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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

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent adds the following facts for purposes of its responsive brief. Some facts have been repeated so as to put them in the proper context and more fully develop them.[1]

Henry was charged in an eleven count information with four counts of sexual battery with a deadly weapon or physical force, kidnaping with a firearm, two counts of robbery with a firearm, carjacking with a firearm, armed burglary with a firearm, possession of 20 grams or less of cannabis, and providing false identification to a law enforcement officer (R 1-12). A judgment of acquittal was granted on one count of sexual battery and on the providing false information count (T 266-68).

The victim testified that she had been at the Tap Room, a bar next to her apartment complex, with friends (T 19). She took her friend Casey home, returned to the bar and paid her tab, filled her car with gas and got home at around 10:30-10:45 (T 21). Her friend Dave, who was also at the bar, texted her and asked her to follow him home to make sure he got there okay (T 25). She got back to her apartment at around 11:30-11:45 (T 25). When she entered, her

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[1] The original record on appeal in case number 5D08-3779 contained six volumes, two of records and four of trial transcripts. It will be referred to as (R __) and (T __). The record was supplemented six times, and the supplemental volumes were not always numbered. The only additional records that will be referenced are those from the 3.800/resentencing proceeding. That supplemental record was filed on August 27, 2010, and contained one volume of records and one volume of transcript, each starting with page one. They will be referred to as 3.800R __) and 3.800T __).

sliding door was open and she saw Henry standing in the hallway (T 26-27). She tried to run, but he was quickly on her and grabbed her from behind (T 28). She fell, hit her face on the table, and he put his hand over her mouth and told her to be quiet (T 28-29).

He showed her a gun and told her to get up (T 29). He took her to her room, showed her the gun and slapped her face (T 30). He licked her genitals, penetrated her vagina and anus, and put his penis in her mouth (T 31-33). He made her shower, then had her take him to an ATM machine where she withdrew $790 of the $800 in her account (T 42). He had also taken a tote bag of hers and put items from her kitchen in it, including a bottle of Biltmore Estate sparkling wine, macaroni and cheese and chicken broth (T 36, 53). The victim was able to get away after they left the ATM; she was close to the Tap Room, and ran back there for help (T 49). She never knew Henry prior to that day (T 105).

Henry testified that he had lived at the same apartment complex as the victim in 2005-06, met her while he was living there, and saw her every day (T 284, 288). He introduced himself while helping her at the dumpster, and started a romantic relationship about a month and a half later (T 291). She invited him over, and also took him to restaurants and movies (T 291-93). She continued to call him after he moved, and told him not to tell anyone (T 294-95). He testified that he loves her (T 297). She had bought him a cell phone (T 297), and she called him on February

13 at around eight o'clock; he walked over, and she let him in the front door at around ten o'clock (T 299-300). They had pizza, talked for a while and had sex (T 301-02). He bought her a Snicker's bar because it was Valentine's Day (T 302). They went to the ATM because she was going to buy him a chain he wanted (T 305). She gave him $790 for the chain and his phone bill (T 305). They went back to her apartment and she gave him a bottle of champagne (T 308). He went to the bathroom, and while he was in there the victim saw a picture of another girl on his phone; she flipped out and he hit her (T 309-10). She took him home (T 312). He claimed that he was the victim (T 325).

Henry was sentenced to life on the three sexual battery counts (counts 1-3), thirty years on the kidnaping count (count 5), thirty years on the carjacking count (count 7), fifteen years on both robbery counts (counts 6 and 8), fifteen years on the burglary count (count 9) and 364 days on the marijuana charge (R 227-41). Counts 1,2,3,5,and 6 were to be served concurrently; count 7 was to be served consecutively to 1,2,3,5 and 6; count 8 was to be served consecutively to 1,2,3,5,6 and 7, and count 9 was to be served consecutively to 1,2,3,5,6,7 and 8; the total sentence was life plus sixty years.

While his appeal was pending, Henry filed a motion to correct sentence based on *Graham v. Florida,* which had held that a sentence of life without parole for a juvenile on a nonhomicide crime was

forbidden by the Eighth Amendment (3.800R 1-4, 7-12). Henry was resentenced to thirty year terms on counts 1 through 3 (3.800R 21-28). The other sentences were to remain the same (3.800R 20-28). The day of resentencing, Henry also filed a motion to declare section 921.002(1)(e) unconstitutional as applied (3.800R 32-35). He asserted that "[s]ince there is no parole in Florida for crimes committed on or after October 1, 1998, and the United States Supreme Court has now ruled that a juvenile offender cannot be sentenced to life without parole for a nonhomicide offense, it necessarily follows that the above statute must be unconstitutional as applied to the Defendant, regarding the life sentences imposed in this case for Counts 1, 2 and 3" (3.800R 34). He further asserted that his combined sentence of ninety years was tantamount to a life sentence, so "it logically follows that the Florida Statute §921.002(1)(e) is unconstitutional as applied to the Defendant regarding the cumulative sentences of Counts 5,6,7,8 and 9" (3.800R 34). The motion was denied the same day (3.800R 37). The trial judge had questioned whether she even had jurisdiction to rule on the motion, and stated that if she did, she would deny it (3.800T 40-41).

Henry gave the following statement at his resentencing:

> Your Honor - overall, Your Honor, last time you saw me, you felt like I deserve to spend the rest of my life in prison. That's the way you sentenced me. You felt like I didn't deserve to be out in society for the rest of my life. That's - and I felt like that at some point when I was in prison. But I was 18 then. Your Honor,

and now I'm 20 years old, fixing to be 21. I've changed. Whether you see it or not, Your Honor, but I've changed, and I know that I've changed based on the way I conduct myself lately.

I ain't just trying to get off based on this new law. That's what the prosecutor may think or other people may think. I feel like, yes, I need to be punished as stated in the letter, but I want you to take into consideration, Your Honor, that I just don't want you to look at the points and say I'm going to get out of prison. I want you to look at what kind of opportunity I got. Look at the environment that I'm fixing to go into. Look at the age of my parents, Your Honor, and my sister. Twenty, thirty years from now, Your Honor, they going to be so old they going to be gone. And doing all that time in prison, a person get out after all that time and fit back into society like that. The environment I'm going to, I'll be forced, Your Honor, to commit crimes. I would have to defend myself. And anybody would do that to survive, Your Honor.

I'm totally sorry for and I've got remorse for [the victim], for society, Your Honor. But at the same time, taking my life ain't going to replace that. If I spend 20, 30 years, that would destroy my life. If I spend the rest of my life in prison, it still ain't going to change what happened. She can't say she scared of me because I ain't fixing to go back into United States society anyway, I'm going to be deported back to Jamaica. But I ask that if you sentence me to over ten years, Your Honor, I ask that you split it into a half and half sentence, Your Honor, if it's a sentence over ten years, Your Honor. Because I feel like over the years, over the age of 27 years old, Your Honor, going back to Jamaica, it wouldn't matter if I have a GED or all the trades they give you in prison, the minimum wage in Jamaica is, like, three, four thousand dollars. That's like, 70 bucks in America. In the army I can make like 120, $130 a month. That's the only opportunity I see going back to Jamaica, Your Honor. Without that opportunity, I go back down there at age 35, they're not going to accept me. And I'll be 47 years old, get out in society, Your Honor, I ain't going to have no family as what I got to lean on now, and I'll be so old. I'm going to have to survive, Your Honor. I'm - I'm going to be forced to do what I got to do to survive and live to see another day. I ask you to take that into consideration and give me a chance,

> Your Honor, because I really - I really have changed Your Honor. I ask for another opportunity to -

(3800T 54-55).

On appeal, Henry claimed that his term-of-years sentences violated the constitutional prohibition against cruel and unusual punishment in light of the United States Supreme Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010).[2] *Henry v. State*, 82 So.3d 1084 (Fla. 5th DCA 2012). The district court examined the holding in *Graham*, reviewed decisions from other jurisdictions that had interpreted *Graham* up to that point, and stated:

> If we conclude that *Graham* does not apply to aggregate terms-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, forty, 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 victims 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.

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[2] Henry elected to represent himself on direct appeal, and filed a nine point brief. He questioned, in point heading seven, whether section 921.002(1)(e), Florida Statues, was unconstitutional, but presented no argument in support of such a claim (IB at 22). The State responded that Henry had failed to meet his burden of demonstrating prejudicial error, and that his failure to provide any legal argument in support of his claim amounted to a waiver (AB 18).

> [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 that is. We conclude that Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment and affirm the decision below.

Henry, 82 So.3d at 1089.

SUMMARY OF ARGUMENT

The district court correctly determined that Henry's aggregate term-of-years sentences do not violate *Graham's* categorical ban on life sentences without the possibility of parole for juvenile offenders convicted of nonhomicide offense. The *Graham* Court did not categorically prohibit states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole, but held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional. Pursuant to the Conformity Clause of the Florida Constitution, this holding cannot be expanded. The four Florida district courts of appeal that have addressed the application of *Graham* to term-of-years sentences for nonhomicide offenses have all recognized its limited holding and application, as have decisions from other jurisdictions.

Further, if this Court determines that *Graham* is somehow applicable to Henry's aggregate term-of-years sentence, it must be remembered that it is not the length of the sentence given to a juvenile convicted of a nonhomicide offense that could potentially violate *Graham*. It is the fact that Florida currently has no means to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." In this respect, this Court should reject Henry's invitation to declare current state parole statutes unconstitutional as applied to juvenile nonhomicide

offenders, because this claim was never presented to the lower courts, no basis for doing so has been demonstrated in the instant proceeding, and such remedy is far to expansive for the issue at hand.

Finally, in the absence of any legislative direction to date, should this Court determine that a judicial remedy is required under *Graham*, it must be carefully considered and evaluated so as not to create more issues than it resolves. In this respect, Respondent submits that even if a remedy is required, relief need not be immediate, because under no interpretation of *Graham* is Henry entitled to an opportunity for release any time in the near future.

ARGUMENT

HENRY WAS PROPERLY RESENTENCED TO A TERM OF YEARS ON EACH OF HIS CHARGES AND HIS AGGREGATE SENTENCE DOES NOT VIOLATE THE CATEGORICAL BAN ON LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILE OFFENDERS WHO COMMITTED NONHOMICIDE CRIMES.

Henry originally received life sentences for each of three sexual batteries, a thirty year sentence for kidnaping, a thirty year sentence for carjacking, fifteen year sentences for each of two robberies, a fifteen year sentence for burglary, and 364 days for a misdemeanor marijuana charge. The trial court structured the sentences so that the overall total was life plus sixty years. While his direct appeal was pending, Henry filed a motion to correct sentence based on *Graham v. Florida,* 130 S.Ct. 2011 (2010), and was resentenced to thirty year terms on the three sexual batteries. The other sentences remained the same. The new sentence structure totaled ninety years for the eight felonies.

Henry appealed to the Fifth District Court of Appeal, claiming that his term-of-years sentences violated the constitutional prohibition against cruel and unusual punishment in light of the United States Supreme Court's decision in *Graham v. Florida,* 130 S.Ct. 2011 (2010). *Henry v. State,* 82 So.3d 1084 (Fla. 5th DCA 2012). The district court examined the holding in *Graham,* reviewed decisions from other jurisdictions that had interpreted *Graham* up to that point, and stated:

> If we conclude that *Graham* does not apply to aggregate terms-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, forty, 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 victims 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 that is. We conclude that Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment and affirm the decision below.

Henry, 82 So.3d at 1089.

Henry now claims that his ninety year sentence violates the Eighth Amendment to the United States Constitution and Article I, section 17 of the Florida Constitution,[3] based on *Graham.* He asserts that *Graham* categorically prohibits the states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole (IB 11). Generally, "mixed questions of law

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[3] Respondent contends that any challenge pursuant to the Florida Constitution has been waived by failure to raise it in the trial court. Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court. *Harrell v. State,* 894 So.2d 935 (Fla. 2005)(Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court).

and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact, but conducting a de novo review of the constitutional issue." *Hilton v. State,* 961 So.2d 284, 293 (Fla. 2007). *See also Connor v. State,* 803 So.2d 598, 605 (Fla. 2001). However, when considering Eighth Amendment challenges, appellate courts must yield "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem v. Helm,* 463 U.S. 277, 290 (1983).

Respondent would first point out that Henry does not have a ninety year sentence. He has eight separate sentences, none of which exceed thirty years, for the eight violent felonies he committed. They are structured for a combined term of ninety years. Further, the *Graham* Court did not categorically prohibit states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole, but held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional. *Graham,* 130 S.Ct. at 2030. Respondent submits that the Fifth District Court of Appeal, like the Second and Fourth District Courts of Appeal, and to a certain extent the First District Court of Appeal, correctly

applied *Graham* only "as it is written," and correctly determined that it does not apply to aggregate term-of-years sentences.

In this respect, Respondent would first note that *Graham* created a categorical ban on a distinct sentencing scheme, and 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 four Florida district courts of appeal that have addressed the application of *Graham* to term-of-years sentences for nonhomicide offenses have all recognized its limited holding and application. The Second District Court of Appeal was the first appellate court in Florida to observe that the sole issue in *Graham* was whether a sentence of life without the possibility of parole

imposed on a juvenile offender for a nonhomicide crime constituted cruel and unusual punishment under the Eighth Amendment. *Manuel v. State,* 48 So. 3d 94 (Fla. 2d DCA 2010). That court further noted:

> *Graham* held only that sentences of life without the possibility of parole imposed on juveniles for nonhomicide offenses are unconstitutional-not that lengthy prison sentences imposed on juveniles for a term of years less than life are unconstitutional. *Graham,* 130 S.Ct. at 2030 (noting that the Eighth Amendment does not "foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life"). Therefore, Mr. Manuel is not entitled to be resentenced on the attempted murder conviction that currently carries a sentence of a term of forty years.

Id. at 98 n.3. *See also Walle v. State,* 99 So.3d 967, 970-71 (Fla. 2d DCA 2012)(finding that *Graham* is limited to a single life without parole sentence for a nonhomicide offense, and it could not expand that ruling beyond the limitations set forth in Graham; the court then identified four analytical factors to determine if *Graham* is applicable - (1) the offender was a juvenile, (2) the sentence imposed applied to a **singular** nonhomicide offense, (3) the offender was "sentenced to life," and (4) the sentence does not provide for any possibility of release during the offender's lifetime)(emphasis supplied); *Young v. State,* 38 Fla. L. Weekly D402 (Fla. 2d DCA February 20, 2013)(*Graham* addressed the narrow issue of whether a sentence of life without the possibility of parole imposed on a nonhomicide offender violated the Eighth Amendment's prohibition on cruel and unusual punishment).

The Fifth District Court of Appeal in the instant case likewise found that *Graham* does not apply to term-of-year sentences, and is to be applied "only as written." *Henry v. State,* 82 So.3d 1084, 1089 (Fla. 5th DCA 2012). *See also Mediate v. State,* 108 So.3d 703, 706-07 (Fla. 5th DCA 2013)(rejecting an invitation to revisit *Henry*); *Johnson v. State,* 108 So.3d 1153 (Fla. 5th DCA 2013)(same). The Fourth District Court of Appeal recently agreed with the Fifth and Second Districts, stating, "we are compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole." *Guzman v. State,* 38 Fla. L. Weekly D617 (Fla. 4th DCA March 13, 2013).

The First District Court of Appeal also expressly acknowledged that the Supreme Court specifically limited its holding in *Graham* to only juvenile offenders sentenced to life without parole for a nonhomicide offense, *Gridine v. State,* 89 So.3d 909, 911 (Fla. 1st DCA 2011); *Thomas v. State,* 78 So.3d 644, 646 (Fla. 1st DCA 2011). However, that court later applied *Graham* to a term-of-years sentence, after finding that because the eighty year sentence was longer than the appellant's life expectancy, it was the "functional equivalent" of a life sentence without parole. *Floyd v. State,* 87 So.3d 45, 47 (Fla. 1st DCA 2012). Significantly, that court has since stated that if it was writing on a clean slate, i.e., without the "rule of law" announced in *Gridine, Thomas,* and *Smith v. State,* 93 So.3d 371 (Fla. 1st DCA 2012), it would now affirm a lengthy

term of years sentence based on the reasoning in *Henry, supra*. *Adams v. State,* 37 Fla. L. Weekly D1865 (Fla. 1st DCA August 8, 2012).[4]

Respondent thus submits that the application of *Graham* to a term of years sentence, particularly an aggregate term of years sentence, creates 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. The First District's need to create a "de facto life sentence," in order to even apply *Graham*, best illustrates this departure from and expansion of *Graham*. For this reason alone, the decision of the district court can be affirmed.[5]

Further, categorical rules simply cannot be applied to sentences that cannot be categorized. As the *Graham* Court

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[4] The *Adams* Court stated that the rule of law from those cases was twofold: first, *Graham* does apply to lengthy term of years sentences that amount to de facto life sentences, and second, a de facto life sentence is one that exceeds a defendant's life expectancy. Respondent questions the legal validity of this pronouncement. That court has also stated that "[w]hen a court makes a pronouncement of law that is ultimately immaterial to the outcome of the case, it cannot be said to be part of the holding in the case." *Lewis v. State,* 34 So.3d 183, 186 (Fla. 1st DCA 2010). The *Gridine* court did not even make the pronouncements that *Graham* applied to term of year sentences or that a term of years sentence was one that exceeds a defendant's life expectancy, so it would appear that the only rule of law from this case is that *Graham* does not apply to lengthy term-of-years sentences.

[5] *See State v. Hankerson,* 65 So.3d 502 (Fla. 2011)(A trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment).

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. The second classification 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. As the Court stated, "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 2021-22. The Court determined that a threshold comparison between the severity of the penalty and the gravity of the crime (the first approach) did not advance such analysis, so the appropriate analysis would be the one used in cases utilizing the categorical approach. *Id.* at 2023. The Court explained that 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 this 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.

Henry's term-of-years sentences are not subject to a categorical challenge without crossing this "clear line." As stated, a categorical challenge involves a "particular type of sentence," and there is no "particular type of sentence" here, other than an aggregate term of years. While the First District later stated that a de facto life sentence is one that "exceeds the defendant's life expectancy," this is not a categorical type of sentence, evidenced by the fact that it would have to be evaluated on a case by case basis. Other courts have used the term "de facto life sentence," but even so, have struggled with what exactly constitutes a "de facto life sentence." *See Henry,* 82 So.3d at 1089 ("At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, 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?"). Additional considerations, not mentioned by the district court, may include minimum mandatory terms and potential downward departures. Significantly, a sentence based on an offender's "life expectancy" would most likely vary from offender to offender, based on race, gender, socioeconomic

class, or even genetic predisposition, i.e, the life expectancy of a (__ year old)(race)(gender). Respondent submits that categorical rules cannot be applied to a sentence that cannot even be defined.

Respondent would further note that Henry never presented a straight proportionality argument, i.e., whether his term-of-years sentences are grossly disproportionate when comparing the gravity of the offense with the severity of sentences, and submits he would have been hard pressed to make such argument in light of the crimes he committed. Instead, Henry appears to advocate for a new, hybrid categorical/disproportionality/life expectancy approach, i.e., the total term of years of the consecutive sentences for the eight crimes I committed constitutes a particular type of sentence that exceeds my life expectancy and applies to an entire class of offenders who have committed a range of crimes. As stated, there is no such category, and it certainly is not recognized in *Graham*.

In this respect, Respondent would point out that the *Graham* Court found that while the imposition of a life without parole sentence for a nonhomicide crime is unconstitutional, "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before that term." *Id.* at 2034. Notably absent from the majority decision in *Graham* was any mention or indication that "the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."

Id. at 2058 (Alito, J. dissenting). Indeed, that the Court's holding did not involve a defined term of years was the entire point of Justice Alito's separate dissenting opinion. *See id.* *See also, Henry,* 82 So.3d at 1087, wherein the district court observed that the dissenting opinions in *Graham* discussed its nonapplication to term-of-year sentences.

Florida district courts are not alone in finding that *Graham* is limited to life sentences without the possibility of parole and in rejecting its application to lengthy term-of-years sentences. An intermediate Colorado appellate court recently surveyed the current legal landscape on this issue. While that court eventually concluded that an aggregate sentence of 112 years was the functional equivalent of a life sentence and thus violative of the Eighth Amendment, its reasoning is far from sound, and actually demonstrates the opposite of that conclusion. *People v. Ranier,* 2013 WL 1490107 (Colo. Ct. App. April 11, 2013). The *Ranier* court first acknowledged the line of cases, including Florida's *Henry* and *Walle,* that have read *Graham* narrowly and either explicitly or implicitly rejected the argument that *Graham* applies to lengthy

term-of-years sentences.[6] The court stated, however, that it was "more persuaded by the reasoning in a number of other cases where courts have explicitly or implicitly held that *Graham's* holding or its reasoning can and should be extended to apply to term-of-year sentences that result in a de facto life without parole sentence." *Id.* at *10. However, those cases are not necessarily greater in

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[6] Additional cases referenced and interpreted by The *Ranier* court are: *Bunch v. State,* 685 F.3d 546, 550 (6th Cir. 2010) (upholding an Ohio state court's determination that an 89 year sentence for a juvenile nonhomicide offender did not violate the Eighth Amendment on the basis that it is clear that *Graham* does not apply to aggregate sentences that amount to the practical equivalent of life without parole); *Goins v. Smith,* 2012 WL 3023306 at *6 (N.D. Ohio No. 4:09-CV-1551, July 24, 2012) (unpublished opinion and order) ("even life-long sentences for juvenile non-homicide offenders do not run afoul of *Graham's* holding unless the sentence is technically a life sentence without the possibility of parole"); *State v. Kasic,* 228 Ariz. 228, 265 P.2d 410, 415-16 (Ariz. Ct. App. 2011) (concurrent and consecutive terms totaling 139.75 years for a nonhomicide child offender furthered Arizona's penological goals and was not unconstitutional under *Graham*); *Adams v. State,* 288 Ga. 695, 707 S.E.2d 369, 365 (2011) (child's 75 year sentence and lifelong probation for child molestation did not violate *Graham*); *People v. Taylor,* 2013 Il App (3d) 110876, 368 Ill. 634, 984 N.E.2d 580 (Ill. App. Ct. 2013) (*Graham* does not apply because the defendant was only sentenced to forty years and not life without possibility of parole); *Diamond v. State,* 2012 WL 1431232 (Tex. Crim. App. Nos. 09-11-00478-CR & 09-11-00479-CR Apr. 25, 2012) (upholding a sentence of 99 years for a nonhomicide child offender without mentioning *Graham*). Cases not mentioned by that court include *Smith v. State,* 258 P.3d 913, 920 (Alaska App. 2011) (*Graham* applies only to juveniles sentenced to life without parole for nonhomicide offenses); *People v. Gay,* 960 N.E.2d 1272, 1279 (Ill. App. 2011) (finding that defendant lacked case law supporting his proposition that an aggregated sentence resulting from multiple convictions must ne considered a life without parole sentence); *United States v. Scott,* 610 F.3d 1009, 1018 (8th Cir. 2012) (rejecting application of *Graham* to sentence of 25 year old "because *Graham* was limited to defendants sentenced to life in prison without parole for crimes committed as a juvenile").

number, and they reflect the reasoning from only two states, California and Florida.

The *Ranier* court first reviewed *People v. Caballero,* 55 Cal.4th 262, 282 P.3d 291, 145 Cal.Rptr.3rd 286 (2012), and several intermediate California appellate decisions that had been decided "prior to and after" *Caballero*. The *Ranier* court completely ignored what the *Henry* court had observed was the "significant split" among the intermediate California appellate courts. *Henry,* 82 So.3d at 1088 (analyzing those California decisions, including the lower court *Caballero* opinion, which had affirmed a 110 year-life sentence). Further, any decisions decided after the California Supreme Court's *Caballero* holding cannot be found as additional support for this proposition, because the intermediate courts were bound to follow it.

The *Ranier* court next noted that "although two Florida decisions have ruled to the contrary, we are more persuaded by the greater number of Florida cases that have applied *Graham* to sentences that are the functional equivalent of life without parole," and that it was particularly persuaded by the reasoning in *Adams*. *Id.* at *11. In simply counting cases, the *Ranier* court ignored Florida's appellate court structure, and the fact that three (and Respondent submits four) of its five district courts of appeal have applied *Graham* "as written." And while being particularly persuaded by Florida's First District in *Adams*, the

Ranier court never mentioned that fact that in that case the court had stated that if it was writing on a clean slate, it would affirm based the *Henry* decision. Thus, it appears that only one state supreme court, California's, has expanded the specific *Graham* holding to "de facto" life sentences.

Should this Court determine that *Graham's* limited holding should be taken across its "clear line" and beyond the specific "sentence of life without parole," there would have to be a means to first determine exactly what sentences cross that line, which would have to be more objectively calculated than "life expectancy," and what procedures would render it constitutional.[7] Significantly, it is not the length of the sentence given to a juvenile convicted of a nonhomicide offense that could potentially violate *Graham*. It is the fact that Florida currently has no means to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The *Graham* 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 warrant that punishment. Because "[t]he age of 18 is the point

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[7] As the Fifth District observed, there is language in the *Graham* majority opinion suggesting that no matter the number of offenses or victims or types of crimes, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, so it makes no logical difference whether the sentence is life or 107 years. *Henry*, 82 So.3d at 1089.

> where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper,* 543 U.S., at 574, 125 S.Ct. 1183.
>
> 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. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving incarceration for the duration of their lives. 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.

130 S.Ct. at 2030. Thus, Henry's aggregate sentence of ninety years for eight felonies does not per se violate the constitution. Henry's aggregate term merely sets the outside limit for the amount of time that he can potentially spend behind bars, subject to a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Resentencing for a shorter term is not required under *Graham*, and in fact, presents the converse of the procedure forbidden by *Graham*, which would be a determination from the outset that an offender **will be** fit to reenter society at some point. *Compare Graham*, 130 S.Ct. at 2029.

As a potential solution, Henry urges this Court to find that the statutes denying juvenile nonhomicide offenders access to parole hearings are unconstitutional as applied, so that juveniles can become parole eligible, thus providing an opportunity for meaningful review and compliance with the Eighth Amendment. At first blush and on the surface, this may be an appealing proposition, but there are several obstacles to and problems with this approach at this time. First, from a procedural standpoint, while Henry filed a motion challenging the constitutionality of section §921.002(1)(e) in the trial court, it was not supported by any legal argument, and thus not sufficient to preserve an as applied constitutional challenge. It is well settled that the constitutional application of a statute to a particular set of facts must be raised at the trial level. *Trushin v. State,* 425 So.2d 1126 (Fla. 1982). This Court has applied a procedural bar to a variety of Eighth Amendment claims, including claims that a sentence is unconstitutionally cruel under the Eighth Amendment. *See Rigterink v. State,* 66 So.3d 866, 897 (Fla. 2011); *Gore v. State,* 964 So.2d 1257, 1276 (Fla. 2007); *Perez v. State,* 919 So.2d 347, 377 (Fla. 2005); *Fotopolous v. State,* 608 So.2d 784, 794 n.7 (Fla. 1992).

Further, as argued by the State in the district court, Henry failed to meet his burden of alleging or demonstrating reversible error. *See, e.g.,* § 924.051(7), Fla. Stat. (2007) (party

challenging judgment has burden of demonstrating prejudicial error and a conviction may not be reversed absent an express finding that prejudicial error occurred); *Shere v. State*, 742 So. 2d 215, 217 n. 6 (Fla. 1999) (finding that issues raised in appellate brief which contain no argument are deemed abandoned). Finally, Henry has set forth no specific legal argument in the instant case demonstrating how this statute is unconstitutional as applied to him. Statutes are presumed constitutional, and the party challenging the constitutionality bears the burden of demonstrating that it is invalid, and a conclusory argument cannot form a basis for reversal. *Newell v. State,* 875 So.2d 747 (Fla. 2d DCA 2004). Henry has failed to meet this burden, so this issue is not properly before this Court at this time.

Respondent also submits that this Court cannot find that a statute is unconstitutional simply because it may provide a solution to a problem. The statute must actually be unconstitutional. Respondent also notes that this would potentially provide an overly broad solution to a limited problem. Henry asserts that if the existing parole system is opened to include all juvenile non-homicide offenders sentenced as adults, then Florida will be in compliance with the Eighth Amendment (MB at 40). However, not all juveniles sentenced as adults receive an extensive term of years, and there is no need to make them all parole eligible.

All of the district courts that have wrestled with this issue have determined that they were not in a position to address the concerns raised by *Graham*, and that this is a matter best left to resolution by the legislature. Due to the absence of any legislative remedy up to this point, it may well fall to this Court to determine a proper course of action should it find that *Graham* applies to lengthy and aggregate term-of-years sentences. The implementation of a new procedural rule may provide a solution. *See e.g., Satz v. Perlmutter,* 379 So.2d 359, 360 (Fla. 1980)("Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights."). However, any changes to implement the *Graham* holding must be carefully considered and evaluated so as to not create additional issues.

Respondent submits that a number of factors must be considered, and the following may not be an exhaustive list. First, there would have to be a determination of what length of sentence would require a *Graham* "opportunity for release," because as demonstrated, *Graham* does not limit the term of years that may be imposed at the outset, nor does it require eventual release. This would have to have a more objective basis than "life expectancy." Next, it would have to be determined at what point during that overall term of years a juvenile nonhomicide offender would be entitled to this "opportunity for release," and the extent

of that opportunity. Considerations within this factor may include any minimum mandatory sentences imposed, as well as sentences imposed in other cases that the offender may be serving.

It would also have to be determined what form of potential release, if deemed appropriate, satisfies *Graham*, yet also takes into consideration society's interests.[8] It appears that under *Graham*, release on parole is sufficient, and Respondent would note that this is far from an unlimited release, and carries with it supervision, as well as rules and regulations that if not followed, may result in a return to incarceration. In this respect, Respondent submits that the Court could perhaps limit any form of release to the conversion of a term-of-years sentence to lifetime probation. This would allow the offender the opportunity to demonstrate that his or her rehabilitation and maturity was genuine, and that the decision to return them to society was correct. Those unable to remain free without reoffending would be subject to revocation proceedings, while the successful candidate may be able to eventually petition the court for termination of their probation.

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[8] Respondent asserts the penological justifications of retribution, deterrence and incapacitation become relevant at this point, because any initial judgment that the offender was "incorrigible" may have been corroborated by prison behavior and failure to mature. *See Graham,* 103 S.Ct. at 2029. As that Court stated, "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030.

With these considerations in mind, a procedural mechanism would have to be developed to implement them. A new rule of criminal procedure, such as a new subsection to Rule 3.800, could provide that mechanism, as long as it remained procedural rather than substantive. Again, a number of factors would have to be considered, including time frames and the number of applications that could be made, rights that an applicant would be entitled to, such as the assistance of counsel and extent of appellate review, if any (to both parties), as well as factors to be considered by the trial court in reaching a decision, and the required contents of any order granting or denying relief.

Finally, Respondent would note that if a remedy is required, relief need not be immediate. There certainly must be consequences for these juvenile nonhomicide offenders, and under no interpretation of *Graham* could it be said that Henry is entitled to immediate review or release, nor does he claim such.[9] Henry does

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[9] 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. Some, like Henry, acted alone, or Gridine, pulled the trigger. *See, Smith, supra* (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, supra* (16 year, 10 month old appellate was convicted of attempted first degree murder, armed burglary, and armed robbery); *Manuel, supra* (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, supra* (13 year-old appellant convicted of eighteen offenses - two counts of armed kidnapping,

state that this judgment must be made not at the outset (which is true under *Graham*), but over the course of several years, as the juvenile offender ages, to determine whether he or she can demonstrate maturation and rehabilitation sufficient to justify release (MB at 22). In this respect, Respondent would note that Henry was resentenced three years after his offenses, and his statement at that proceeding demonstrated anything but maturity and rehabilitation. It must be remembered that Henry acted alone in his crime spree of eight violent felonies, and took the stand in his defense claiming that he was the victim. His belief several years after this, that staying in prison for more than five or ten years is not going to change what happened, will ruin his life and thwart his plans to put this all behind him and return to Jamaica and join the army, comes much closer to demonstrating that he may

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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 a deadly weapon); *Young, supra* (Young was fourteen and fifteen years old when he committed a series of four armed robberies); *Guzman, supra* (Guzman committed multiple violent crimes at the age of fourteen); *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; *Mediate, supra* (defendant, while still a minor, committed the crimes of kidnapping and four counts of sexual battery); *Johnson, supra* (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).

just be one of those juvenile offenders who is deserving of the extended term of incarceration that was imposed.

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 Merits Brief of Respondent has been furnished by email to counsel for Petitioner, Peter D. Webster, pwebster@carltonfields.com, David L. Luck, dluck@carltonfields.com, and Christopher Corts, cbcorts@carltonfields.com, this 9th day of May, 2013.

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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IN THE SUPREME COURT OF FLORIDA

LEIGHDON HENRY,

Petitioner,

v. CASE NO. SC12-578

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

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82 So.3d 1084, 37 Fla. L. Weekly D195
(Cite as: 82 So.3d 1084)

District Court of Appeal of Florida,
Fifth District.
Leighdon HENRY, Appellant,
v.
STATE of Florida, Appellee.

Nos. 5D08–3779, 5D10–3021.
Jan. 20, 2012.
Rehearing Denied Feb. 24, 2012.

Background: Defendant was convicted in the Circuit Court, Orange County, Julie H. O'Kane, J., of sexual battery, kidnapping, robbery, carjacking, and burglary of a dwelling, arising out of acts against a single victim when he was 17 years of age. Defendant appealed.

Holding: The Fifth District Court of Appeal, Griffin, J., held that defendant's aggregate term-of-years sentence totaling 90 years in prison was not unconstitutionally excessive.

Affirmed.

West Headnotes

Sentencing and Punishment 350H ⚿345

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk340 Presence of Defendant
350Hk345 k. Voluntary absence and waiver. Most Cited Cases

Sentencing and Punishment 350H ⚿1508

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(E) Excessiveness and Proportionality of Sentence
350Hk1508 k. Cumulative or consecutive sentences. Most Cited Cases

Defendant's aggregate term-of-years sentence totaling 90 years in prison, of which he would be required to serve at least 76.5 years without the possibility of parole, for multiple felonies committed when he was 17 years of age, including sexual battery with a deadly weapon or physical force, kidnapping with intent to commit a felony with a firearm, robbery, carjacking, and burglary of a dwelling, was not unconstitutionally excessive under the Eighth Amendment. U.S.C.A. Const.Amend. 8.

***1085** Leighdon Henry, Jasper, pro se.

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Gerard F. Glynn, Barry University School of Law, Orlando, Sonya Rudenstine, Gainesville, and Michael Ufferman, Tallahassee, Amici Curiae of The Juvenile Life Without Parole Defense Resource Center and The Florida Association of Criminal Defense Lawyers in Support of Appellant Henry.

GRIFFIN, J.

Leighdon Henry ["Henry"] *pro se* appeals 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. We find no error and affirm without comment on all issues except one. Henry contends that the sentences he received violate the constitutional prohibition against cruel and unusual punishment in light of the United States Supreme Court's decision in *Graham v. Florida,* —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). At the time of his offenses, Henry was seventeen years old.

Henry's convictions and sentences arose from the following facts: The victim entered her apartment and found her sliding door had been opened.

She saw a stranger, Henry, standing in the hallway. She tried to run, but he grabbed her from behind, causing her to fall and injure her face. Henry put his hand over her mouth and told her to be quiet. He then showed her a gun and told her to get up. He took her into her bedroom, showed her the gun and slapped her face. He licked her genitals, penetrated her vagina and anus and put his penis in her mouth. He then made her shower. Henry took food from the victim's kitchen and forced her to take him to an ATM machine and withdraw money. The victim was able to get away after they left the ATM.

At the time of his sentencing on October 17, 2008, the trial court found that Henry qualified as a sexual predator, and sentenced him as follows: Counts I, II, & III (sexual battery with a deadly weapon or physical force)—natural life on each count, Count V (kidnapping with intent to commit a felony)—thirty years, Count VI (robbery)-fifteen years, Count VII (carjacking)—thirty years, Count VIII (robbery) fifteen years, Count IX (burglary of a dwelling)—fifteen years, and Count X (possession of 20 grams or less of cannabis (marijuana)—364 days in jail with credit for 364 time served. Counts I, II, III, V, and VI were ordered to run concurrently with each other; Counts VII, VIII, and IX were ordered to run consecutively with each other as well as consecutively to Counts I, II, III, V, and VI; and Count X was ordered to run concurrently to Count I. Thereafter, on October 20, 2008, the trial court entered an order, nunc pro tunc, correcting sentencing with respect to ***1086** Count V, in which it directed that no minimum mandatory be imposed, pursuant to the jury verdict.

Henry filed a notice of appeal on October 24, 2008. Thereafter, Henry filed a rule 3.800(b) motion, and an amended rule 3.800(b) motion, to correct sentencing error, in which he argued that the imposition of life sentences constituted cruel and unusual punishment under *Graham.* After conducting a hearing, the trial court granted Henry's motion and entered an order re-sentencing Henry on the sexual battery counts to thirty years on each count concurrent to each other, but consecutive to the remaining counts. Thus, Henry was sentenced to a total of ninety years in prison. In all other respects, the sentencing remained the same.

In this appeal, Henry contends that his current sentence constitutes a *de facto* sentence of life without the possibility of parole and that such a sentence meets the test of cruel and unusual punishment under *Graham.* Although the time that Henry is to serve can be shortened through incentive and meritorious gain-time, under Florida law, he must serve eighty-five percent; therefore, Henry should serve at least 76.5 years.[FN1] Henry has filed a National Vital Statistics Report as supplemental authority, suggesting that his life expectancy at birth by race and sex is 64.3 years. Henry argues that because he is going to have to serve more years in prison than, statistically, he is expected to live, his sentence is an unconstitutional *de facto* life sentence.

FN1. Section 921.002(1)(e), Florida Statutes, provides:

> The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85 percent of his or her term of imprisonment as provided in s. 944.275(4)(b) 3. The provisions of chapter 947, relating to parole, shall not apply to persons sentenced under the Criminal Punishment Code.

In *Graham,* the United States Supreme Court addressed the issue of "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." 130 S.Ct. at 2017–18. The State of Florida imposed such a sentence, and the defendant "challenge[d] the sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause, made applicable

to the States by the Due Process Clause of the Fourteenth Amendment." *Id.* at 2018. After the defendant was found to have "violated his probation by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity," he was adjudicated guilty of the earlier charges of armed burglary and attempted armed robbery for which he had been serving probation. *Id.* at 2019–20. The trial court "sentenced him to the maximum sentence authorized by law on each charge: life imprisonment for the armed burglary and 15 years for the attempted armed robbery." *Id.* at 2020. Importantly, "[b]ecause Florida ... abolished its parole system, *see* Fla. Stat. § 921.002(1)(e) (2003), a life sentence gives a defendant no possibility of release unless he is granted executive clemency." *Id.*

The Supreme Court found:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity***1087** to obtain release before the end of that term.

Id. at 2034. With respect to the defendant, the Court said:

> Terrance Graham's sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Id. at 2033. The Court noted "the global consensus against the sentencing practice in question." *Id.* It also noted that it "has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* at 2027. The Court observed that "[l]ife without parole is an especially harsh punishment for a juvenile," explaining:

> Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only. *See Roper,*[FN2] *supra,* at 572, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; *cf. Harmelin,*[FN3] *supra,* at 996, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 ("In some cases ... there will be negligible difference between life without parole and other sentences of imprisonment—for example, ... a lengthy term sentence without eligibility for parole, given to a 65–year–old man"). This reality cannot be ignored.

FN2. *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

FN3. *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

Id. at 2028.

In his dissenting opinion, Justice Thomas discussed the evidence of the frequency of the sentencing practice at issue. *Id.* at 2052 (Thomas, J., joined by Scalia, J., and joined in Parts I and III by Alito, J., dissenting). He noted: "[I]t seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)," and asserted: "It is difficult to argue that a judge or jury imposing such a long sentence—which effectively denies the offender any material opportunity for parole—would express moral outrage at a life-without-parole sentence." Id. at 2052 n. 11. Justice

Alito, in his dissenting opinion, pointed out that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole," and that "[i]ndeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional." *Id.* at 2058 (Alito, J., dissenting).

The facts here are different from those in *Graham.* Here, unlike the defendant in Graham, Henry did not (in the end) receive a life sentence without parole for a nonhomicide offense; he received a lengthy aggregate term-of-years sentence without the possibility of parole for multiple nonhomicide offenses. This precise issue has not yet been addressed by a Florida court, although, very recently in two cases, the First District Court of Appeal ***1088** did address the issue of a lengthy term-of-years sentence imposed on a juvenile in *Gridine v. State,* —— So.3d ——, 2011 WL 6849649 (Fla. 1st DCA 2011) and *Thomas v. State,* 78 So.3d 644 (Fla. 1st DCA 2011). In *Gridine,* the sentence at issue was seventy years for attempted first degree murder, and in *Thomas,* the sentences were concurrent fifty years for armed robbery and aggravated battery. In neither did the First District find a constitutional violation based on *Graham. See also Manuel v. State,* 48 So.3d 94, 98 n. 3 (Fla. 2d DCA 2010).

Courts in other jurisdictions that have considered this issue have arrived at inconsistent conclusions. California has seen a significant split among its intermediate appellate courts on the application of *Graham* to lengthy term-of-years sentences.

In *People v. Mendez,* 188 Cal.App.4th 47, 114 Cal.Rptr.3d 870, 873 (Cal.App.2010), Division 2 of California's Second District Court of Appeal, applied the holding in *Graham* to a lengthy term-of-years sentence that it characterized as a *de facto* life sentence without the possibility of parole. Months later in *People v. Caballero,* 191 Cal.App.4th 1248, 119 Cal.Rptr.3d 920, 926 (Cal.App.2011), Division 4 of California's Second District Court of Appeal, disagreed with the holding in *Mendez,* stating that it "decline[d] to follow *Mendez's* holding that the principles stated in *Graham* bar a court from sentencing a juvenile offender to a term-of-years sentence that exceeds his or her life expectancy." Thereafter, in *People v. Ramirez,* 193 Cal.App.4th 613, 123 Cal.Rptr.3d 155, 165 (Cal.App.2011), Division 4 of California's Second District Court of Appeal, adhered to the view in *Caballero.* However, in *People v. J.I.A.,* 196 Cal.App.4th 393, 127 Cal.Rptr.3d 141, 149 (Cal.App.2011), Division 3 of California's Fourth District Court of Appeal, declined to follow *Caballero,* concluding that the defendant's sentence was cruel and unusual punishment under *Graham* and *Mendez* where: "[a]lthough [the defendant's] sentence [was] not technically an LWOP ["life without parole"] sentence, it [was] a de facto LWOP sentence because he [was] not *eligible* for parole until about the time he [was] expected to die." Again, in *People v. De Jesus Nunez,* 195 Cal.App.4th 414, 125 Cal.Rptr.3d 616, 618 (Cal.App.2011), Division 3 of California's Fourth District Court of Appeal, agreed with *Mendez* and disagreed with *Ramirez,* stating that it "perceive[d] no sound basis to distinguish *Graham's* reasoning where a term of years beyond the juvenile's life expectancy is tantamount to an LWOP term." The California Supreme Court recently granted review of these decisions. *See People v. Caballero,* 123 Cal.Rptr.3d 575, 250 P.3d 179 (2011), *People v. Ramirez,* 128 Cal.Rptr.3d 271, 255 P.3d 948 (2011) , and *People v. Nunez,* 128 Cal.Rptr.3d 274, 255 P.3d 951 (2011).

Unlike California, Georgia courts are, so far, consistent in their view that *Graham* is not implicated in a term-of-years sentence. *See Adams v. State,* 288 Ga. 695, 707 S.E.2d 359 (2011) (holding that sentence of mandatory twenty-five years followed by life on probation for aggravated molestation of a four-year-old child does not implicate categorical Eighth Amendment restriction under *Graham,* nor is it grossly disproportionate for particular

crime); *Middleton v. State,* 313 Ga.App. 193, 721 S.E.2d 111 (Ga.Ct.App.2011) (determining that aggregate sentence of thirty years without parole for armed robbery, two counts of aggravated assault, kidnapping and theft after sexual assault of a fifty-four-year-old woman and theft of her car and purse did not implicate *Graham* because the defendant received a term-of-years sentence).

***1089** The Arizona Court of Appeals also recently considered the application of *Graham* in a case involving convictions of six counts of arson of an occupied structure, one count of attempted arson, fifteen counts of endangerment, seven counts of criminal damage and two counts of arson of property, which, with a combination of enhanced and consecutive sentences, totaled an aggregate of 139.75 years. *State v. Kasic,* 265 P.3d 410 (Ariz.Ct.App.2011). The court rejected the "de facto life sentence" argument, saying that the *Graham* decision made clear that it applied only to juvenile offenders sentenced to life without parole for non-homicide offenses. The court also pointed out that Kasic was convicted of thirty-two felonies and the longest sentence Kasic received for any one offense was 15.75 years.

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. [FN4] At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, 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 victims 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.[FN5] 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 that is. We conclude that Henry's aggregate term-of-years sentence is not invalid under the Eighth Amendment and affirm the decision below.

FN4. One of the underlying premises of *Graham,* that juveniles, as a class, spend more time incarcerated than do adults because "life" for a juvenile is longer than "life" for an adult, breaks down when term-of-years sentences come into play.

FN5. *But see U.S. v. Mathurin,* 2011 WL 2580775 (S.D.Fla. June 29, 2011).

AFFIRMED.

ORFINGER, C.J., and PALMER, J., concur.

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