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IN THE SUPREME COURT OF FLORIDA

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

LEIGHDON HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

______________________________ /

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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CITATION CONVENTIONS

In this brief, the following conventions are used to cite the record materials designated by the Clerk of the Fifth District Court of Appeal:

Fifth DCA Designation	Citation Convention
1 Volume of Record on Appeal	(R. Page)
4 Volumes of Trial Transcript	(T. Vol.:Page)
2 Volumes of Transcript to Record	(TR. Vol.:Page)
5 Volumes of Supplemental Index to Record[1]	(SR. Vol.:Page)
2 Volumes of 3.800 Index to Record	(3.800 R. Vol.:Page)
1 Volume of Index to Record	(IR. Page)

In addition, Petitioner has cited the proposed, agreed-to Supplemental Record filed along with this brief as follows:

Petitioner's Designation	Citation Convention
Petitioner's 02-27-2013 Supplemental Record	(PSR. Page)

Unless otherwise noted, all emphasis is supplied.

[1] Because each volume's name does not necessarily correspond with the order in which the Supplemental Index was actually compiled, we have referred to each volume, in ascending order, as follows: **Volume I**: Supplemental Index to Record (pp. 263-396); **Volume II**: Supplemental Index to Record Volume I (pp. 397-579); **Volume III**: Supplemental Index to Record (pp. 580-618); **Volume IV**: Supplemental Index to Record – Transcript (pp. 1-66); **Volume V**: Fifth Supplemental Transcript to Record (pp. 619-40).

STATEMENT OF THE CASE AND FACTS

Approximately two months after his 17th birthday, Petitioner, Leighdon Henry, entered a woman's apartment, sexually assaulted her while armed with a firearm, and then forced her to drive him to a nearby ATM to withdraw $790 from her checking account. (T. 2:16-84, 90-106; T. 3:240, 282). Mr. Henry also took the woman's purse and mobile phone and several items from her kitchen (a bottle of champagne, three boxes of macaroni and cheese, and a can of chicken broth). (T. 2:29, 36, 48, 104, 162-64, 171; T. 3:238). After they left the ATM, the woman was able to escape, but her car remained with Mr. Henry. (T. 2:44-49).

The next day, after receiving an anonymous tip, Orlando-area police arrested Mr. Henry at his residence. (T. 2:175-86; T. 3:230-40, 244-451). At the time of arrest, Mr. Henry was in possession of a small amount of marijuana. (T. 2:175-86, 195-97; T. 3:237). The police were ultimately able to recover the woman's abandoned car and purse, a firearm, approximately $500 of the $790 withdrawn from the ATM, and the items removed from the woman's kitchen. (T. 2:161-66, 169-72; T. 3:231-38, 244-251). Following arrest, Mr. Henry was committed to State custody as a juvenile. (TR. 1:24-25).

The State, however, filed a motion to transfer Mr. Henry's case from juvenile to adult court pursuant to section 985.227, Florida Statutes (2006),[2] which motion was granted. (TR. 1:28-69). As a result of this sequence of offenses involving a single victim, Mr. Henry was tried and convicted in adult court of eight felonies and one misdemeanor: three counts of sexual battery with a deadly weapon or physical force; one count of kidnapping with intent to commit a felony (with a firearm); two counts of robbery; one count of carjacking; one count of burglary of a dwelling; and one count of possession of 20 grams or less of cannabis. (TR. 1:179-96; TR. 2:218-23; IR. 11-30).

At the time of sentencing on October 17, 2008, Mr. Henry was 18 years, 9 months, and 2 weeks of age. (3.800 R. 1:33). Following a hearing, the trial court determined Mr. Henry qualified as a sexual predator and sentenced him as follows:

- Three sexual-battery counts – natural life in prison for each count;
- One kidnapping count – 30 years in prison;
- Two robbery counts – 15 years in prison for each count;
- One carjacking count – 30 years in prison;
- One burglary count – 15 years in prison; and
- One cannabis-possession count – 364 days in jail.

[2] Subsequently renumbered as section 985.557, Florida Statutes.

(TR. 2:213-14, 224-41, 245-50; IR. 38-59; SR. 1:369-83). The trial court ordered the sexual-battery and kidnapping counts and one of the robbery counts to run concurrently with each other, and the carjacking and burglary counts and remaining robbery count to run consecutively to each other and to the other sentences. (TR. 2:227-41; IR. 41-49; 54-59). The court also awarded Mr. Henry 1 year and 225 days of jail-time credit, which satisfied the cannabis-possession sentence. (*Id.*; *see also* IR. 35, 58).

In total, for a sequence of offenses that he committed as a juvenile against a single victim, Mr. Henry received a life sentence plus an additional 60 years in prison. (SR. 1:377-83). Because Florida has abolished its parole system for adults and juveniles sentenced under the Criminal Punishment Code, Mr. Henry's sentences necessarily offered no opportunity for parole. (3.800 R. 1:10). In seeking these sentences, the State asserted that Mr. Henry's juvenile status was irrelevant; that the trial court needed to guarantee Mr. Henry would never be released from prison; and that Mr. Henry was irredeemably dangerous "and that's not going to change in the next ten, twenty or thirty years." (SR. 1:369-70).[3] The trial court agreed, stating that the maximum penalty of life was "the only appropriate penalty." (SR. 1:377-82).

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[3] Before trial, the State offered Mr. Henry a plea bargain of 30 years total for all offenses. (SR. 1:371-72).

Mr. Henry filed a notice of appeal with the Fifth District Court of Appeal on October 24, 2008. (R. 1-15; TR. 2:251). After his public defender filed a brief under *Anders v. California*, 386 U.S. 738 (1967), and withdrew, Mr. Henry proceeded *pro se*. (R. 16-18). While his appeal was pending, the United States Supreme Court issued *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *Graham*, the Court held that the Eighth and Fourteenth Amendments to the United States Constitution preclude the states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole. *Id.* at 2019-34.

Based on *Graham*, while his appeal was still pending and before the district court ruled on his counsel's motion to withdraw, Mr. Henry's public defender filed a motion and amended motion with the trial court pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). (3.800 R. 1:1-4, 7-12; *cf.* SR. 5:625).[4] Mr. Henry requested that the trial court resentence him on all counts, contending that his life sentences on the sexual-battery counts and the additional, combined 60-year sentence on the remaining counts were cruel and unusual punishment. (*Id.*).

Additionally, Mr. Henry made an oral motion, and the public defender filed a written motion on his behalf, requesting that the trial court declare section 921.002(1)(e), Florida Statutes, unconstitutional as applied to him.

[4] Rule 3.800(b)(2) permits such motions to be filed while an appeal is pending.

Specifically, he contended that *Graham* entitles him to parole consideration, but that under this statutory subsection, there is "no parole in Florida for crimes committed on or after October 1, 1998." (3.800 R. 1:19; 32-36). The trial court denied the oral and written motions to declare section 921.002(1)(e) unconstitutional, but granted the 3.800(b)(2) motion exclusively as to the life sentences imposed for the sexual-battery counts. (3.800 R. 1:19, 37). Mr. Henry separately appealed to the Fifth District the order denying his constitutional challenge to section 921.002(1)(e), which the Fifth District subsequently consolidated with the already-pending appeal. (R. 92, 124).

The trial court resentenced Mr. Henry to 30 years in prison on each sexual-battery count, to run concurrently with each other but consecutively to the remaining counts. (3.800 R. 1:6, 14-31). Thus, following resentencing, Mr. Henry – whose life expectancy is a little over 64 years – received a combined sentence of 90 years in prison without the possibility of parole. *Henry v. State*, 82 So. 3d 1084, 1086 & n.1 (Fla. 5th DCA 2012); (3.800 R. 1:6, 14-31; PSR. at 25).

Later, while his appeal remained pending, Mr. Henry filed a *pro se* motion under *Graham*, requesting that the Fifth District relinquish jurisdiction to the trial court with directions to correct his "patently illegal" 90-year resentence. (R. 107-110). The Fifth District denied this request and imposed a deadline for filing and serving Mr. Henry's *pro se* initial brief. (R. 110).

Under Florida law, assuming he receives the maximum amount of available meritorious and incentive gain-time, Mr. Henry must serve at least 85 percent of his 90-year resentence – a minimum total of 76.5 years in prison. *Henry*, 82 So. 3d at 1086 & n.1 (citing § 921.002(1)(e), Fla. Stat.). Mr. Henry's age at the time of sentencing (18 years) combined with his minimum total sentence (76.5 years), means he will not be eligible for release until he is 94.5 years of age – which is 30.2 years (three decades) beyond his life expectancy of 64.3 years. *Id.*; *see also* (3.800 R. 1:33; PSR. at 25). As Mr. Henry stated in his *pro se* reply brief below, "the only release that [he] can look forward to is dying in prison." (Fifth DCA Reply Br. at 2).

Despite these facts and the decision in *Graham*, the Fifth District held that Mr. Henry's 90-year combined resentence – imposed without any opportunity for parole – passed constitutional muster. It did so by reasoning that, technically, "[Mr.] Henry did not (in the end) receive a life sentence without parole for a nonhomicide offense"; rather, based on a sequence of offenses involving a single victim, he received a lengthy term-of-years sentence that exceeds his life expectancy. 82 So. 3d at 1087-88. The Fifth District concluded by holding that "[Mr.] Henry's aggregate term of years sentence is not invalid under the Eighth Amendment." *Id.* at 1089.

After obtaining pro-bono counsel, Mr. Henry sought review in this Court.

SUMMARY OF THE ARGUMENT

For purposes of criminal sentencing, children are different. Drawing a clear analytical distinction between juvenile and adult offenders, the United States Supreme Court in *Graham v. Florida*, 130 S. Ct. 2011 (2010), categorically held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the states from sentencing juvenile non-homicide offenders to life in prison without providing realistic, meaningful opportunities to seek rehabilitation-based release. *Graham*'s rule and rationale apply equally to juveniles sentenced to *de facto* life-without-parole sentences – *i.e.*, sentences that exceed the juvenile non-homicide offender's life expectancy without providing any parole consideration. The particular terminology used and the specific term of years imposed do not control. Rather, it is a non-homicide offender's juvenile status combined with the absence of parole opportunities within his or her lifetime that trigger *Graham*.

This is especially apparent as to Mr. Henry. The State imposed Mr. Henry's combined 90-year resentence for non-homicide offenses that he committed against a single victim, during a single night, when he was only 17. While these offenses were admittedly very serious, Mr. Henry was a child in the eyes of the law. Because Florida has largely abolished its parole system as to adult offenders (and has applied that same law to juveniles sentenced as adults), Mr. Henry's sentence

fails to provide any opportunity for release based on demonstrated maturity and rehabilitation. Indeed, given that his sentence exceeds his life expectancy by three decades, it is a virtual certainty that Mr. Henry will die in prison. Thus, despite ostensibly being resentenced pursuant to *Graham*, the Fifth District's decision below ensures that Mr. Henry will never receive the parole opportunity contemplated by *Graham.*

Therefore, Mr. Henry's 90-year resentence falls squarely within the ambit of *Graham* and violates the Eighth Amendment and its Florida cognate. The only remedy that ensures *Graham* compliance is to reopen Florida's existing parole system to juvenile non-homicide offenders. While the State is not required to release offenders like Mr. Henry, it must provide them realistic, meaningful opportunities to seek release within their lifetimes. This Court should reverse the decision below and hold unconstitutional, as applied, those Florida Statutes that preclude parole eligibility for juvenile non-homicide offenders.

ARGUMENT

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

On May 17, 2010, the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the states from sentencing juvenile non-homicide offenders to die in prison with no possibility of

parole. *Graham v. Florida*, 130 S. Ct. 2011, 2021-34 (2010). In issuing this decision, the Court left to the states, "in the first instance," the responsibility for determining "the means and mechanisms for compliance." *Id.* at 2030. More than two years after the Court's decision, the Florida Legislature and Governor have not provided any mechanism for complying with *Graham*.[5] It is time for this Court to act and ensure that the state which caused *Graham* complies with its mandate.

Every year, as many as 200,000 U.S. juveniles are prosecuted as adults and sentenced to prison terms served side-by-side with hardened adult convicts. Mary Berkheiser, *Death Is Not So Different After All: Graham v. Florida and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 45 (2011); Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 106-08 (2010). Through its various direct-filing and waiver laws, "Florida has been a national leader" in contributing to this number.

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[5] For example, during the 2011 Florida legislative session, *Graham*-compliance legislation died in committee despite the fact that the Florida Prosecuting Attorneys Association supported the proposed legislation. Jeff Kunerth, *"Graham Law" Would Replace Life Without Parole for Juveniles*, ORLANDO SENTINEL, Apr. 12, 2011, *available at* http://articles.orlandosentinel.com/2011-04-12/features/os-life-without-parole-graham-20110412_1_terrance-graham-parole-juveniles (last accessed Feb. 10, 2013) (discussing 2011 Senate Bill 160 and 2011 House Bill 29); *see also* http://www.flsenate.gov/Session/Bill/2011/0160; http://www.flsenate.gov/Session/Bill/2011/0029 (last accessed Feb. 10, 2013). Proposed *Graham*-compliance legislation suffered the same fate during the 2012 legislative session. *See* http://www.flsenate.gov/Session/Bill/2012/0212; http://flsenate.gov/Session/Bill/2012/0005 (last accessed Feb. 10, 2013).

Arya, *supra*, 71 LA. L. REV. at 106. Indeed, "Florida – where most of the *Graham* inmates are housed – leads the nation in incarceration rates and stringency in law and sentencing, making it the most punitive of the 50 states as measured by more than 40 variables." Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51, 82-83 (2012). "Florida is clearly the most zealous state for sentencing juveniles to life without parole for" non-homicide offenses. Sally T. Green, *Realistic Opportunity For Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 2 (2011).

Florida's penchant for imposing this type of "cruel and unusual" punishment led to *Graham*. In fact, Florida has sentenced and incarcerated more *Graham* offenders than all other states combined. *See* 130 S. Ct. at 2023-26. Therefore, it is only fitting that this Court may now right this wrong for all of Florida's juvenile non-homicide offenders.

A. <u>Standard Of Review – *De Novo.*</u>

This case centers on the meaning of the Eighth Amendment's "cruel and unusual punishment" clause and its Florida cognate. In addition, it raises a remedies issue that requires this Court to hold unconstitutional (as applied) those Florida Statutes that preclude juvenile non-homicide offenders from parole eligibility. "The determination of a statute's constitutionality and the interpretation

of a constitutional provision are both questions of law reviewed *de novo*." *Garcia v. Andonie*, 101 So. 3d 339, 343 (Fla. 2012).

B. ***Graham* Requires The States To Provide Juvenile Non-Homicide Offenders With Realistic, Meaningful Opportunities To Demonstrate Rehabilitation And Seek Release Within Their Lifetimes.**

1. ***Graham*'s Analysis And Holding.**

The Eighth Amendment and article I, section 17 of the Florida Constitution both prohibit "cruel and unusual punishments." *See, e.g.*, *Ventura v. State*, 2 So. 3d 194, 198 n.4 (Fla. 2009) ("The prohibition against 'cruel or unusual punishment' present in [article I, section 17] '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 . . . .'").[6] *Graham* held that this prohibition – viewed through a lens of "the evolving standards of decency that mark the progress of a maturing society"[7] – categorically prohibits the states from sentencing juvenile non-homicide offenders to die in prison with no opportunity for parole. 130 S. Ct. at 2017-34. Under *Graham*, "juveniles" are those who commit such offenses before age 18. *Id.* at 2030.

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[6] Further, the Eighth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Robinson v. California*, 370 U.S. 660, 664-68 (1962).

[7] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)) (internal quotation marks omitted).

Building upon *Graham*, the Court recently held that mandatory life-without-parole (LWOP) sentences for homicides committed by juveniles also violate the Eighth Amendment. *Miller v. Alabama*, 132 S. Ct. 2455, 2460-75 (2012). As part of its rationale, the Court reiterated that, not only is "death different"[8] – but "children are different too":

> *Roper* [*v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth Amendment prohibits death sentences for juvenile offenders,] and *Graham* establish that **children are constitutionally different from adults for purposes of sentencing**. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments."
>
> . . . .
>
> Our decisions rested not only on common sense – on what "any parent knows" – but on science and social science as well. . . . [W]e [have] cited studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds – for example, in parts of the brain involved in behavior control. We reasoned that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his [or her] "deficiencies will be reformed."
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> . . . .
>
> . . . [T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

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[8] *See, e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("the penalty of death is different in kind from any other punishment"); *see also, e.g.*, *State v. Davis*, 872 So. 2d 250, 254-55 (Fla. 2004) (same recognition from this Court).

. . . .

> . . . [N]one of what [*Roper* and *Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific.
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> . . . .
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> . . . [Just as] "death is different," **children are different too**. Indeed, it is the odd legal rule that does not have some form of exception for children.

Miller, 132 S. Ct. at 2458-70 (some citations, quotation marks, and footnotes omitted); *see also generally* Berkheiser, *supra*, 36 VT. L. REV. 1; Stephen St. Vincent, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9 (2010).[9]

The Court also provided similar reasoning when holding that *Miranda* custody inquiries must account for the fact that the questioned person is under 18:

> A child's age is "far more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. . . . [T]he differentiating characteristics of youth are universal. . . . **Children cannot be viewed simply as miniature adults.**

J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403-04 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Yarborough v. Alvarado*, 541 U.S. 652, 674

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[9] *See also, e.g.*, Br. of the Sentencing Project as *Amicus Curiae* at 5-14, *Graham*, SCOTUS Case No. 08-7412; Br. of Juvenile Law Ctr., et al., as *Amici Curiae* at 2-20, *Graham*, SCOTUS Case No. 08-7412; Br. of Former Juvenile Offenders, et al., as *Amici Curiae* at 3-32, *Graham*, SCOTUS Case No. 08-7412.

On December 19, 2012, Petitioners Henry and Gridine jointly filed with this Court a motion for judicial notice accompanied by copies of all *amici* briefs submitted to the United States Supreme Court in *Graham*. This briefing is also *available at* http://www.scotusblog.com/case-files/cases/graham-v-florida/ (last accessed Feb. 10, 2013).

(2004) (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.)) (citations and internal divisions omitted).

Thus, the common theme drawn from *Graham* – which resonates throughout the United States Supreme Court's recent juvenile-justice case law – is that children are constitutionally distinct from adult offenders and must be treated as such. This overarching principle dictates the proper outcome here: "*Graham*'s . . . foundational principle [is] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2458; *see also, e.g.*, Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 464, 490 (2012) ("*Graham* is a case about how and why children are different from adults that states a constitutional principle with broad implications . . . . States are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults.").

Terrance J. Graham – like Mr. Henry – committed a series of felony offenses against the same victim. Specifically, Graham was charged with, and pled guilty to: (1) armed burglary with an assault or battery; and (2) attempted armed robbery, both stemming from his attempt as a 16-year-old to rob a Jacksonville barbeque restaurant. 130 S. Ct. at 2018-20. He initially received probation for those offenses. Graham, however, later reoffended by participating in several home-

invasion robberies, and thereby violated his probation. *Id.* As a result, the trial court sentenced him to life on the burglary count and 15 years on the attempted-robbery count, finding him – at the outset – to be forever irredeemable. *Id.* Graham's sentence was not explicitly designated "life without parole." Nevertheless, because Florida has largely abolished parole for adult offenders (and juveniles sentenced as adults), Graham's sentence was itself a *de facto* LWOP sentence with only the remote possibility of executive clemency. *Id.* at 2020 (citing § 921.002(1)(e), Fla. Stat. (2003)); *see also, e.g.*, *People v. De Jesús Nuñez*, 195 Cal. App. 4th 414, 418, 423 (Cal. 4th DCA 2011) (same recognition), *rev. dismissed*, 148 Cal. Rptr. 3d 499 (Cal. 2012) (decision approved in light of *People v. Caballero*, 282 P.3d 291 (Cal. 2012)).

Thus, *Graham* dealt not simply with a juvenile who committed multiple non-homicide offenses against a single victim (like Mr. Henry), but rather, a recidivist juvenile who later violated his probation by committing several additional, serious non-homicide felonies against different victims. *See* 130 S. Ct. at 2018-20. After the First District Court of Appeal upheld Graham's sentence and this Court declined to exercise its discretionary jurisdiction, the United States Supreme Court reversed, holding that the sentence violated the Eighth and Fourteenth Amendments. *Id.* at 2017-34.

The *Graham* Court initially framed the issue as "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. Later in its decision, however, the Court clarified what it meant by "life," recognizing that *Graham* involved "a categorical challenge to a **term-of-years sentence**," which guaranteed that Graham would "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." *Id.* at 2022, 2033. In other words, a "life" sentence is a lengthy term-of-years sentence measured by the juvenile offender's natural life. *See id.* Indeed, the Court reiterated its prior recognition that, in some cases, "there will be a negligible difference between life without parole and . . . a lengthy sentence without eligibility for parole," and emphasized that, as to juveniles, this "reality cannot be ignored." *Id.* at 2028 (quoting, in part, *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991)).

Because Graham's sentence raised a categorical challenge to a type of term-of-years sentence that guaranteed the relevant class of juvenile offenders would die in prison with no hope of release, the Court analyzed it under the categorical approach previously reserved for capital cases. 130 S. Ct. at 2022-23 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper*, 543 U.S. 551; *Kennedy v. Louisiana*, 554 U.S. 407 (2008)). This approach involves two parts: (1) consulting objective

indicia of society's standards to determine whether a national consensus exists against the sentencing practice; and (2) the Court's exercise of its independent judgment to determine whether the punishment at issue is "cruel and unusual." 130 S. Ct. at 2022-23, 2026.

In holding that juvenile, non-homicide LWOP sentences categorically violate the Eighth Amendment, the Court considered national and international norms, the distinct nature of juveniles when compared to adults, the stark contrast between homicide and non-homicide offenses, the severity of sentencing a juvenile to die in prison, and the ostensible penological justifications for such sentences. *See id.* at 2021-34. The Court first determined that a national consensus exists against sentencing juvenile non-homicide offenders to life without parole. While 37 states, the District of Columbia, and the federal government technically permit the punishment (because they allow some juvenile offenders to be sentenced as adults without "deliberate, express, and full legislative consideration" of whether those adult penalties are appropriate for children),[10] in practice, only 11 jurisdictions nationwide actually mete out this punishment, and 77 of the 123

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[10] For example, as *Graham* noted, "under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State acknowledged at oral argument that even a 5-year-old, theoretically, could receive such a sentence under the letter of the law." 130 S. Ct. at 2025-26; *see also* §§ 985.556, 985.557, 985.56, Fla. Stat. (2012).

juvenile offenders nationwide identified by the Court are incarcerated in just one state – Florida. *Id.* at 2023-26 (citing, *e.g.*, a 2009 study conducted by Florida State University Law Professor, Paolo G. Annino, et al., *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf (last accessed Feb. 10, 2013)).

The Court thus concluded that there was a clear national trend against sentencing juvenile non-homicide offenders to die in prison. *Graham*, 130 S. Ct. at 2024-26. It further concluded that "the United States now stands alone in a world that has turned its face against life without parole for juvenile nonhomicide offenders." *Id.* at 2034 (quotation marks omitted).[11]

Consistent with its emerging "children are different" doctrine, the Court exercised its independent judgment regarding the nature of the punishment by first considering the culpability of the category of offenders. *Id.* at 2026-28. The Court, relying on *Roper*, recognized that for purposes of sentencing, juveniles must be treated differently for at least three reasons. First, juveniles exhibit a "lack of maturity and underdeveloped sense of responsibility." *Graham*, 130 S. Ct. at 2026-27. Second, they "are more vulnerable or susceptible to outside pressures,

[11] *See also* Br. of Am. Bar Ass'n as *Amicus Curiae* at 20-22, *Graham*, SCOTUS Case No. 08-7412; Br. of Amnesty Int'l, et al., as *Amici Curiae* at 2-40, *Graham*, SCOTUS Case No. 08-7412.

including peer pressure." *Id.* Finally, their "characters are not as well formed," and thus, they "are more capable of change than adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* Indeed, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* Unlike adults, it "is even difficult for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* Therefore, "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult" because minors' character deficiencies are more subject to reform and rehabilitation. *Id.*[12]

With regard to the nature of non-homicide offenses, the Court 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

[12] *See also* Br. of the Am. Psychological Ass'n, et al., as *Amici Curiae* at 3-33, *Graham*, SCOTUS Case No. 08-7412; Br. of the Am. Med. Ass'n as *Amicus Curiae* at 2-32, *Graham*, SCOTUS Case No. 08-7412; Br. of J. Lawrence Aber, et al., as *Amici Curiae* at 10-36, *Graham*, SCOTUS Case No. 08-7412; Br. of Juvenile Law Ctr., et al., as *Amici Curiae* at 15-35, *Graham*, SCOTUS Case No. 08-7412; Br. of Council of Juvenile Correctional Administrators, et al., as *Amici Curiae* at 3-33, *Graham*, SCOTUS Case No. 08-7412; Br. of *Amici Curiae* Educators at 3-33, *Graham*, SCOTUS Case No. 08-7412; Br. of the Am. Ass'n of Jewish Lawyers and Jurists, et al., as *Amici Curiae* at 1-27, *Graham*, SCOTUS Case No. 08-7412.

murderers." *Graham*, 130 S. Ct. at 2027. Thus, the Court reasoned that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.*

As for the severity of sentencing a juvenile to die in prison with no hope of release, the Court recognized that this sentence shares many of the hallmarks of a death sentence. Such a sentence carries a "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile offender], he will remain in prison for the rest of his days." *Id.* (citation omitted). Further, none of the penological justifications recognized in Anglo-American law support such severe sentences for children. "A sentence lacking any penological justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028.

Because juveniles as a class are far less mature, responsible, and in control of their impulses, retribution is not a proportionate justification for sentencing juvenile non-homicide offenders to die in prison. *Id.* Further, "the same characteristics that render juveniles less culpable suggest that juveniles will be less susceptible to deterrence." *Id.* (ellipses omitted). Juveniles' "lack of maturity and underdeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions." *Id.* at 2028-29 (ellipses omitted). Thus, any deterrent

effect of holding them in prison for life as the result of non-homicide offenses is disproportionate to their level of culpability and understanding of their actions. *Id.*

Incapacitation fails as a justification for similar reasons:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . [I]ncorrigibility is inconsistent with youth. . . . Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations . . . .

Graham, 130 S. Ct. at 2029 (citations, internal divisions, and quotation marks omitted).

Finally, rehabilitation – the penological goal supporting parole – is inconsistent with sentences that require juvenile offenders to die in prison:

> The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.

Id. at 2030.

Based on the lack of penological justification, the limited culpability of juveniles, and the severity of sentences that require them to die in prison, the Court held that this sentencing practice constitutes "cruel and unusual punishment" in

violation of the United States Constitution. *Id.* at 2030-34. While the states are not required to release such offenders, they must provide them realistic, meaningful opportunities to seek release within their lifetimes:

> . . . [The states must] give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.
>
> . . . .
>
> 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 to obtain release before the end of that term.

Graham, 130 S. Ct. at 2030, 2034. The Court characterized this as a categorical rule that "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.* at 2032. This is a judgment that must be made, not at the outset, but over the course of several years, to determine, as the juvenile offender ages, whether he or she can demonstrate maturation and rehabilitation sufficient to justify release. *See id.* at 2030-34; *see also* Robert Smith, et al., *Redemption Song: Graham v. Florida and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 94 (2010) ("[T]he most significant aspect of [*Graham*] is the recognition that a once-and-for-all determination of an offender's capacity for change cannot be made at the onset of the sentence.").

2. Mr. Henry's *De Facto* Life-Without-Parole Resentence Denies Him Any Opportunity To Seek Release Based On Demonstrated Rehabilitation And Maturity And, Thus, Violates *Graham*.

(a) *Graham* applies to *de facto* life-without-parole sentences.

Graham squarely confronted a categorical challenge to a "term-of-years sentence" measured by Graham's natural life. *See* 130 S. Ct. at 2022, 2033. Regardless of the label the State might affix to a sentence, *Graham* established an Eighth Amendment ban on sentences that deny a juvenile non-homicide offender any opportunity within his or her lifetime to seek review and potential release based on demonstrated rehabilitation and maturity. *See id.* at 2019-34. The Eighth Amendment and its Florida cognate thus prohibit the State from imposing any sentence that effectively ensures a juvenile non-homicide offender will "die in prison without any meaningful opportunity to obtain release" based on demonstrated reform. *Id.* at 2030-34. Yet this is precisely what the State has done by resentencing Mr. Henry in a way that ensures he will not be eligible for release until – at the very earliest – he is 94.5 years of age, which is three decades beyond his life expectancy.

Given *Graham*'s rule and rationale, there can be no material distinction between a sentence formally designated LWOP and a lengthy term-of-years sentence that achieves the same result. 130 S. Ct. at 2032 (describing its holding

as creating "a categorical rule [that] gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform"); *see also, e.g.*, *People v. Ramirez*, 193 Cal. App. 4th 613, 628 (Cal. 2d DCA 2011) (Manella, J., dissenting) ("The Supreme Court's intention that . . . *Graham* be applied to any sentence which results in a juvenile nonhomicide offender dying of old age in prison without hope of release is inherent in the rationale given to support the decision.");[13] Drinan, *supra*, 87 WASH. L. REV. at 72 (*Graham* "precludes excessive term-of-years sentences, for they, too, deprive the juvenile offender of 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'").

Accordingly, "a sentence imposed upon a non-homicide offender is unconstitutional under *Graham* if it provides no meaningful opportunity for parole during the offender's lifetime, even if that sentence is a term-of-years sentence and not a formal [LWOP] sentence." *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (65-to-150-year sentence imposed for multiple non-homicide felonies violated *Graham* because it failed to provide any opportunity to seek parole); *see also Adams v. State*, No. 1D11-3225, --- So. 3d

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[13] Judge Manella's reasoning was later endorsed by the California Supreme Court in *People v. Caballero*, 282 P.3d 291, 293-96 (Cal. 2012), which recognized that *Graham* applies regardless of sentencing semantics. On remand from the California Supreme Court, Judge Manella's dissent became the majority position in *Ramirez*. *See People v. Ramirez*, B220528, 2012 WL 5921152, at *7 (Cal. 2d DCA Nov. 27, 2012).

----, 37 Fla. L. Weekly D1865, 2012 WL 3193932, at *1-*2 (Fla. 1st DCA Aug. 8, 2012) (same; 60-year sentence); *Floyd v. State*, 87 So. 3d 45, 45-47 (Fla. 1st DCA 2012) (same; 80-year sentence);[14] *United States v. Mathurin*, No. 09-21075-Cr., 2011 WL 2580775, at *1-*7 (S.D. Fla. June 29, 2011) (same; 307-year sentence); *People v. Morrison*, B235563, 2013 WL 453869, at *5-*6 (Cal. 2d DCA Feb. 7, 2013) (same; 80-year minimum sentence).[15]

In this context, "there is no basis to distinguish sentences based on their label." *Thomas*, 2012 WL 6678686, at *2; *cf. also Summer v. Shuman*, 483 U.S. 66, 83 (1967) ("[T]here is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."); *Yarborough*, 541 U.S. at 674 (Breyer, J., dissenting) (For purposes of deterrence, "why pretend that a child is an adult or that a blind

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[14] The First District's decisions in *Adams* and *Floyd* (along with several other district-court decisions involving *Graham* compliance) are currently pending in this Court. *See Adams*, SC12-1795 (stayed pending disposition of this case and *Gridine v. State*, SC12-1223); *Floyd*, SC12-1026 (same); *Walle v. State*, SC12-2333 (same); *Smith v. State*, SC12-1953 (same).

[15] Unpublished California appellate decisions are generally non-precedential under California law. *See* Cal. Rule of Ct. 8.1115(a)-(b). However, there does not appear to be any prohibition under Florida law against citing such decisions here as persuasive regarding the same or similar legal issue.

man can see?").[16] Were this Court to conclude otherwise, *Graham* would be meaningless, as Florida courts could avoid the Eighth Amendment simply by imposing term-of-years sentences that exceed the juvenile offender's life expectancy (rather than imposing express "life" sentences). *See, e.g.*, Ilona P. Vila, *Supporting the Florida Legal Community's Response to Graham v. Florida*, 17 BARRY L. REV. 153, 161 (2011) (discussing this problem); Drinan, *supra*, 87 WASH. L. REV. at 53, 72 (same). This is precisely what happened to Mr. Henry as a result of his resentencing.

Whether sentenced to *de jure* or *de facto* LWOP, a juvenile offender who did not kill or intend to kill will most assuredly die in prison without ever receiving a "meaningful," "realistic" opportunity to seek release based on "demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030, 2034. Regardless of label, each sentence denies the "possibility of parole[,] gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope." *Id.* at 2032.

None of the distinctive characteristics that render juvenile non-homicide offenders developmentally different from adults depend on the sentencing label chosen or the number of charges the State can bring based on a single series of

[16] A majority of the Court later adopted much of the reasoning provided by Justice Breyer in his *Alvarado* dissent. *See J.D.B.*, 131 S. Ct. at 2402-08.

felony offenses involving a single victim. Incorrigibility is inconsistent with youth because juveniles lack adult-level maturity and responsibility; have brains and impulse-control mechanisms that are still undergoing significant development; are subject to negative environments and influences from which they typically cannot extricate themselves; and, given proper support, are much more capable of rehabilitation and reform than adults. *Id.* at 2026-29; *cf. also, e.g.*, *State v. Smith*, Case Nos. 1D11-5671, 1D12-826, --- So. 3d ----, 2013 WL 646229, at *1-*3 (Fla. 1st DCA Feb. 22, 2013) (holding that *Graham* applies to life sentences imposed for juvenile non-homicide offenses as a result of probation violations committed as an adult).

The same is true regarding *Graham*'s analysis of purported penological justifications. Sentences (regardless of label) that guarantee a juvenile will die in prison for non-homicide offenses cannot be justified by retribution, deterrence, incapacitation, or rehabilitation. The transient hallmarks of youth – immaturity, impetuousness, and foolish risk taking – mean that a State cannot irrevocably write-off a juvenile offender who did not commit a homicide. 130 S. Ct. at 2028-34. This conclusion is unaffected by sentencing semantics:

> A term of years effectively denying any possibility of parole is no less severe than an LWOP term. Removing the "LWOP" designation does not confer any greater penological justification. Nor does tinkering with the label somehow increase a juvenile's culpability. Finding a determinate sentence exceeding a juvenile's life expectancy constitutional because it is not labeled an LWOP sentence is

> Orwellian. Simply put, a distinction based on changing a label . . . is arbitrary and baseless. . . . Labels are not controlling.

Nuñez, 195 Cal. App. 4th at 425, 428 (175-year combined sentence imposed for multiple felonies committed against multiple victims within a 36-hour period violated *Graham*) (internal division omitted), *rev. dismissed*, 148 Cal. Rptr. 3d 499 (Cal. 2012) (decision approved in light of *Caballero*, 282 P.3d 291).

Graham's sentence was not unconstitutional because of some sentencing formalism or talismanic incantation but, rather, because it carried no possibility for him to seek parole within his lifetime based solely on offenses that "he committed while a child in the eyes of the law." 130 S. Ct. at 2033. "This the Eighth Amendment does not permit." *Id.*

(b) The Fifth District's failure to apply *Graham* to Mr. Henry's 90-year resentence violates the Eighth Amendment and its Florida cognate.

The same is true here. *Graham* itself indicated that the Court's decision would apply categorically to all term-of-years sentences that guarantee a juvenile non-homicide offender will die in prison without ever having access to "meaningful," "realistic" opportunities to seek rehabilitation-based release. 130 S. Ct. at 2021-34. Mr. Henry's 90-year resentence following *Graham* falls directly into this category, and, thus, violates *Graham*'s mandate. The Fifth District erred in concluding otherwise.

Mr. Henry's age at the time of initial sentencing (18 years) combined with the minimum number of years he must serve (76.5 years), yields 94.5 years. This exceeds Mr. Henry's life expectancy of 64.3 years by three decades. Like Graham, Mr. Henry's sentence mandates that he will die in prison without so much as a single parole hearing.

Graham does not permit guaranteed discharge in a coffin. As reiterated in *Miller*, the message is clear: Juvenile offenders – even those who commit terrible crimes – are different, and must be treated as such. 132 S. Ct. at 2458-70. The State cannot ignore *Graham*'s true import by continuing to treat juvenile non-homicide offenders as "miniature adults" who are denied any parole opportunities within their lifetimes:

> *Graham*'s analysis does not focus on the precise sentence meted out. Instead, . . . it holds that a state must provide a juvenile offender "with some realistic opportunity to obtain release" from prison during his or her expected lifetime. . . . [S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them . . . of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.

Caballero, 282 P.3d at 295 (combined sentence of 110 years imposed for three gang-related felonies committed against three victims was a *de facto* LWOP sentence and, thus, violated *Graham*) (citations and internal division omitted).

Below, the Fifth District held that Mr. Henry's resentence did not violate the Eighth Amendment for two reasons. First, after resentencing, Mr. Henry "did not (in the end) receive" a sentence technically labeled "life without parole." *Henry*, 82 So. 3d at 1087-88. And second, his sentence was imposed "for multiple nonhomicide offenses." *Id.* Each reason is inconsistent with *Graham.*[17]

First, as explained above, *Graham* does not distinguish between sentences technically denominated LWOP and lengthy term-of-years sentences that also ensure the offender will die in prison. Indeed, the Court identified Graham's sentence as a "term-of-years sentence," which guaranteed that he would "die in prison." 130 S. Ct. at 2022, 2033. Further, Graham's sentence was not expressly entered as "without parole," that just happened to be the result given that Florida has largely abolished parole for adults. *Id.* at 2020.

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[17] Post-*Graham* decisions reaching the same conclusions as *Henry* are wrong for all of the same reasons described *infra*, and, further, some are collateral federal cases subject to the stringent standard of review applicable under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. § 2254, which is not at issue here. *See Walle v. State*, 99 So. 3d 967, 970-71 (Fla. 2d DCA 2012) (incorrectly restricting *Graham* to (a) sentences formally designated "life," and (b) offenders who are charged with only a single offense), *rev. pending*, SC12-2333; *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012) (same; collateral AEDPA case), *cert. pet. pending*, SCOTUS Case No. 12-558; *Young v. State*, No. 2D11–5681, --- So. 3d ----, 2013 WL 614247 (Fla. 2d DCA Feb. 20, 2013) (following *Walle* and limiting *Graham* exclusively to sentences formally designated "life").

The case law on which the Fifth District relied to hold that *Graham* does not apply to *de facto* LWOP sentences is incorrect, inapposite, or both. For instance, each of the similar, intermediate California decisions it cited was subsequently overruled by the California Supreme Court in *Caballero*, 282 P.3d at 291-99. Further, the Georgia decisions it cited are inapposite, because they did not involve sentences that exceeded the defendants' life expectancies. *Adams v. State*, 707 S.E.2d 359, 364-65 (Ga. 2011) (25-year sentence); *Middleton v. State*, 721 S.E.2d 111, 112-13 (Ga. Ct. App. 2011) (30-year sentence). Finally, the intermediate Arizona decision it cited involved unrelated felonies committed over the course of a year – some of which the defendant committed as an adult. *See State v. Kasic*, 265 P.3d 410, 411-17 (Ariz. Ct. App. 2011).

Rather than focus on the Supreme Court's express statement that *Graham* involved a categorical challenge to a "term-of-years sentence," and its admonition that it chose a "categorical rule" to give "all juvenile nonhomicide offenders a chance to demonstrate maturity and reform," 130 S. Ct. at 2022, 2032-34, the Fifth District adopted the *Graham* dissenters' views as to the scope of the decision. *Henry*, 82 So. 3d at 1088. Specifically, the Fifth District relied on Justice Thomas' and Justice Alito's statements that *Graham* does not apply to lengthy term-of-years sentences (assertions that neither dissenter saw fit to explain in any great detail). *Compare Henry*, 82 So. 3d at 1088 (citing *Graham*, 130 S. Ct. at 2052 n.11

(Thomas, J., dissenting, joined by Scalia and Alito, JJ.), and *Graham*, 130 S. Ct. at 2058 (Alito, J., dissenting)), *with Graham*, 130 S. Ct. at 2022 (identifying the case as raising "a categorical challenge to a term-of-years sentence").

As explained above, such statements contradict *Graham*'s actual analysis and holding, which this Court is required to follow under article I, section 17 of the Florida Constitution. Further, as other jurists have observed:

> Characterization by the *Graham* dissenters of the scope of the majority opinion is, of course, dubious authority. . . . [T]he majority opinion of the Supreme Court states the law and . . . a dissenting opinion has no function except to express the private view of the dissenter.

Caballero, 282 P.3d at 297 (Werdegar, J., concurring) (citations and quotation marks omitted).

Moreover, contrary to the Fifth District's reasoning, there is no serious "line-drawing" problem. *See* 82 So. 3d at 1089. In this context, the only relevant "line" following *Graham* is the line that separates juvenile non-homicide offenders from adults. The length of sentence is not the real problem – it is the absence of any parole-review opportunities for juveniles. *See Smith v. State*, 93 So. 3d 371, 375-78 (Fla. 1st DCA 2012) (Padovano, J., concurring). As explained at Point I.C., *infra*, if Florida's existing parole system is reopened to all of its juvenile non-homicide offenders for regular parole review, any issue of line-drawing is obviated entirely. Regular, meaningful parole review will ensure *Graham* compliance even

if the Parole Commission eventually determines – on appropriate grounds – that the particular juvenile offender is truly incorrigible and should remain in prison. *See Smith*, 93 So. 3d at 375-78 (Padovano, J., concurring) (explaining, with particular reference to *Henry*, that the only way to comply fully with *Graham* is to reopen parole review for juvenile non-homicide offenders).[18]

As for the Fifth District's second basis for declining to apply *Graham* – that Mr. Henry was sentenced for multiple offenses involving a single victim – it is enough to recognize that *Graham*, itself, involved a recidivist juvenile offender who was sentenced for multiple offenses. 130 S. Ct. at 2018-20; *see also, e.g.*, *Nuñez*, 195 Cal. App. 4th at 425 ("A distinction premised on the multiple offenses or victims that often underlie a *de facto* LWOP [sentence] is also unpersuasive. The distinction finds no traction in *Graham*, given the juvenile there was a recidivist offender sentenced on multiple felonies . . . ."). The Supreme Court

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[18] As an alternative means of dealing with the supposed line-drawing problem, many courts which have ruled on this issue have consulted the Centers for Disease Control's National Vital Statistics Reports to determine the given juvenile's life expectancy. If the sentence imposed does not offer any opportunity to seek parole within the juvenile's lifetime (as is true regarding Mr. Henry), it violates the Eighth Amendment. *See, e.g.*, *Adams*, 2012 WL 3193932, at *2 (relying on CDC Reports); *People v. J.I.A.*, 196 Cal. App. 4th 393, 403-04 (Cal. 4th DCA 2011), *reaff'd on remand*, 2013 WL 342653, at *5 (Cal. 4th DCA Jan. 30, 2013) (same); *Nuñez*, 195 Cal. App. 4th at 626-27 (same); *Ramirez*, 193 Cal. App. 4th at 628 (Manella, J., dissenting) (same); *People v. Mendez*, 188 Cal. App. 4th 47, 62-63 (Cal. 2d DCA 2010) (same). These CDC Reports are *available at* http://www.cdc.gov/nchs/products/nvsr.htm (last accessed Feb. 10, 2013).

never indicated that, on remand, the State of Florida remained free to resentence Graham to an aggregate term-of-years sentence for his armed-burglary and attempted-robbery offenses that, when combined, exceeded his life expectancy and carried no opportunity for parole. *See* 130 S. Ct. at 2021-34.[19]

That, however, is the "remedy" the State now contends is appropriate for Mr. Henry. *Graham* provides no support for such a position. Instead, the Court mandated that juvenile non-homicide offenders like Graham and Henry receive "realistic," "meaningful" opportunities to seek release within their lifetimes. *Id.* at 2030-34. *Graham* does not mandate release, but it does guarantee a well-founded hope for rehabilitation and potential release.

The Fifth District denied Mr. Henry that right, and its decision therefore violates the United States and Florida Constitutions. This Court should reverse, and, as explained *infra*, should do so by ensuring that Mr. Henry has access to Florida's existing parole system.

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[19] Under the statutes applicable to Graham's sentencing, armed burglary with an assault or battery was a first-degree felony carrying a maximum penalty of life in prison. §§ 810.02(1)(b), (2)(a), Fla. Stat. (2003). Under the same version of the Florida Statutes, attempted armed robbery was a second-degree felony carrying a maximum penalty of 15 years' imprisonment. §§ 812.13(2)(b), 777.04(1), (4)(a), 775.082(3)(c), Fla. Stat. (2003); *see also Graham*, 130 S. Ct. at 2018.

C. **Following *Graham*, Parole Eligibility Is The Only Remedy That Ensures Mr. Henry's Sentence Complies With The Federal And Florida Constitutions.**

1. **Parole Hearings Can Fulfill *Graham*'s Mandate.**

Because the Eighth Amendment and article I, section 17 of the Florida Constitution prohibit the State from sentencing a juvenile non-homicide offender to life in prison without also providing "realistic," "meaningful" opportunities to seek "release based on demonstrated maturity and rehabilitation," the possibility of parole is the only remedy post-*Graham* that ensures the constitutionality of Mr. Henry's sentence. 130 S. Ct. at 2030-34. While *Graham* suggests "[i]t is for legislatures to determine what rehabilitative techniques are appropriate and effective," when faced with legislative and executive inaction, this Court is constitutionally obligated to enforce *Graham*'s mandate that these juveniles receive appropriate opportunities to seek release. 130 S. Ct. at 2029-34.

"[A]s is universally recognized, it is the exclusive province of the judiciary to interpret terms in a constitution and to define those terms." *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 631 (Fla. 2012) (citing, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.")); *see also Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 510 (Fla. 2008) ("[I]t is the duty of this Court to determine the meaning of [a] constitutional

provision."). Through its "cruel and unusual punishment" jurisprudence, this Court has simultaneously affirmed a "great respect for the legislative voice," while also recognizing an "obligation . . . to decide the question of whether a punishment [selected] by the [L]egislature is unconstitutionally cruel or unusual by applying constitutional, not legislative, standards." *Brennan v. State*, 754 So. 2d 1, 9 (Fla. 1999); *cf. Shands Teach. Hosp. & Clinics, Inc. v. Smith*, 480 So. 2d 1366, 1375 (Fla. 1st DCA 1985) (Barfield, J., concurring) ("In this country, our constitutions are the primary sources of the law. From them emanate the legislatures and their acts; against them all law is tested.").

The Legislature has already created an appropriate remedy through the existing parole system. *See generally* ch. 947, Fla. Stat. (2012). However, access to that system has been legislatively circumscribed by section 921.002(1)(e), Florida Statutes, which provides that "[t]he provisions of chapter 947, relating to parole, shall not apply" to persons who have been "sentenced under the Criminal Punishment Code." *See also* § 921.002, Fla. Stat. (2012) ("The Criminal Punishment Code shall apply to all felony offenses, except capital felonies, committed on or after October 1, 1998.").[20]

[20] Prior to the Legislature enacting the Criminal Punishment Code and section 921.002(1)(e), Florida Statutes (1998), it abolished parole for felony offenders by passing chapter 83-87, Laws of Florida, which established former section 921.001(8), effective October 1, 1983. *See* § 921.001(8), Fla. Stat. (1983) ("The

Thus, while a *Graham*-compliant legislative remedy already exists under Florida law, to date, the Legislature has failed to make that remedy available to juvenile non-homicide offenders. *See, e.g.*, *Smith*, 93 So. 3d at 378 (Padovano, J., concurring) ("The Eighth Amendment requires the possibility of release, and . . . that . . . possibility can be afforded only by a system of parole eligibility."); *Gridine v. State*, 89 So. 3d 909 at 911 (Fla. 1st DCA 2011) (Wolf, J., dissenting) ("Absent the option of parole, I am at a loss on how to apply the *Graham* decision to a lengthy term of years."); *see also* Drinan, *supra*, 87 WASH. L. REV. at 77 ("As a threshold matter, parole must be available under state law in order to comport with *Graham*'s requirements.").[21]

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provisions of Chapter 947 shall not be applied to persons convicted of crimes committed on or after October 1, 1983"); *see also* ch. 83-87, § 1, Laws of Fla. (establishing former section 921.001(8), Florida Statutes). This change became part of Florida's former Sentencing Guidelines, subsequently replaced by the Criminal Punishment Code.

Thus, as to juvenile non-homicide offenders who – unlike Mr. Henry – were sentenced under the Guidelines, this Court would have to hold unconstitutional, as applied, the predecessor provisions of the Guidelines that similarly precluded such juveniles from parole consideration. While this does not affect Mr. Henry and other juveniles sentenced under the Code, it could affect subsequent cases that reach this Court that involve the Guidelines.

[21] At Mr. Henry's resentencing hearing, the trial court agreed that *Graham* likely requires a reinstatement of parole opportunities for this class of juvenile offenders, but was concerned that it lacked jurisdiction to hold section 921.002(1)(e) unconstitutional as applied. (SR. 4:36-40, 51-52). The trial court and both parties' counsel also appear to have been unaware that Florida still has a functioning Parole Commission. *See* (SR. 4:39-40, 51-52).

Given the Legislature's failure to comply with *Graham*, the Eighth Amendment and its Florida cognate require this Court to declare section 921.002(1)(e), Florida Statutes, unconstitutional as applied to juvenile non-homicide offenders. By removing this statutory impediment for this class of offenders, Mr. Henry – and others like him – will receive "realistic," "meaningful" opportunities "to obtain release based on demonstrated maturity and rehabilitation" within Florida's extant parole system. *See Smith*, 93 So. 3d at 376 (Padovano, J., concurring) (a statutory provision precluding parole consideration for juvenile non-homicide offenders sentenced as adults must be held unconstitutional, as applied, following *Graham*); *Gridine*, 89 So. 3d at 911 (Wolf, J., dissenting) ("The only logical way to address the concerns expressed . . . in *Graham* is to provide parole opportunities for juveniles."); *cf. Graham*, 130 S. Ct. at 2030-34. As several commentators have concluded, "to carry out [*Graham*'s] . . . constitutional mandate, all states will need an active parole board and rehabilitative measures in place." Leslie P. Wallace, *"And I Don't Know Why It Is That You Threw Your Life Away": Abolishing Life Without Parole, The Supreme Court in Graham v. Florida Now Requires States to Give Juveniles Hope For a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 68 (2010); *see also, e.g.*, Drinan, *supra*, 87 WASH. L. REV. at 77 (same).[22]

[22] *See also* Br. of Am. Bar Ass'n as *Amicus Curiae* at 15-19, *Graham*, SCOTUS

As indicated above, individual judges of this State have also concluded that, to satisfy the Eighth Amendment, it is necessary to grant juvenile non-homicide offenders realistic, meaningful opportunities for parole consideration. *See*, *e.g.*, *Swanson v. State*, 98 So. 3d 135, 135 (Fla. 1st DCA 2012) (Clark, J., concurring specially) (agreeing with Judge Padovano's concurrence in *Smith* and Judge Wolf's dissent in *Gridine*, each recognizing that juvenile non-homicide offenders must receive parole consideration); *Treacy v. Lamberti*, 80 So. 3d 1053, 1055 (Fla. 4th DCA 2012) ("[W]ere the legislature to enact a parole system for juveniles who have been sentenced to life for non-homicide offenses," *Graham* would be satisfied).

The Third District, in applying *Graham* to a juvenile offender who received concurrent life sentences **with** an opportunity for parole, concluded that on-going opportunities for parole review satisfy *Graham*. *Cunningham v. State*, 54 So. 3d 1045, 1045-46 (Fla. 3d DCA 2011) (affirming concurrent life sentences for a juvenile offender pursuant to *Graham* because, "[u]nlike the defendant in *Graham*, Cunningham is statutorily entitled to parole consideration because he committed the offenses prior to the effective date of the statute creating sentencing guidelines and eliminating parole."). Consistent with *Cunningham*, if the existing parole

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Case No. 08-7412 (discussing the need to provide juvenile non-homicide offenders appropriate parole opportunities).

system is opened to include all juvenile non-homicide offenders sentenced as adults, then Florida will be in compliance with the Eighth Amendment.

The high courts of other states that have considered this issue have also concluded that providing parole consideration is the appropriate means to comply with *Graham*. *See State v. Shaffer*, 77 So. 3d 939 (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); *Caballero*, 282 P.3d at 295 (reversing 110-year sentence under *Graham* and mandating that the petitioner receive appropriate parole consideration within his lifetime).[23]

Writing a concurring opinion in *Smith*, Judge Padovano – drawing on an earlier dissent by Judge Wolf in *Gridine* – persuasively articulated why parole is the only remedy that is consistent with both *Graham*'s mandate and constitutional separation-of-powers principles. Agreeing that "courts will never be able to draw a

[23] Legislative inaction in the face of *Graham* is not a problem unique to Florida. Both the California and Louisiana high courts expressed a belief that their actions in making parole available would be "interim" measures until state legislative action was taken to ensure continued *Graham* compliance. *See Shaffer*, 77 So. 3d at 943 n.6 ("[O]ur decision . . . is an interim measure . . . pending the legislature's response to *Graham*."); *Caballero*, 282 P.3d at 296 n.5 ("We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a [juvenile] defendant serving a *de facto* life sentence . . . with the opportunity to obtain release on a showing of rehabilitation and maturity.").

line between a sentence to a term of years that offends the Eighth Amendment and one that does not," *Smith,* 93 So. 3d at 377-78, Judge Padovano concluded that *Graham* does not require courts to engage in the "futility" of second-guessing the lengths of sentences imposed; rather, it requires the judicial branch to safeguard juvenile non-homicide offenders' access to potential release through parole. *Compare Smith*, 93 So. 3d at 375 (Padovano, J., concurring) ("[T]he question is not whether the defendant will have a significant part of his life remaining at the end of the sentence; rather, it is whether the defendant will have a reasonable opportunity to show that he has been rehabilitated during the course of the sentence and is therefore deserving of release at some point before the sentence expires."), *with Gridine*, 89 So. 3d at 911 (Wolf, J., dissenting) ("Is a 60-year sentence lawful, but a 70-year sentence not?"), *and 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?").

Thus, "[t]he only way the courts can carry out the mandate of . . . *Graham* . . . is to ensure that a juvenile offender is eligible for parole or some equivalent of parole." *Smith*, 93 So. 3d at 376 (Padovano, J., concurring); *Gridine*, 89 So. 3d at 911 (Wolf, J., dissenting) ("[T]he only logical way to address . . . *Graham* . . . is to provide parole opportunities for juveniles.") (citation omitted). Faced with legislative and executive inaction, the district courts of appeal now look to this

Court to articulate the means by which Florida may comply with *Graham*. *See, e.g.*, *Thomas v. State*, 78 So. 3d 644, 647 (Fla. 1st DCA 2011) ("This Court lacks the authority to craft a solution to this problem. We encourage the Legislature to consider modifying Florida's current sentencing scheme to include a mechanism for review of juvenile offenders sentenced as adults as discussed in *Graham*."); *Gridine*, 89 So. 3d at 911 (Wolf, J., dissenting) ("[A]bsent a legislative solution [to *Graham* compliance], I look for guidance from either the United States or Florida Supreme Courts."); *Smith*, 93 So. 3d at 378 (Padovano, J., concurring) (stating that if he were not bound by prior First District decisions, he would hold unconstitutional, as applied, those statutory provisions that prohibit access to parole opportunities for juvenile non-homicide offenders).

This Court faces no similar constraints, and has both the constitutional authority and obligation to enforce *Graham* and its Eighth Amendment guarantees. As Judge Padovano correctly apprehended, the parole system necessary to comply with *Graham* is already in place. This Court, however, must ensure that juvenile non-homicide offenders receive appropriate consideration through that preexisting system. *See Smith*, 93 So. 3d at 375-78 (Padovano, J., concurring).

By opening the existing parole system to this class of juveniles, the Court can adequately safeguard *Graham*'s Eighth Amendment guarantees and comply with the obligations imposed under article I, section 17 of the Florida Constitution.

Accordingly, Mr. Henry respectfully requests that the Court hold section 921.002(1)(e), Florida Statutes, unconstitutional as applied to juvenile non-homicide offenders. By doing so, this Court would ensure that Florida provides Mr. Henry, and others like him, the "realistic," "meaningful" opportunities to seek release mandated by *Graham*. *See*, *e.g.*, *Smith*, 93 So. 3d at 375-78 (Padovano, J., concurring).

2. The Florida Statutes Denying Juvenile Non-Homicide Offenders Access To Parole Hearings Are Unconstitutional As Applied And May Be Severed As To This Class Of Offenders.

As the United States Supreme Court has repeatedly held, "a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S. Ct at 2470 (collecting cases); *cf. Smith*, 93 So. 3d at 378 (Padovano, J., concurring) (*Graham* compliance requires courts to declare invalid any "law restricting parole eligibility as it applies to [juvenile non-homicide offenders] . . . . [A] statute restricting parole eligibility violates the Eighth Amendment as applied to juvenile offenders."). Such is the case here.

While there is no constitutional right to parole for adults,[24] *Graham* mandates that juvenile non-homicide offenders receive meaningful, realistic opportunities to demonstrate rehabilitation and seek release under a system of

[24] *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (citing *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979)).

parole or something substantially comparable. 130 S. Ct. at 2030-34; *see also* *Miller*, 132 S. Ct at 2470 (citing *Graham* for the proposition that "life without parole is permissible for nonhomicide offenses – except, once again, for children"). Thus, in seeking relief under *Graham*, Mr. Henry requests a remedy that will ensure compliance with the Eighth Amendment guarantee announced there: regular parole consideration for this class of juveniles.

This request also complies with constitutional separation-of-powers principles. *See* art. II, § 3, Fla. Const. It is well-established that a "statute may be applied to one class of cases, even though it may violate the Constitution when applied to another class . . . , without necessarily destroying the statute." *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 505 (Fla. 1999) (quoting *In re Seven Barrels of Wine*, 83 So. 627, 632 (Fla. 1920)) (quotation marks and brackets omitted); *Smith v. Chase*, 109 So. 94, 97 (Fla. 1926) ("A statutory regulation may, consistently with organic law, be applied to one class of cases in controversy, and may violate the Constitution as applied to another class of cases. This does not destroy the statute, but imposes the duty to enforce the regulation when it may be legally applied.").

Indeed, this Court has previously held unconstitutional, as applied, legislation which improperly swept a class of juveniles within its ambit. *See B.B. v. State*, 659 So. 2d 256, 257-60 (Fla. 1995). There, the Court held section 794.05,

Florida Statutes (1991), unconstitutional as applied to a 16-year-old who was prosecuted for having consensual sex with another 16-year-old. 659 So. 2d at 257-60. The statute prohibited "unlawful carnal intercourse" with an unmarried minor but, as applied to youths, violated the privacy rights of consenting juveniles to engage "in carnal intercourse." *Id.*[25] The same should hold true here – juveniles are different.

Further, "[t]he rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act." *Cramp v. Bd. of Pub. Instr. of Orange Cnty.*, 137 So. 2d 828, 830 (Fla. 1962). Rooted in vital separation-of-powers principles, Florida has a well-developed jurisprudence of severability that empowers this Court to sever discrete portions of statutes that it determines are unconstitutional as applied to a particular class. This limited role ensures proper respect for legislative intent by leaving the statute undisturbed in its application to all other classes of persons lawfully within its scope. *See, e.g.*, *State v. Catalano*, SC11-1166, --- So. 3d ----, 37 Fla. L. Weekly S763, 2012 WL 6196899, at *8 (Fla. Dec. 13, 2012) (severability is "derived from the respect of

[25] Subsequently, in *J.A.S. v. State*, 705 So. 2d 1381, 1385 n.11 (Fla. 1998) (citing section 794.05, Fla. Stat. (1997)), the Court noted that "in apparent response" to the *B.B.* decision, the Legislature had rewritten the offending statute to comply with the constitutional privacy right announced in *B.B.*, specifying that the statute only applied to "[a] person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age."

the judiciary for the separation of powers, and is designed to show great deference to the legislative prerogative to enact laws") (citations and quotation marks omitted); *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 649 (Fla. 2010) ("Severability is a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions."); *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991) (substantially similar).

Based on this test, the Court may sever – on an as-applied basis – those statutory provisions that would deny juvenile non-homicide offenders parole eligibility. As to section 921.002(1)(e), Florida Statutes (2012), "[t]he absence of a severability clause does not prevent the court from exercising its inherent power to preserve the constitutionality of an act by eliminating invalid clauses if it is possible to do so." *Bush v. Holmes*, 886 So. 2d 340, 374 (Fla. 1st DCA 2004), *aff'd in part*, 919 So. 2d 392 (Fla. 2006); *see also Schmitt*, 590 So. 2d at 415 n.12 ("[S]everability does not always depend on the inclusion of a severability clause in a legislative enactment . . . ."). Thus, notwithstanding the lack of an express severability clause, this Court may still sever section 921.002(1)(e) as applied to juvenile non-homicide offenders like Mr. Henry. Indeed, the Eighth Amendment and its Florida cognate require this Court to do so.

Absent an express severability clause, this Court applies a four-part test:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken.

Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (quoting *Cramp*, 137 So. 2d at 830).

Section 921.002(1)(e) provides that "[t]he provisions of chapter 947, relating to parole, shall not apply" to persons who have been "sentenced under the Criminal Punishment Code." Severing this subsection (as applied) meets all four parts of the *Cramp* test because the offending portion can be "fixed" without doing any violence to the broader Code's text, its underlying purpose, or its overall operational scheme.

After the offending portion is severed, as applied, adult offenders would remain subject to all of the Code's provisions in the precise manner that the Legislature intended. And, juvenile non-homicide offenders sentenced as adults would remain subject to the other provisions of the Code, just as the Legislature intended. Therefore, as to Mr. Henry and other juvenile non-homicide offenders sentenced under the Criminal Punishment Code, the Court need only act on an as-applied basis to sever this lone statutory subsection.

All told, because the offending subsection is separable from the unoffending portions of the broader statutory scheme, the Criminal Punishment Code - consistent with legislative intent – would remain an "act complete in itself . . . after the invalid provisions are stricken." *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 493-94 (Fla. 2008). Therefore, this Court should sever section 921.002(1)(e) and declare it unconstitutional as applied to juvenile non-homicide offenders. *See Waldrup*, 562 So. 2d at 694 (applying the *Cramp* factors and holding that the offending subsections of a gain-time statute were unconstitutional as applied to a certain class of offenders but could be severed in application from the unoffending sections, leaving the legislative purpose intact and resulting in a "statute complete in itself.").

Following this limited, as-applied severance, these offenders will have access to the existing parole system, and, as to them, Florida will have complied with *Graham*. Indeed, the Third District has already reached this same conclusion as to juvenile non-homicide offenders who received their sentences before the Legislature abrogated parole consideration. *Cunningham*, 54 So. 3d at 1045-46.

For all of these reasons, section 921.002(1)(e), Florida Statutes, must be severed on an as-applied basis to ensure that Florida complies with *Graham*. After severing this provision on an as-applied basis, the legislative intent behind parole remains intact. *Compare* § 947.002(5), Fla. Stat. (2012) ("It is the intent of the

Legislature that the decision to parole an inmate from the incarceration portion of the inmate's sentence is an act of grace of the state and shall not be considered a right."), *with Graham*, 130 S. Ct. at 2030 ("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."). So long as realistic, meaningful opportunities to seek parole are available through this system, parole can remain an act of grace based on an appropriate, circumspect review process.[26]

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[26] Of course, consistent with *Graham*, once parole consideration is available to this class, parole review will, in due course, have to reflect *Graham*'s broader mandate that juveniles are different. *See, e.g.*, *Graham*, 130 S. Ct. at. 2031 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."); *Miller*, 132 S. Ct. at 2466 (the State "cannot proceed as though" juvenile offenders "[a]re not children").

CONCLUSION

For the reasons detailed above, Petitioner, Leighdon Henry, respectfully requests that this Court reverse the Fifth District's decision below and remand with instructions that he is to be resentenced to a combined term-of-years sentence with parole eligibility.

Respectfully submitted,

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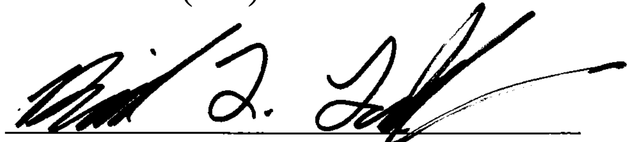

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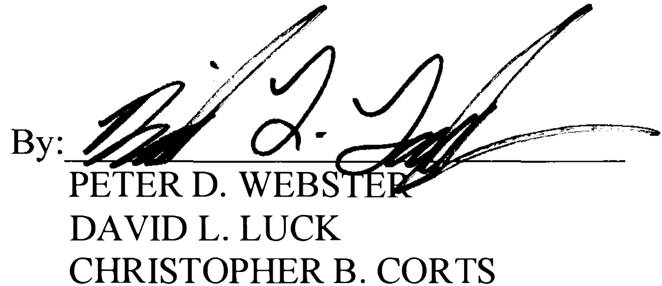

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certify that this brief complies with Florida Rule of Appellate Procedure 9.210's font requirements by using Times New Roman 14-point text.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2012

LEIGHDON HENRY,

Appellant,

v. Case Nos. 5D08-3779 & 5D10-3021

STATE OF FLORIDA,

Appellee.

________________________________/

Opinion filed January 20, 2012

Appeal from the Circuit Court
for Orange County,
Julie H. O'Kane, Judge.

Leighdon Henry, Jasper, pro se.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

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*, 130 S. Ct. 2011 (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 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.[1] 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

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[1] 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.

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.

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 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*,[2] *supra*, at 572, 125 S. Ct. 1183; *cf. Harmelin*,[3] *supra*, at 996, 111 S. Ct. 2680 ("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.

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

[2] *Roper v. Simmons*, 543 U.S. 551 (2005).

[3] *Harmelin v. Michigan*, 501 U.S. 957 (1991).

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 did address the issue of a lengthy term-of-years sentence imposed on a juvenile in *Gridine v. State*, 37 Fla. L. Weekly D69 (Fla. 1st DCA Dec. 30, 2011) and *Thomas v. State*, 37 Fla. L. Weekly D68 (Fla. 1st DCA Dec. 30, 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*, 114 Cal. Rptr. 3d 870, 873 (Ct. 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*, 119 Cal. Rptr. 3d 920, 926 (Ct. 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*, 123 Cal. Rptr. 3d 155, 165 (Ct. 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.*, 127 Cal. Rptr. 3d 141, 149 (Ct. 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*, 125 Cal. Rptr. 3d 616, 618 (Ct. 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 (2011), *People v. Ramirez*, 128 Cal. Rptr. 3d 271 (2011), and *People v. Nunez*, 128 Cal. Rptr. 3d 274 (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*, 707 S.E.2d 359 (Ga. 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*, No. A11A1558, __ S.E.2d __ (Ga. Ct. App. Nov. 14, 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).

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. Oct. 27, 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.[4] 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.[5] 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.

AFFIRMED.

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

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[4] 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.

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