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IN THE SUPREME COURT OF FLORIDA

LEIGHDON HENRY,

Petitioner,

v. CASE NO. SC12-578

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

SUPPLEMENTAL ANSWER BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

Recent legislation has no impact on the instant case for two reasons. First, as the district court concluded, Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment. *Henry v. State*, 82 So.3d 1084, 1089 (Fla. 5th DCA 2012). In *Graham v. Florida*, 130 S.Ct. 2011 (2010), the Court created a categorical ban on sentences of life without the possibility of parole for juvenile offenders who committed non-homicide crimes, and Henry's sentence does not violate that ban. In addition, the juvenile-specific sentencing provisions contained in chapter 2014-200, Laws of Florida, apply only to those crimes committed after July 1, 2014.

ARGUMENT

HENRY WAS PROPERLY RESENTENCED TO A TERM OF YEARS ON EACH OF HIS CHARGES AND HIS AGGREGATED SENTENCES DO NOT VIOLATE THE CATEGORICAL BAN ON LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILE OFFENDERS WHO COMMITTED NONHOMICIDE CRIMES AND RECENT LEGISLATION HAS NO IMPACT ON THIS CASE.

Respondent submits that recent legislation has no impact on the instant case for two reasons. First, as the district court concluded, Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment. *Henry v. State,* 82 So.3d 1084, 1089 (Fla. 5th DCA 2012). In *Graham v. Florida*, 130 S.Ct. 2011 (2010), the Court created a categorical ban on sentences of life without the possibility of parole for juvenile offenders who committed non-homicide crimes, and Henry's sentence does not violate that ban. In addition, the juvenile-specific sentencing provisions contained in chapter 2014-200, Laws of Florida, apply only to those crimes committed after July 1, 2014,[1] and they do not appear to provide

[1] Further, the Florida Constitution imposes a restriction on retroactive application of criminal legislation. Article X, section 9 states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision thus precludes any newly enacted criminal statutes from applying to pending criminal cases. *See Smiley v. State*, 966 So.2d 330, 336-37 (Fla. 2007)(newly enacted self defense statute qualified as criminal statute because it has a direct impact on the prosecution of the offense of murder in Florida, and article X, section 9 of Florida's constitution made it impermissible for it to receive retroactive application where it would provide the defendant with a new affirmative defense); *Castle v. State*, 330 So.2d 10, 11 (Fla. 1976)(because ten years was the maximum penalty in effect when the crime was committed, the

any additional procedures for review of aggregate sentences, each of which is less than life.

As the *Graham* Court 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. This was not the classification used by the *Graham* Court.

The second classification, a **categorical challenge**, 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. When utilizing the categorical approach, '[t]he analysis begins with objective indicia of national consensus." *Graham*, 130 S.Ct. at 2023. Thus, the *Graham* Court considered **only** the number of life

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imposition of a later enacted lower sentence would be unconstitutional pursuant to article X, section 9 of the Florida Constitution); *State v. Pizzaro*, 383 So.2d 762 (Fla. 4th DCA 1980)(because retroactive application of an amended statute affecting prosecution is unconstitutional, the Youthful Offender Act, which alters the prescribed punishments for those persons meeting its requirements, cannot apply to offenses committed before it effective date).

without the possibility of parole sentences imposed on juvenile offenders for nonhomicide offenses when it found a "national consensus" against such sentences. Respondent submits that if the number of juveniles nationwide who received extended term of years sentences were added to the 109 life without parole sentences which formed the "national consensus" in *Graham*, a different "national consensus" would no doubt emerge.[2] And since petitioner has not

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[2] 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. *See, 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); *Rosario v. State,* 122 So.3d 412 (Fla. 2013)(state charged appellant with fifteen counts occurring over a three week period, including three counts of home invasion robbery with a firearm, three counts of kidnapping with a firearm, two counts of conspiracy to commit home invasion robbery with a firearm, along with racketeering, conspiracy to commit racketeering, and aggravated assault with a firearm on a police officer, to which appellant pled, along with nine violations of probation; *Smith v. State,* 93 So.3d 371 (Fla. 1st DCA 2012)(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 v. State,* 37 Fla.L.Weekly D1865 (Fla. 1st DCA August 8, 2012) *supra* (16 year, 10 month old appellate was convicted of attempted first degree murder, armed burglary, and armed robbery); *Manuel v. State*, 48 So.3d 94 (Fla. 2d DCA 2010)(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 v. State*, 99 So.3d 967 (Fla. 2d DCA 2012)(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

established a national consensus against extended term of year sentences, a categorical ban on them cannot be applied.[3] As the *Graham* Court explained, 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 its 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 (emphasis supplied).

Henry's aggregated sentences are not subject to a categorical challenge without crossing this "clear line." As stated, a categorical challenge involves a "particular type of sentence,"

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a deadly weapon); *Young v. State*, 110 So.3d 931 (Fla. 2d DCA 2013)(Young was fourteen and fifteen years old when he committed a series of four armed robberies); *Guzman v. State,* 110 So.3d 480 (Fla. 4th DCA 2013)(Guzman committed multiple violent crimes at the age of fourteen); *Mediate v. State,* 108 So.3d 703 (Fla. 5th DCA 2013)(defendant, while still a minor, committed the crimes of kidnapping and four counts of sexual battery); *Johnson v. State,* 108 So.3d 1153 (Fla. 5th DCA 2013)(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).

[3] "It is not the burden of [a State] to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus against it." *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)(quoting *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S.Ct. 2909 (joint opinion of Stewart, Powell and Stevens, JJ.).

against which there is a national consensus, and there is no such "particular type of sentence" here. Categorical rules simply cannot be applied to sentences that cannot be categorized, particularly the categorical rule announced in *Graham*, which was based on a different "national consensus."[4]

[4] Respondent also reiterates that 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 application of *Graham* to a term of years sentence would create 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.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Supplemental Answer Brief of Respondent has been furnished by email to Counsel for Petitioner, Peter D. Webster and David Luck, Carlton Fields Jorden Burt, P.A., 215 S. Monroe Street, Suite 500, Post Office Drawer 190, Tallahassee, FL 32302, and Carlton Fields Jorden Burt, P.A., 4200 Miami Tower, 100 Southeast Second Street, Miami, FL 33131 at pwebster@carltonfields.com, and dluck@carltonfields.com, and Christopher Corts, Assistant Professor of Legal Writing, University of Richmond School of Law, 28 Westhampton Way, Richmond, VA 23173, at ccorts@richmond.edu, this 15th day of August, 2014.

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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