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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, FLORIDA

DAVID ELKIN,

Appellant,

Case No.: 2D17-1750
L.T. Case No.: 03-CF-2218

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING

Appellant, DAVID ELKIN, (hereinafter "Appellant" or "Mr. Elkin"), pursuant to Florida Rule of Appellate Procedure 9.330, respectfully requests this Court consider a rehearing of its opinion issued on February 28, 2018. Appellant respectfully states this Court overlooked or misapprehended two points of law, and therefore, a rehearing is appropriate for the following reasons:

I. REHEARING STANDARD

Florida Rule of Appellate Procedure 9.330 requires that a motion for rehearing "state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision[.]" Fla. R. App. P. 9.330. Courts have found that a rehearing is appropriate where there has been an intervening change or clarification of the law. *See e.g. State v. Bennett*, 53 So. 3d 368 (Fla. 3d

DCA 2011) (court granted appellee-defendant's motion for rehearing citing a recent opinion of the Florida Supreme Court as the basis for its decision to grant rehearing).

II. A REHEARING IS APPROPRIATE BECAUSE THE COURT OVERLOOKED OR MISAPPREHENDED TWO LEGAL ISSUES

In the opinion, this Court held that: (1) sections 775.0821(1)(b)2., 775.082(3)(a)5.b., and 775.082(3)(b)2.b., Florida Statutes only apply to nonhomicide offenses—not homicides; and (2) Mr. Elkin, an individual who pled *nolo contendere* to the offense of second-degree felony murder, pursuant to section 782.04(3), Florida Statutes, is not entitled to a review of his sentence pursuant to Florida Rule of Criminal Procedure 3.802(b)(3) and section 921.1402, Florida Statutes. *Elkin v. State*, 2D17-1750, 2018 Fla. App. LEXIS 2867, 2018 WL 1081473 (Fla. 2d DCA February 28, 2018). Mr. Elkin respectfully submits this Court has overlooked or misapprehended two points of law[1] in the opinion that warrant a rehearing. Fla. R. App. P. 9.330(a).

First, the Court overlooked or misapprehended the plain language of sections 775.0821(1)(b)2., 775.082(3)(a)5.b., and 775.082(3)(b)2.b., Florida Statutes. Each of these statutes apply to homicide offenses. A recent decision by the Florida Supreme Court supports this position. *See Williams v. State*, SC17-506, 2018 Fla. LEXIS 455, *30, 43 Fla. L. Weekly S 91, 2018 WL 1007810 (Fla. February 22,

[1] Because the points of law on rehearing involve purely legal questions, the appropriate standard of review is *de novo*. *Kelsey v. State*, 206 So. 3d 5, 8 (Fla. 2016).

2018). In *Williams*, *inter alia*, the Florida Supreme Court held that a juvenile offender convicted of first-degree murder was entitled to a resentencing hearing. *Id.* Specifically, the Court held he was entitled to a resentencing pursuant to section 775.0821(1)(b)2., Florida Statutes—one of the statutes this Court held does not apply to homicide offenses. *Elkin*, 2018 Fla. App. LEXIS 2867 at *4.

Second, the Court overlooked or misapprehended that Mr. Elkin is entitled to a review of his sentence and the appropriate remedy to resolve his case. Because Mr. Elkin pled *nolo contendere* to second-degree felony murder, by law, he could not have intended to kill nor actually kill the victim. *See* § 782.04(3), Fla. Stat. (2004). As such, he is entitled to a review of his sentence pursuant to section 921.1402(2)(c), Florida Statutes after fifteen years. Fla. R. Crim. P. 3.802(b)(3); § 775.082(3)(b)2.b., Fla. Stat. (2017). Therefore, the proper remedy to resolve Mr. Elkin's appeal is based on this Court's recent decision in *Matias v. State*, 228 So. 3d 677 (Fla. 2d DCA 2017).[2] This Court held that where a juvenile offender is entitled to review pursuant to chapter 2014-220, but the sentence is not unconstitutional, the trial court should amend the juvenile offender's sentencing documents to identify he is entitled to judicial review. *Matias*, 228 So. 3d at 679. This Court overlooked this remedy in Mr. Elkin's case, and therefore a rehearing is necessary.

[2] *Matias* was *per curiam* affirmed with an opinion authored by Judge Casanueva joined by Judge Lucas and Judge Badalementi.

A. The plain language of sections 775.0821(1)(b)2., 775.082(3)(a)5.b., and 775.082(3)(b)2.b., Florida Statutes shows that each statute apply to homicide offenses.

Mr. Elkin was born on January 14, 1987. (R. 31). On May 30, 2003, he was indicted for a capital felony, premeditated first-degree murder, pursuant to section 782.04(1)(a), Florida Statute. (R. 31). At the time of the offense, he was sixteen years old. On July 13, 2004, Mr. Elkin pled *nolo contendere* to the lesser included offense of second-degree felony murder, pursuant to section 782.04(3), Florida Statute. (R. 23-24). The trial court sentenced Mr. Elkin to twenty-five years in the Florida Department of Corrections. (R. 25).

On January 30, 2017, Mr. Elkin filed his pro se "Application For Sentence Review By Juvenile Offender." (R. 1-20). As support for his motion, Mr. Elkin relied on *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016), *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), and Florida Rule of Criminal Procedure 3.802(b)(3). (R. 2-3). Florida Rule of Criminal Procedure 3.802(b)(3), *inter alia*, states that a juvenile offender may seek a sentence review "after 15 years, if the juvenile offender is sentenced to a term of more than 15 years under s. 775.082(1)(b)2., 775.082(3)(a)5.b., or 775.082(3)(b)2, Florida Statutes." Fla. R. Crim. P. 3.802(b)(3). Mr. Elkin's motion stated that, at the time of filing, he had "served or has nearly served 15 years and thus this application may be considered timely." (R. 3).

Following the trial court's denial of his motion (as this Court noted on erroneous grounds)[3] Mr. Elkin appealed to this Court, R. 34-35, and filed his pro se initial brief. On February 28, 2018, this Court issued its opinion affirming the denial of Mr. Elkin's motion, but on different grounds than the trial court. *Elkin v. State*, 2D17-1750 at *1. In denying his motion, this Court held that

> Rule 3.802(b)(3), the provision under which Elkin applied for review, provides that a juvenile offender may seek review "after 15 years, if the juvenile offender is sentenced to a term of more than 15 years under sections 775.082(1)(b)2., 775.082(3)(a)5.b.,or 775.082(3)(b)2.b., Florida Statutes." **Elkin fails to recognize that the delineated statutes involve sentencing for nonhomicide offenses.** *See also* § 921.1402(2)(c) (setting forth the same limitations as rule 3.802(b)(3)).

Id. at 3-4 (emphasis added).

However, respectfully, this is an incorrect statement of the law. The "delineated statutes" in question do apply to homicide offenses.

Each of these statutes apply to juvenile offenders convicted of an offense arising from section 782.04, Florida Statutes, i.e., Florida's "Murder" statute. Thus, the plain language demonstrates that these statutes apply to homicide offenses, as shown below:

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[3] This Court held that the trial court erred in "concluding Elkin could not take advantage of section 921.1402 because he committed his crime before the statute's effective date of July 1, 2014." *Elkin,* 2D17-1750 at *3 (citing *Falcon v. State,* 162 So. 3d 954, 962 (Fla. 2015) (concluding "that juvenile offenders whose conviction and sentences were final prior to the Supreme Court's decision in *Miller* may seek collateral relief based on that decision.").

- Section 775.082(1)(b)2., Florida Statutes, states that "[a] person who did not actually kill, intend to kill, or attempt to kill the victim *and who is convicted under s. 782.04* of a capital felony [and] … is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).";

- Section 775.082(3)(a)5.b., Florida Statutes, states that "a person who is *convicted under s. 782.04* of an offense that was reclassified as a life felony [and] ... did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c)."; and

- Section 775.082(3)(b)2.b., Florida Statutes, states that a "person convicted under s. 782.04 of a first degree felony punishable by a term of years not exceeding life imprisonment [and] … did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c)."

The critical difference regarding whether review of a juvenile offender's sentence occurs at fifteen years, as opposed to twenty-five years, does not arise from whether the offense is a homicide. Rather, the issue is whether the juvenile offender did or did not "actually kill, intend to kill, or attempt to kill the victim." *See* § 921.1401, Fla. Stat. (2017) *compare* § 921.1402, Fla. Stat. (2017). This reading of the statutes is supported by the Florida Supreme Court's recent decisions in *Williams v. State*, SC17-506 (Fla. February 22, 2018).

B. The Florida Supreme Court's recent decision in *Williams* supports that sections 775.0821(1)(b)2., 775.082(3)(a)5.b., and 775.082(3)(b)2.b., Florida Statutes apply to homicide offenses.

In *Williams*, the Florida Supreme Court resolved the following certified question of great public importance whether, "*Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), require[s] the jury and not the trial court to make the factual finding under section 775.082(1)(b), Florida Statutes (2016), as to whether a juvenile offender actually killed, intended to kill, or attempted to kill the victim?" *Elkins*, 2D17-1750 at *1. In *Alleyne*, to ensure the guarantees of the Sixth Amendment right to a jury trial, the United States Supreme Court held that any fact that increases the mandatory minimum sentence for an offense is an "element" which must be submitted to a jury and found beyond a reasonable doubt. 570 U.S. at 108.

In *Williams*, following a jury trial, the juvenile offender was charged and convicted of first-degree murder and kidnapping. *Id.* at *2. He was given a life sentence with the possibility of parole in twenty-five years for the murder. *Id.* at *5. On appeal, the Fifth District affirmed Mr. Williams's convictions but reversed his sentence pursuant to *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). *Id.* at *6. Thereafter, Mr. Williams filed a Motion to Empanel Jury with the trial court arguing that

> because the finding that a juvenile offender actually killed, intended to kill, or attempted to kill the victim leads to a minimum forty-year

> sentence with a sentence review after twenty-five years—whereas a finding that the offender did not actually kill, intend to kill, or attempt to kill the victim results in there being no minimum sentence and a sentence review after fifteen years—*Alleyne* requires that this factual determination be made by a jury beyond a reasonable doubt.

Id. at *9.

The trial court denied this motion, and later found that Mr. Williams both actually killed and intended to kill the victim. *Id.* at *10. Subsequently, the trial court held a resentencing hearing pursuant to section 921.1401, Florida Statutes and again sentenced Mr. Williams to life, but with a sentence review in twenty-five years, per section 921.1402(2)(a), Florida Statute. *Id.* On appeal, Mr. Williams challenged the trial court's denial of his motion and the Fifth District Court of Appeal affirmed the denial. *Id.* However, the Fifth District Court of Appeal certified the question as one of great public importance. *Id.*

On February 22, 2018, six days before this Court's decision in *Elkin*, the Florida Supreme Court decided *Williams*. The Court held Mr. Williams was entitled to relief because an *Alleyne* violation had occurred, and the Court could not say the error was harmless.[4] *Id.* at *24-27. However, rather than empanel a jury to make these specific findings, the Florida Supreme Court held the appropriate remedy was for Mr. Williams to receive a resentencing hearing pursuant to section

[4] For the first time, the Florida Supreme Court held that *Alleyne* violations are reviewed based on a harmless error analysis. *Id.* at 20-21 (relying on *Galindez v. State*, 955 So. 2d 517, 522-23 (Fla. 2007)).

775.082(1)(b)2., Florida Statutes, with a finding that he did not intend to kill nor actually killed the victim. *Id.* at *27-31.

Importantly, section 775.082(1)(b)2., Florida Statutes, the statute cited in *Williams* authorizing a resentencing, is one of the statutes this Court held did not apply to homicide offenses. *Elkin,* 2D17-1750 at *4. Based on the plain language of the statutes, and the Florida Supreme Court recent decision in *Williams*, this Court's interpretation of section 775.081(1)(b)2., as well as Florida Rule of Criminal Procedure 3.802(b)(3), and section 921.1402(2)(c), cannot stand. Therefore, because this Court has overlooked or misapprehended a point of law, namely, whether sections 775.0821(1)(b)2., 775.082(3)(a)5.b., or 775.082(3)(b)2.b., Florida Statutes apply to homicide offenses, a rehearing is appropriate.

C. Mr. Elkin is entitled to a review of his sentence because he pled *nolo contendere* to second-degree felony murder to an offense which falls under section 775.082(3)(b)2.b., and entitles him to review after fifteen years.

For a juvenile offender to receive review pursuant to section 775.082(3)(b)2.b., and 921.1402(2)(c), the offender (1) must be convicted of an offense under section 782.04 of a first degree felony punishable by a term of years not exceeding life imprisonment; (2) must not have not actually killed, intended to kill, or attempted to kill the victim; and (3) was sentenced to a term of imprisonment of more than 15 years. § 775.082(3)(b)2.b.,Fla. Stat. Here, Mr. Elkin meets all three criteria for resentencing under section 921.1402(2)(c), Florida Statutes.

Mr. Elkin pled *nolo contendere* to a life felony and was sentenced to more than fifteen years. (R. 23-24). Based on the elements of the conviction, and the case law interpreting the conviction, as discussed in detail below, Mr. Elkin could not have had the intent to kill the victim, nor actually killed the victim. He also was sentenced to imprisonment for greater than fifteen years. As such, he falls within the category of juvenile offenders eligible for a sentence review pursuant to section 775.082(3)(b)2.b., and is entitled to a review of his sentence pursuant to section 921.1402(2)(c), Florida Statutes.

(1) Mr. Elkin was convicted of convicted of an offense under section 782.04 of a first-degree felony punishable by a term of years not exceeding life imprisonment.

Second-degree felony murder is a first-degree felony punishable by a term of years not exceeding life imprisonment. §§ 782.04(3) and 775.082, Fla. Stat. (2004); *see also Dean v. State*, 230 So. 3d 420, 430 (Fla. 2017) (Parientie, J., concurring in part and dissenting in part) ("second-degree felony murder, a first-degree felony with a maximum sentence of life."). Here, because Mr. Elkin was convicted of an offense under section 782.04, punishable by a term of years not exceeding life, he falls within the category of offender in section 775.082(3)(b)2.b., Florida Statutes.

(2) Based on the elements of the offense of second-degree felony murder, Mr. Elkin could not have actually killed, intended to kill, or attempted to kill the victim.

Second-degree felony murder is defined by section 782.04(3), Florida Statutes (2004), which states as follows: "When a person is killed in the perpetration of, or in the attempt to perpetrate, any" of a list of felonies, "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree …" § 782.04(3), Fla. Stat. (2004). The Florida Supreme Court has long held that a person guilty of second-degree felony murder does not have the specific intent to kill the victim at the time of the offense, rather the offense is a general intent crime. *See Gentry v. State*, 437 So. 2d 1097, 1099 (Fla. 1983) ("Second-degree and third-degree murder under our statutes are crimes requiring only general intent."). Nor could that same person actually killed the victim, because in "[t]racing the evolution of the felony murder statutes, the supreme court has concluded that 'second-degree felony murder as defined in section 782.04(3) requires that the killing be done by a nonprincipal.'" *Garcia v. State*, 114 So. 3d 424, 426 (Fla. 2d DCA 2013) (quoting *State v. Dene*, 533 So. 2d 265, 270 (Fla. 1988)).[5]

[5] The language of the statute at issue in *Dene* is essentially the same as the 2004 version applicable in this case, the only change being the list of qualifying felonies. *Compare Dene*, 533 So. 2d at 268 (quoting § 782.04(3), Fla. Stat. (1975)), *with* § 782.04(3), Fla. Stat. (2004).

Here, the fact Mr. Elkin pled to this offense, as opposed to some other offense, is critically important. Under the plain language of the statute, and the case law interpreting this offense, Mr. Elkin could did not actually kill, intend to kill, or attempt to kill the victim. *Gentry*, 437 So. 2d at 1099; *Garcia*, 114 So. 3d at 426. As discussed in *Williams*, this distinction is important because it establishes when a juvenile offender's sentence should be reviewed. *See Williams*, SC17-506 at *30. Therefore, because he legally could not have intended to kill, nor actually killed the victim, he is entitled to review of his sentence after fifteen years. Fla. R. Crim. P. 3.802(b)(3); § 921.1402, Fla. Stat. (2017).

(3) Mr. Elkin was sentenced to a term of imprisonment of more than 15 years.

Here, as recognized by this Court, it is undisputed that Mr. Elkin was sentenced to twenty-five years in prison. (R. 23-24); *Elkin*, 2D17-1750 at *4. Therefore, under section 775.082(3)(b)2.b., because all the statutory requirements are met, Mr. Elkin is entitled to a resentencing hearing. *See* § 775.082(3)(b)2.b., Fla. Stat. (2017) ("[A] person convicted under s. 782.04 of a first degree felony punishable by a term of years not exceeding life imprisonment … [and] who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).").

D. This Court's decision in *Matias* appropriately resolves Mr. Elkin's case.

In *Matias*, 228 So. 3d at 677, a juvenile offender sought review of his fifty-one-year sentence pursuant to chapter 2014-220. Mr. Matias argued that his sentence was unconstitutional due to the length of his sentence. *Id.* However, this Court found this argument meritless. *Id.* at 678 n. 1. But, it did find merit in the argument that, "the trial court should have specified in Mr. Matias's sentencing documents that he was entitled to judicial review of his sentences after twenty years." *Id.* at 678. In this decision, this Court relied on the Florida Supreme Court's decision in *Kelsey* for the holding "that all juvenile offenders whose sentences meet the standard defined by the Legislature 2014-220, a sentence longer than twenty years, are entitled to judicial review." *Id.* (quoting *Kelsey v. State*, 206 So. 3d 5, 8 (Fla. 2016)). This Court held that the trial court "correctly found" he was entitled to judicial review because his sentence exceeded twenty years. *Id.* at 678. To ensure there would be no ambiguity, this Court "remand[ed] with directions to the trial court to amend the sentencing documents to provide that Mr. Matias is entitled to a judicial review hearing pursuant to section 921.1402 and Mr. Matias has served twenty years in prison." *Id.*

Here, as demonstrated above, Mr. Elkin is entitled to a sentencing review after fifteen years. *Supra,* II, C. (1)-(3). To ensure there is no ambiguity, this Court should similarly remand to the trial court with directions to amend his sentencing documents as it did in *Matias*. Thus, this Court should remand with direction for the trial court

to amend Mr. Elkin's sentencing documents to provide that he is entitled to a judicial review pursuant to section 921.1402 and that Mr. Elkin has served fifteen years in prison.

CONCLUSION

WHEREFORE, Appellant, DAVID ELKIN, respectfully requests this Court grant a rehearing and remand his case to the trial court to amend his sentencing documents.

Respectfully submitted,

s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III
LAW OFFICE OF ROCCO J. CARBONE, III, PLLC
320 HIGH TIDE DRIVE, SUITE 100
ST. AUGUSTINE, FL 32080
TELEPHONE: (904) 599-3238
E-MAIL: Rocco@rjc3law.com
FLORIDA BAR NO.: 0095544

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail to the Office of the Attorney General at crimapptpa@myfloridalegal.com and Assistant Attorney General, Elba Martin-Schomaker at Elba.MartinSchomaker@myfloridalegal.com on this 18th day of March 2018.

Respectfully submitted,

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III, ESQ.