IN THE FLORIDA SUPREME COURT

CASE NO. SC12-578
L.T. CASE NOS. 5D08-3779, 5D10-3021

LEIGHDON HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____ /

PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review From a Decision
of the Fifth District Court of Appeal

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES
(Continued)

Page

Rules

Treatises

STATEMENT OF THE CASE AND FACTS

The facts briefed here are found within the four corners of the decision below, *Henry v. State*, 37 Fla. L. Weekly D195 (Fla. 5th DCA Jan. 20, 2012), which is attached as an Appendix. *See* (APP.); Fla. R. App. P. 9.120(d).

At age seventeen, Petitioner, Leighdon Henry, entered a woman's apartment, sexually assaulted her while armed with a firearm, and then took her to an ATM to withdraw funds. (APP. at 2). After she and Mr. Henry left the ATM, the woman was able to escape. (*Id.*). As a result of this single criminal episode involving a single victim, Mr. Henry was convicted of eight felonies and one misdemeanor: 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 20 grams or less of cannabis. (*Id.*).

On October 17, 2008, the trial court determined Mr. Henry qualified as a sexual predator and sentenced him as follows:

- Three sexual-battery counts – natural life in prison for each count;
- One kidnapping count – 30 years in prison;
- Two robbery counts – 15 years in prison for each count;
- One carjacking count – 30 years in prison;
- One burglary count – 15 years in prison; and

- One cannabis-possession count – 364 days in jail.

(APP. at 2). The trial court ordered the sexual-battery and kidnapping counts and one of the robbery counts to run concurrently with each other, and the carjacking and burglary counts and remaining robbery count to run consecutively to each other and to the other sentences. (*Id.*). The jail time Mr. Henry had already served satisfied the cannabis-possession sentence. (*Id.*). In total, for a single criminal episode he committed as a juvenile, Mr. Henry received a life sentence plus an additional 60 years in prison. (*Id.*). Because Florida has abolished its parole system for adults and juveniles tried and sentenced as adults, Mr. Henry's sentences necessarily offered no opportunity for parole. (APP. at 3 & n.1) (citing § 921.002(1)(e), Fla. Stat. (2008)).

Mr. Henry filed a notice of appeal on October 24, 2008. While his appeal was pending in the Fifth District, the United States Supreme Court issued *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *Graham*, the Court held that a state violates the Eighth Amendment to the United States Constitution when it sentences a defendant to life in prison *without the possibility for parole* based on non-homicide offenses committed as a juvenile. *Id.* at 2019-34; (APP. at 2, 4-5). *Graham*, however, did not hold that a juvenile life sentence imposed for non-homicide offenses is always unconstitutional. *Graham*, 130 S. Ct. at 2021-30; (APP. at 4-5). Instead, it recognized (1) that minors who commit non-homicide offenses are not

irredeemable at the outset and, therefore, (2) states imposing such a sentence must provide the defendant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" before the defendant dies in prison – *i.e.*, an opportunity for juvenile parole. *Graham*, 130 S. Ct. at 2030-34; (APP. at 4-5).

Based on *Graham*, and while his appeal was still pending, Mr. Henry filed a motion with the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b), contending that his juvenile life-without-parole sentences constituted cruel and unusual punishment. (APP. at 3). The trial court agreed and resentenced Mr. Henry to 30 years in prison on each sexual-battery count, to run concurrently with each other but consecutively to the remaining counts. (*Id.*). Thus, following resentencing, Mr. Henry – whose life expectancy is a little over 64 years (*id.*) – received a combined sentence of 90 years in prison without the possibility of parole. (*Id.*).

Under Florida law, assuming he receives the maximum amount of available meritorious and incentive gain-time, Mr. Henry must serve at least 85 percent of his 90-year sentence – a minimum total of 76.5 years in prison. (*Id.* at 3 & n.1). Mr. Henry's age at the time of his criminal conduct (17 years) combined with his minimum total sentence (76.5 years), yields 93.5 years. *See* (APP. at 2-4). This exceeds Mr. Henry's life expectancy of 64.3 years by 29.2 years, or nearly three decades. *See* (*id.*).

Despite these facts and the decision in *Graham*, the Fifth District held that Mr. Henry's new 90-year combined sentence – imposed without any opportunity for parole – passed constitutional muster. (APP. at 4-9). It did so by reasoning that, technically, "[Mr.] Henry did not (in the end) receive a life sentence without parole for a nonhomicide offense"; rather, based on a single criminal episode involving a single victim, he received a lengthy term-of-years sentence that exceeded his life expectancy and precluded any chance for juvenile parole as contemplated in *Graham*. (APP. at 6). The Fifth District concluded by holding that "[Mr.] Henry's aggregate term of years sentence is not invalid under the Eighth Amendment." (*Id.* at 9).

The Fifth District's decision guarantees Mr. Henry will die in prison without ever receiving a meaningful opportunity to demonstrate rehabilitation and seek juvenile parole as required by *Graham*. *See* (APP. at 2-9).

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction because the decision below expressly construed the Eighth Amendment to the United States Constitution. Art. V, § 3(b)(3), FLA. CONST. Specifically, the Fifth District held that despite (1) Mr. Henry's initial receipt of *de jure* life-without-parole sentences for intertwined non-homicide offenses committed as a juvenile, and (2) his later resentencing – which produced a 90-year *de facto* life-without-parole sentence – his combined sentences

did not constitute "cruel and unusual punishment." That decision thus contradicts both the letter and spirit of *Graham v. Florida*, 130 S. Ct. 2011 (2010), which held that a state violates the Eighth Amendment by sentencing a defendant to life in prison without the possibility for parole based on non-homicide offenses committed as a juvenile. The Court should exercise jurisdiction here because Florida imposes more of these sentences than any other state and, thus, this case presents a significant constitutional issue of statewide impact; and because, if it does not, lower courts are likely to continue to circumvent *Graham* by imposing *de facto*, rather than *de jure*, life-without-parole sentences.

ARGUMENT

I. THE DECISION BELOW EXPRESSLY CONSTRUED THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court has discretionary jurisdiction to review the decision below, which expressly construed the Eighth Amendment to the United States Constitution, made applicable to the states by the due process clause of the Fourteenth Amendment.[1] Art. V, § 3(b)(3), FLA. CONST.; Fla. R. App. P. 9.030(a)(2)(A)(ii); *see also, e.g.*, *Moreno-Gonzalez v. State*, 67 So. 3d 1020, 1022, 1025 (Fla. 2011); *Doe v. Evans*, 814 So. 2d 370, 371 (Fla. 2002). To satisfy the "express construction" requirement, the decision below must "explain, define or otherwise

[1] *Robinson v. California*, 370 U.S. 660, 664-68 (1962).

eliminate existing doubts arising from the language or terms of the constitutional provision." *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958), *reapproved*, *Ogle v. Pepin*, 273 So. 2d 391, 392-93 (Fla. 1973); *Croteau v. State*, 334 So. 2d 577, 581 (Fla. 1976) (Hatchett, J., concurring).[2] In other words,

> The Court's ["constitutional construction"] jurisdiction, . . . may be exercised to say whether an evolution in constitutional law developed by the lower appellate courts is proper, or to resolve a doubt those courts have expressly noted.

Justices Harry Lee Anstead & Gerald Kogan, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 505-06 (2005) (citation footnotes omitted).

Here, the Fifth District construed the Eighth Amendment's bar on "cruel and unusual punishment" and held that it did not proscribe a lengthy term-of-years sentence imposed on a juvenile as the result of a non-homicide criminal episode involving a single victim. (APP. at 1-9).[3] The district court did so despite the fact that this sentence far exceeds Mr. Henry's life expectancy and precludes him from

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[2] This Court's pre-1980 decisions regarding "constitutional construction" jurisdiction remain persuasive today despite the amendment of article V. Justices Harry Lee Anstead & Gerald Kogan, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 504-06 (2005).

[3] Because of article I, section 17's conformity clause, the Fifth District also necessarily construed our state Constitution's "cruel and/or unusual punishment" clause. Art. I, § 17, FLA. CONST. (This provision "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[.]").

demonstrating rehabilitation and seeking juvenile parole. (*Id.* at 3-9). Further, the district court reached this conclusion notwithstanding the *de jure* life-without-parole sentences Mr. Henry received initially. (*Id.*). Those unconstitutional initial sentences should not have resulted in a resentencing calculated to avoid *Graham*, but rather, should have entitled Mr. Henry to the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" guaranteed by the Eighth Amendment. *Graham*, 130 S. Ct. at 2030-34.

By expressing considerable doubt on this point and, indeed, going so far as to state that "*Graham* offers no direction whatsoever" here (APP. at 9), the Fifth District rendered the "cruel and unusual punishment" clause irrelevant to juveniles who (1) initially receive *de jure* life-without-parole sentences, but (2) are later resentenced to aggregate, *de facto* life-without-parole sentences that exceed their life expectancies. In contrast, as the majority of courts which have addressed this issue recognize, the Eighth Amendment and *Graham* offer substantial guidance regarding juveniles who commit intertwined non-homicide offenses: such juveniles are works in progress, more malleable and more capable of change, and less responsible from a moral standpoint than adults. Therefore, juveniles convicted of non-homicide offenses are demonstrably less culpable than adults, and the State may not forever "write them off" as incapable of attaining sufficient

rehabilitation and maturity to seek their freedom.[4] Because dying in prison *without the possibility of parole* "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope," it violates the Eighth Amendment when applied to juveniles who do not kill. *Graham*, 130 S. Ct. at 2032. That mandate must apply equally to *de jure* and *de facto* life-without-parole sentences; otherwise, *Graham* is meaningless. In sum, the Fifth District's construction of the "cruel and unusual punishment" clause vitiates both the letter

[4] *United States v. Mathurin*, No. 09-21075, 2011 WL 2580775, at *1-*3 (S.D. Fla. June 29, 2011) (307-year aggregate sentence is cruel and unusual punishment); *People v. Kidd*, Nos. C062075, C062512, 2012 WL 243250, at *20-*23 (Cal. 3d DCA Jan. 26, 2012) (same – 90.5-year aggregate sentence); *People v. J.I.A.*, 196 Cal. App. 4th 393, 400-10 (Cal. 4th DCA 2011) (same – sentence would not permit parole until age 70); *People v. De Jesus Nuñez*, 195 Cal. App. 4th 414, 417-30 (Cal. 4th DCA 2011) (same – 175-year aggregate sentence); *People v. Mendez*, 188 Cal. App. 4th 47, 62-68 (Cal. 2d DCA 2010) (same – 84-year aggregate sentence); *see also People v. Ramirez*, 193 Cal. App. 4th 613, 627-32 (Cal. 2d DCA 2011) (Manella, J., dissenting) (would have held that 120-year aggregate sentence is cruel and unusual punishment); *Gridine v. State*, 37 Fla. L. Weekly D69, 70 (Fla. 1st DCA Dec. 30, 2011) (agreeing that "at some point, a term-of-years sentence may become the functional equivalent of a life sentence" but declining to hold that a 70-year sentence met that mark); *Thomas v. State*, 78 So. 3d 644, 646 (Fla. 1st DCA 2011) (same – 50-year sentence). The California decisions are currently on review before the California Supreme Court due to conflict with *Ramirez* and *People v. Caballero*, 191 Cal. App. 4th 1248 (Cal. 2d DCA 2011). The Georgia decisions on which the Fifth District relied did not involve sentences that exceeded the defendants' life expectancies. *Adams v. State*, 707 S.E.2d 359 (Ga. 2011); *Middleton v. State*, 721 S.E.2d 111 (Ga. Ct. App. 2011). Further, the Arizona decision on which the Fifth District relied involved unrelated felonies committed over the course of a year some of which the defendant committed as an adult. *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011).

and spirit of that constitutional provision, and provides this Court with discretionary jurisdiction under article V, section 3(b)(3).

The Court should exercise jurisdiction here because Florida sentences more juveniles to life-without-parole for non-homicide offenses than any other state. *Graham*, 130 S. Ct. at 2024 (observing that a significant majority of all such defendants – 77 out of 123 – are incarcerated in Florida); Sally T. Green, *Realistic Opportunity For Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 2 (2011) ("Florida is clearly the most zealous state for sentencing juveniles to life without parole for these less violent crimes and thus the implications of the *Graham* decision are most [significant] for this state."); *cf. also E.A.R. v. State*, 4 So. 3d 614, 618 (Fla. 2009) (juvenile dispositions are "enormously important to the futures of thousands of children per year (not to mention the future of Florida)"). Consequently, it is Florida's responsibility to set an example for the nation by ensuring that it complies fully with the "cruel and unusual punishment" clauses present in the United States and Florida Constitutions. Moreover, if this Court does not act, lower courts are likely to continue to circumvent *Graham* by imposing *de facto*, rather than *de jure*, life-without-parole sentences.

This Court "is the one state court that can resolve legal doubts on a statewide basis," and it should exercise that authority here. Anstead & Kogan, 29 NOVA L. REV. at 505.

CONCLUSION

For these reasons, Petitioner, Leighdon Henry, respectfully requests that this Court exercise its discretion to review the decision below.

Respectfully submitted,

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We CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210's font and formatting requirements.

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