Electronically Filed 02/27/2013 10:58:13 AM ET

FILED, 2/27/2013, Thomas D. Hall, Clerk, Supreme Court

IN THE
SUPREME COURT OF FLORIDA

SHIMEEK DAQUIEL GRIDINE,

Petitioner,

v. Case Number: SC12-1223

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION

PETITIONER'S INITIAL BRIEF

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

This proceeding involves the direct appeal from Appellant's guilty pleas and sentences for attempted first degree murder and attempted armed robbery. The following symbols will be used to designate references to the record on appeal:

"R. [page number]" - one volume labeled "Record on Appeal";

"SuppR[volume number]. [page number]" - five volumes of supplemental record;

"PSI [page number]" - Pre-Sentence Investigation dated April 14, 2010;

"DJJ [page number]" - Department of Juvenile Justice Adult Sentencing Summary Form dated April 22, 2010.

STATEMENT OF THE CASE AND FACTS

On April 21, 2009, Appellant, Shimeek Daquiel Gridine, age 14, and a 12-year-old accomplice confronted Dana Battles behind a gas station in Jacksonville, Florida, and demanded, "Give it up" (PSI 2). As Battles began turning away, Mr. Gridine shot him once with a shotgun (PSI 2; DJJ 2). Battles suffered "buckshot" wounds to the left side of his face, his left shoulder and the back of his head and neck and was taken to the hospital with non-life-threatening injuries (PSI 2-3; DJJ 2). After the gunshot, Mr. Gridine and his accomplice fled the scene (PSI 2).

The gas station's surveillance camera captured video of the attempted robbery and of the fleeing suspects (PSI 2). The video

was shown on television news, and Mr. Gridine's family brought him to the police station on April 24, 2009 (DJJ 1). Mr. Gridine was interviewed by the police and admitted to committing the shooting (DJJ 1).

On May 15, 2009, the State direct filed an information charging Mr. Gridine as an adult with attempted first degree murder (Count 1), attempted armed robbery (Count 2) and aggravated battery (Count 3) (R. 1). Count 1 was a first degree felony punishable by a term of years up to life in prison (SuppR1. 17; *see* sections 782.04(1)(a), 777.04(4)(b), 775.087(1)(a), and 775.082(3)(a)3., Fla. Stat. (2009)). Counts 1 and 2 were subject to a 25-year minimum mandatory sentence (SuppR1. 17-18; *see* Section 775.087, Fla. Stat. (2009)).

On March 9, 2010, Mr. Gridine pled guilty to all three counts with no agreement as to sentence (R. 48-49; SuppR1. 14-22).[1] Mr. Gridine told the court he was pleading guilty because he was guilty (SuppR1. 16). The court set sentencing for April 30, 2009, and ordered the Department of Corrections to prepare a Pre-Sentence Investigation (PSI) and the Department of Juvenile Justice to prepare a Pre-Disposition Report (SuppR1. 21).

The PSI reported that Mr. Gridine was born in Brooklyn, New York, on November 7, 1994, to Rasheene Hollowell and Charlett Gridine, who were never married (PSI 1, 6). Mr. Gridine did not

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[1]The State later nol prossed Count 3 (R. 91).

remember meeting his father until 1998 and "knew very little of him" (PSI 6). Hollowell died in 2001 (PSI 6). In 1997, Charlett Gridine married Jerry Gidharry, but they divorced in 2000 (PSI 6). Charlett Gridine then moved to Jacksonville, where she supported her family through employment and public assistance (PSI 6). In 2009, Charlett Gridine became unemployed and lost her home (PSI 6, 7). She and Mr. Gridine moved in with his grandparents, Ranono Graham and John Harmon (PSI 6). Harmon was a father figure for the family, and Mr. Gridine had a close relationship with him (PSI 6).

Mr. Gridine had completed the seventh grade and began general education classes on May 20, 2009, while he was in pretrial detention (PSI 4). Mr. Gridine had a speech impairment which had been addressed during his school years, and the pretrial detention school planned to have him evaluated by a speech pathologist so he could receive appropriate therapy (PSI 4, 7). He was promoted to the eighth grade in October of 2009 (PSI 4). The pretrial detention school reported that "while his academic test scores are mostly below average, his grades are satisfactory. Special education services have been identified, and he began academic learning strategies on October 23, 2009 to assist in advancement. He reportedly displays positive behavior and attitude" (PSI 4).

Mr. Gridine's prior criminal record consisted of two misdemeanors (PSI 3). In 2008, he was charged with petit theft and completed a pretrial diversion program (PSI 3; DJJ 2). In February of 2009, Mr. Gridine was charged with disturbing the peace, which was dismissed, and with resisting an officer without violence, for which he was placed on probation (PSI 3; DJJ 2). In 2008, Mr. Gridine had received anger management counseling after a fight at his middle school (PSI 7).

The PSI recommended that if the court were to depart from the sentencing guidelines or the Criminal Punishment Code, the court should impose a Youthful Offender sentence of six years in prison followed by two years of community control and then three years of probation (PSI 8). Mr. Gridine told the PSI preparer that "he desires the opportunity to apologize to the victim for his actions" (PSI 3). The DJJ report recommended that the court impose juvenile sanctions of commitment to a maximum risk residential program (DJJ 2).

Mr. Gridine presented 12 witnesses at the sentencing hearing. Jeffrey Kelly became Mr. Gridine's step-father in 2000 (R. 93). Although he and Mr. Gridine's mother were now separated, Kelly was still a big part of Mr. Gridine's life (R. 93). Kelly had taught Mr. Gridine morals and other good things, got him into Boy Scouts and took him to church (R. 94). Kelly believed Mr. Gridine could be a positive influence (R. 95). In

talking to Mr. Gridine since the incident, Kelly could see that Mr. Gridine felt remorse, wanted to apologize to everyone and knew he had let people down (R. 95). Kelly believed Mr. Gridine still had a future because he made good grades in school and was a good kid (R. 95-96). Mr. Gridine was smart and knew right from wrong (R. 96).

Cody Gridine, Mr. Gridine's uncle, came to support Mr. Gridine "because I know that he is a good kid and we all make mistakes in life" (R. 98). Cody believed Mr. Gridine should be given a chance "because I know for a fact he got a heart, and he is very intelligent, and he is smart" (R. 98). Cody asked the court not to "write him off. . . . [P]lease don't write my nephew off, because I know he has a heart, Your Honor, and I know he can be a productive child" (R. 99).

Marilyn Gridine, Mr. Gridine's aunt, testified that Mr. Gridine "is a very intelligent guy, he is very sweet, he is really nice" (R. 102). Mr. Gridine "got in trouble this time, but he don't really do stuff like that" (R. 102). Mr. Gridine "doesn't do things bad, he don't do nothing wrong really" (R. 102). Marilyn asked the court to "have mercy on him, he is a little boy" (R. 102).

Robert Graham, Mr. Gridine's uncle, spent a lot of time with Mr. Gridine, and "he doesn't get in trouble when he is around me" (R. 104). Mr. Gridine "has some bad people that he hang out

with, but he -- whenever I am around, I keep him away from them and he stays with me" (R. 104). Graham himself had "been here before" and "changed my life around" (R. 104). Graham asked the court to "give my nephew a chance to make a change" (R. 104). Asked why Mr. Gridine would do something like this offense, Graham explained that Mr. Gridine had "lost a lot [of] people back to back," including "his pops" and "his closest cousin" (R. 105). Mr. Gridine "has been struggling ever since his father died" (R. 105). Mr. Gridine was "very remorseful" and apologetic, "so it is not like he is sitting here like happy about what he did" (R. 105-06). Mr. Gridine "don't do things like this, this is not SHIMEEK, this is not him for nothing, it is not him" (R. 106).

Tyresha May, Mr. Gridine's aunt, described Mr. Gridine as "a good kid" who "never really got into any trouble" (R. 108). May "was real shocked to hear that he got into this kind of trouble because he is not a bad child and he go to school and get good grades" (R. 108). May believed "sometimes the company you keep causes you to lean off from what . . . you have been taught" (R. 108). May asked the court to have mercy and give Mr. Gridine another chance because "I know that he can be a successful young man in life," "he will do better," and "he is a baby and he can change" (R. 108).

Two of Mr. Gridine's cousins and Mr. Gridine's brother testified that Mr. Gridine was a good cousin and brother (R. 114-15). Mr. Gridine taught his brother a lot of sports, never taught him to do anything wrong, and was a positive person in his brother's life (R. 114-15). Cousin Sharissa Graham did not "see why he got in trouble, but he is a role model to me, he is my hero" (R. 115).

Amanda Graham, Mr. Gridine's aunt, described him as "a good child" who caused no problems (R. 117). Mr. Gridine was not a "child that just runs wild and nobody watches him," but "has a very close family" and "is very loved" (R. 117). Amanda asked the court to give Mr. Gridine another chance (R. 117).

At the time of the offense, Mr. Gridine was living with Ranona Graham, his grandmother (R. 118-19). Mr. Gridine was Ranona's first grandchild, and although he was not perfect, "he tries to be" (R. 119). Ranona was "missing him in my life" and asked the court, "please don't take my child away from me" (R. 119). When the offense happened, the family had Mr. Gridine turn himself in "because it was bothering him just that much" and he "was on the verge of a nervous breakdown" (R. 120). Mr. Gridine "deserves to be punished, but not taken away" (R. 120). Ranona was the first person Mr. Gridine told about the offense, and he was honest about it (R. 120). Then the family took him to turn himself in (R. 120-21).

At the time of the offense, Mr. Gridine also lived with his grandfather, John Harmon (R. 123). Mr. Gridine was "a good kid," and when he was growing up, he "would ask me for help in school, he would ask me to help stuff with his bicycles" (R. 123). When Harmon was away working as a merchant seaman, Mr. Gridine helped other kids in the neighborhood with fixing their bicycles (R. 123). Other than sometimes leaving Harmon's tools out, Mr. Gridine did not "get in trouble as a matter of habit or anything like that" (R. 123). Before the offense, Mr. Gridine's mother lost her job and the house, and there were two deaths in the family (R. 123). When the family learned about Mr. Gridine's involvement in the offense, they talked to him, and "he wanted to turn himself in, he says, you know, I didn't mean to do it" (R. 123-24). Mr. Gridine "even says he has to be punished for what he did" (R. 124). Harmon believed that a sentence of 25 years to life "does nothing for society or for him if he grows up in jail" (R. 124-25). Mr. Gridine "knows he did something wrong, he knows he has to be punished for it" (R. 125). Harmon asked the court to sentence Mr. Gridine as a juvenile "where he has a second chance, where he will still be incarcerated but they have programs to help him," so that he could "come out and be productive" (R. 125).

To his mother, Charlotte Gridine, Mr. Gridine "is a good child" (R. 127). Before the offense, Charlotte lost her job and

her house, and there were two deaths in the family, including a cousin to whom Mr. Gridine was close (R. 127). Mr. Gridine took the cousin's death "real hard" (R. 127). Mr. Gridine's father also passed away (R. 127). Mr. Gridine was an obedient child and only got into normal childhood trouble (R. 128). Mr. Gridine was remorseful about the offense (R. 128). Charlotte talked to Mr. Gridine about the offense before he turned himself in (R. 128). He admitted committing the offense and was "[s]cared, nervous, . . . on the verge of breaking down" (R. 128). He knew it was a serious offense and told the police what happened (R. 129). Mr. Gridine knew he made a mistake and wanted to apologize to the victim (R. 129). Charlotte asked the court to impose a juvenile sentence (R. 129).

Robert Jackson was married to a cousin of Mr. Gridine and was a first sergeant in the United States Army and Florida National Guard (R. 140-41). Mr. Gridine came to Jackson's home on the weekends "because there is no father in the home. His grandfather is constantly deployed to provide for the family" (R. 141). Mr. Gridine's offense "was a complete shock" to Jackson, who "never ha[d] an ounce of problem out of him" (R. 141). Jackson had noticed that Mr. Gridine had "small issues, hanging with the wrong kids in the neighborhood. But that wasn't his normal demeanor" (R. 141). Normally, Mr. Gridine was "very respectful to adults and his peers alike" (R. 141). Jackson was

"a hundred percent sure that he could be rehabilitated without any issues" because of his family support system (R. 142). That support system was not as available before the offense (R. 142). Mr. Gridine's grandfather was "his biggest influence," but was "gone on a ship on a regular basis" (R. 142). Jackson had been deployed, so he had also been gone and was not available (R. 142-43).

The State called no witnesses, but introduced photographs of Battles' injuries (R. 132; SuppR5. State Exs. 1-5). The State recommended that the court impose a 40-year prison sentence with a 25-year minimum mandatory term (R. 137). The defense requested a Youthful Offender sentence such as was recommended in the PSI and the DJJ report (R. 145-50).

In imposing sentence, the court remarked that "[t]he sole question concerning sentence in this case . . . is the defendant's age" (R1. 155). Despite Mr. Gridine's age, the court found that he was "intelligent, . . . aware of right and wrong, . . . able to determine things for [himself] and . . . [his] thought process is in no way impaired, no way infirmed [sic]" (R1. 155). The court declined to impose a youthful offender sentence "given the nature of conduct that took place on that night and the nature of the conduct that has been admitted to by this defendant" (R1. 158). The court imposed concurrent prison sentences of 70 years on Count 1 and 25 years on Count 2 with a

25-year minimum mandatory sentence on both counts (R1. 53-55, 159-60). Mr. Gridine timely filed a notice of appeal (R1. 69).

Before filing this initial brief, Mr. Gridine filed a motion under Rule 3.800(b)(2), Fla. R. Crim. P., in the circuit court (SuppR2. 1-8). The motion argued that Mr. Gridine's 70-year prison sentence with a 25-year minimum mandatory on Count 1 was a *de facto* life sentence imposed on a juvenile for a nonhomicide crime and thus violated the Eighth Amendment under the rationale of Graham v. Florida, 130 S. Ct. 2011 (2010).

The motion alleged that the 70-year sentence with a 25-year minimum mandatory was a life without parole sentence because it extended beyond Mr. Gridine's expected life span (SuppR2. 3). The motion proffered that according to the National Center for Health Statistics, in 2006, the latest year for which statistics were available at the time, a 15-year-old black male was expected to live for another 51.3 years. National Center for Health Statistics, Centers for Disease Control, National Vital Statistics Reports (June 28, 2010) table A, vol. 58, no. 21. (SuppR2. 3). The motion alleged that even if Mr. Gridine served only eighty-five percent[2] of the 45 years of his sentence remaining after he serves the minimum mandatory 25-year sentence, his total prison sentence would be 63.25 years, which also

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[2]*See* § 944.275(4)(b)3., Fla. Stat. (2010) (maximum gain time award may not reduce sentence below 85% of sentence imposed).

extends beyond his expected life span (SuppR2. 3).

The circuit court heard argument and issued an order denying the motion (SuppR4. 13-24; SuppR2. 14-18). The court later issued an amended order (SuppR3. 2-6).

In the amended order, the circuit court summarized the facts of the offenses to which Mr. Gridine pled guilty and found that Mr. Gridine was 14 years old at the time of the crimes (SuppR3. 3). The court held that the "condition precedent" for applying Graham had "not been met - that is, this Court did not impose a life without parole sentence" (SuppR3. 4) (footnote omitted). Addressing Mr. Gridine's argument that his term of years sentence was a *de facto* life sentence, the court stated: "In his motion, the Defendant cites to the National Center for Health Statistics 2006 Vital Statistics Reports, which were not introduced into evidence at the sentencing hearing, and are not in evidence before the Court" (SuppR3. 5) (footnote omitted).

Although accepting that attempted homicide is a nonhomicide offense under Florida law, the court opined that in Graham, the United States Supreme Court "recognizes that the most serious forms of punishment are reserved for those who kill, intend to kill or foresee that life will be taken" (SuppR3. 5) (citing Graham, 130 S. Ct. at 2027). The court concluded:

> [T]he 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.

(SuppR3. 5-6).

Mr. Gridine presented his Graham argument to the First District Court of Appeal. That court agreed with the circuit court that Graham was inapplicable to Mr. Gridine because he did not receive a sentence of life without parole. Gridine v. State, 89 So. 3d 909, 910 (Fla. 1st DCA 2011). The court declined to apply Graham to Mr. Gridine's 70-year sentence because "the Supreme Court specifically limited its holding in Graham to only 'those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'" 89 So. 3d at 911 (quoting Graham, 130 S. Ct. at 2023). The court affirmed Mr. Gridine's sentence, concluding, "we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence. . . . Nevertheless, we do not believe that situation has occurred in the instant case." Gridine, 89 So. 3d at 911. Judge Wolf dissented, stating, "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." Gridine, 89 So. 3d at 911 (Wolf, J., Dissenting).

On Mr. Gridine's motion for rehearing, the court certified the following question of great public importance: "Does the United States Supreme Court decision in Graham v. Florida, 130 S. Ct. 2011 (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). This Court accepted jurisdiction. Gridine v. State, Case No. SC12-1223 (Fla. Oct. 11, 2012).

SUMMARY OF THE ARGUMENT

In Graham v. Florida, the United States Supreme Court held that a life sentence imposed upon a juvenile offender for a nonhomicide crime violates the Eighth Amendment. The question here is whether a 70-year prison sentence imposed upon a 14-year-old offender for a nonhomicide crime likewise violates the Eighth Amendment. Graham's focus on the psychological characteristics of juveniles and on their potential for rehabilitation provides the answer: a lengthy term-of-years sentence imposed upon a juvenile offender for a nonhomicide crime violates the Eighth Amendment in the same way as a life sentence because it does not provide "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

The Court should direct that Mr. Gridine receive a sentence which provides him "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." In light of Mr. Gridine's current sentence structure, that opportunity should occur when he has served his two concurrent 25-year minimum mandatory sentences. The Court could direct this outcome based upon its rule-making authority or by holding the statute abolishing parole unconstitutional as applied to juvenile offenders.

ARGUMENT

THE IMPOSITION OF A 70-YEAR PRISON SENTENCE WITH A 25-YEAR MINIMUM MANDATORY TERM ON A 14-YEAR-OLD VIOLATES THE EIGHTH AMENDMENT UNDER THE REASONING OF GRAHAM V. FLORIDA, 130 S.CT. 2011 (2010), AND REQUIRES RESENTENCING.

Standard of Review: This Court applies a *de novo* standard of review to a pure question of constitutional law. *See* State v. Glatzmeyer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

Argument: In Graham v. Florida, 130 S. Ct. 2011, 2030 (2010), the Supreme Court held, "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." This holding "does not foreclose the possibility" that juveniles convicted of nonhomicide crimes "will remain behind bars for life," but "does forbid States from making the judgment at the outset that those offenders will never be fit to reenter society." Id. Thus, Graham requires the States to "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

Mr. Gridine's case presents a variation on Graham. Mr. Gridine, who was 14 years old at the time of his offenses, received a 70-year prison sentence with a 25-year minimum mandatory term, not a sentence of life without parole. Nevertheless, Mr. Gridine's sentence assures that he will have no "meaningful opportunity to obtain release based on demonstrated

maturity and rehabilitation." Under his sentence structure, Mr. Gridine has no chance of release until he has served every day of the 25-year minimum[3] plus at least 85% of the remaining 45 years of the 70-year sentence.[4] Mr. Gridine must therefore serve at least 63.25 years in prison, resulting in no chance for release until he is 77.25 years old.[5] Mr. Gridine is now 18 years old. According to the National Center for Health Statistics, in 2008, the latest year for which statistics are available, a 15-year-old black male was expected to live for another 56.8 years and a 20-year-old for another 52.2 years. (National Center for Health Statistics, Centers for Disease Control, National Vital Statistics Reports, Vol. 61 No. 3 (Sept. 24, 2012), "United States Life Tables, 2008," Table B.[6] Mr. Gridine's present life expectancy is therefore approximately 72 years, five years less than the earliest age at which he will be eligible for release from prison.

The First District held that Graham was inapplicable to Mr.

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[3]The 25-year minimum mandatory term was imposed under section 775.087(2)(a)3., Fla. Stat. (2009). A defendant sentenced under this section is not eligible to earn gain time or to obtain any other form of discretionary early release during the mandatory term. Section 775.087(2)(b), Fla. Stat. (2009).

[4]*See* § 944.275(4)(b)3., Fla. Stat. (2009) (maximum gain time award may not reduce sentence below 85% of sentence imposed).

[5]Mr. Gridine is not eligible for parole. Section 921.002(1)(e), Fla. Stat. (2003).

[6]Available at www.cdc.gov/nchs/data/nvsr61/nvsr61_03.pdf.

Gridine because he did not receive a sentence of life without parole. Gridine v. State, 89 So. 3d 909, 910 (Fla. 1st DCA 2011). The court declined to apply Graham to Mr. Gridine's 70-year sentence because "the Supreme Court specifically limited its holding in Graham to only 'those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.'" 89 So. 3d at 911 (quoting Graham, 130 S. Ct. at 2023). The court affirmed Mr. Gridine's sentence, concluding, "we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence. . . . Nevertheless, we do not believe that situation has occurred in the instant case." Gridine, 89 So. 3d at 911. On Mr. Gridine's motion for rehearing, the court certified the following question of great public importance: "Does the United States Supreme Court decision in Graham v. Florida, 130 S. Ct. 2011 (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).

Regardless of whether Mr. Gridine's sentence is labeled a "term of years" sentence or a "life without parole" sentence, the result is the same. Mr. Gridine will most likely die in prison. Neither the State nor the courts has questioned this fact in the prior proceedings in this case. On the other hand, the State and courts have not acknowledged this fact either. The trial court's

and First District's decisions in Mr. Gridine's case effectively nullify Graham by allowing a *de facto* life without parole sentence to stand because it was not labeled a "life without parole" sentence.

A. GRAHAM APPLIES TO MR. GRIDINE'S SENTENCE.

The issue for the Court to decide in Mr. Gridine's case is whether a 70-year prison sentence is equivalent to a life sentence. Florida law already establishes that attempted first degree murder is a non-homicide crime. Cunningham v. State, 74 So. 3d 568, 569-70 (Fla. 4th DCA 2011); McCollum v. State, 60 So. 3d 502, 503 (Fla. 1st DCA 2011); Manuel v. State, 48 So. 3d 94, 97 (Fla. 2nd DCA 2010). The First District has held that a lengthy term-of-years prison sentence *may* constitute a *de facto* life sentence which violates Graham,[7] but in Mr. Gridine's case concluded, "we do not believe that situation has occurred in the instant case." Gridine, 89 So. 3d at 911.

In Graham, the Supreme Court held that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits imposing sentences which fail to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" on juveniles who commit nonhomicide crimes. 130 S. Ct. at 2030.

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[7] *See* Adams v. State, ___ So. 3d ___, 37 Fla. L. Weekly D1865 (Fla. 1st DCA Aug. 8, 2012); Floyd v. State, 87 So. 3d 45, 46 (Fla. 1st DCA 2012); Thomas v. State, 78 So. 3d 644, 646 (Fla. 1st DCA 2011).

This holding is based upon the substance of the Eighth Amendment--the ban on cruel and unusual punishment--not upon the label given a sentence. In substance, a 70-year sentence imposed upon a 14-year-old is just as cruel and unusual as a sentence of life without parole.

The Court itself in Graham described the case as "involv[ing] an issue the Court has not considered previously: a categorical challenge to a *term-of-years* sentence." 130 S. Ct. at 2022 (emphasis added). Indeed, the Supreme Court has previously recognized that "[i]n some cases . . . there will be negligible difference between life without parole and other sentences of imprisonment--for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man." Harmelin v. Michigan, 501 U.S. 957, 996 (1991). The Court has also noted the lack of difference between a life without parole sentence and a term of years sentence exceeding a defendant's life span: "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." Sumner v. Shuman, 483 U.S. 66, 83 (1987).

Graham and Roper v. Simmons, 543 U.S. 551 (2005), "establish[ed] that children are constitutionally different from adults for purposes of sentencing." Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012). Put plainly, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Id. at 2466.

Even if Mr. Gridine were to live long enough to obtain release eventually, that release would not satisfy Graham because it would be based upon longevity and not upon "demonstrated maturity and rehabilitation." Just as a sentence labeled "life without parole," Mr. Gridine's 70-year sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirt of [the convict], he will remain in prison for the rest of his days." Graham, 130 S. Ct. at 2027 (quoting Naovarath v. State, 779 P.2d 944 (Nev. 1989) (bracketed material in Graham)). Mr. Gridine's sentence also means that he will spend more of his life in prison than would an adult convicted of the same crime. Graham, 130 S. Ct. at 2028.

The foundation of Graham's holding is that children are not adults. The differences between children and adults establish that "juveniles have lessened culpability" and therefore "are less deserving of the most severe punishments." Graham, 130 S. Ct. at 2026 (citing Roper, 543 U.S. at 569). The Court explained

the differences which reduce a juvenile's culpability:

> As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." [*Roper*, 543 U.S.] at 569 . . . . These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573 . . . . Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569 . . . . A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson [v. Oklahoma*, 487 U.S. 815,] 835 [1988], . . . (plurality opinion).

Graham, 130 S. Ct. at 2026 (parallel citations omitted). The Court noted recent data regarding "the nature of children" supported its observations in Roper, including the facts that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" and "parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026.

The differences between children and adults also mean that children are more capable of reforming their behavior. Graham, 130 S. Ct. at 2026-27. "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." Id. at 2026 (quoting Roper, 543 U.S. at 570). A

child's actions are not equivalent to an adult's because "a greater possibility exists that a minor's character deficiencies will be reformed." Graham, 130 S.. Ct. at 2026-27 (quoting Roper, 543 U.S. at 570).

The Supreme Court's focus on the qualities which make children different from adults confirms that Mr. Gridine's 70-year sentence violates the Eighth Amendment in the same way a "life without parole" sentence does. When he committed his crimes, Mr. Gridine was a child with all of the characteristics of a child described in Graham, including the ability to reform. In Graham, the Supreme Court commanded that States "must" impose a sentence on a juvenile non-homicide offender which provides a "*meaningful* opportunity" to demonstrate reformation. 130 S. Ct. at 2030 (emphasis added). A 70-year prison sentence provides no opportunity, much less a meaningful one.

The California Supreme Court has explained that Graham's focus on the qualities of children belies any argument that Graham applies only to sentences labeled "life without parole":

> In *Miller* [*v. Alabama*, 567 U.S. ----, 132 S. Ct. 2455 (2012)], the United States Supreme Court extended *Graham*'s reasoning (but not its categorical ban) to homicide cases, and, in so doing, made it clear that *Graham*'s "flat ban" on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of intent in the crime's commission, or how a sentencing court structures the life without parole sentence. (*Miller, supra*, 567 U.S. ----, 132 S.Ct. at pp. 2465, 2469.) The high court was careful to emphasize that *Graham*'s "categorical bar" on life without parole applied "only

> to nonhomicide crimes." (*Id.* at p. ----, 132 S.Ct. at p. 2465.) But the court also observed that "none of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when ... a botched robbery turns into a killing. So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." (*Miller, supra*, 567 U.S. ----, 132 S.Ct. at p. 2465.) *Miller* therefore made it clear that *Graham*'s "flat ban" on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.

People v. Caballero, 55 Cal. 4th 262, 267-68 (Cal. 2012). The California Supreme Court thus concluded, "*Graham*'s analysis does not focus on the precise sentence meted out. Instead, . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime." Caballero, 55 Cal. 4th at 268 (quoting Graham, 130 S. Ct. at 2034). Likewise, a United States district court has observed that the Supreme Court's emphasis on providing juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" did not depend upon whether the sentence was labeled "life without parole" or "term-of-years." Thomas v. Pennsylvania, 2012 WL 6678686 at *2 (E.D. Pa. Dec. 21, 2012) (quoting Graham, 130 S. Ct. at 2030). Rather, "[t]he Court's concerns about juvenile culpability and inadequate penological justification apply

equally in both situations, and there is no basis to distinguish sentences based on their label." Id.

Mr. Gridine has effectively received a life sentence for a nonhomicide crime. Regardless of whether his sentence is characterized as a "term-of- years" or "life without parole," Mr. Gridine will probably die in prison, in violation of Graham's command that States "must" provide a juvenile non-homicide offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030.

B. THIS COURT SHOULD ORDER A RESENTENCING AT WHICH MR. GRIDINE WILL RECEIVE A SENTENCE PROVIDING A "MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE BASED ON DEMONSTRATED MATURITY AND REHABILITATION."

Graham addressed an entire system of juvenile sentencing. The Court applied cases which had adopted categorical rules defining Eight Amendment standards because "here a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." Graham, 130 S. Ct. at 2022-23. Ultimately, Graham directed Florida and the other states to rethink their systems of juvenile sentencing:

> 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.

Id. at 2030.

In the two and a half years since Graham was decided, Florida's Legislature and Executive Branch have done nothing "to explore the means and mechanisms for compliance" with Graham. They have left in place the existing adult system for sentencing juveniles and that system is broken when it comes to sentencing juveniles.

In response to Graham in cases where the sentence was labeled "life without parole," Florida's District Courts of Appeal have sometimes vacated the sentences and remanded for a resentencing which "accords" or "comports" with Graham.[8] In other cases involving sentences labeled "life without parole," the district courts have simply remanded for "resentencing."[9] Likewise, in two cases where the First District found term-of-years sentences to be *de facto* life sentences which violated Graham, the court remanded for "resentencing."[10]

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[8]Kleppinger v. State, 81 So. 3d 547, 550 (Fla. 2nd DCA 2012) (new sentence "must comport . . . with Graham); McCullum v. State, 60 So. 3d 502, 504 (Fla. 1st DCA 2011) (remanding for resentencing "in accordance with the Supreme Court's holding in Graham); Rioux v. State, 48 So. 3d 1029 (Fla. 2nd DCA 2010) (remanding for resentencing "in accordance with Graham"); Lavrrick v. State, 45 So. 3d 893 (Fla. 3rd DCA 2010) (remanding for resentencing "in accordance with the dictates of Graham).

[9]Jean-Baptiste v. State, 76 So. 3d 1070 (Fla. 4th DCA 2011); Cunningham v. State, 74 So. 3d 568, 570 (Fla. 4th DCA 2011); Garland v. State, 70 So. 3d 609 (Fla. 1st DCA 2010).

[10]Adams v. State, ___ So. 3d ___, 2012 WL 3193932 at *3 (Fla. 1st DCA Aug. 8, 2012); Floyd v. State, 87 So. 3d 4547 (Fla. 1st

The district courts have followed this course because of the numerous unanswered questions involved in providing the trial courts with any more specific guidance regarding the sentence which should be imposed. For example, in his dissent in Mr. Gridine's case, Judge Wolf stated, "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?" Gridine, 89 So. 3d at 911 (Wolf, J., Dissenting). The First District has acknowledged "that there is little guidance on how trial courts should proceed with claims such as Appellant's because the United States Supreme Court has yet to address the issue of whether and at what point a term-of-year[s] sentence would violate the Eighth Amendment." Thomas v. State, 78 So. 3d at 646. The Thomas court concluded that it "lacks the authority to craft a solution to this problem" and thus encouraged the Florida Legislature "to consider modifying Florida's current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults." Id. at 647.[11]

DCA 2012).

[11]Similarly, in a case where a juvenile's life sentence was found unconstitutional under Miller v. Alabama, 132 S. Ct. 2455 (2012), the First District noted that Miller "regrettably gives little guidance to the trial court regarding sentencing options in the present case." Washington v. State, ___ So. 3d ___, 2012 WL 5382184 at *2 (Fla. 1st DCA Nov. 5, 2012). The court decided simply to remand for resentencing without any further directions because "[a] discourse by this Court on other sentencing options is premature. . . . The better course calls for this Court to

In remanding for resentencing in Floyd, the First District again urged the Florida Legislature to act, noting, "Until either the Legislature or a higher court addresses the issue, the uncertainty that has arisen in this area of the law since Graham was issued will undoubtedly continue." 87 So. 3d at 47.

The resolution of the difficulties in applying Graham identified by the First District must remain focused on providing juvenile offenders "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 130 S. Ct. at 2030. In the context of Graham's focus on the particular qualities of juveniles, including a juvenile's potential for reform, "a meaningful opportunity to obtain release" must mean more than that a sentence will allow a juvenile to obtain release near or at the end of life. Rather, "a meaningful opportunity to obtain release" must include the opportunity for a juvenile to have his or her progress reviewed at some point in time when the juvenile has some "meaningful" life remaining.

In Mr. Gridine's case, a reasonable point in time for conducting such a review has already been set by his current sentence structure. Mr. Gridine received a 70-year sentence with

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exercise restraint and for the parties to make their case before the trial court, where testimony may be taken, evidence presented, and argument made on all material issues to include the potential range of sentencing options." Id.

a 25-year minimum mandatory term on Count 1 and a concurrent 25-year minimum mandatory term on Count 2. Mr. Gridine's sentence on Count 2 has not been challenged. The 25-year minimum mandatory term on both counts could thus serve as the point in time at which Mr. Gridine should receive a review to determine whether he has matured and been rehabilitated sufficiently to merit release.

Mr. Gridine suggests two alternative options the Court might employ in setting a point in time for review of his potential for release. First, the Court could set the 25-year mark in Mr. Gridine's case through its rule-making authority. The Court has the authority to generate rules protecting constitutional rights when the Legislature does not act. *See generally* Satz v. Perlmutter, 379 So. 2d 359, 360-61 (Fla. 1980); Dade County Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684, 686-87 (Fla. 1972); Gideon v. Wainwright, 153 So. 2d 299, 300 (Fla. 1963). The Court could direct the fashioning of a rule requiring the trial court to review a juvenile's progress toward maturity and rehabilitation and could include a list of nonexclusive factors for the trial court to consider in assessing whether or not the juvenile had demonstrated sufficient maturity and rehabilitation to warrant release.

Second, the Court could set the 25-year mark in Mr. Gridine's case through its authority to review the

constitutionality of state statutes. Thus, the Court could hold section 947.16(6), Florida Statutes, which abolished parole, unconstitutional as applied to a juvenile offender sentenced as an adult and require that a juvenile offender be eligible for parole. *See* Smith v. State, 93 So. 3d 371, 375-78 (Fla. 1st DCA 2012) (Padavano, J., concurring); Gridine, 89 So. 3d at 911 (Wolf, J., dissenting). In this alternative, the Parole Commission would review the juvenile's progress when he or she approaches the end of some term of incarceration[12]--25 years in Mr. Gridine's case--and determine whether that progress warranted release.

Given the absence of legislative or executive action, it is up to this Court "to explore the means and mechanisms for compliance" with Graham. 130 S. Ct. at 2030. Mr. Gridine has suggested two such possible mechanisms. Based upon these suggestions, Mr. Gridine urges the Court to provide him "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id.

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[12]Under section 947.16, Florida Statutes (2010), and Rule 23-21.006, Florida Administrative Code (2010), the Parole Commission has already established time frames for a prisoner's initial determination of a presumptive parole release date.

CONCLUSION

Based upon the argument presented here, Mr. Gridine requests the Court to answer the certified question in the affirmative, reverse his sentence on Count 1 and order resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished to **Trisha Meggs Pate**, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and to **Mr. Shimeek Daquiel Gridine**, DOC# 132747, Suwannee Correctional Institution, 5964 U.S. Highway 90, Live Oak, Florida 32060, on this 27th day of February, 2013.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitt

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MJ Lord for
GAIL E. ANDERSON
Assistant Public Defender
Florida Bar No. 0841544
Leon County Courthouse
301 S. Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8514
Gail.Anderson@flpd2.com

COUNSEL FOR Mr. Gridine