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IN THE SUPREME COURT OF FLORIDA

SHIMEEK DAQUIEL GRIDINE,

Petitioner,

v. CASE NO. SC12-1223

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent adds the following facts for purposes of its responsive brief.

In its amended order denying Gridine's motion to correct sentencing error, the trial court stated:

> An understanding of the facts of the case *sub judice* is required. On April 21, 2009, the Defendant, joined by his younger friend, proceeded to a property nearby the Shell Gas Station at the southeast corner of Union Street and Main Street in Jacksonville, Florida. The Defendant was armed with a loaded and functional gun. The Defendant and his friend approached a gentleman exiting that property. The Defendant then pointed the shotgun at this unsuspecting man, demanding his money and/or other property. The startled and frightened man *turned to run from his assailant*. At that moment and from a short distance, the Defendant fired the shotgun at his victim, striking the victim on his face, head neck shoulder, side and back. Photographs of the victim's wounds were presented into evidence, speaking - more eloquently than these feeble words - not only to the Defendant's actions but also to his intent. In light of the nature of the wounds and locations thereof, it cannot, with reasonable sustainability, be argued the Defendant had any other intent but to kill his victim.[1] Thankfully, the Defendant failed in his deliberate and premeditated endeavor. The security cameras at the Shell Gas Station recorded the Defendant fleeing from his crime. At the time of his crimes, the Defendant was 14 years old (his date of birth being November 7, 1994). (Exhibit "D"). Following a sentencing hearing, the Court imposed the above-described sentences.
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> The Defendant argues that the recent United States Supreme Court case of *Graham v. Florida,* 130 S.Ct. 2011 (2010), renders cruel and unusual the Defendant's 70-year sentence on Count One, thus violating the Eighth Amendment to the United States Constitution.

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[1]Indeed, the crimes to which the Defendant pled guilty confirm the Court's conclusion. Further, these described facts, as well as the crimes to which defendant pled guilty, distinguish this case from *Graham*.

> In *Graham*, which originated in this Circuit, Petitioner *Graham* was 16 years old when he committed Armed Burglary and another crime. *Id.* at 2014. Pursuant to a plea agreement, the trial court sentenced Graham to probation and withheld adjudication of guilt. *Id.* Graham violated the terms of his probation by committing new crimes, and the trial court adjudicated Graham guilty of the earlier crimes, revoked his probation, and sentenced him to life in prison for the Burglary. *Id.* Florida had (and has) abolished its parole system, leaving Graham with no release except executive clemency. *Id.* at 2014-15. Graham challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishment Clause.

The trial court set forth the *Graham* Court's holding, and continued:

> The condition precedent required for the applicability of the *Graham* decision has not been met - that is, the Court did not impose a life without parole sentence.[2] By the express holding of *Graham*, the term of years sentence imposed does not run afoul of the United States Supreme Court's decision. Nor is the term of years sentence imposed by this Court some coy attempt to circumvent precedent. Such would be impossible, as this Court rendered its sentence prior to the *Graham* decision.
>
> Nonetheless, while recognizing a life without parole sentence was not imposed, the Defendant argues that this Court's sentence is a *de facto* life without parole sentence in violation of *Graham*. *See* Defendant's Motion, p. 3. Specifically, the Defendant argues that because he was convicted of Attempted Murder in the First Degree, a nonhomicide offense,[3] the Court is prohibited from

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[2]While the Court notes the imposition of a term of years sentence, that is not to suggest that this Court is not keenly aware of the gravity of the sentence imposed upon the Defendant and the tragedy thereof - each born of the Defendant's choice. The Court's sentence reflects the gravity of the defendant's crimes.

[3]While this Court, based on law and the Court's reasoning in *Graham*, perhaps would find that Attempted First Degree Murder for purposes of *Graham* is a homicide offense, this Court is bound by *Manuel v. State*, 48 So.3d 94 (Fla. 2d DCA 2010) as this Court is unaware of any precedent on this issue from the First District Court of Appeal or the Florida Supreme Court.

sentencing the Defendant to the said sentence because, as the Defendant argues, the Court has "guaranteed the Defendant will die in prison." *See* Motion, p. 6 (citing *Graham*). In his motion, the Defendant cites to the National Center for Health Statistics 2006 Vital Statistics Report, which were not introduced into evidence at the sentencing hearing, and are not in evidence before this Court.[4]

While Attempted Murder in the First Degree has been, as of the date of the date of this order, legally defined in Florida for purposes of *Graham* as a nonhomicide offense (*See* n. 3, *supra*), the United States Supreme Court itself in *Graham* recognizes that the most serious forms of punishment are reserved for those who kill, intend to kill or foresee that life will be taken. *See Graham* 130 S.Ct. at 2027. ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers (citations omitted)(emphasis added)"). Even *assuming arguendo Graham* were to apply in this case at bar, the Defendant is not - by law - afforded such categorical protection in light of the nature of his crimes and the clear intent of his actions. Further, by the *Graham* Court's own reasoning, the Defendant does not enjoy the diminished culpability of Graham because he had a clear and premeditated intent to kill. Indeed, his intent to kill is memorialized forever in full color.

Just because this juvenile Defendant failed in his criminal and deadly endeavor does not preclude this Court from sentencing the Defendant commensurate with the defendant's intent - the same intent possessed by a juvenile murderer. Thus, the Court finds that the Defendant's sentence of 70 years imprisonment, with a 25-year minimum mandatory sentence, as to Count One, Attempted Murder in the First Degree, is both legal and appropriate.

(SRIII 3-6).

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[4]In his Motion, the Defendant requested authorization "to hire an expert to compile data and present testimony at an evidentiary hearing." *see* Motion, p. 4. The Court declined to provide such authorization or schedule an evidentiary hearing, based on its ruling that no sentencing error had occurred.

On appeal, the district court disagreed with Gridine's assertion that his seventy year sentence was the "functional equivalent" of a life sentence without the possibility of parole, and agreed with the trial court's finding that by the express terms of *Graham*, the term of years sentence imposed did not run afoul of *Graham*. *Gridine v. State*, 89 So.3d 909, 910 (Fla. 1st DCA 2011). The court stated that "the Supreme Court specifically limited its holding in *Graham* to only 'those juvenile offenders sentenced to life without parole solely for a nonhomicide offense,'" quoting *Graham* at 2023. The court added that at some point, a term-of-years sentence may become the functional equivalent of a life sentence, but did not believe that situation had occurred in the instant case. *Gridine*, 89 So.3d at 911. On rehearing, the court certified the following question: "Does the United States Supreme Court decision in *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first degree murder?". *Gridine v. State*, 93 So.3d 360 (Fla. 1st DCA 2012).

SUMMARY OF ARGUMENT

The district court correctly determined that Gridine's term-of-years sentence does not violate *Graham's* categorical ban on life sentences without the possibility of parole for juvenile offenders convicted of nonhomicide offense. The *Graham* Court did not categorically prohibit states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole, but held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional. Pursuant to the Conformity Clause of the Florida Constitution, this holding cannot be expanded. The four Florida district courts of appeal that have addressed the application of *Graham* to term-of-years sentences for nonhomicide offenses have all recognized its limited holding and application, as have decisions from other jurisdictions.

Further, if this Court determines that *Graham* is somehow applicable to Gridine's term-of-years sentence, it must be remembered that it is not the length of the sentence given to a juvenile convicted of a nonhomicide offense that could potentially violate *Graham*. It is the fact that Florida currently has no means to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." In this respect, this Court should reject Gridine's invitation to declare current state parole statutes unconstitutional as applied to juvenile nonhomicide

offenders, because this claim was never presented to the lower courts, no basis for doing so has been demonstrated in the instant proceeding, and such remedy is far to expansive for the issue at hand.

Finally, in the absence of any legislative direction to date, should this Court determine that a judicial remedy is required under *Graham*, it must be carefully considered and evaluated so as not to create more issues than it resolves. In this respect, Respondent submits that even if a remedy is required, relief need not be immediate, because under no interpretation of *Graham* is Gridine entitled to an opportunity for release any time in the near future.

ARGUMENT

GRIDINE WAS PROPERLY SENTENCED TO A SEVENTY YEAR SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER AND HIS SENTENCE DOES NOT VIOLATE THE CATEGORICAL BAN ON LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILE OFFENDERS WHO COMMITTED NONHOMICIDE CRIMES.

After entering a guilty plea, Gridine was sentenced to seventy years for attempted murder and 25 years for attempted armed robbery. He also received concurrent 25 year minimum mandatory terms for the use of a firearm during the commission of both offenses. While his direct appeal was pending, Gridine filed a motion to correct sentence based on *Graham v. Florida,* 130 S.Ct. 2011 (2010). The trial court denied the motion, finding that *Graham* applied only to sentences of life without the possibility of parole for nonhomicide offenses. The trial court also observed that it may have found that attempted first degree murder is a homicide offense, and therefore outside the scope of the *Graham* decision, but it was bound by a Florida appellate decision to the contrary.

On direct appeal, the district court disagreed with Gridine's assertion that his seventy year sentence was the "functional equivalent" of a life sentence without the possibility of parole, and agreed with the trial court's finding that by the express terms of *Graham*, the term of years sentence imposed did not run afoul of *Graham*. *Gridine v. State,* 89 So.3d 909, 910 (Fla. 1st DCA 2011).

The court specifically stated that "the Supreme Court specifically limited its holding in *Graham* to only 'those juvenile offenders sentenced to life without parole solely for a nonhomicide offense,'" quoting *Graham* at 2023. The court added that at some point, a term-of-years sentence may become the functional equivalent of a life sentence, but did not believe that situation had occurred in the instant case. *Gridine,* 89 So.3d at 911. On rehearing, the court certified the following question: "Does the United States Supreme Court Decision in *Graham v. Florida,* 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first degree murder?". *Gridine v. State,* 93 So.3d 360 (Fla. 1st DCA 2012). As will be demonstrated, the answer to this question is no, because *Graham* applies only to sentences of life without parole for nonhomicide crimes, and Gridine received a term of years sentence. Further, for purposes of a *Graham* analysis, attempted first degree murder should be considered a homicide offense, because the fact that the victim survived has no effect on the offender's culpability or characteristics, which is what provides the framework for the *Graham* analysis.

Generally, "mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact, but conducting a de novo review of

the constitutional issue." *Hilton v. State,* 961 So.2d 284, 293 (Fla. 2007). *See also Connor v. State,* 803 So.2d 598, 605 (Fla. 2001). However, when considering Eighth Amendment challenges, appellate courts must yield "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem v. Helm,* 463 U.S. 277, 290 (1983).

Gridine claims that his seventy year sentence for attempted first degree murder violates the Eighth Amendment to the United States Constitution. He asserts that whether his sentence is labeled a "term of years" sentence or "life without parole" sentence, he will probably die in prison, in violation of *Graham's* command that states must provide a juvenile nonhomicide offender a meaningful opportunity to obtain release. As will be demonstrated, the *Graham* Court did not categorically prohibit states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for release, but held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional. *Graham,* 130 S.Ct. at 2030. The First District Court of Appeal in this case, like the Second, Fourth and Fifth District Courts of Appeal, correctly stated, as the trial court had found, that the *Graham* Court limited

its holding only to those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

In this respect, Respondent would first note that *Graham* created a categorical ban on a distinct sentencing scheme, and Florida courts are precluded from expanding *Graham* beyond its express and limited holding, pursuant to Article I Section 17 of the Florida Constitution, which states in relevant part:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Cf. Valle v. State, 70 So.3d 530 (Fla. 2011)(recognizing that under the Conformity Clause, Florida's courts are bound by precedent of the United States Supreme Court on issues regarding cruel and unusual punishment); *cf. Holland v. State,* 696 So.2d 757 (Fla. 1997)(explaining that the conformity clause prohibits a state court from providing greater protection than what is provided in United States Supreme Court precedent).

The four Florida district courts of appeal that have addressed the application of *Graham* to term-of-years sentences for nonhomicide offenses have all recognized its limited holding and application. The Second District Court of Appeal was the first appellate court in Florida to observe that the sole issue in *Graham* was whether a sentence of life without the possibility of parole

imposed on a juvenile offender for a nonhomicide crime constituted cruel and unusual punishment under the Eighth Amendment. *Manual v. State,* 48 So. 3d 94 (Fla. 2d DCA 2010). That court further noted:

> *Graham* held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional-not that lengthy prison sentences imposed on juveniles for a term of years less than life are unconstitutional. *Graham,* 130 S.Ct. at 2030 (noting that the Eighth Amendment does not "foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life"). Therefore, Mr. Manuel is not entitled to be resentenced on the attempted murder conviction that currently carries a sentence of a term of forty years.

Id. at 98 n.3. *See also Walle v. State,* 99 So.3d 967, 970-71 (Fla. 2d DCA 2012)(finding that *Graham* is limited to a single life without parole for a sentence for a nonhomicide offense, and it could not expand that ruling beyond the limitations set forth in Graham; the court then identified four analytical factors to determine if *Graham* is applicable - (1) the offender was a juvenile, (2) the sentence imposed applied to a singular nonhomicide offense, (3) the offender was "sentenced to life," and (4) the sentence does not provide for any possibility of release during the offender's lifetime); *Young v. State,* 38 Fla. L. Weekly D402 (Fla. 2d DCA February 20, 2013)(*Graham* addressed the narrow issue of whether a sentence of life without the possibility of parole imposed on a nonhomicide offender violated the Eighth Amendment's prohibition on cruel and unusual punishment).

The Fifth District Court of Appeal likewise found that *Graham* does not apply to term-of-year sentences, and is to be applied "only as written." *Henry v. State,* 82 So.3d 1084, 1089 (Fla. 5th DCA 2012). *See also Mediate v. State,* 108 So.3d 703, 706-07 (Fla. 5th DCA 2013)(rejecting an invitation to revisit *Henry*); *Johnson v. State,* 108 So.3d 1153 (Fla. 5th DCA 2013)(same). The Fourth District Court of Appeal recently agreed with the Fifth and Second Districts, stating, "we are compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole." *Guzman v. State,* 38 Fla. L. Weekly D617 (Fla. 4th DCA March 13, 2013).

As stated, the First District Court of Appeal in this case expressly acknowledged that the Supreme Court specifically limited its holding in *Graham* to only juvenile offenders sentenced to life without parole for a nonhomicide offense, *Gridine,* 89 So.3d at 911. *See also Thomas v. State,* 78 So.3d 644, 646 (Fla. 1st DCA 2011). The court also stated that there may be some point that a term of years sentence could become the functional equivalent of a life sentence, and later applied *Graham* to a term-of-years sentence. *Floyd v. State,* 87 So.3d 45, 47 (Fla. 1st DCA 2012)(finding that because the eighty year sentence was longer than the appellant's life expectancy, it was the "functional equivalent" of a life sentence without parole). Significantly, the court has since stated that if it was writing on a clean slate, i.e., without the

"rule of law" announced in *Gridine, Thomas,* and *Smith v. State,* 93 So.3d 371 (Fla. 1st DCA 2012), it would now affirm a lengthy term of years sentence based on the reasoning in *Henry, supra*. *Adams v. State,* 37 Fla. L. Weekly D1865 (Fla. 1st DCA August 8, 2012).[5]

Respondent thus submits that the application of *Graham* to a term of years sentence creates an additional protection for juvenile offenders beyond that provided in the United States Constitution, and is prohibited under the Conformity Clause of the Florida Constitution. The First District's later need to create a "de facto life sentence," in order to even apply *Graham,* best illustrates this departure from and expansion of *Graham*. For this reason alone, the decision of the district court can be affirmed.[6]

Further, categorical rules simply cannot be applied to sentences that cannot be categorized. As the *Graham* Court

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[5] The *Adams* Court stated that the rule of law from this case and *Thomas* was twofold: first, *Graham* does apply to lengthy term of years sentences that amount to de facto life sentences, and second, a de facto life sentence is one that exceeds a defendant's life expectancy. Respondent questions the legal validity of this pronouncement. That court has also stated that "[w]hen a court makes a pronouncement of law that is ultimately immaterial to the outcome of the case, it cannot be said to be part of the holding in the case." *Lewis v. State,* 34 So.3d 183, 186 (Fla. 1st DCA 2010). The *Gridine* court did not even make the pronouncements that *Graham* applied to term of year sentences or that a term of years sentence was one that exceeds a defendant's life expectancy, so it would appear that the only rule of law from this case is that *Graham* does not apply to lengthy term-of-years sentences.

[6] *See State v. Hankerson,* 65 So.3d 502 (Fla. 2011)(A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment).

observed, cases addressing proportionality fall into two general classifications. *Id.* at 2021. The first classification involves challenges to the length of term of years sentences, where the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. *Id.* A court begins its analysis for determining whether a sentence for a term of years is grossly disproportionate by comparing the gravity of the offense with the severity of sentence. *Id.* at 2022. The second classification uses categorical rules to define Eighth Amendment standards. *Id.* The Court determined that *Graham* presented a categorical challenge, with the sentencing process itself being called into question. As the Court stated, "This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.* at 2021-22. The Court determined that a threshold comparison between the severity of the penalty and the gravity of the crime (the first approach) did not advance such analysis, so the appropriate analysis would be the one used in cases utilizing the categorical approach. *Id.* at 2023. The Court explained that the categorical restriction espoused therein was one involving, "only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* After completing this analysis, the Court held:

> that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without

> parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders, who are not sufficiently culpable to merit that punishment.

Id. at 2030.

Gridine's seventy year sentence is not subject to a categorical challenge without crossing this "clear line." As stated, a categorical challenge involves a "particular type of sentence," and there is no "particular type of sentence" here other than a term of years. While the First District later stated that a de facto life sentence is one that "exceeds the defendant's life expectancy," this is not a categorical type of sentence, evidenced by the fact that each sentence would have to be evaluated on a case by case basis. Other courts have clearly struggled with what exactly would constitute a de facto life sentence. *See e.g.*, *Henry*, 82 So.3d at 1089 ("At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender, based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?"). Significantly, a sentence based on an offender's "life expectancy" is no more concrete, and would most likely vary from offender to offender, based on race, gender, socioeconomic class, or perhaps even genetic predisposition. Gridine's argument clearly demonstrates this. He quotes a statistic from a "National Center

for Health Statistics" for the life expectancy of a 15 year-old black male, then a 20 year-old black male.[7] Not all juvenile offenders are that age, that race, or that gender. Respondent thus submits that categorical rules cannot be applied to a sentence that cannot even be defined.

Respondent would further note that Gridine never presented a straight proportionality argument, i.e., whether his term of years sentence is grossly disproportionate when comparing the gravity of the offense with the severity of sentences. Instead, he appears to advocate for a new, hybrid categorical/disproportionality/life expectancy approach, which includes the crime, the severity of the sentence, and the offender's life expectancy. As stated, there is no such category, and it certainly was not recognized in *Graham*.

In this respect, Respondent would point out that the *Graham* Court found that while the imposition of a life without parole sentence for a nonhomicide crime is unconstitutional, "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before that term." *Id.* at 2034. Notably absent from the majority decision in *Graham* was any mention or indication that "the Court's opinion affects the imposition of

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[7] Respondent submits that Gridine failed to preserve any claim below regarding his life expectancy. As the trial court observed in its order, he did not submit any evidence in support of this claim, and respondent objects to its use on review since there has been no showing as to it acceptance or reliability.

a sentence to a term of years without the possibility of parole." *Id.* at 2058 (Alito, J. dissenting). Indeed, that the Court's holding did not involve a defined term of years was the entire point of Justice Alito's separate dissenting opinion. *See id. See also, Henry,* 82 So.3d at 1087, wherein the district court observed that the dissenting opinions in *Graham* discussed its nonapplication to term-of-year sentences.

Florida district courts are not alone in finding that *Graham* is limited to life sentences without the possibility of parole and in rejecting its application to lengthy term-of-years sentences. An intermediate Colorado appellate court recently surveyed the current legal landscape on this issue. While that court eventually concluded that an aggregate sentence of 112 years was the functional equivalent of a life sentence and violative of the Eighth Amendment, its reasoning is far from sound, and demonstrates the opposite of that conclusion. *People v. Ranier,* 2013 WL 1490107 (Colo. Ct. App. April 11, 2013). The *Ranier* court first acknowledged the line of cases, including Florida's *Henry* and *Walle*, that have read *Graham* narrowly and either explicitly or implicitly rejected the argument that *Graham* applies to lengthy term-of-years sentences.[8] The court stated, however, that it was

[8] Additional cases referenced and interpreted by The *Ranier* court as finding this are: *Bunch v. State,* 685 F.3d 546, 550 (6th Cir. 2010) (upholding an Ohio state court's determination that an 89 year sentence for a juvenile nonhomicide offender did not violate the Eighth Amendment on the basis that it is clear that *Graham* does

"more persuaded by the reasoning in a number of other cases where courts have explicitly or implicitly held that *Graham's* holding or its reasoning can and should be extended to apply to term-of-year sentences that result in a de facto life without parole sentence." *Id.* at *10. However, those cases are not necessarily greater in number, and they reflect the reasoning from only two states, California and Florida.

The *Ranier* court first reviewed *People v. Caballero,* 55 Cal.4th 262, 282 P.3d 291, 145 Cal.Rptr.3rd 286 (2012), and several

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not apply to aggregate sentences that amount to the practical equivalent of life without parole); *Goins v. Smith,* 2012 WL 3023306 at *6 (N.D. Ohio No. 4:09-CV-1551, July 24, 2012)(unpublished opinion and order)("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham's* holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic,* 228 Ariz. 228, 265 P.2d 410, 415-16 (Ariz. Ct. App. 2011)(concurrent and consecutive terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Adams v. State,* 288 Ga. 695, 707 S.E.2d 369, 365 (2011)(child's 75 year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor,* 2013 Il App (3d) 110876, 368 Ill. 634, 984 N.E.2d 580 (Ill. App. Ct. 2013)(*Graham* does not apply because the defendant was only sentenced to forty years and not life without possibility of parole); *Diamond v. State,* 2012 WL 1431232 (Tex. Crim. App. Nos. 09-11-00478-CR & 09-11-00479-CR Apr. 25, 2012)(upholding a sentence of 99 years for a nonhomicide child offender without mentioning *Graham*). Cases not mentioned by that court include *Smith v. State,* 258 P.3d 913, 920 (Alaska App. 2011)(*Graham* applies only to juveniles sentenced to life without parole for nonhomicide offenses); *People v. Gay,* 960 N.E.2d 1272, 1279 (Ill. App. 2011)(finding that defendant lacked case law supporting his proposition that an aggregated sentence resulting from multiple convictions must ne considered a life without parole sentence); *United States v. Scott,* 610 F.3d 1009, 1018 (8th Cir. 2012)(rejecting application of *Graham* to sentence of 25 year old "because *Graham* was limited to defendants sentenced to life in prison without parole for crimes committed as a juvenile").

intermediate California appellate decisions that had been decided "prior to and after" *Caballero*. The *Ranier* court completely ignored what the *Henry* court had observed was the "significant split" among the intermediate California appellate courts. *Henry*, 82 So.3d at 1088 (analyzing those California decisions, including the lower court *Caballero* opinion, which had affirmed a 110 year-life sentence). Further, any decisions decided after the California Supreme Court's *Caballero* holding cannot be found as additional support for this proposition, because the intermediate courts were bound to follow it.

The *Ranier* court next noted that "although two Florida decisions have ruled to the contrary, we are more persuaded by the greater number of Florida cases that have applied *Graham* to sentences that are the functional equivalent of life without parole," and that it was particularly persuaded by the reasoning in *Adams*. *Id*. at *11. In simply counting cases, the *Ranier* court ignored Florida's appellate court structure, and the fact that three (and Respondent submits four) of its five district courts of appeal have applied *Graham* "as written." And while being particularly persuaded by Florida's First District in *Adams*, the *Ranier* court never mentioned that fact that in that case the court had stated that if it was writing on a clean slate, it would affirm based the *Henry* decision. Thus, it appears that only one state

supreme court, California's, has expanded the specific *Graham* holding to "de facto" life sentences.

Respondent further submits that attempted first degree murder should not be considered a nonhomicide offense that is entitled to a *Graham* analysis. Respondent acknowledges, as Gridine states, that the lower courts in Florida have determined that attempted murder is not a nonhomicide offense, but would ask this could to consider this issue as it relates to Gridine. *See Manuel,* 48 So.3d at 93 ("simple logic dictates that attempted murder is a nonhomicide offense because death, by definition, has not occurred"); *McCullum v. State,* 60 So.3d 502 (Fla. 1st DCA 2011)(agreeing with *Manuel* reasoning). In addition to the foregoing Florida decisions, the California Supreme Court has also determined that attempted first degree murder is not a homicide, *Caballero, supra,* but the concurring opinion specifically acknowledges that *Graham* "is not crystal clear on this point."

> As respondents point out, *Graham* at one point says, "[t]he Court has recognized that defendants who do not kill, *intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." (*Graham, supra,* 560 U.S. at p. -, 130 S.Ct. at p. 2027, italics added). Here defendant's convictions for attempted murder necessarily demonstrate the jury found he acted with intent to kill. (*People v. Gonzalez,* (2012) 54 Cal.4th 643, 653, 142 Cal.Rptr.3d 893, 278 P.3d 1242).
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> *Graham* also relied heavily on a scholarly paper to conclude that "nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses" (*Graham, supra,* 560 U.S. at p. --,

> 130 S.Ct. at p. 2023), but that paper defined homicide crimes *to include attempted murder* (Annino et al, Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to nation, Fla. St. U./ Pub. Int. L. Center, September 14, 2009, p.4 [for purposes of the study, "[i]ndividuals convicted of attempted homicide ... are defined as homicide offenders"]). Finally, in recognizing the worldwide consensus against imprisoning juveniles for life with no chance of parole, *Graham* noted that only two countries - the United States and Israel - impose that sentence in practice, and that "all of the seven Israeli prisoners whom commentators have identified as serving life sentences for juvenile crimes were convicted of homicide *or attempted homicide*." (*Graham, supra,* 560 U.S. at p. -, 130 S.Ct. at p. 2033, italics added.)
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> Despite these slight inconsistencies in *Graham's* analysis, the main thrust of its reasoning is that crimes resulting in the death of another human being are qualitatively different from all others, both in their severity, moral depravity, and irrevocability, and the Eighth Amendment to the United States Constitution demands courts take cognizance of that fact when sentencing those who committed their crimes while still children.

Caballero, 282 P.3d at 271 n.1 (Werdegar, J. concurring).

Respondent submits that these statements in *Graham* are not just "slight inconsistencies." The holding in *Graham* is premised on the juvenile offender's characteristics and the nature of the crime committed, and applies to an entire class of offenders. Considered within its analysis is "the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty may apply." *Graham* 130 S.Ct. at 2027. It was at this point that the Court stated it had recognized that defendants who do not kill, intend to kill or foresee that life will be taken are "categorically less deserving'

of the most serious form of punishment. *Id.* The Court then stated that while serious nonhomicide crimes may be devastating in their harm, they could not be compared to murder in their severity and irrevocability, as well as in terms of moral depravity and injury to the person and public. *Id.* The Court reasoned that this was because while life was over for the murder victim, life is not over and normally not beyond repair for the victim of the nonhomicide crime. *Id.* The Court concluded that it followed that when compared to an adult murderer, a juvenile offender who did not kill or **intend to kill** has a twice diminished moral culpability. "The **age** of the offender **and** the **nature of the crime** each bear on the analysis." *Id.* (emphasis supplied).

The *Graham* Court distinguished those who do not kill or intend to kill twice during this analysis, and those words must carry some meaning, particularly since it is a juvenile offender's status and characteristics that provide the framework for that decision. The fact remains, the moral culpability of a juvenile who attempts to kill with premeditation is exactly the same as the moral culpability of the juvenile who kills with premeditation. The fact that an attempted murder victim survives has no place in this analysis. Further, while some attempted murder victims may escape injury entirely, for many, such as those paralyzed, brain damaged and/or comatose, life is qualitatively and/or quantitatively over and beyond repair. But more importantly, in terms of a *Graham*

analysis, whether a victim lives or dies has no effect on the characteristics of the offender. As it relates to the defendant's moral culpability and the nature of the offense, an attempted first degree murder is, at the very least, the "functional equivalent" of a completed murder. In fact, an attempted murder exhibits much greater moral depravity than some completed felony murders. *Compare Arrington v. State,* 37 Fla. L. Weekly D155 (Fla. 2d DCA 2012)(finding that felony murder is not a nonhomicide offense for purposes of *Graham,* but some juveniles who are convicted of it who did not actually commit the murder may be entitled to individualized sentencing).

When addressing the same claim, a superior court commissioner in Delaware reasoned:

> An attempted murder first degree conviction necessarily means that the Defendant harbored the intent to kill and attempted to do so. An attempted first degree murder and an executed first degree murder are of the same grade and degree, and both appear to fall within the ambit of homicide cases, in which the intent to kill is present, as distinguished from nonhomicide cases, where the intent to kill is not present. It appears therefore that a juvenile defendant who intended to kill, and is convicted of an attempted homicide, may be sentenced to life without probation or parole for attempted murder first degree under *Graham*.

Id. at *2. *Delaware v. Twyman,* 2010 WL 42611921 (Del.Super October 19, 2010)(unpublished opinion). That report was adopted by the Superior Court, and on appeal the Delaware Supreme Court agreed that under *Graham*, attempted murder in the first degree appeared to fall within that category of crimes for which a life sentence

without parole could be imposed upon a juvenile. *Twyman v. State*, 26 A.3d 215, 2011 WL 3078822 (Del.Supr. 2011)(unpublished disposition). In so finding, the court quoted the foregoing language from *Graham* which recognized that defendants who do not intend to kill are categorically less deserving of the most serious forms of punishments than are murderers. Respondent thus submits that unlike the foregoing *Manuel* reasoning, simple logic dictates that attempted murder is a homicide offense for purposes of *Graham*, because the fact that a death did not occur has no bearing on the juvenile offender's moral culpability or characteristics.

Should this Court determine that *Graham's* limited holding should be taken across its "clear line" and beyond the specific "sentence of life without parole," there would have to be a means to first determine exactly what sentences cross that line, which would have to be more objectively calculated than "life expectancy," and what procedures would render them constitutional. Significantly, it is not the length of the sentence given to a juvenile convicted of a nonhomicide offense that could potentially violate *Graham*. It is the fact that Florida currently has no means to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The *Graham* Court held:

> ...that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to warrant

> that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper*, 543 U.S., at 574, 125 S.Ct. 1183.
>
> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

130 S.Ct. at 2030. Thus, Gridine's seventy year sentence for attempted murder does not per se violate the constitution. It merely sets the outside limit for the amount of time that he can potentially spend behind bars, subject to a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Resentencing for a shorter term is not required under *Graham*, and in fact, presents the converse of the procedure forbidden by *Graham*, which would be a determination from the outset that an offender **will be** fit to reenter society at some point. *Compare Graham*, 130 S.Ct. at 2029.

As one potential solution, Gridine states that this Court could find that the statutes denying juvenile nonhomicide offenders access to parole hearings are unconstitutional as applied, so that juveniles can become parole eligible. At first blush and on the surface, this may be an appealing proposition, but there are several obstacles to and problems with this approach at this time. First, from a procedural standpoint, Gridine never presented this argument to the trial court. It is well settled that the constitutional application of a statute to a particular set of facts must be raised at the trial level. *Trushin v. State,* 425 So.2d 1126 (Fla. 1982). This Court has applied a procedural bar to a variety of Eighth Amendment claims, including claims that a sentence is unconstitutionally cruel under the Eighth Amendment. *See Rigterink v. State,* 66 So.3d 866, 897 (Fla. 2011); *Gore v. State,* 964 So.2d 1257, 1276 (Fla. 2007); *Perez v. State,* 919 So.2d 347, 377 (Fla. 2005); *Fotopolous v. State,* 608 So.2d 784, 794 n.7 (Fla. 1992). Further, Gridine has set forth no specific legal argument in the instant case demonstrating how this statute is unconstitutional as applied to him. Statutes are presumed constitutional, and the party challenging the constitutionality bears the burden of demonstrating that it is invalid, and a conclusory argument cannot form a basis for reversal. *Newell v. State,* 875 So.2d 747 (Fla. 2d DCA 2004). Gridine has not met this

burden, so this issue is not properly before this Court at this time.

Respondent also submits that this Court cannot find that a statute is unconstitutional simply because it may provide a solution to a problem. The statute must actually be unconstitutional. Further, this could provide an overly broad solution to a limited problem. It has the potential to open up the parole system to, if not all juveniles, at least those juveniles sentenced as adults, and not all juveniles sentenced as adults receive an extensive term of years subject to *Graham* restrictions.

Gridine alternatively states that this Court could direct the fashioning of a rule that would require judicial review of a juvenile's progress toward maturity and rehabilitation, and include a list of non-exclusive factors for a trial court to consider in making this evaluation. Due to the absence of any legislative remedy up to this point, it may well fall to this Court to determine a proper course of action should it find that *Graham* applies to lengthy and aggregate term-of-years sentences. As Gridine suggests, the implementation of a new procedural rule may provide a solution. *See e.g., Satz v. Perlmutter,* 379 So.2d 359, 360 (Fla. 1980)("Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights."). However, any changes to

implement the *Graham* holding must be carefully considered and evaluated so as to not create additional issues.

Respondent submits that a number of factors have to be considered, including, but not limited to the following. First, there would have to be a determination of what length of sentence would require a *Graham* "opportunity for release," because as demonstrated, *Graham* does not limit the term of years that may be imposed at the outset, nor does it require eventual release. This would have to have a more objective basis that "life expectancy." Next, it would have to be determined at what point during that overall term of years a juvenile nonhomicide offender would be entitled to this "opportunity for release," and the extent of that opportunity. Considerations within this factor may include any minimum mandatory sentences imposed, as well as sentences imposed in other cases that the offender may be serving.

It would also have to be determined what form of potential release, if deemed appropriate, satisfies *Graham*, yet also takes into consideration society's interests.[9] It appears that under *Graham*, release on parole is sufficient, and Respondent would note

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[9] Respondent asserts the penological justifications of retribution, deterrence and incapacitation become relevant at this point, because any initial judgment that the offender was "incorrigible" may have been corroborated by prison behavior and failure to mature. *See Graham,* 103 S.Ct. at 2029. As that Court stated, "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030.

that this is far from an unlimited release, and carries with it supervision, as well as rules and regulations that if not followed, which may result in a return to incarceration. In this respect, Respondent submits that the Court could perhaps limit any form of release to the conversion of a term-of-years sentence to lifetime probation. This would allow the offender the opportunity to demonstrate that his or her rehabilitation and maturity was genuine, and that the decision to return them to society was correct. Those unable to remain free without reoffending would be subject to revocation proceedings, while the successful candidate may be able to eventually petition the court for termination of their probation.

With these considerations in mind, a procedural mechanism would have to be developed to implement them. A new rule of criminal procedure, such as a new subsection to Rule 3.800, could provide that mechanism, as long as it remained procedural rather than substantive. Again, a number of factors would have to be considered, including time frames and the number of applications that could be made, rights that an applicant would be entitled to, such as the assistance of counsel and extent of appellate review, if any (to both parties), as well as factors to be considered by the trial court in reaching a decision, and the required contents of any order granting or denying relief. Finally, Respondent would note that if a remedy is required, relief need not be immediate.

There certainly must be consequences for these juvenile nonhomicide offenders,[10] and under no interpretation of *Graham* could it be said that Gridine is entitled to immediate review or release, nor does he claim such.

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[10] Many of these juvenile offenders have committed numerous violent felonies, and it does not appear that any of them were simply caught up in circumstances beyond their control. Some, like Henry, acted alone, or Gridine, pulled the trigger. *See, Smith, supra* (17 year-old Smith was convicted in two separate cases with eight offenses - two counts of sexual battery, two counts of burglary, one count of aggravated assault, one count of kidnaping, one count of possession of a weapon during the commission of a felony, and one count of possession of burglary tools); *Adams, supra* (16 year, 10 month old appellate was convicted of attempted first degree murder, armed burglary, and armed robbery); *Manuel, supra* (13 year-old appellant pled guilty as charged to robbery with a firearm, attempted robbery with a firearm, and two counts of attempted first degree murder); *Walle, supra* (13 year-old appellant convicted of eighteen offenses - two counts of armed kidnapping, eleven counts of armed sexual battery with battery with a deadly weapon, one count of armed burglary of a structure, one count of grand theft of a motor vehicle, one count of attempted armed robbery with a firearm, one count of third degree grand theft, and one count of carjacking with a deadly weapon); *Young, supra* (Young was fourteen and fifteen years old when he committed a series of four armed robberies); *Guzman, supra* (Guzman committed multiple violent crimes at the age of fourteen); *Henry, supra* (17 year-old appellant committed three counts of sexual battery with a deadly weapon or physical force, one count of kidnaping with intent to commit a felony (with a firearm), two counts of robbery, one count of carjacking and one count of burglary of a dwelling; *Mediate, supra* (defendant, while still a minor, committed the crimes of kidnapping and four counts of sexual battery); *Johnson, supra* (armed burglary, three counts of armed kidnapping to facilitate a felony, one count of attempted first degree murder with a firearm, and one count of sexual battery using force or a weapon).

CONCLUSION

Based on the arguments and authorities presented herein, the State requests this Court approve the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by email to Counsel for Petitioner, Gail Anderson, Gail.Anderson@flpd2.com, this 9th day of May, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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IN THE SUPREME COURT OF FLORIDA

SHIMEEK DAQUIEL GRIDINE,

Petitioner,

v. CASE NO. SC12-1223

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

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89 So.3d 909, 37 Fla. L. Weekly D69
(Cite as: 89 So.3d 909)

District Court of Appeal of Florida,
First District.
Shimeek GRIDINE, Appellant,
v.
STATE of Florida, Appellee.

No. 1D10–2517.
Dec. 30, 2011.

Background: Juvenile defendant, convicted of attempted first-degree murder and sentenced to seventy-years' imprisonment, filed motion to correct sentencing error. The Circuit Court, Duval County, Adrian G. Soud, J., denied motion. Defendant appealed.

Holding: The District Court of Appeal, Hawkes, J., held that defendant's 70-year sentence, including a twenty-five year minimum mandatory, did not violate prohibition of life sentences without the possibility for parole for juveniles convicted of nonhomicide crimes.

Affirmed.

Wolf, J., dissented and filed opinion.

West Headnotes

[1] Homicide 203 ⚿1567

203 Homicide
203XIV Sentence and Punishment
203k1565 Extent of Punishment in General
203k1567 k. Murder. Most Cited Cases

Sentencing and Punishment 350H ⚿1607

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(L) Juvenile Justice
350Hk1607 k. Juvenile offenders. Most Cited Cases

Juvenile defendant's sentence of seventy years' imprisonment for attempted first-degree murder, including a twenty-five year minimum mandatory for his use of a firearm, was not the functional equivalent of a life sentence for purposes of Eighth Amendment prohibition on life sentences without the possibility of parole for juveniles convicted of nonhomicide crimes. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⚿1481

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(E) Excessiveness and Proportionality of Sentence
350Hk1481 k. Length of sentence. Most Cited Cases

At some point, a term-of-years sentence may become the functional equivalent of a life sentence for purposes of Eighth Amendment prohibition on life sentences without the possibility of parole for juveniles convicted of nonhomicide crimes. U.S.C.A. Const.Amend. 8.

***909** Hon. Nancy A. Daniels, Public Defender, and Gail E. Anderson, Assistant Public Defender, for Appellant.

Hon. Pamela Jo Bondi, Attorney General, and Therese A. Savona, Assistant Attorney General, for Appellee.

***910** HAWKES, J.

Appellant, Shimeek Gridine, argues that the United States Supreme Court's holding in *Graham v. Florida,* —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), prohibits Florida trial courts from imposing a seventy-year sentence on juvenile defendants. We disagree with his assertion that his sentence is the "functional equivalent" of a natural life sentence without the possibility of parole and affirm the trial court's finding that "[b]y the express

holding of *Graham,* the term of years sentence imposed does not run afoul of the United States Supreme Court's decision."

On April 21, 2009, Mr. Gridine approached his victim, pointed a loaded shotgun at him and demanded he hand over whatever money and/or property he had on his person. When the victim attempted to run, Mr. Gridine fired the shotgun at him, "striking [him] on his face, head, neck, shoulder, side and back." Security cameras at a nearby gas station recorded Mr. Gridine fleeing from the scene of the shooting. He was fourteen years old on the date he shot the victim.

The State filed a Certificate of Filing Direct Information on Juvenile and charged Mr. Gridine with one count of attempted first degree murder, one count of attempted armed robbery, and one count of aggravated battery. He pled guilty to all three counts.

After a sentencing hearing, the trial court adjudicated Mr. Gridine guilty and sentenced him to a seventy-year prison sentence for committing attempted first degree murder and a twenty-five year concurrent sentence for committing attempted armed robbery (the State nolle prossed the aggravated battery charge). Included in the sentence was a twenty-five year minimum mandatory for his using a firearm during his commission of the charged offenses.

[1] Pursuant to Rule 3.800(b)(2) of the Florida Rules of Criminal Procedure, Mr. Gridine filed a Motion to Correct Sentencing Error, arguing his sentence violated the Eighth Amendment of the United States Constitution. Specifically, he referenced the United States Supreme Court's decision in *Graham v. Florida,* —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and equated his sentence to "a de facto life sentence." In its order denying the motion, the trial court found *Graham* inapplicable to Mr. Gridine's situation on grounds that he did not face a life sentence without the possibility of parole. We agree.

In *Graham,* the defendant committed armed burglary with assault or battery and attempted armed robbery when he was sixteen years old. *Id.* at 2018. The trial court withheld adjudication of guilt and sentenced Graham to concurrent terms of three years' probation. One year later, Graham admitted to violating the terms of his probation, and the trial court adjudicated him guilty of the underlying offenses and sentenced him to concurrent terms of life imprisonment and fifteen years' imprisonment. *Id.* at 2019–20. Graham argued that his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 2020. Due to juveniles' diminished moral responsibility, the Supreme Court held that the Eighth Amendment prohibited life sentences without the possibility for parole for juveniles convicted of nonhomicide crimes because life sentences improperly denied juvenile offenders a chance to demonstrate growth and maturity. *Id.* at 2029–30. Specifically, the Supreme Court held:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What ***911** the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Graham, 130 S.Ct. at 2030.

Appellant asks this Court to apply *Graham* to his case and find that his seventy-year sentence is the functional equivalent of a natural life sentence. However, the Supreme Court specifically limited its holding in *Graham* to only "those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." *Id.* at 2023; *See also Thomas v. State,* 78 So.3d 644 (Fla. 1st DCA 2011) (affirming a juvenile's fifty-year sentence for armed robbery and aggravated battery); *and see Manuel v. State,* 48 So.3d 94, 98 n. 3 (Fla. 2d DCA 2010) (affirming a juvenile's forty-year sentence for attempted murder with a firearm).

[2] As in *Thomas,* we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence. *See United States v. Mathurin,* 2011 WL 2580775 (S.D.Fla. June 29, 2011) (finding that a mandatory minimum sentence of three-hundred and seven years' imprisonment for a juvenile was unconstitutional). Nevertheless, we do not believe that situation has occurred in the instant case.

We, therefore, AFFIRM the trial court's imposition of judgment and sentence.

AFFIRMED.

ROBERTS, J., Concurs; WOLF, J., Dissents with Opinion.

WOLF, J., Dissenting.

As we stated in *Thomas v. State,* 78 So.3d 644 (Fla. 1st DCA 2011), the only logical way to address the concerns expressed by the United States Supreme Court in *Graham v. Florida,* —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), is to provide parole opportunities for juveniles. The Legislature, not the judiciary, is empowered to create a provision for parole.

Absent the option of parole, I am at a loss on how to apply the *Graham* decision to a lengthy term of years. Is a 60–year sentence lawful, but a 70–year sentence not? Regardless, it is clear to me that appellant will spend most of his life in prison. This result would appear to violate the spirit, if not the letter, of the *Graham* decision. I, therefore, must respectfully dissent. However, in doing so, I note that absent a legislative solution, I look for guidance from either the United States or Florida Supreme Courts.

Fla.App. 1 Dist.,2011.
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