Filing # 17745667 Electronically Filed 09/02/2014 02:49:38 PM

RECEIVED, 9/2/2014 14:53:37, John A. Tomasino, Clerk, Supreme Court

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 SUPPLEMENTAL REPLY BRIEF ADDRESSING CHAPTER 2014-220, LAWS OF FLORIDA

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

CARLTON FIELDS JORDEN BURT, P.A.
215 S. Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Christopher B. Corts
Assistant Professor of Legal Writing
UNIVERSITY OF RICHMOND
SCHOOL OF LAW
28 Westhampton Way
Richmond, VA 23173
Telephone: (804) 289-8189

CARLTON FIELDS JORDEN BURT, P.A.
4200 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

By: Peter D. Webster
David L. Luck
Christopher B. Corts

Pro-Bono Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MR. HENRY'S 90-YEAR AGGREGATE RESENTENCE VIOLATES THE FEDERAL EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION. 1

II. THE JUVENILE-SENTENCING LEGISLATION ADOPTED IN CHAPTER 2014-220, LAWS OF FLORIDA, DOES NOT APPLY TO MR. HENRY'S 90-YEAR AGGREGATE RESENTENCE. 3

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. 3

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. 5

C. For Mr. Henry and Those Similarly Situated, this Court Should Provide the Remedy that Mr. Henry Previously Requested – Recurring, Meaningful Parole Review. 7

CONCLUSION 8

CERTIFICATE OF SERVICE 10

CERTIFICATE OF COMPLIANCE 11

TABLE OF AUTHORITIES

Cases

Adams v. State, No. 1D11-3225, --- So. 3d ----,
2012 WL 3193932 (Fla. 1st DCA Aug. 8, 2012), *rev. pending*,
Case No. SC12-1795 7

Anderson v. State,
87 So. 3d 774 (Fla. 2012) 5

Edwards v. State,
No. 5D12-3403, --- So. 3d ----,
2014 WL 3966291 (Fla. 5th DCA Aug. 15, 2014) 6

Floyd v. State,
87 So. 3d 45 (Fla. 1st DCA 2012), *rev. pending*, Case No. SC12-1026 7

Graham v. Florida,
560 U.S. 48 (2010) ..... passim

Hawkins v. Ford Motor Co.,
748 So. 2d 993 (Fla. 1999) 5

Mediate v. State,
108 So. 3d 703 (Fla. 5th DCA 2013), *rev. pending* Case No. SC13-438 6

Miller v. Alabama,
132 S. Ct. 2455 (2012) 3

Rosario v. State,
122 So. 3d 412 (Fla. 4th DCA 2013), *rev. pending*, Case No. SC13-1820 6

Satz v. Perlmutter,
379 So. 2d 359 (Fla. 1980) 8

State v. Harden,
938 So. 2d 480 (Fla. 2006) 4

Vargas v. Enter. Leasing Co.,
60 So. 3d 1037 (Fla. 2011) 4

TABLE OF AUTHORITIES
(Continued)

Page

Walle v. State,
99 So. 3d 967 (Fla. 2d DCA 2012), *rev. pending*, Case No. SC12-2333 6

Statutes

§ 775.082(3)(c), Fla. Stat. (2014) 5

§ 775.082(3)(d), Fla. Stat. (2014) 5

§ 775.082(3)(e), Fla. Stat. (2014) 5

§ 921.002(1)(e), Fla. Stat. 8

§ 921.1402(2)(d), Fla. Stat. (2014) 1

Other Authorities

Chapter 2014-220, Laws of Florida ..... passim

Constitutional Provisions

Art. I, §17, Fla. Const. 1, 2, 9

Article X, § 9, Fla. Const. 4

U.S. Const., Amend. VIII 1, 2, 4, 9

U.S. Const., Article VI, Clause 2 4

ARGUMENT

I. MR. HENRY'S 90-YEAR AGGREGATE RESENTENCE VIOLATES THE FEDERAL EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Rather than address the remedy that should apply here to ensure Florida's compliance with the Eighth Amendment, the State once again misconstrues *Graham v. Florida*, 560 U.S. 48 (2010), in an effort to circumvent its prohibition against sentencing juvenile nonhomicide offenders to die in prison with no opportunities for early-release review. Indeed, the State devotes its entire brief to the mistaken contention that *Graham* does not apply to "term-of-years sentences." [Supp. AB at 2-6 & n.4].

Not only does *Graham* not support the State's position, the Legislature also disagrees with the State because, when enacting chapter 2014-220, Laws of Florida, the Legislature construed *Graham* to require early-release review for juvenile nonhomicide offenders convicted of a serious life or first-degree felony and sentenced to a term of years of "20 years or more." § 921.1402(2)(d), Fla. Stat. (2014). Thus, even though the new juvenile-sentencing legislation does not appear to apply here, it still provides a clear indication that the Legislature also rejects the State's formalistic and short-sighted "life means life" position.

As explained in Mr. Henry's prior briefing and at oral argument, *Graham* addressed – and held unconstitutional – the following category of sentence when

imposed on juvenile nonhomicide offenders: a "term-of-years sentence" that "guarantees [the offender] will die in prison without any meaningful opportunity to obtain release." 560 U.S. at 61, 79; [IB at 8-34]; [RB at 2-8]. Therefore, the State's insistence that *Graham* applies only to "actual life" sentences (and not "term-of-years sentences" that significantly exceed the offender's life expectancy) contradicts the Supreme Court's analysis: "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence." *Graham*, 560 U.S. at 61.[1]

Although the State now avoids direct citation to these sources, its position that *Graham* does not reach term-of-years sentences comes from the *Graham* dissenters, not the *Graham* majority decision. *See id.* at 113 n.11 (Thomas, J., dissenting); *id.* at 124 (Alito, J., dissenting). As previously briefed (and explained at oral argument), those dissents have no bearing on this Court's obligation to enforce the Eighth Amendment under article I, section 17 of the Florida Constitution and the Fourteenth Amendment to the federal Constitution.

When reaching its holding here, this Court should remain cognizant that the Supreme Court adopted *Graham*'s categorical bar to ensure that "all juvenile nonhomicide offenders [receive] a chance to demonstrate maturity and reform." 560 U.S. at 79. The State never explains how its (mis)interpretation of *Graham*

[1] All emphasis is supplied unless otherwise noted.

furthers that goal. In fact, the State has yet to acknowledge that *Graham* even contains such language.

Finally, the State's preoccupation with the seriousness of certain nonhomicide offenses is also inconsistent with *Graham*. *Graham*'s categorical mandate applies to all juvenile nonhomicide offenders – even those who commit serious nonhomicide offenses. *See id.* 560 U.S. at 69 (drawing the categorical line between homicide and "serious nonhomicide crimes"); *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) ("*Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

In sum, the State's continued attempt to vitiate *Graham* is meritless.

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

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.

The State agrees with Mr. Henry that the date restriction present in chapter 2014-220, Laws of Florida, precludes its application here. However, the State goes further by contending that the Legislature could never adopt retroactively applicable legislation to remedy *Graham* violations because of article X, section 9

of the Florida Constitution, entitled "Repeal of criminal statutes." [Supp. AB at 2-4 n.1]. The State is wrong as a matter of law.

In making this argument, the State fails to acknowledge the Supremacy Clause of the federal Constitution (article VI, clause 2), which provides that the federal Constitution is "the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This necessarily includes the federal Eighth Amendment as interpreted in *Graham*.

As detailed in Mr. Henry's prior briefing, there is nationwide agreement that *Graham* applies retroactively, and the United States Supreme Court has ordered the several states to devise means of complying with this retroactive decision. *See Graham*, 560 U.S. at 75 (leaving to the states, "in the first instance," the task of adopting "means and mechanisms for compliance"). Thus, in keeping with the supreme law of the land, the Legislature could have adopted retroactive means of complying with *Graham* – and any contrary constraint imposed by article X, section 9 would have failed when confronted with the federal Supremacy Clause and the Eighth Amendment. *See, e.g.*, *Vargas v. Enter. Leasing Co.*, 60 So. 3d 1037, 1040-41 (Fla. 2011) (explaining that contrary state law fails when confronted with supreme federal law); *State v. Harden*, 938 So. 2d 480, 485-86 (Fla. 2006) (same). The Legislature was not constitutionally prohibited from adopting

retroactive *Graham*-compliant legislation. In fact, it was constitutionally required to do so. It simply failed to fully meet that obligation with this current legislation.

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.

The State also agrees with Mr. Henry that the new juvenile-sentencing legislation does not appear to address aggregate sentences. That position is correct because the legislation is worded to address only sentences imposed for "an offense," singular. *See, e.g.*, § 775.082(3)(c), Fla. Stat. (2014). Further, the legislation does not appear to provide any review opportunities for sentences composed of (or including) second- and/or third-degree felonies. *See* §§ 775.082(3)(d)-(e), Fla. Stat. (2014).

In opposing these positions, one of the amici curiae, the Florida Association of Criminal Defense Lawyers ("FACDL"), does not acknowledge the legislation's plain text. It thus overlooks a basic canon of construction and would have this Court rewrite chapter 2014-220, Laws of Florida, to suit the amicus curiae's preferences rather than adhere to the under-inclusive parameters that the Legislature actually adopted. *Cf., e.g.*, *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012) ("A court primarily discerns legislative intent by looking to the plain text of the relevant statute."); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) ("[T]his Court may not rewrite statutes contrary to their plain language.").

The Court cannot rewrite this legislation to correct the Legislature's oversights. By its plain text, chapter 2014-220, Laws of Florida, does not appear to apply here and fails to provide review opportunities for a wide range of sentences subject to *Graham*'s mandate.

In addition, FACDL is incorrect in asserting that aggregate sentences such as Mr. Henry's are "atypical." [FACDL Supp. Br. at 12]. Indeed, if the numerous tag cases pending here are any indication, these aggregate sentences are all too common in Florida. For example, the following reported decisions come to mind:

- *Edwards v. State*, No. 5D12-3403, --- So. 3d ----, 2014 WL 3966291 (Fla. 5th DCA Aug. 15, 2014) (addressing 90-year aggregate sentence imposed on a 17-year-old juvenile nonhomicide offender for multiple felonies comprising a single criminal episode);
- *Rosario v. State*, 122 So. 3d 412 (Fla. 4th DCA 2013) (addressing 270-year aggregate sentence imposed on a juvenile nonhomicide offender), *rev. pending*, Case No. SC13-1820 (tagged to *Henry*, Case No. SC12-578);
- *Mediate v. State*, 108 So. 3d 703 (Fla. 5th DCA 2013) (addressing 130-year aggregate sentence imposed on a juvenile nonhomicide offender), *rev. pending*, Case No. SC13-438 (tagged to *Henry*, Case No. SC12-578);
- *Walle v. State*, 99 So. 3d 967 (Fla. 2d DCA 2012) (addressing 92-year aggregate sentence imposed on a juvenile nonhomicide offender for a series

of offenses committed in neighboring counties), *rev. pending*, Case No. SC12-2333 (tagged to *Gridine*, Case No. SC12-1223);

- *Adams v. State*, No. 1D11-3225, --- So. 3d ----, 2012 WL 3193932 (Fla. 1st DCA Aug. 8, 2012) (addressing 60-year aggregate sentence imposed on a juvenile nonhomicide offender), *rev. pending*, Case No. SC12-1795 (tagged to *Gridine*, Case No. SC12-1223); and
- *Floyd v. State*, 87 So. 3d 45 (Fla. 1st DCA 2012) (addressing 80-year aggregate sentence imposed on a juvenile nonhomicide offender), *rev. pending*, Case No. SC12-1026 (tagged to *Gridine*, Case No. SC12-1223).

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

The State and FACDL do not disagree that a properly functioning parole system could bring Florida into compliance with *Graham*. The State merely avoids the issue, and FACDL states that it "still ... tacitly support[s] the parole remedy in the alternative." [FACDL Supp. Br. at 5] (emphasis in original).

For all of the reasons Mr. Henry previously briefed, this Court should do as other state supreme courts have done and open the existing parole system to those qualifying juvenile nonhomicide offenders to whom chapter 2014-220, Laws of

Florida, does not apply. The Court should make this remedy available by holding section 921.002(1)(e), Florida Statutes, unconstitutional as applied.

Further, to the extent there are concerns in this regard, the Legislature surrendered any trepidations that it might have regarding the requested parole-review remedy when it failed to enact legislation that provides relief for a large portion of *Graham* offenders. Through its inaction, the Legislature cannot deny qualifying juvenile nonhomicide offenders access to Florida's existing parole system: "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).[2]

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

[2] If, however, the Court disagrees with Mr. Henry's requested remedy, respectfully, it must still provide relief here – whether through some application of chapter 2014-220, Laws of Florida, or the adoption of a new postconviction Rule of Criminal Procedure.

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,

CARLTON FIELDS JORDEN BURT, P.A.
215 S. Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Christopher B. Corts
Assistant Professor of Legal Writing
UNIVERSITY OF RICHMOND SCHOOL OF LAW
28 Westhampton Way
Richmond, VA 23173
Telephone: (804) 289-8189

CARLTON FIELDS JORDEN BURT, P.A.
4200 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 530-0050
Facsimile: (305) 530-0055

PETER D. WEBSTER
Florida Bar No. 185180
pwebster@cfjblaw.com
DAVID L. LUCK
Florida Bar No. 041379
dluck@cfjblaw.com
CHRISTOPHER B. CORTS
Florida Bar No. 091374
ccorts@richmond.edu

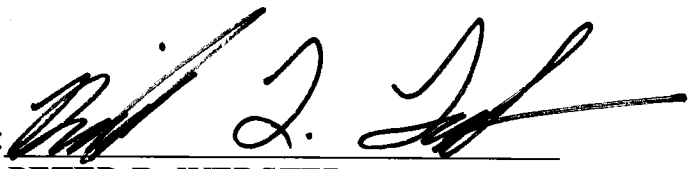
Pro-Bono Counsel for Petitioner Leighdon Henry

CERTIFICATE OF SERVICE

We CERTIFY that a copy of this brief was served by U.S. Mail and e-mail on September 2, 2014, to:

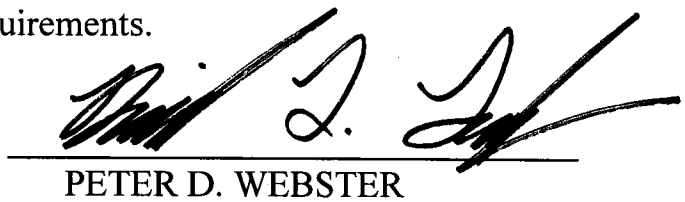
Pamela J. Bondi
Attorney General, State of Florida
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Fax: (850) 922-6674
pam.bondi@myfloridalegal.com

Wesley Heidt and Kellie A. Nielan
Assistant Attorneys General, State of Florida
Office of the Attorney General, Criminal Appeals Division
444 Seabreeze Boulevard, Suite 500
Daytona Beach, FL 32118
Telephone: (386) 238-4990
Fax: (386) 238-4997
crimappdab@myfloridalegal.com
Counsel for Respondent

By: 
PETER D. WEBSTER
DAVID L. LUCK
CHRISTOPHER B. CORTS

CERTIFICATE OF COMPLIANCE

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



PETER D. WEBSTER
DAVID L. LUCK
CHRISTOPHER B. CORTS