IN THE SUPREME COURT OF FLORIDA

WAYNE TREACY

Petitioner,

vs.

AL LAMBERTI, as Sheriff of Broward County, Florida,

Respondent.
_____/

Supreme Court Case No: SC12-647

REPLY BRIEF OF PETITIONER

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this initial brief on the merits of Petitioner:

The term "Petitioner" shall refer to WAYNE TREACY, the juvenile Defendant in the trial court.

The term "Respondent" shall refer to the Sheriff of Broward County, Florida.

AB= Answer Brief of Respondent, State of Florida

ARGUMENT

THE PETITIONER WAS ENTITLED TO PRE-TRIAL RELEASE AS A MATTER OF RIGHT BECAUSE HE WAS NO LONGER CHARGED WITH AN OFFENSE THAT WAS PUNISHABLE BY LIFE IMPRISONMENT.

In its Answer Brief, the State argues that the classification approach should be utilized in construing Article I, section 14 because "the categorical rule of *Graham* is that a juvenile offender who commits a non-homicide offense must be given a meaningful opportunity for parole at some point during his or her incarceration" and that "[this] specific determination cannot be made at the outset of a juvenile's sentence". (AB: 7). Except for the fact that Florida has abolished parole and thus, the Petitioner can never be sentenced to a term of life in prison, the Petitioner would agree with the State's argument that a juvenile must only have an opportunity for parole or release under *Graham*.[1]

However, the imposition of a life sentence under Florida's current sentencing scheme is constitutionally impermissible under *Graham*, and thus, his offense is removed from the category of offenses that are explicitly described in Article I, section 14. Since the Petitioner is not charged with an offense punishable by life imprisonment under *Graham* and Florida's current statutory sentencing

[1] *Graham v. Florida*, 130 S.Ct. 2011 (2010).

scheme, he therefore is not subject to the heightened standard set forth in *State v. Arthur*.[2]

The State's argument that the holding in *Graham* "affects only the sentencing consequences for an individual ultimately convicted . . . not the pre-trial release consequences faced by that individual" fails to recognize the significance of *Graham* **in light of the current sentencing scheme in Florida.** (AB:7). This assertion by the State presumes that the court has discretion to impose a life sentence, but there is absolutely no discretion to do so because the legislature has not yet responded to *Graham* by providing a meaningful opportunity for release for these juvenile offenders.

Further, the Respondent's attempt to persuade this court under the authority of *Miller* is unavailing because *Miller* actually supports the Petitioner's argument.[3] Although *Miller* recognized that *Graham* does not foreclose the possibility of a life sentence for a juvenile, the current sentencing scheme in Florida does exactly what *Graham* on its own does not. It forecloses the imposition of a life sentence on any

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[2] The Petitioner does not argue that the trial court was prohibited from imposing reasonable conditions upon his release, but instead, merely argues that the standard under *Arthur* is not applicable.

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

juvenile who has committed a non-homicide offense – at least until Florida revamps its current sentencing system to conform with *Graham*. The Respondent's argument appears to overlook this critical factor.

In its Answer brief, the State also urges this court to affirm the decision of the District Court because "the language of Article I, section 14 is not ambiguous" and must be interpreted to mean the nature of the offense as classified by the legislature. (AB: 10). The Petitioner agrees with the Respondent – the language is clear and unambiguous, but the Petitioner obviously interprets the explicit language in a different manner.[4]

Indeed, because the language of this provision is unambiguous, as both parties suggest, and because it is a constitutional provision, there is a presumption that the language used was deliberately chosen. *Lawnwood Medical Center, Inc. v. Sieger, M.D.*, 990 So.2d 503, 510-11 (Fla. 2008) citing *Ervin v. Collins*, 85 So.2d 852, 855 (Fla. 1956).[5] The Respondent's focus on the word "charged" does not

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[4] Certainly, it could be argued, that the mere fact that each party has interpreted the language of Article I, section 14 differently demonstrates that it is ambiguous. However, based upon the express and unequivocal language used, as well as the statutory rules of construction as applied to constitutional provisions, there is actually no ambiguity.

[5] In its Answer Brief, the Respondent attempts to distinguish the analysis in *Lawnwood* from the instant case because it involved whether a special law was

alter the analysis, nor the result. The word "charged" is not synonymous with, nor does it suggest, the classification of the offense. It is the description of the potential punishment of the offense one is charged with that controls – whether the offense is potentially punishable by life imprisonment or death.

Indeed, the most compelling reason why the phrase "punishable by life imprisonment" justifies a punishment approach is because it is contained in a constitutional provision, which affords "less latitude" and must be enforced as written since, as both parties contend, it is unambiguous. *Fla.Soc'y of Ophthalmology v. Fla. Optomertic Assin*, 489 So.2d 1118, 1119 (Fla. 1986); *Ford v. Browning*, 992 So.2d 132 (Fla. 2008). This is especially compelling since this provision was amended in 1983, which could have been changed in light of the turmoil after *Furman*. Importantly, the cases relied upon by the District Court, such as *Batie*, *Hogan*, and *Crines* do not involve constitutional provisions, but only statutory provisions or rules.

A similar flaw in the Respondent's argument is its assertion that "the right to bond is based on Article I, Section 14 of Florida's Constitution, not on Federal

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constitutional. (AB:22). However, *Lawnwood* is relied on by the Petitioner because of this court's recognition of the applicable rule of statutory construction as it applies to constitutional provisions, not because it involved a similar issue.

Constitutional principles". (AB: 11). Although the State can expand a right or provide greater freedom, it is still bound by the limitations of the Federal Constitution. Indeed, "the Federal Constitution . . . represents the floor for basic freedoms; the State Constitution the ceiling." *Armstrong v. Harris*, 773 So.2d 717 (Fla. 2000) quoting *Traylor v. State*, 596 So.2d 957 (Fla. 1992). As such, *Graham* expands the right to bail to similarly situated juveniles, but only because Florida's current sentencing scheme does not provide for a meaningful opportunity for release.

The Respondent also relies upon *Donaldson v. Sack*, 265 So.2d 499, 504 (Fla. 1972) to support its position. However, the State misinterprets this Honorable Court's acknowledgement in *Donaldson* that the abolition of the death penalty did not change the constitutional and statutory provisions for bail. In *Donaldson*, this Honorable Court expressly stated that the constitutional and statutory provisions for bail did not change when the death penalty was abolished. *Id.* at 504.

However, as recognized by *Donaldson*, the right to bail under these circumstances did not change only because Article I, section 14 limited the right to bail to capital offenses, as well as those offenses punishable by life imprisonment. Since the death penalty was abolished, the punishment was reduced to life

imprisonment – still requiring the standard under *Arthur*. The Respondent's reliance on *Donaldson* for this proposition is therefore misplaced.

The Respondent cites selected cases which demonstrate that the classification approach should be utilized and argues that the issue is a clear cut issue. However, existing case law from Florida, as well as other jurisdictions, demonstrate conflicting views on this issue. As recognized by this Honorable Court in *Reino*, it would be "conceptually inconsistent to conclude that the procedural advantages inuring to a Defendant in a capital case fall...and then conclude that the substantive disadvantages ... remain viable." *Reino v. State*, 352 So.3d 853, 858 (Fla. 1977) *receded from on other grounds, Perez v. State*, 545 So.2d 1357 (Fla. 1989) (relying on the **possible penalty** in determining the applicable statute of limitations). This Honorable Court should adopt this reasoning by utilizing the punishment approach to resolve this issue.

Finally, the State's reliance on *People v. Salas*,[6] should also not persuade this Honorable Court to utilize the classification approach. (AB: 17). A review of *Salas* reveals that it has no bearing on the issue currently before this court. The *Salas* court rejected the juvenile's argument that a juvenile automatic transfer

[6] 961 N.E. 2d 831 (Ill. 2011).

statute was punishment under the Eighth Amendment. *Id.* The Respondent presumably relies upon the language in *Salas* that states that "Eighth Amendment principles and analysis utilized in *Roper*[7] and *Graham* have no application where the statute at issue imposes no punishment and is not subject to the Eighth Amendment." *Salas* at 846.

However, the reasoning in *Salas* falls short here because, based upon analogous decisions by this Court, limitations imposed by the U.S. Constitution (*Graham*) to a juvenile apply pre-trial even though there is no punishment being imposed. This is similar to when the death penalty was abolished for capital offenses, resulting in the elimination of the requirement of an indictment and also the requirement of a twelve member jury. *State v. Hogan*, 451 So.2d 844 (Fla. 1984) (twelve jurors not required); *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972) (indictment not required). Obviously, both of those matters did not involve punishment, but were nevertheless affected by the limitations imposed by the Supreme Court prior to imposition of punishment.

[7] *Roper v. Simons*, 543 U.S. 551 (2005).

CONCLUSION

Based upon Florida's current sentencing scheme which prohibits the possibility of parole for a sentence of life imprisonment, as well as the Supreme Court's express holding in *Graham* that a trial court is prohibited from imposing a life sentence upon a juvenile who committed a non-homicide offense, the Petitioner was entitled to pretrial release with reasonable conditions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner's Reply Brief on the Merits has been furnished by Federal Express Mail and sent via email e-file@flcourts.org, to the Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399 and emailed to crimappwpb@myfloridalegal.com to the Office of the Attorney General on this 25th day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, WAYNE TREACY, hereby certifies this Reply Brief is printed in 14-point Times New Roman font, as required by the Florida Rule of Appellate Procedure 9.210(a)(2).

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March 25, 2013

Clerk of the Court
Supreme Court of Florida
500 Duval Street
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RE: *Wayne Treacy vs. Al Lamberti, as Sheriff of Broward County, Florida*
Case no.: SC12-647

Dear Clerk of the Court:

Enclosed is an original Reply Brief along with seven copies for the above referenced matter.

Please file the original motion and time stamp our copy, and kindly return it to our office in the enclosed self-addressed stamped envelope.

Thank you for your anticipated cooperation in this matter.

Sincerely yours,

Jason T. Forman

JTF:mc
Enclosures