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**IN THE**
**SUPREME COURT OF FLORIDA**

**SHIMEEK DAQUIEL GRIDINE,**

Petitioner,

**v.** **Case Number: SC12-1223**

**STATE OF FLORIDA,**

Respondent.
_____/

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**ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION**

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# PETITIONER'S REPLY BRIEF

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## ARGUMENT IN REPLY

**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.**

Respondent focuses solely on the Supreme Court's holding that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Graham v. Florida, 130 S. Ct. 2011, 2030 (2010), and contends that applying Graham to sentences not labeled "life without parole" is prohibited by the conformity clause found in Article I, Section 17 of the Florida Constitution (Answer Brief at 8-13). Mr. Gridine's initial brief explained that whether a sentence is labeled a "term of years" sentence or a "life without parole" sentence is not dispositive of the issue presented here, and that discussion will not be repeated. The bottom line is that Mr. Gridine will most likely die in prison, a fact which Respondent does not dispute. Respondent's arguments, as well as the trial court and district court decisions upon which it relies, effectively nullify Graham by allowing a *de facto* life without parole sentence to stand simply because it was not labeled a "life without parole" sentence.

The flaw in Respondent's narrow reading of Graham lies in the failure to recognize the basis of the Supreme Court's holding. 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). 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 differences between children and adults also mean that children are more capable of reforming their behavior. Graham, 130 S. Ct. at 2026-27. Finally, the differences between children and adults also mean that penological goals such as retribution, deterrence, incapacitation and rehabilitation are insufficient justification for life-long imprisonment of juvenile offenders. Id. at 2028-30. Thus, Graham requires the States to "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030.

Respondent's argument recognizes none of the reasoning which led to Graham's holding, instead reducing the decision to one sentence. The reasoning is integral to the Supreme Court's holding, and the conformity clause requires this Court to adhere to that reasoning.

Respondent argues that Mr. Gridine's sentence is not subject to Graham because Graham applied a categorical approach while Mr. Gridine's sentence is "no 'particular type of sentence' . . . other than a term of years" which cannot be categorized (Answer

Brief at 13-15). Respondent unnecessarily ratchets up the difficulty level of applying Graham to lengthy term-of-years sentences. Graham requires that juvenile non-homicide offenders receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030. It does not require a determinative sentence at which point the offender is forever released without supervision. Rather, Graham requires Florida to give such offenders an opportunity to demonstrate they deserve release. This requirement could be met by providing interim points in a sentence at which an offender may present evidence showing he or she has obtained the maturity and rehabilitation sufficient to deserve release.

Although recognizing that attempted murder is a nonhomicide crime under Florida law, Respondent nevertheless argues that attempted murder is a homicide crime (Answer Brief at 20-24). The universal meaning of the term "homicide," Supreme Court precedent and Florida's statutory scheme all establish that attempted homicide is a nonhomicide crime. "Homicide" is by definition "[t]he killing of one person by another."[1] The definition of "homicide" requires the death of a person. Tipton v. State, 97 So. 2d 277, 281 (Fla. 1957) ("[i]t is necessary . . . under the definition of homicide" for an "act to result in the death of a human being"); Todd v. State, 594 So. 2d 802, 805

[1] Black's Law Dictionary 739 (7th Ed. 1999).

(Fla. 5th DCA 1992)(same). *See also* Le v. Mullin, 311 F.3d 1002, 1016 (10th Cir. 2002); People v. Perry, 593 N.E.2d 712, 715 (Ill. App. Ct. 1st Dist. 1992); Wozniak v. John Hancock Mut. Life Ins. Co., 286 N.W. 99, 100 (Mich. 1939). The distinction between a "homicide" and a "nonhomicide" crime is straightforward: a homicide crime results in the death of a person, while a nonhomicide crime does not.

Although Graham established a rule applicable outside the death penalty context, 130 S. Ct. at 2023, 2032-33, the decision was informed by the Supreme Court's death penalty jurisprudence, which has drawn a bright line between crimes that result in death and crimes that do not. In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court held that imposing a death sentence on an offender convicted of raping an adult is disproportionate and violative of the Eighth Amendment. The court explained that violent offenses such as rape, in which a victim does not die, are "without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, [they] do[] not compare with murder, which does involve the unjustified taking of human life." 433 U.S. at 598. While "[l]ife is over for the victim of the murderer[,] for [other] victim[s], life may not be nearly so happy as it was, but is not over and normally is not beyond repair." Id.

The Supreme Court addressed a related issue in Enmund v.

Florida, 458 U.S. 782 (1982), which held that an accomplice who did not personally kill or intend to kill could not be sentenced to death, even for a crime involving a completed murder. The court reaffirmed that there is a "fundamental, moral distinction between" murderers and other offenders, noting that while "'robbery is a serious crime deserving serious punishment,' it is not like death in its 'severity and irrevocability.'" Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008) (quoting Enmund, 458 U.S. at 797).

The Supreme Court relied on Coker and Enmund in Kennedy v. Louisiana, which established a categorical rule prohibiting the death penalty for nonhomicide crimes. 128 S. Ct. at 2665. In Kennedy, the court opined that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." Id. at 2660. While some crimes that do not result in death "may be devastating in their harm, . . . 'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their 'severity and irrevocability.'" Id. (quoting Coker, 433 U.S. at 598) (internal citation omitted). The court stressed that "harm to the victim [of a nonhomicide], though grave, cannot be quantified in the same way as death of the victim." Id. at 2261.

Throughout its analysis, Kennedy alternated between

referring to crimes which "do[] not involve the death of the victim," id. at 2649; *see also* id. at 2658, 2661, 2665, and "nonhomicide" crimes. *See, e.g., Id.* at 2649, 2952, 2657, 2660, 2962. The court used the terms interchangeably, and it is clear that it understood them to have the same meaning.

It was against the backdrop of these decisions that Graham prohibited life without parole sentences for juvenile offenders who do not commit homicide. In Graham, the court described its death penalty precedents as holding "that capital punishment is impermissible for nonhomicide crimes against individuals." 130 S. Ct. at 2022 (citing Kennedy, 128 S. Ct. at 2660; Enmund, 458 U.S. 782; Coker, 433 U.S. 584). Graham relied on Kennedy, Enmund and Coker for the proposition that although some nonhomicides are "'serious crime[s] deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." Graham, 128 S. Ct. at 2027 (quoting Enmund, 458 U.S. at 797).

The Florida statutory scheme also establishes that attempted homicide is a nonhomicide crime. First degree murder--the homicide offense--is subject to the death penalty, the harshest penalty under Florida law. *See* § 782.04(1), Fla. Stat. (2009). In contrast, attempted first degree murder is ordinarily a first degree felony, punishable by a maximum of thirty years' imprisonment. *See* § 775.082(3)(b), Fla. Stat. (2009); § 777.04(4)(b), Fla. Stat. (2009). Even where a weapon or firearm

is used, enhancing attempt to a life felony, it is not death-eligible. *See* § 775.082(3)(a), Fla. Stat. (2009); § 775.087(1)(a), Fla. Stat. (2009); § 777.04(4)(b), Fla. Stat. (2009); Strickland v. State, 437 So. 2d 150, 151-52 (Fla. 1983). Thus, the Florida legislature has recognized that a completed capital offense is categorically more serious than attempted first degree murder.

However, even if attempted homicide is considered a homicide crime, Graham should apply. In reaching its conclusion, the Graham Court considered "objective indicia of society's standards" and the Court's "independent judgment." 130 S. Ct. at 2022. The "independent judgment" prong includes three factors: culpability of the offender, severity of punishment, and penological goals. 130 S. Ct. at 2026.

The "independent judgment" prong alone requires applying Graham to attempted murder. The factors in the "independent judgment" prong are not different in the attempted homicide and nonhomicide contexts, and thus are controlled by Graham. As to the severity of the punishment, Mr. Gridine's 70-year sentence, which extends beyond his expected life span, is the same as life without parole.

Regarding penological goals, the deterrence rationale for Mr. Gridine's sentence fails for the same reason the life without parole sentence failed in Graham: children are less susceptible

to deterrence than adults. If a juvenile murderer will not be deterred "by the knowledge that a small number of persons his age have been executed," Thompson v. Oklahoma, 487 U.S. 815, 838 (1988), there is no reason a juvenile attempted murderer will be deterred by the knowledge that some persons like him might receive a *de facto* life sentence. On rehabilitation, Graham did not distinguish between homicide and nonhomicide offenders--for both groups, a sentence extending beyond the individual's life span gives the individual no motivation to mature, while a chance for release provides that motivation. *See* Graham, 130 S. Ct. at 2029-30. Although sentencing an adult to a sentence extending beyond his or her life span may be supportable as retribution, "the case for retribution is not as strong with a minor." Roper, 543 U.S. at 571. Finally, regarding incapacitation, there is no evidence that a juvenile attempted murderer is more likely to be a recidivist than is a juvenile rapist or burglar. Graham focused on guaranteeing a juvenile the "chance" to be released based upon his or her "maturity and rehabilitation" rather than upon the severity of the crime. 130 S. Ct. at 2030.

Regarding culpability, the higher culpability of an attempted murderer does not defeat the reduced culpability of a juvenile. Roper held a person under 17 could not receive a death sentence, and Atkins v. Virginia, 536 U.S. 304 (2002), held a mentally retarded person could not receive a death sentence. In

both cases, the reduced culpability of the offender was more significant than the severity of the crime.

Respondent relies upon Graham's statement that the Supreme 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," 130 S. Ct. at 2027, to argue that Mr. Gridine is not entitled to Graham's protection (Answer Brief at 20-24). This reliance is misplaced.

The meaning of the phrase "intend to kill" derives from Supreme Court precedent addressing the *mens rea* and *actus reus* requirements of capital offenses. Graham incorporates language from opinions holding that a defendant is not death-eligible unless (1) a crime results in death **and** (2) the defendant directly caused the death or intended for the death to occur. *See* Kennedy, 128 S. Ct. at 2650 ("[T]he death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim"); Cabana v. Bullock, 474 U.S. 376, 378 (1986) ("[T]he Eighth Amendment forbids the imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" (quotation marks omitted)); Enmund, 458 U.S. at

798 ("Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed").

In using the phrase "intend to kill," these decisions all assumed that a death had taken place. Respondent takes this language out of context and incorrectly states that the most severe punishment available under law (life without parole in the case of a juvenile) is appropriate if the offender ***either*** kills ***or*** intends to kill. In context, it is clear the Supreme Court was not suggesting life without parole is an appropriate sentence for attempted murder. Under Graham, the only question regarding the crime is whether or not it was a nonhomicide crime. Attempted homicide is a nonhomicide crime, and Mr. Gridine is entitled to the protection of Graham's rule.

Respondent lastly addresses Mr. Gridine's suggestions regarding a remedy for his unconstitutional sentence (Answer Brief at 24-30). Respondent contends that Mr. Gridine's suggestion that juvenile offenders be made eligible for parole is not preserved (Answer Brief at 26-27). First, in the lower courts, Mr. Gridine requested resentencing under Graham, which forbids life without parole sentences for juvenile nonhomicide offenders. Second, Mr. Gridine's suggestions recognize that if the Court holds his sentence violates Graham, the Court will need to fashion a remedy.

Respondent argues that allowing juveniles access to parole is an "overly broad" solution (Answer Brief at 27), although agreeing that "release on parole is sufficient" to satisfy Graham (Answer Brief at 28). Due to his current sentence structure, Mr. Gridine did not suggest a broad solution but requested a solution specific to his case, parole review after 25 years. Further, access to parole would provide an even-handed solution based upon rules already established by the Parole Commission, as explained in Judge Padavano's concurrence in Smith v. State, 93 So. 3d 371, 375-78 (Fla. 1st DCA 2012) (Padavano, J., concurring).

## CONCLUSION

Based upon the argument presented here and in his initial brief, 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 **Wesley Heidt** and **Kellie A. Nielan**, Assistant Attorneys General, at crimappdab@myfloridalegal.com, and to **Mr. Shimeek Daquiel Gridine**, DOC# 132747, Suwannee Correctional Institution, 5964 U.S. Highway 90, Live Oak, Florida 32060, on this 3rd day of June, 2013.

## CERTIFICATE OF FONT AND TYPE SIZE

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

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