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IN THE FLORIDA SUPREME COURT

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

LEIGHDON HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____ /

PETITIONER'S INITIAL SUPPLEMENTAL BRIEF ADDRESSING CHAPTER 2014-220, LAWS OF FLORIDA

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

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STATEMENT OF THE CASE AND FACTS

Petitioner, Leighdon Henry, adopts and incorporates here by reference the Statement of the Case and Facts provided in his initial merits brief. *See* [Pet.'s IB at 1-6]. Mr. Henry provides this initial supplemental merits brief pursuant to the Court's order of June 26, 2014, in which the Court directed Mr. Henry to address the impact, if any, on this case of the juvenile-sentencing legislation adopted in chapter 2014-220, Laws of Florida.

SUMMARY OF THE ARGUMENT

The State of Florida's overly harsh sentencing practices regarding juvenile nonhomicide offenders led to *Graham v. Florida*, 560 U.S. 48 (2010). For multiple lawmaking sessions after that decision, Florida's Legislature and Governor were unsuccessful in attempting to reform this state's juvenile-sentencing laws to comply with the federal Eighth Amendment and *Graham*.

Over four years later, in June 2014, with knowledge of dozens of cases like Mr. Henry's still pending in Florida's courts, the Legislature and Governor passed legislation ostensibly directed at *Graham* compliance, chapter 2014-220, Laws of Florida. Unfortunately, this new legislation is date-restricted, exclusively prospective in operation, and does not appear to address aggregate sentences like Mr. Henry's – a sentence that exceeds his life expectancy by at least three decades. Thus, chapter 2014-220, Laws of Florida, does not apply here.

The Legislature and Governor still have not provided a *Graham*-compliant remedy for Mr. Henry and similarly situated juvenile nonhomicide offenders sentenced under the Criminal Punishment Code. Therefore, as concerns these offenders, it remains this Court's duty to ensure that the state which caused *Graham* complies with its mandate. It should do so by holding section 921.002(1)(e), Florida Statutes, unconstitutional as applied to this narrow class, thereby opening the existing parole system to them.

ARGUMENT

I. THE JUVENILE-SENTENCING LEGISLATION ADOPTED IN CHAPTER 2014-220, LAWS OF FLORIDA, DOES NOT APPLY TO MR. HENRY'S 90-YEAR AGGREGATE SENTENCE.

The United States Supreme Court decided *Graham v. Florida*, 560 U.S. 48 (2010), on May 17, 2010. For more than four years, the Legislature and Governor were unsuccessful in attempting to bring Florida's sentencing laws into compliance with *Graham*'s retroactively applicable holding that the federal Eighth Amendment, and, by necessary implication, article I, section 17 of the Florida Constitution, prohibit this state from sentencing juvenile nonhomicide offenders to die in prison with no opportunities for meaningful early-release review:

> **This Court now holds 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....
>
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> 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**.... The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.
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> ***
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> **[A] categorical rule gives <u>all</u> juvenile nonhomicide offenders a chance to demonstrate maturity and reform**....

560 U.S. at 74-75, 79.[1]

The Legislature and Governor still have not provided a *Graham*-compliant remedy for Mr. Henry and those similarly situated juvenile nonhomicide offenders sentenced under the Criminal Punishment Code. While the Legislature passed, and the Governor signed into law, House Bill 7035 (which became chapter 2014-220, Laws of Florida) as an attempt to comply with *Graham*, that law is under-inclusive and fails to remedy the pertinent constitutional violation.[2]

A. Chapter 2014-220 Does Not Apply to Mr. Henry and Does Not Comply Fully With *Graham* Because It Is Date-Restricted and Prospective Only.

First, the applicable legislative Staff Analysis correctly recognized that "*Graham* was held to apply retroactively, even to criminal cases which were considered final at the time *Graham* was rendered."[3] Yet, despite this recognition, the Legislature and Governor chose to pass legislation that:

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[1] All emphasis is supplied unless otherwise noted.

[2] Mr. Henry takes no position on the legislation's attempt to comply with *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that the states may not sentence juvenile homicide offenders to mandatory sentences of life without parole. Nor does he take any position regarding whether the legislation complies with *Graham* vis-à-vis the juvenile nonhomicide offenders to which the legislation applies.

[3] 06-27-2014 Staff Analysis for HB 7035, at 2, *available at* http://www.flsenate.gov/Session/Bill/2014/7035/Analyses/h7035z1.CRJS.PDF (last accessed July 20, 2014); *see also, e.g.*, *Johnson v. State*, No. 1D12-3854, --- So. 3d ----, 2013 WL 1809685, at *1 (Fla. 1st DCA Apr. 30, 2013) (*Graham* "created a new fundamental constitutional right whose application has retroactive effect."); *St. Val v. State*, 107 So. 3d 553, 554-55 (Fla. 4th DCA 2013) (same);

1) is date-restricted and prospective only; and

2) further, fails to address cases like Mr. Henry's that do not even involve the retroactive application of *Graham* because they were pending in the appellate pipeline at the time *Graham* was decided in 2010.

Specifically, under chapter 2014-220 and the new sentencing-review provisions that it creates, the term "juvenile offender" is defined to include only "a person sentenced to imprisonment in the custody of the Department of Corrections for an offense **committed on or after July 1, 2014**, and committed before he or she attained 18 years of age." Ch. 2014-220, § 3, Laws of Fla., *available at* http://laws.flrules.org/2014/220 (last accessed July 20, 2014); § 921.1402(1), Fla. Stat. (2014). While *Graham* also defines "juvenile offenders" as those who commit the relevant offense(s) before age 18, it does not contain an additional date restriction as to when the pertinent offense(s) must have been committed in order to secure a remedy for the identified constitutional violation. *See* 560 U.S. at 74-

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Moore v. Biter, 725 F.3d 1184, 1186-94 (9th Cir. 2013) (applying *Graham* retroactively to hold unconstitutional a 254-year aggregate sentence imposed for multiple, separate nonhomicide offenses committed during a five-week period in 1991), *re'hrg denied*, 742 F.3d 917 (9th Cir. 2014); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (Petitioner "made a *prima facie* showing that *Graham* has been made retroactively applicable by the [United States] Supreme Court to cases on collateral review."); *Kleppinger v. State*, 81 So. 3d 547, 549-50 (Fla. 2d DCA 2012) (holding life sentence imposed for 1996 nonhomicide offense unconstitutional under *Graham*); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011) (concluding that *Graham* applies retroactively on collateral review).

75. Moreover, as noted above, *Graham* has been held, time and again, to apply retroactively. *See* footnote 3, *supra* (collecting case law).

Mr. Henry committed his offenses approximately two months after his 17th birthday on the night of February 13 and early morning of February 14, 2007, as part of a single criminal episode against one victim. (T. 2:16-84, 90-106; T. 3:240, 282); *Johnson v. State*, 112 So. 3d 757, 758 (Fla. 5th DCA 2013) (recognizing that Mr. Henry's 90-year resentence "arose from a single criminal episode"). Further, Mr. Henry's *pro se* appeal to the Fifth District was pending below when *Graham* was decided, and he raised the Eighth Amendment violation addressed here in both the trial court and the Fifth District. *See* [Pet.'s IB at 4-6; Pet.'s RB at 10-11]. Therefore, despite (a) satisfying *Graham*'s definition of juvenile nonhomicide offender, and (b) raising an Eighth Amendment violation that does not even involve retroactive application of *Graham*, Mr. Henry would not meet chapter 2014-220's date-restricted definition of "juvenile offender."

Given Florida's history of meting out harsh sentences for juvenile nonhomicide offenders, this undoubtedly will not be a situation unique to Mr. Henry. Indeed, Terrance Graham himself would also fail to qualify as a "juvenile offender" under this new legislation because he committed his felony offenses in 2003-04. *See Graham*, 560 U.S. at 52-58. The date-restricted, prospective manner

in which the Legislature drafted chapter 2014-220 is grossly under-inclusive and does not comply fully with *Graham*.

B. In Addition, Chapter 2014-220 Does Not Apply to Mr. Henry and Does Not Comply Fully With *Graham* Because It Fails to Provide a Remedy for Aggregate LWOP Sentences.

Even if this Court could hold the legislation's date restriction unconstitutional as applied, chapter 2014-220 would still not apply to Mr. Henry or those similarly situated. This is so because of their sentence structures. In particular, the new legislation does not appear to address aggregate LWOP sentences, including those that involve felonies of the second or third degree.

As explained in Mr. Henry's prior briefing, for the single criminal episode that he committed against one victim, he received a 90-year aggregate sentence. [Pet.'s IB at 4-6; Pet.'s RB at 8, 14].[4] That sentence includes eight felony offenses – five first-degree or life felonies (three counts of sexual battery, one kidnapping count, and one carjacking count) and three second-degree felonies (two robbery counts and one burglary count). (3.800 R. 1:6, 14-31). The sentence was structured such that Mr. Henry must serve an initial concurrent term of 30 years, followed by a consecutive term of 60 years (for a total of 90 years). Specially, the terms for the

[4] Before trial, the State offered Mr. Henry a plea bargain of 30 years total in prison for all of his offenses. (SR. 1:371-72). Mr. Henry's sentencing scoresheet similarly would have permitted a minimum total sentence of 26.4 years (316.65 months), but the trial court appears to have made the decision, at the outset, that Mr. Henry was irredeemable. (3.800 R. 1:29-31); *see also* [Pet.'s IB at 2-5].

sexual-battery and kidnapping counts and one of the robbery counts run concurrently with each other for a subtotal of 30 years. (*Id.*). Then, the terms for the carjacking and burglary counts and remaining robbery count run consecutively to each other and to the initial 30-year term for an additional 60 years. (*Id.*).

Even if Mr. Henry receives the maximum amount of available gain-time, he must serve at least 85 percent of this 90-year aggregate sentence. § 921.002(1)(e), Fla. Stat. This means that he must remain in prison for at least three decades beyond his life expectancy without ever receiving an opportunity for parole review. (3.800 R. 1:33-34; PSR. at 25).

The legislation's sentencing-review provisions do not appear to address aggregate, consecutive sentences like that of Mr. Henry. For example, new section 921.1402(2)(d), Florida Statutes, provides for a sentencing-review opportunity before the sentencing court for "a juvenile offender" (as defined under-inclusively by the statute) who was "sentenced to a term of 20 years or more **under [new section] 775.082(3)(c)**."[5] In turn, new section 775.082(3)(c) addresses

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[5] Even for the narrow subset of juvenile nonhomicide offenders who qualify for a sentencing review under this portion of the legislation, they would receive, at most, only two sentencing reviews. If the sentencing court does not find that the offender has demonstrated rehabilitation at the initial sentencing review, he or she will receive only one subsequent re-review after serving an additional 10 years. § 921.1402(2)(d), Fla. Stat. (2014).

Conversely, there would be no comparable cap on the parole-review remedy requested in Mr. Henry's merits briefing. Further, under the remedy that he has

nonhomicide life or first-degree felonies and is worded to address only sentences imposed for "an offense," singular. Apparently, there is no sentencing review contemplated for aggregate, consecutive sentences, particularly not those that include second- or third-degree felonies – as to which no sentencing review is provided. *See* §§ 775.082(3)(d)-(e), Fla. Stat. (2014).

Accordingly, this is another example of the legislation's under-inclusion. Its date restriction aside, chapter 2014-220 also does not appear to provide sentencing-review opportunities for offenders like Mr. Henry, who have received aggregate sentences that exceed their life expectancies. However, as explained in Mr. Henry's prior briefing and during oral argument, *Graham* applies to such sentences. *See* [Pet.'s IB at 8-34; Pet.'s RB at 2-8].

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requested, Mr. Henry should receive parole interviews and a hearing sooner than after serving 20 years. *See* § 947.16(1)(c), Fla. Stat. (initial parole interview with hearing examiner "within 24 months after the initial date of confinement in execution of the judgment"); § 947.172, Fla. Stat. (establishment of "presumptive parole release date" based on the "objective parole guidelines"); § 947.165, Fla. Stat. (vesting the Parole Commission with the authority to draft Florida's "objective parole guidelines"); § 947.173, Fla. Stat. (establishing a mechanism to review the "presumptive parole release date"); § 947.174(b), Fla. Stat. (subsequent interviews to review the "presumptive parole release date" – "The interview shall take place once within 7 years after the initial interview and once every 7 years thereafter if the commission finds that it is not reasonable to expect that parole will be granted at a hearing during the following years and states the bases for the finding in writing."); §§ 947.1745-.1746, Fla. Stat. (establishment of effective parole release date).

C. For Mr. Henry and Those Similarly Situated, this Court Should Provide the Remedy that Mr. Henry Previously Requested – Recurring, Meaningful Parole Review.

In sum, a remedy must still be provided here, and the Legislature and Governor have not done so. "Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights." *Satz v. Perlmutter*, 379 So. 2d 359, 360 (Fla. 1980). As to Mr. Henry and those similarly situated, chapter 2014-220, Laws of Florida, is inapplicable and fails to provide the remedy that *Graham* requires. Rather than judicially redrafting this legislation or creating a substantive rule of criminal procedure, either of which would run afoul of separation-of-powers principles, this Court should provide the remedy previously requested by Mr. Henry: open the existing parole system to these juvenile nonhomicide offenders, who were sentenced under the Criminal Punishment Code, by holding section 921.002(1)(e), Florida Statutes, unconstitutional as applied. *See* [Pet.'s IB at 35-49; Pet.'s RB at 8-15]. As explained during oral argument, section 921.002(1)(e), is the same statutory subsection that would otherwise require Mr. Henry to serve 85 percent of his 90-year sentence.

If this Court adopts Mr. Henry's proposed remedy, it would not be the first state supreme court to embrace parole reinstatement to rectify a *Graham* violation. For example, in *Bonilla v. State*, 791 N.W.2d 697, 698-703 (Iowa 2010), the Iowa

Supreme Court reinstated parole by holding the relevant portions of Iowa's criminal code unconstitutional as applied to a juvenile nonhomicide offender sentenced to life without parole for a first-degree kidnapping offense. The court did so because: (a) it recognized that the provisions of Iowa's code precluding parole review for the juvenile nonhomicide offender were unconstitutional under *Graham* but severable; and (b) the remainder of the code could remain in place, such that the offender's sentence would stay the same except that he would now receive recurring parole review consistent with *Graham*:

> We find the clauses of Iowa Code sections 902.1 and 906.5 prohibiting parole are unconstitutional as applied to Bonilla and severable. Therefore, Bonilla shall [remain] sentenced to life in prison, [but] with the potential of parole.

Id. at 703; *see also People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (reversing 110-year aggregate sentence under *Graham* and mandating that petitioner receive appropriate parole consideration); *State v. Shaffer*, 77 So. 3d 939, 940-43 (La. 2011) (reversing petitioners' juvenile LWOP sentences under *Graham* and holding that the Louisiana statute precluding parole eligibility for anyone sentenced to life in prison was unconstitutional as to this class of offenders).

Under this requested remedy, parole review would be available for Mr. Henry and those like him, who were not provided any relief under chapter 2014-220. While the existing parole system is not perfect, it can be made available to Mr. Henry and those similarly situated consistent with the separation of powers.

See art. II, § 3, Fla. Const. And, in due time, Florida's parole system will have to measure up to the "meaningful" and "realistic" opportunity for early-release review required for juvenile nonhomicide offenders under *Graham*. 560 U.S. at 75, 82. Indeed, Florida's Parole Commission – which is responsible for administering Florida's parole system and drafting the regulations that implement chapter 947, Florida Statutes – will have an independent and indisputable constitutional obligation mandated by the Eighth and Fourteenth Amendments to the federal Constitution, as well as article I, section 17 of the Florida Constitution, to provide the level of review required under *Graham*. Florida's Department of Corrections, which controls the educational and vocational opportunities available to incarcerated juvenile offenders, will share this constitutional obligation.

Undoubtedly, the Parole Commission and the Department of Corrections will have to review and redraft some of their administrative rules to comply with *Graham* and to recognize the distinct attributes of juvenile offenders. *See generally* Fla. Admin. Code Title 23, Parole Commission, and Title 33, Department of Corrections. If the Parole Commission and Department of Corrections fail to do so or otherwise fail to comply with *Graham*, there will be additional litigation (through subsequent cases) to enforce *Graham*'s constitutional mandate and the holdings that this Court issues in *Henry* and *Gridine*.

Consistent with this analysis, after conducting a detailed national survey of the parole practices applied in the several states, including Florida, one Eighth Amendment scholar recently explained that, to comply with *Graham*, existing parole boards will have to change the manner in which they consider parole opportunities for juvenile offenders because: (a) juveniles are inherently different than adults for purposes of criminal sentencing and punishment;[6] and (b) unlike parole review for adults, such review (or something substantially similar) is now constitutionally mandated by the Eighth and Fourteenth Amendments for juvenile nonhomicide offenders serving extensive prison terms and, further, must satisfy the standard articulated by *Graham* – *i.e.*, "meaningful" and "realistic" review opportunities to determine whether early release is appropriate "based on demonstrated maturity and rehabilitation." Sarah F. Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L. J. 373, 374-433 (2014); *Graham*, 560 U.S. at 75, 82. Thus, unlike adult offenders, juvenile nonhomicide offenders have a recognized interest in "meaningful" and "realistic" parole review under *Graham* and the Eighth Amendment. *Id.*

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[6] *See, e.g.*, *Miller*, 132 S. Ct. at 2458, 2466 ("*Graham* establish[es] that children are constitutionally different from adults for purposes of sentencing." Consequently, the State "cannot proceed as though" juvenile offenders "[a]re not children.").

As Professor Russell explained:

> *Graham*'s requirement that states provide a meaningful opportunity for release encompasses three distinct components: **(1)** individuals must have a chance of release at a meaningful point in time, **(2)** rehabilitated prisoners must have a realistic likelihood of being released, and **(3)** the parole board or other releasing authority must employ procedures that allow an individual a meaningful opportunity to be heard.
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> *Graham* promises to change the interaction among courts and parole boards because the decision mandates a release mechanism that complies with constitutional standards. Simply making a juvenile offender eligible for parole under an existing parole system may not guarantee compliance with *Graham*'s mandate.
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> Going forward, data will need to be collected to determine the release rates of juvenile offenders sentenced to long prison terms. Moreover, an analysis of the prisoner's degree of rehabilitation needs to be assessed to determine if parole boards are complying with *Graham*, for *Graham* requires a realistic chance of release for rehabilitated juvenile offenders, not for all juvenile offenders. Over time, trends in these cases will emerge, and it may be possible for prisoners to establish that a parole board is failing to grant release in an appropriate number of juvenile cases involving rehabilitated prisoners.
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> [A] state's existing parole system will comply with the Eighth Amendment only if it actually uses a meaningful process for considering release. In other words, the parole board must provide more than *pro forma* consideration.

Russell, *supra*, 89 IND. L. J. at 375-76, 396, 414-15.

To comply with *Graham*, state parole boards and departments of correction should provide recurring and meaningful parole review for juvenile nonhomicide offenders serving lengthy prison terms that includes: (a) access to educational and vocational programs while incarcerated so that these juveniles can seek to

rehabilitate themselves; (b) in-person hearings before the early-release decision-makers; (c) access to all of the information considered by these decision-makers; (d) the representation of counsel; and (e) sufficient notice, recording of proceedings, a written statement of reasons supporting the grant or denial of early release, and meaningful appellate review. Russell, *supra*, 89 IND. L. J. at 419-28.

Despite the Legislature and Governor falling short in attempting to enact *Graham*-compliant legislation that provides a remedy for Mr. Henry and those like him, at least one conclusion can and should be drawn from chapter 2014-220 and new section 921.1402(2)(d), Florida Statutes, and applied here. Given that the Legislature identified sentences of "20 years or more" as the threshold at which a sentence becomes long enough to warrant early-release review for qualifying juvenile nonhomicide offenders, this Court should hold that for all juvenile nonhomicide offenders like Mr. Henry (to whom chapter 2014-220 does not pertain), the remedy of recurring parole review should apply to their sentences – including aggregate sentences – if they are 20 years or longer. *Cf. also, e.g.*, *Swanson v. State*, 98 So. 3d 135, 135 (Fla. 1st DCA 2012) (Clark, J., concurring specially) (expressing serious concern regarding "the imposition of a 22-year prison sentence [without parole] for ... a juvenile with no prior criminal or delinquency record, who committed [an] armed robbery with a BB gun, but did not shoot at or strike the victim"); *Smith v. State*, 93 So. 3d 371, 375-78 (Fla. 1st DCA

2012) (Padovano, J., concurring) (reasoning that the only way to comply fully with *Graham* is to reopen parole review for all juvenile nonhomicide offenders).

CONCLUSION

For the reasons provided here and in Petitioner's prior briefing, Petitioner, Leighdon Henry, respectfully requests that this Court reverse the decision below and hold section 921.002(1)(e), Florida Statutes, unconstitutional as applied to him. Such a holding will ensure that Mr. Henry and those similarly situated receive the recurring and meaningful parole review required by *Graham*, the federal Eighth Amendment, and article I, section 17 of the Florida Constitution.

Respectfully submitted,

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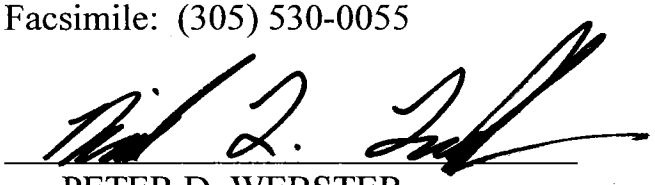

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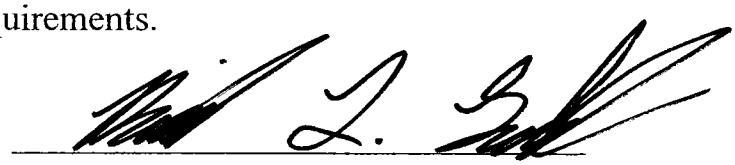
We CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210's font and formatting requirements.



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