FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4487

TYREE WASHINGTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

August 31, 2021

ON MOTION FOR REHEARING EN BANC AND CLARIFICATION

PER CURIAM.

The Court denies Appellant's motion for rehearing en banc and clarification, filed June 22, 2021.

LEWIS, J., concurs; MAKAR and LONG, JJ., both concur with written opinions.

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

MAKAR, J., concurring.

Counsel for Tyree Rashaad Washington—in a thoughtful request for clarification—seeks a more detailed explanation about how the abuse of discretion standard applies in appellate review of juvenile resentencing cases under the Eighth Amendment jurisprudence first spawned by *Graham v. Florida* 560 U.S. 48 (2010), expanded by *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and most recently tempered by *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). The decision in *Jones* provides clarity in the sense that it reemphasizes that broad sentencing discretion is permitted under the federal constitution in Eighth Amendment juvenile sentencing cases, leaving it to the States to develop and impose sentencing standards or guidelines.

The first take-away from *Jones* is that no federal constitutional requirement exists for trial judges (or appellate judges) to explain the manner in which they exercised their sentencing discretion (or applied the abuse of discretion standard on appeal). Jones claimed that trial judges must make a factual finding or an on the record explanation that a murderer under the age of 18 is permanently incorrigible before a sentencing of life without parole may be imposed. *Id.* at 1313. In rejecting this claim, the Supreme Court majority noted that its prior Eighth Amendment juvenile sentencing cases—as well as its capital cases—had not imposed such a requirement; indeed, it noted that its capital cases "afford sentencers wide discretion in determining 'the weight to be given relevant mitigating evidence.' . . . But those cases do not require the sentencer to make any particular factual finding regarding those mitigating circumstances." *Id.* at 1316 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114–115 (1982)). So long as the record establishes that a process was used by which the

sentencing court actually considered relevant mitigating factors, federal constitutional standards are met. *Jones*, 141 S. Ct. at 1320 ("A sentencing explanation is not necessary to ensure that the sentencer in death penalty cases considers the relevant mitigating circumstances. It follows that a sentencing explanation is likewise not necessary to ensure that the sentencer in juvenile life-without-parole cases considers the defendant's youth.").

The Court explicitly noted that aberrations in sentencing may occur due to the wide berth that sentencing judges possess in juvenile sentencing cases:

> It is true that one sentencer may weigh the defendant's youth differently than another sentencer or an appellate court would, given the mix of all the facts and circumstances in a specific case. *Some sentencers may decide that a defendant's youth supports a sentence less than life without parole. Other sentencers presented with the same facts might decide that life without parole remains appropriate despite the defendant's youth.*

Id. at 1319 (emphasis added). While recognizing the likelihood of different sentencing outcomes in identical cases, it also noted that "this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence[,]" *id.* at 1322, leaving the door open for such claims.

The second takeaway is that *Jones* shifted the focus of potential juvenile sentencing reforms to the individual states, noting that the Court's interpretations of the federal constitution do not demand any particular policy approach:

> Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct

> sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States. *See generally* J. Sutton, *51 Imperfect Solutions* (2018). Indeed, many States have recently adopted one or more of those reforms.

Id. at 1323. The Court also said that its "holding today is far from the last word on whether Jones will receive relief from his sentence." *Id.*

> Jones contends that he has maintained a good record in prison and that he is a different person now than he was when he killed his grandfather. He articulates several moral and policy arguments for why he should not be forced to spend the rest of his life in prison. *Our decision allows Jones to present those arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor.* Those state avenues for sentencing relief remain open to Jones, and they will remain open to him for years to come.

Id. (emphasis added). The net effect of *Jones* is that clarification about the process and standards for discretionary juvenile sentencing decisions must come from developments in state procedures and legislation, which in Florida originate in our supreme court and the legislature.

In conclusion, denial of the motion for clarification is proper because an intermediate appellate court cannot practically provide clarity beyond the cases it is presented. *See, e.g.*, *J.M.H. v. State*, 311 So. 3d 903, 913 (Fla. 2d DCA 2020) (explaining why an abuse of sentencing discretion existed in that particular case). As reflected in *Jones*, our disposition today is not the last word on juvenile sentencing reforms and policies, which belong to those who may act on them, such as the legislature, the Governor and cabinet, and our supreme court.

LONG, J., concurring.

I agree with Judge Makar that *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), provides some of the clarity Mr. Washington now seeks and that we should not elaborate on the law beyond its application to the case before us. I write separately to express my own view that Mr. Washington's case presents a close question and to reject the notion that such appeals are futile, despite how it may seem to Mr. Washington who posits there may be "no scenario that qualifies as an abuse of discretion" to this Court.

When a judge is considering sentencing a juvenile offender to life imprisonment,[1] a sentence only available for homicides, the trial court "shall consider factors relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401, Fla. Stat. (2020). Section 921.1401 contains a non-exclusive list of ten factors, nine that focus on the defendant's possible youth and attendant circumstances and one that considers the effect of the crimes on the victim's family and the community. *Id.*

In applying these factors, a relevant consideration is the legal distinction between a felony murder and a premeditated murder.[2] Premeditated murder, by its nature, is less indicative of youth and

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[1] This includes when the eventual sentence affords judicial review. *J.M.H. v. State*, 311 So. 3d 903, 914 (Fla. 2d DCA 2020) ("We recognize that *Miller* and *Graham* prohibit only mandatory sentences of life in prison, without the possibility of parole, for juveniles and that J.M.H.'s new sentences provide for a meaningful opportunity for release . . . . Nonetheless, we must consider whether the trial court abused its discretion in its application of the statutory factors in section 921.1401.").

[2] This distinction is reflected in section 921.1402 on judicial reviews for juvenile offenders which provides sentence review for juveniles who commit felony murder at 15 years and review for those who commit premeditated murder at 25 years. §§ 921.1402(2)(b), (c), Fla. Stat. (2020).

attendant circumstances such as "immaturity, impetuosity, or failure to appreciate risks and consequences." § 921.1401(2)(e), Fla. Stat. Felony murder is a homicide without specific intent and invokes a theory based on an appreciation of the recklessness in committing a felony—an appreciation that is often deficient in juveniles. These differences can affect other enumerated factors as well: "[t]he nature and circumstances of the offense," *id.* at (2)(a), "the defendant's participation in the offense," *id.* at (2)(f), "[t]he effect, if any, of familial pressure or peer pressure on the defendant's actions," *id.* at (2)(g), and possibly relevant to "[t]he effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment," *id.* at (2)(i). Because Mr. Washington did not intend for a death to occur, these sentencing factors should normally weigh in his favor.

On the other hand, Mr. Washington helped plan the robbery, agreed to prevent the victim's escape, and provided the firearm. When a person provides a firearm with knowledge that it will be pointed at a victim, the possibility that the trigger may be pulled is inescapable.[3] The trial judge emphasized this view of the crime, finding that Mr. Washington's planning and execution of the crime were "not indicative of youthfulness."[4] It does not matter if I agree

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[3] Knowledge of risks and appreciation of risks are two different things—one of the hallmark features of youth is "failure to *appreciate* risks and consequences." *Miller v. Alabama*, 567 U.S. 460, 477 (2012) (emphasis added).

[4] Other factors were less disputed. In prison, Mr. Washington received 15 disciplinary reports, one of which was violent. A defense expert noted that most of the reports occurred soon after his incarceration at age 16, and all of them occurred before age 22. Mr. Washington also had a significant criminal history prior to the homicide. The homicide was committed at age 16—his other crimes were committed prior, and Mr. Washington's childhood was replete with abuse, neglect, and trauma. These facts are relevant to "[t]he defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense," § 921.1401(2)(c), Fla. Stat., "[t]he defendant's background, including his or her family, home, and community environment," *id.* at (2)(d), "[t]he nature and extent of the defendant's prior criminal history,"

with this conclusion because, with an abuse of discretion standard of review, it is not enough to disagree. In order to reverse the trial court's judgment, it must be that no "reasonable [judge] could differ as to the propriety of" the sentence. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). Here, I find that reasonable judges could differ.

Jessica J. Yeary, Public Defender, and Justin Karpf, Assistant Public Defender, Tallahassee, for Appellant.

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id. at (2)(h), and "[t]he possibility of rehabilitating the defendant," *id.* at (2)(j).