civil cases where a trial court retains authority to address past rulings. Rule 1.540, Florida Rules of Civil Procedure, allows for correction of mistakes and relief from judgment in fairly expansive circumstances while rule 3.800, Florida Rules of Criminal Procedure, only allows correction under more limited circumstances. But it is unnecessary to reach the

Our action here, correct though it is, will result in some defendants who committed serious criminal offenses as juveniles being treated differently than others. In *Falcon v. State*, 162 So. 3d 954, 964 (Fla. 2015), the Florida Supreme Court opened a two-year window for a person affected by the retroactive application of *Miller v. Alabama*, 567 U.S. 460 (2012), to file for relief under rule 3.850(a)(1) by extending the time to file per rule 3.850(b)(2). Rogers committed a homicide, so this ruling from *Falcon* applying *Miller* would have been applicable to her. *See Landrum v. State*, 192 So. 3d 459 (Fla. 2016). But she initially filed a motion under rule 3.800(a) which was denied in 2015. Her successive, pro se 3.800 motion, which at issue in this appeal, was then filed May 12, 2017. The mandate issued in *Falcon* on May 22, 2015, so Rogers' second motion, if it had been filed under 3.850 rather than 3.800 would have been just barely within the two-year window of rule 3.850(b)(2) opened by *Falcon*.[4] And if she had filed

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issue of a trial court's inherent authority to reconsider orders in criminal cases since, as the majority opinion points out, the trial court here retained jurisdiction under rule 3.800 to reconsider the order granting resentencing. Additionally, if we were to adopt the rationale in Judge B. L. Thomas' concurrence, we may be in conflict with *Taylor v. State*, 140 So. 3d 526 (Fla. 2014). *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66–67 (1996) (holding that courts are bound by the result of a prior decision as well as "those portions of the opinion necessary to that result").

[4] Simmons was a non-homicide juvenile offender, so *Falcon* did not directly apply to him. But in *Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015), decided on the same date as *Falcon*, the Florida Supreme Court held that the "new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch. 2014-220, Laws of Fla." should be applied retroactively to juveniles with a sentence found to be unconstitutional under *Graham v. Florida*, 560 U.S. 48 (2010). Simmons also styled his motion as under rule 3.800, claiming his life sentence with the possibility of parole violated *Graham*, but Simmons' motion also could have been filed under rule 3.850(a)(1). Simmons' motion would have been clearly timely if filed under rule 3.850 since it was filed in 2016, and the two-year limit to file under rule 3.850(b)(2) did not start until the

a motion under rule 3.850 then pursuant to *Taylor v. State*, 140 So. 3d 526 (Fla. 2014), the trial court would have had to go forward with resentencing. *See also Croft*, 45 Fla. L. Weekly at D712, 2020 WL 1444973, *2.

"[W]hen a movant files a properly pleaded postconviction claim but incorrectly styles the postconviction motion in which it is raised, the postconviction court must treat the claim as if it had been filed in an appropriately styled motion." *Curtis v. State*, 197 So. 3d 135, 136 (Fla. 2d DCA 2016). But Rogers does not appear to get the benefit of this holding because at the time her motion was filed, it was properly brought under either rule 3.800 or rule 3.850.

Why does the possibility of resentencing matter if "the trial court can, if it chooses, legally reimpose the same sentence" upon resentencing a juvenile offender? *Simmons*, 274 So. 3d at 472 (Bilbrey, J., concurring). Going forward with resentencing for a juvenile offender may only result in a "pyrrhic victory." *Croft*, 45 Fla. L. Weekly at D712, 2020 WL 1444973, *2. But since "the decisional law effective at the time of the resentencing applies" per *State v. Fleming*, 61 So. 3d 399, 400 (Fla. 2011), the trial court in many cases would have discretion upon resentencing to impose a lesser, still lawful sentence other than the original sentence.[5]

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mandate in *Henry* issued until October 2015. It was only after our opinion in *Currie v. State*, 219 So. 3d 960 (Fla. 1st DCA 2017), that it was clear that Simmons' life with the possibility of parole sentence was constitutional.

[5] In Rogers' case, had she been resentenced, it is possible she could have received a sentence as low as twenty years and six months without the trial court having any grounds for a departure sentence. *See* §§ 775.082(3)(b), 782.04(2), 921.0024, & 921.0026 Fla. Stat. (2003). Rogers' criminal punishment code worksheet showing this possible sentence is contained in the record of one of her previous appeals, 1D10-5271. *See Loren v. State*, 601 So. 2d 271 (Fla. 1st DCA 1992) (permitting appellate courts to take notice of the records in other cases before the court). Additionally, the record in this case contains evidence supporting Rogers' rehabilitation including a letter from the senior chaplain at Lowell

In addition to a possible reduced sentence upon resentencing, juvenile offenders who are granted resentencing because their original sentences were found to be unconstitutional under *Miller* or *Graham* receive the benefit of sentence review under chapter 2014-220, Laws of Florida. *Falcon*, 162 So. 3d at 963–64; *Horsley v. State*, 160 So. 3d 394, 405–06 (Fla. 2015). Depending on the offender's sentence, sentence review could shorten or terminate a sentence. *See* § 921.1402, Fla. Stat. (2019).[6]

Under our holding today, offenders like Rogers will not get the benefit of a possible reduced sentence upon resentencing or a sentence review hearing merely because the offender chose to file the motion under rule 3.800 instead of rule 3.850. I believe the majority's interpretation of rule 3.800 is correct, but I also believe the disparate treatment of offenders, who at one time were thought to have an unconstitutional sentence, based only on how they styled the motion bears mentioning.

TANENBAUM, J., concurring in the result.

I.

The intent to correct the panel's error is well-founded. I was on the panel in this case, and I acknowledge that our decision was

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Correctional Institute stating that Rogers had matured "to a fully rehabilitated young lady ready to be an asset and not a liability." The chaplain further stated the he was "confident that she is most capable and ready to successfully transition and re-enter society." Of course, if Rogers was resentenced, the chaplain's contention would be just one factor for the trial court's consideration. *See* § 921.002(1)(b), Fla. Stat. (2003) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.").

[6] An offender's "maturity and rehabilitation" would be one factor to consider at the sentence review hearing. § 921.1402(6)(a), Fla. Stat. (2019).

wrong. However, the entire court, which is already very busy, need not be involved in making the needed correction. Our panel could get there on its own, albeit via a rationale different from that expressed by the en banc majority.

To be sure, the en banc majority's opinion is analytically spot on, completely candid about the errors in *Simmons*, and characteristically well written. Still, in reversing with an instruction that the postconviction court grant Rogers a resentencing on the *procedural* grounds set out in *Simmons*, our panel effectively granted Rogers access to *substantive* relief under rule 3.800(a) that our supreme court now expressly forecloses. Our original panel's decision to follow *Simmons* now appears to have been futile; it led us to a legally impermissible disposition. On this basis alone, our panel could have reheard the case and affirmed, without expressly receding from *Simmons* as the en banc court now does.[1] I then concur only in the decision to affirm; I do not join in the en banc majority's opinion.

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[1] Contrary to the majority's suggestion in the margin, silently *not* relying on *Simmons* at all under these circumstances would not be the equivalent of expressly receding from it. The approach also would not upend principles of prior panel precedent or promote "chaos," as Judge Bilbrey separately suggests. We have here a rare situation that allows for quietly leaving *Simmons* to the side in the exercise of a panel's proper judgment. As I already mentioned and will explain further in a moment, there is no way our panel now could follow *Simmons* and reach a result that does not conflict with controlling precedent regarding the availability of postconviction relief. In such circumstances, a panel need not be bound to unerringly follow a prior panel's *ratio decidendi*. *Cf. Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545, at *12 (U.S. April 20, 2020) (Gorsuch, J., concurring) ("But *stare decisis* has never been treated as an inexorable command." (internal quotation and citation omitted)); *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (discussing how *stare decisis* might not always "comport with our judicial duty").

I say this without minimizing the importance of decisions by prior panels of this Court. *Cf. Gamble*, 139 S. Ct. at 1985–86 & n.6

II.

Rogers murdered someone when she was 13 years old. For that crime, she was sentenced to 45 years in prison (with five years suspended). She filed a rule 3.800(a) motion, claiming that what effectively was her 40-year sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment. She

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(describing usefulness of precedent in the exercise of judgment and judicial discretion and counseling in favor of "proceed[ing] on the understanding that our predecessors properly discharged their constitutional role until we have reason to think otherwise"). Our duty as judges, though, is "to exercise 'mere[] judgment.'" *Id.* at 1981 (quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also id.* at 1982 (explaining that the exercise of judicial power is "the duty to exercise 'judicial discretion' as distinct from 'arbitrary discretion'" (quoting THE FEDERALIST NO. 78, at 468, 471)).

To dispose of this case with reference to supreme court precedent, with no mention of *Simmons*, merely would be to exercise judicial discretion that meets the situation; it would not be to indiscriminately or arbitrarily ignore a decision of a prior panel. *Cf. In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc*, 416 So. 2d 1127, 1128 (Fla. 1982) (warning against three-judge panels ruling "*indiscriminately* without regard to previous decisions of the same court" but refusing to adopt a "strict rule of procedure" that requires panels to follow prior panel precedent, which the court regarded as "unworkable and inappropriate" (emphasis supplied)). Our panel undoubtedly could have taken this approach without risking confusion; panels have done so before without incident. *See, e.g., Daniel v. State*, 271 So. 3d 1214, 1215 n.3 (Fla. 1st DCA 2019) (acknowledging a conflict between two other panels and following the "later decision," which "controls," even though there was no express overruling of the prior panel's decision); *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590, 603–04 (Fla. 2017) (noting with passing approval a district court's change in decisional law effected *sub silentio* by a subsequent panel's conflicting decision).

relied on the United States Supreme Court's decision in *Miller*[2] and the Florida Supreme Court's decision in *Landrum*, among others. *See Landrum v. State*, 192 So. 3d 459, 460 (Fla. 2016) (holding that, under *Miller*, a discretionary life sentence without parole violates a juvenile homicide offender's Eighth Amendment right, unless the sentence was "informed by consideration of the juvenile offender's youth and its attendant circumstances" (internal quotation and citation omitted)). Rogers asserted in her motion that her sentence was the functional equivalent of a life sentence imposed without consideration of her youth. She asked for a resentencing hearing at which she could present "mitigating factors." In essence, the relief she sought was the remedy provided by *Horsley v. State*, 160 So. 3d 393, 395, 409 (Fla. 2015) (holding that for "all juvenile offenders whose sentences are unconstitutional under *Miller*," the remedy is "resentencing in conformance with chapter 2014-220, Laws of Florida").

After the postconviction court denied her motion, our panel should have noted the difference between the relief available under rule 3.800(a) and the relief available under rule 3.850, a key difference the en banc majority now addresses. Unlike rule 3.850, rule 3.800(a) does not provide for vacating a sentence. Rather, it allows a court to "*correct* an illegal sentence imposed by it." Fla. R. Crim. P. 3.800(a) (emphasis supplied). "[T]o be subject to correction under rule 3.800(a) a sentence must be one that no judge under the entire body of sentencing laws could possibly impose." *Martinez v. State*, 211 So. 3d 989, 991 (Fla. 2017) (internal quotation and citation omitted). To put this differently, "a sentence that *patently* fails to comport with statutory or constitutional limitations is by definition 'illegal.'" *Id.* (emphasis supplied) (internal brackets, quotation, and citation omitted). By "patently," the supreme court means that a rule 3.800(a) motion's "subject matter is limited to those sentencing issues that can be resolved as a matter of law without an evidentiary determination." *Hopping v. State*, 708 So. 2d 263, 265 (Fla. 1998) (internal quotation, citation, and emphasis

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[2] *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that a mandatory life sentence without parole for an offense committed while a defendant was a juvenile violates the Eighth Amendment's protection against cruel and unusual punishment).

omitted). In turn, before deciding on a corrected sentence, the postconviction court must determine that the original sentence is illegal as a *matter of law*. If the sentence is *not* illegal, then there is neither reason nor authority to have a resentencing hearing *or* grant a 3.800(a) motion and enter a corrected sentence.

At first the State conceded that Rogers was entitled to a resentencing, so the postconviction court entered an order stating this: "Defendant's Motion to Correct an Illegal Sentence is GRANTED, such that Defendant is entitled to resentencing, which shall be set by separate order." This order did not vacate the original sentence or impose a new sentence. It just told Rogers that she would get a resentencing hearing, presumably the one *Horsley* allowed. But the postconviction court could not provide this remedy if Rogers's original sentence were not demonstrably unconstitutional (read: illegal) *as a matter of law*. *See McCrae v. State*, 267 So. 3d 470, 472 (Fla. 1st DCA 2019) (holding that a defendant is not entitled to this type of resentencing hearing absent first establishing a *Graham* or *Miller* violation); *cf. Pedroza v. State*, 45 Fla. L. Weekly S93, S95b (Fla. Mar. 12, 2020) (treating as a "threshold requirement," for a *Graham* or *Miller* resentencing under rule 3.800(a), that a defendant show that she received a life sentence or "the functional equivalent").

The State's initial concession could not override controlling precedent or dictate any court's decision. And, as it turns out, binding precedent now *precludes* the only threshold legal conclusion—that Rogers's sentence was the functional equivalent of a life sentence—that would entitle her to a resentencing hearing. *See Pedroza*, 45 Fla. L. Weekly at S94a, S95b (holding that, as a "categorical matter," 40-year-sentence for second-degree murder committed by a juvenile, whereby she would be in her fifties upon release, was *not* "the functional equivalent of life" and did *not* entitle the defendant to resentencing under rule 3.800(a));[3]

[3] *Pedroza* approves the Fourth District's decision affirming the denial of a rule 3.800(a) motion "challenging the forty-year sentence imposed following a second-degree murder conviction." *Pedroza v. State*, 244 So. 3d 1128, 1129 (Fla. 4th DCA 2018). The Fourth District affirmed because the defendant had not shown

see also Hart v. State, 255 So. 3d 921, 927 (Fla. 1st DCA 2018) (holding that juvenile offender who received a 50-year aggregate sentence for various violent non-homicide offenses, committed when he was 15 years old, was *not* a *de facto* life sentence that would entitle him to resentencing); *McCrae*, 267 So. 3d at 470–71 (finding 30-year sentence imposed on a 17-year-old is *not* a *de facto* life sentence because the defendant would "still be in his forties when released"); *Austin v. State*, 127 So. 3d 1286, 1287 (Fla. 1st DCA 2013) (finding 45-year sentence for attempted second-degree murder is *not* a *de facto* life sentence).

The postconviction court, then, ultimately was right to deny Rogers a resentencing. Controlling *substantive* precedent would not allow it. *Cf. Pedroza*, 45 Fla. L. Weekly at S95b (characterizing a resentencing hearing as "unauthorized" and with "no legal basis" if the original sentence is "lawfully imposed"). As the court properly explained, Rogers's "45 year sentence is not a *de facto* life sentence" and "does not entitle her to judicial review" under this Court's decision in *Hart*. In contrast, our panel was wrong to quash that order and remand with an instruction that the postconviction court reinstate its original grant of the rule 3.800 motion and "*resentence* Rogers to a lawful sentence." *Rogers v. State*, 45 Fla. L. Weekly D357 (Fla. 1st DCA Feb. 13, 2020) (emphasis supplied). We followed *Simmons*, but our panel's disposition now runs counter to binding Florida Supreme Court precedent categorically *defeating* Rogers's claim of an illegal sentence under *Miller*. Rogers is not entitled to be resentenced under rule 3.800(a) because, as a matter of law, she cannot demonstrate that her sentence is illegal under *Miller* and *Landrum*.

III.

Simply put, even with the *Simmons* decision, our panel could not legally have ordered a *Horsley* resentencing in Rogers's rule 3.800(a) proceeding. That makes *Simmons* irrelevant in this case, so there is no need to recede from *Simmons* here. I then concur

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that her sentence violated the Eighth Amendment and did not identify any binding precedent that required resentencing. *Id.*

only in the result, which is simply to affirm the postconviction court's order denying 3.800(a) relief.

MAKAR, J., dissenting from denial of motion for dissolution.

Our supreme court recently accepted review on the identical issue in this case, which is the jurisdictional question decided in *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DCA 2019), adopted by two other districts and disagreed with by another. *See, e.g., Magill v. State*, 287 So. 3d 1262, 1262-63 (Fla. 5th DCA 2019) (citing *Simmons*); *German v. State*, 284 So. 3d 572, 573 (Fla. 4th DCA 2019) (citing *Simmons*); *but see State v. Spears*, 45 Fla. L. Weekly D421 (Fla. 2d DCA Feb. 26, 2020) (certifying conflict with *Simmons*, *Magill*, and *German*).

The supreme court's action has spawned accelerated en banc review in this Court so that the justices will have the collective benefit of our latest views. In essence, we are in a race to issue opinions before our supreme court does so in its pending cases. Rather than proceed in this manner, it is more efficacious under the circumstances that we dissolve[1] our en banc proceeding, allow the panel to proceed expeditiously (certifying conflict with the Second District), and hold our other cases involving resentencing under *Simmons*[2] in abeyance pending supreme court guidance. Nothing explicitly prohibits plowing ahead to (re)decide an issue pending in the supreme court, but prudential factors weigh against doing so here.

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[1] Our internal operating procedures allow a vote for "En Banc Consideration" and a vote for the "Dissolution of En Banc" proceedings. *See IOPs 6.9 & 6.10*. I was among those who voted to consider the case en banc but was among those voting to dissolve the proceeding following our en banc conference.

[2] *E.g., Melton v. State,* 45 Fla. L. Weekly D357 (Fla. 1st DCA Feb. 13, 2020) (identical issue and issued the same day as this case).

First off, the State's motion for rehearing en banc in this case, which challenges the validity of this Court's decision in *Simmons*, is virtually identical[3] to its filings in the pending supreme court cases, two of which are progressing rapidly and set for oral argument in a few weeks. In light of our supreme court (a) exercising jurisdiction in these topically-related cases, (b) choosing to hasten their resolution (and staying matters in all related cases), and (c) likely addressing and resolving the jurisdictional issue discussed in *Simmons*, *Magill*, *German* and *Spears* (and others),[4] it is prudent that we await those outcomes rather than inject our views into the process at this juncture.

Perhaps opinions of the en banc court will assist the supreme court in its decision-making, for example, by providing new and useful perspectives beyond those already expressed by judges in four of the five districts as well as the supreme court briefs of

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[3] In *State v. Frances*, SC20-252, the *first page* of the State's emergency petition implores the supreme court to "disregard the First District Court of Appeal's decision in *Simmons v. State*," thereafter devoting the bulk of its argument (14 of 21 pages) to why *Simmons* is: incorrect as to jurisdiction/finality; a misapplication of the rules of criminal procedure (including Rule 3.800); an intrusion on the "inherent authority" of trial courts to revisit issues already ruled upon (assuming ongoing jurisdiction exists); and an impediment to justice. The State argues all this while candidly noting that *the State* had *conceded* in *Simmons* and "many of the other district courts" that resentencing entitlement orders are final. The same is true as to *State v. Jackson*, SC20-257, except that the *entirety* of the State's argument is devoted to overturning *Simmons*. In both cases, the State's petitions include the same arguments presented in their motion for rehearing en banc in this Court, many verbatim. For these reasons, the issues in the pending supreme court cases are identical, in whole or large measure, to this case.

[4] *See Morgan v. State*, 45 Fla. L. Weekly D791 (Fla. 2d DCA Apr. 3, 2020) (certifying conflict with *Simmons* and districts adopting *Simmons*).

litigants in the pending cases.[5] Or perhaps they will be surplusage, merely repeating, adopting, or repackaging existing arguments,

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[5] Doing so might be viewed as a judicial "amicus brief" designed to persuade higher court jurists, a potentially problematic practice when oral argument is imminent or complete (because litigants don't have a ready means of responding to the lower court's opinion(s) absent supplemental briefing). *See, e.g.,* Josh Blackman, *Divided Fifth-Circuit Panel Submits Untimely Amicus Brief in Seila Law v. CFPB: Courts of Appeals should resist the urge to opine on cases pending before the Supreme Court*, The Volokh Conspiracy (March 4, 2020), https://reason.com/2020/03/04/divided-fifth-circuit-panel-submits-untimely-amicus-brief-in-seila-law-v-cfpb/#comments ("Circuit Judges should know their role. When a Supreme Court case is pending, hold your pens."); *see also* Josh Blackman, *The Fifth Circuit's Inconsistent Approach to Certiorari and Abeyance: What should a Court of Appeals do when the Supreme Court grants, or is about to grant, a case with related issues?* The Volokh Conspiracy (March 30, 2020), https://reason.com/2020/03/30/the-fifth-circuits-inconsistent-approach-to-certiorari-and-abeyance (critiquing the Fifth Circuit's handling of cases involving issues pending at the Supreme Court as "ad hoc, and not standardized" as well as "unfair to litigants" and lacking "due deference for the Supreme Court.").

A contrary view is that more information via new judicial insights is better, even if on the eve of a supreme court decision; and judicial vouching on the merits of a pending case can increase the weight of a recent precedent, particularly where the rendering court's status or an opinion's author is held in high regard, potentially resulting in a bandwagon effect. Bryan A. Garner et al., *The Law of Judicial Precedent* 245 (2016) ("the reputation of the judges of the court and of the court itself can affect the persuasive value of an opinion."). In this sense, judicial opinions sent "over the transom" to a high court deciding an identical issue has similarities to "virtual briefing," which is "online advocacy—written or oral—targeted at particular cases pending at the Supreme Court and outside of the normal briefing process." Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 Cornell L. Rev. 85 (2019) (forthcoming), available at http://ssrn.com/abstract=3388080 (last revised March 2, 2020).

albeit through a re-aligned voting pattern. On a cost/benefit basis, my hunch is that this expenditure of judicial effort by our Court will not be worth the marginal benefit of letting the supreme court's justices know of our change of heart and the views of individual judges. Whatever benefit will be ephemeral because the supreme court's soon-to-come decision will eclipse whatever is written at the district court level. Its decision will become *the* authoritative law on the issue presented; our opinions—even if cited with approval—will "bear little authority, since courts are unlikely to place much reliance on them." Bryan A. Garner et al., *The Law of Judicial Precedent* 260 (2016). As an example, courts typically cite the Supreme Court's decision in *D.C. v. Heller*, 554 U.S. 570 (2008), as authoritative on Second Amendment rights, not the underlying D.C. Circuit's decision that was affirmed.

Plus, it is uncertain if the supreme court will find fault with *Simmons* and the other districts that have adopted it. *Simmons* is a reasonable and defensible opinion, particularly in light of the supreme court's decision in *Taylor v. State,* 140 So. 3d 526, 528 (Fla. 2014), which held that resentencing is a separate and distinct proceeding and that an order is final "even if the relief granted requires subsequent action in the underlying case, such as resentencing." In addition, *Simmons* is faithful to existing district precedent and the important principle of finality, which shields

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The primary purpose in both situations is to get viewpoints of judges/scholars/commentators into the mix in the high court's decision-making, particularly where the high court values such input from so-called elite sources. *Id.* ("It seems there is a growing sense that the Justices are keenly aware of the input and judgments coming instantaneously from blogs and other legal commentators" and that they "are paying keen attention to what these elite audiences think about the pending cases.").

Both views have merit, leaving appellate courts with much discretion in whether and how to weigh in on issues pending in supreme court cases. There is value in knowing that our Court has reversed course and jettisoned *Simmons*, even on the eve of supreme court disposition, but principles of judicial restraint, administrative efficacy, and timing play an important role as well.

judicial proceedings from becoming open-ended with no firm terminus.[6] Entitlement to resentencing is a final legal determination that requires no additional judicial labor; it is not contingent upon whatever criminal sentence is ultimately imposed (oftentimes years later by a different trial judge) if resentencing has been granted. Until now, seventeen appellate opinions in three districts involving 28 different judges (12 of the 15 judges in our district, 8 of the 12 in the Fourth District, and 8 of the 11 in the Fifth District) have expressed no qualms with *Simmons*; none have viewed it as foreclosing the long-standing principle that the trial court applies the law in effect at the time of resentencing (as discussed below).

That said, the Second District's approach is a reasonable and defensible alternative, one based on pragmatism, allowing trial courts broad leeway to revisit resentencing entitlement rulings months or even years later; doing so accords no finality to the entitlement ruling, placing it instead on the ultimate order imposing the new sentence whenever that may occur. Six of their sixteen judges have weighed-in and prefer their district's approach. Jumping ship by abandoning our precedent in *Simmons* and adopting the Second District's approach may prove to be a prescient and praiseworthy move. But which approach the supreme court chooses—the one favoring finality or another founded on pragmatism—is anyone's educated guess; we risk an awkward moment if *Simmons* endures, but a triumphal one if not. Far better to allow the dust to settle after our supreme court forges an authoritative resolution.

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[6] The State, though having no right of appeal from an adverse 3.800 ruling under Rule 9.140, Florida Rules of Appellate Procedure, may seek review within 30 days of such a ruling via a petition for certiorari. Fla. R. App. P. 9.100(c)(1). *See generally* Philip J. Padovano, 2 *Fla. Prac., Appellate Practice* § 27:24 n.6 (2019 ed.) ("Certiorari is available to the state as a discretionary remedy to review unappealable nonfinal orders in criminal cases."). Of course, nothing precludes our supreme court from amending Rule 9.140 to make it symmetric by including the State's right to appeal a resentencing entitlement order (versus resorting to certiorari).

All this aside, the most significant point is that the district courts—though in conflict on the jurisdictional issue—all arrive at the same destination on the ultimate question of practical importance: what must a trial court do when presented with a change in the law *at the time of resentencing*? Neither line of jurisdictional precedent stands in the way of a trial court applying the legal standards prevailing at the time of actual resentencing (versus the time of the order granting entitlement to resentencing). An order granting entitlement to resentencing, whether a final order or not, doesn't bar a resentencing court from applying the prevailing law at the time when resentencing actually occurs; interpreting *Simmons* as such a bar, for example, is mistaken.

So, whether the supreme court prefers the jurisdictional approach first adopted in *Simmons*, favors the Second District's approach, or fashions its own approach (perhaps with rule changes) will not impact the end result, which is that criminal defendants will be resentenced de novo under the legal standards our supreme court decrees are applicable for purposes of resentencing after a change in the law. *See State v. Fleming*, 61 So. 3d 399, 407 (Fla. 2011) ("Thus, because resentencing is de novo, the decisional law in effect at the time of the resentencing or before any direct appeal from the proceeding is final applies."); *Wheeler v. State*, 344 So. 2d 244, 245 (Fla. 1977) ("The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial.").[7]

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[7] Because resentencing is a separate, de novo proceeding, it follows that a trial judge applying currently prevailing decisional law may choose—as a general matter—to reimpose the same sentence. *See Simmons*, 274 So. 3d at 472 ("when Simmons is resentenced, 'the decisional law effective at the time of the resentencing applies'" such that "the trial court can, if it chooses, legally reimpose the same sentence") (citing *State v. Fleming*, 61 So. 3d 399, 400 (Fla. 2011)) (Bilbrey, J., specially concurring); *see also Jones v. State*, 279 So. 3d 172, 174 (Fla. 4th DCA 2019) (applying *Simmons* but noting that the "trial court should . . . resentence Jones to a lawful sentence" based on the decisional law effective at the time of resentencing) (citing *Simmons* and Judge Bilbrey's concurrence); *Magill*, 287 So. 3d at 1263 (State conceded

For these reasons, we better serve the judicial process by allowing the three-judge panel to expeditiously certify conflict with the Second District, staying related cases, and paving the way for our supreme court to provide definitive guidance.

Andy Thomas, Public Defender, and Justin F. Karpf, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Anne C. Conley, Assistant Attorney General, Tallahassee, for Appellee.

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that *Simmons* requires resentencing, both parties agreeing that "upon resentencing, Magill may receive the same sentence of life with the possibility of parole.").