IN THE SUPREME COURT OF FLORIDA

LEIGHDON HENRY,

Petitioner,

v.

Case No. SC12-578

Fifth DCA Case Nos. 5D08-3779
5D10-3021

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
kellie.nielan@myfloridlegal.com
Fla. Bar No. 618550

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026

444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF THE CASE AND FACTS

Respondent disagrees that the facts set forth by Petitioner are all in the district court opinion, and will rely upon the following:

Henry appealed his judgment and sentence for three counts of sexual battery with a deadly weapon or physical force, one count of kidnapping with intent to commit a felony (with a firearm), two counts of robbery, one count of carjacking, one count of burglary of a dwelling, and one count of possession of twenty grams or less of cannabis. *Henry v. State,* 37 Fla. L. Weekly D195 (Fla. 5th DCA January 10, 2012). At his original sentencing, Henry was sentenced to life for each sexual battery, thirty years for the kidnapping, fifteen years for each robbery, thirty years for the carjacking, fifteen years for the burglary and time served for the cannabis charge. *Id.* While his appeal was pending, he sought relief pursuant to *Graham v. Florida,* 130 S.Ct. 2011 (2010), and was resentenced on the sexual battery counts to thirty years on each count concurrent to each other, but consecutive to the remaining counts, for a total sentence of ninety years in prison. *Id.*

On direct appeal, Henry claimed that this sentence constituted a *de facto* sentence of life without the possibility of parole, and thus met the test of cruel and unusual punishment under *Graham*. *Id.* The district court found that the facts in Henry's case differed from those in *Graham,* because unlike the defendant in

Graham, Henry did not receive a life sentence without the possibility of parole for a nonhomicide offense; he received a lengthy aggregate term-of-years sentence without the possibility of parole for nonhomicide offenses. *Id*. at D196. The district court observed that this precise issue had not yet been addressed by a Florida court, but courts in other jurisdictions that have considered the issue arrived at inconsistent conclusions. *Id.* After reviewing cases from several jurisdictions, the district court stated:

> If we conclude that *Graham* does not apply to aggregate term-of-years sentences, our path is clear. If, on the other hand, under the notion that a term-of-years sentence can be a *de facto* life sentence that violates the limitations of the Eighth Amendment, *Graham* offers no direction whatsoever [footnote omitted]. At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forth, 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? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victim or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is 'life' or 107 years [footnote omitted]. Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what it is. We conclude that Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment and affirm the decision below.

Id. at D197. Henry now seeks review of that decision.

SUMMARY OF ARGUMENT

This Court should not accept jurisdiction in this case because the Fifth District Court of Appeal did not construe the Eighth Amendment to the United States Constitution. Rather, it applied a decision of the United States Supreme Court, "as it is written," and left it to that Court to provide any further explanation, construction or analysis of the Eighth Amendment in factually distinguishable situations.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Henry asserts that the Fifth District Court of Appeal expressly construed the Eighth Amendment to the United States Constitution. While Henry takes issue with the holding of the Fifth District Court of Appeal, he fails to demonstrate that its decision expressly construed a provision of the United States Constitution, as would be required for this Court to exercise its jurisdiction under article V, section 3(b)(3) of the Florida Constitution. As Justice Grimes has explained, there is a distinction between the construction and application of a constitutional provision for purposes of supreme court jurisdiction. *Schutz v. Schutz,* 581 So. 2d 1290, 1294 (Fla. 1991)(Grimes, J., concurring in part, dissenting in part). That distinction was explained by Justice Thornal in *Armstrong v. City of Tampa,* 106 So. 2d 407, 409 (Fla. 1958):

> We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubt arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the constitution. The case before us now is illustrative. Here, the Chancellor took an agreed

> state of facts and concluded that the appellants were engaged in "a separable intrastate" transaction that precluded the necessity of applying those provisions of the United States Constitution dealing with interstate commerce or the privileges of citizens as between the several states. On the same factual basis he concluded that it was not necessary to apply Section 1 of the Declaration of Rights of Florida. Nowhere in the final decree did the Chancellor undertake to construe, explain or define the language of the state or federal constitution.

Justice Grimes observed that this position was reaffirmed in *Rojas v. State,* 288 So. 2d 234, 236 (Fla. 1973), when the Court said, "*Applying* is not synonymous with *construing*; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is." 581 So. 2d at 1294.

Here, the district court specifically avoided any constitutional construction by limiting its holding to a determination of whether G*raham* applied to aggregate term-of-year sentences.[1] *Henry,* 37 Fla. L. Weekly at D197. The district court

[1] Respondent would note that the district court was correct in this determination. The issue in *Graham* involved a categorical proportionality challenge to a term-of-years sentence. The *Graham* Court observed that cases addressing proportionality fall into two general categories. The first involves challenges to the length of term of year sentences, where the Court considers all of the circumstances of the case to determine whether a sentence is constitutionally excessive. The analysis begins by comparing the gravity of the offense with the severity of sentence. *Id.* at 1022. The second classification, and the one presented by *Graham,* uses categorical rules to define Eighth Amendment standards, with the sentencing process itself being called into 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." *Id.* at

stated that it could "only apply *Graham* as it is written," i.e., to sentences of life without parole for nonhomicide crimes, and concluded that Henry's term-of-years sentence was not invalid under the Eighth Amendment. *Id*. This holding involved no constitutional construction. "As tempting as it is to decide a case involving matters of broad general interest, [this Court is] limited to taking those cases specifically prescribed by our constitution." *Schutz,* 581 So. 2d at 1294 (Grimes, J., concurring in part, dissenting in part). Since the district court did not expressly construe any constitutional provision, there is no basis for this Court to exercise its discretionary jurisdiction.

2021-22. Henry's consecutive sentences for the eight felonies he was convicted of were thus not subject to a categorical challenge, and no other proportionality argument was presented to the district court.

CONCLUSION

Based on the foregoing argument and authorities, the State respectfully requests that this Court decline to accept jurisdiction in this case.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_____
KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
kellie.nielan@myfloridalegal.com
Fla. Bar No. 618550

_____
WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026

444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by U.S. Mail to Counsel for Petitioner, Peter D. Webster, Carlton Fields, P.A., 215 S. Monroe Street, Suite 500, Post Office Drawer 190, Tallahassee, FL 32302, this _____ day of April, 2012.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
KELLIE A. NIELAN
COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

LEIGHDON HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

Case No. SC12-578

Fifth DCA Case Nos. 5D08-3779
5D10-3021

APPENDIX

PAMELA JO BONDI
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0618550
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)

COUNSEL FOR RESPONDENT