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IN THE SUPREME COURT OF FLORIDA

TORRENCE LAWTON,

Petitioner,

v. Case No. SC13-685

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, Torrence Lawton ("Petitioner" or "Lawton"), is before this Court after being granted discretionary review of the Third District Court of Appeal opinion in Lawton v. State, 109 So. 3d 825 (Fla. 3d DCA 2013), based on the allegation that the opinion is in express and direct conflict with the First District Court of Appeal in Akins v. State, 104 So. 3d 1173 (Fla. 1st DCA 2012) and Johnson v. State, 38 Fla. Weekly D953 (Fla. 1st DCA April 30, 2013), and the Second District Court of Appeal in Washington v. State, 110 So. 3d 1 (Fla. 2d DCA 2012), as to whether a life sentence was illegal under Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), where Petitioner was found guilty of committing both homicide and nonhomicide crimes in a single criminal episode and was sentenced on both at the same time.

Respondent, the State of Florida, maintains that the Third District Court of Appeal correctly found that pursuant to Graham the Eighth Amendment does not prohibit the imposition of a life sentence where a juvenile commits a homicide and nonhomicide offense within a single criminal episode.

In this brief, citations to the appendix prepared by Petitioner will be designated by the symbol. (App.) followed by the page number.

STATEMENT OF THE CASE AND FACTS

In Case Number F87-9838-B, Petitioner was convicted in the Eleventh Judicial Circuit Court, Miami-Dade County, of First-Degree Murder (count one), Attempted First-Degree Murder with a Firearm (count two), and Armed Robbery (count three)for crimes committed on January 4, 1987, when he was sixteen. (App. B). He was sentenced to life in prison with parole eligibility after twenty-five years (count one); life in prison with a three-year mandatory minimum (for use of a firearm in the commission of the offense) to run consecutively with the sentence in Count One (count two); and life in prison, to run concurrently with the sentence in Count Two, but consecutively with the sentence in Count One (count three). (App. C).[1] The judgments and sentences were affirmed on direct appeal. Lawton v. State, 538 So.2d 1369 (Fla. 1989).

On or about, April 15, 2011, Lawton filed a motion to correct illegal sentences contending that the life without parole sentences imposed upon the nonhomicide offenses, committed while

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[1] At the time of sentencing in Case Number F87-9838, Petitioner was also sentenced to life in prison in Case Number F87-8000, which consisted of two counts of attempted first-degree murder. This case was also included as part of his postconviction motion that is the subject of the instant case. However, the Third District Court of Appeal found that Lawton was entitled to a new sentencing hearing solely as to the sentences in Case Number F87-8000 which violated Graham because they were issued solely on nonhomicide offenses. Lawton, 109 So. 3d at 828.

he was a juvenile, violate Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).[2] As to Case Number F87-9838, the circuit court disagreed, finding that the sentences did not violate Graham because Lawton was sentenced on a homicide crime, specifically first-degree murder, at the same time as the nonhomicide. (App. G, Trial Court order pg. 5-6). The court also noted that at the time Petitioner was sentenced, life sentences on first-degree murders carried a possibility of parole after twenty-five years. (App. G, Trial Court order pg. 7). Lawton appealed this decision.

At issue here, as to Case Number F87-9838, the Third District Court of Appeal found that because Lawton was convicted of both homicide and nonhomicide offenses that arose out of a **single** criminal episode, it fell within the exception created in Graham, permitting the imposition of such a sentence for a juvenile who "committed both homicide and nonhomicide crimes....". Lawton, 109 So. 3d at 829-31. (citing to Graham, 130 S.Ct. at 2023.) The district court also noted that the record revealed that the trial court, in sentencing Lawton to life without parole for the attempted murder and the armed robbery on his companion case, departed upward from the sentencing guidelines, and properly considered the unscored

[2] The motion also sought relief as to Case Number F87-8000-A.

homicide as an aggravating factor justifying the departure sentence on the two nonhomicide offenses. Id. at 829. The court also rejected Petitioner's argument that that the life-without-parole sentences on the two nonhomicides are nevertheless unconstitutional because those sentences (life without parole) "exceeded" the sentence imposed for the homicide (life with parole eligibility after twenty-five years). Id. at 829-30. The Third District Court wrote that:

> nothing in Graham requires that the sentence on the homicide equal or exceed the sentence on the nonhomicide offense in order for the sentences to be lawful. More importantly, however, under the statutory scheme that existed at the time of the instant case, the trial judge imposed the maximum sentence authorized for first-degree murder. In fact, the trial court had no discretion whatsoever; given that the death penalty had been waived by the State, the trial court was required by law to impose a sentence of life without parole eligibility for twenty-five years. See § 775.082(1), Fla. Stat. (1987). In 1987, a sentence of life without parole for the homicide would have been illegal. The trial court did not and could not exercise any discretion in imposing this sentence. It seems plain, given the upward departure sentences of life-without-parole on the two nonhomicide offenses, that the trial court would have imposed life without parole on the homicide count, had such a sentence been authorized under the law.

Lawton, 109 So. 3d at 830. Finally, in its opinion, the court noted that Petitioner's allegations of disproportionality of the sentences were predicated not upon Graham, but upon a "sentencing scheme that existed in 1987, which provided a non-discretionary sentence for first-degree murder (life without

parole eligibility for twenty-five years) that was less severe than the discretionary maximum sentence for attempted first-degree murder (life without parole)." Id. Thus, the court found that the claim was time-barred and should have been raised on direct appeal or, at the latest, in a motion filed under Rule 3.850 within two years of his conviction and sentence becoming final.

Thereafter, this Court granted Lawton's petition seeking discretionary review before this tribunal. The State's response to Petitioner's merits brief follows.

SUMMARY OF ARGUMENT

In Graham, the Supreme Court of the United States concluded that states violate the Eighth Amendment when they sentence juveniles to life imprisonment for only nonhomicide crimes; the Court placed no Eighth Amendment limits on prison terms resulting from homicide convictions or nonhomicide conviction crimes when sentenced with homicide convictions. Although Petitioner was found guilty of a homicide offense, he maintains that his life sentence as to his nonhomicide offenses that were part of the same, single criminal episode are illegal under Graham. As the Second and Third District Courts of Appeal and non-Florida jurisdictions have properly recognized, a life sentence under this fact pattern is not illegal under the express language of Graham. When offenses occur during a single criminal episode, and at least one offense is a homicide offense, there is no Eighth Amendment prohibition to sentencing a juvenile to life imprisonment for nonhomicide offenses at the same time.

ARGUMENT

ISSUE I: THE DISTRICT COURT CORRECTLY DETERMINED THAT THERE IS NO EIGHTH AMENDMENT PROHIBITION AGAINST SENTENCING A JUVENILE TO A LIFE SENTENCE WITHOUT PAROLE WHERE HE HAS COMMITTED BOTH HOMICIDE AND NONHOMICIDE OFFENSES WITHIN THE SAME CRIMINAL EPISODE.

In Graham, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the United States Supreme Court held that unqualified life sentences for **nonhomicides** constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution when imposed upon persons who were minors when they committed the crimes. However, while the Court in Graham concluded that states violate the Eighth Amendment when they sentence juveniles to life imprisonment for only nonhomicide crimes, the Court placed no Eighth Amendment limits on prison terms resulting from homicide convictions or nonhomicide conviction crimes when sentenced with homicide convictions that arose from the same criminal episode. In its opinion, the Court stated that it opinion only concerned those juvenile offenders sentenced to life without parole solely for nonhomicide offenses. Graham, 130 S.Ct. at 2023.

In the instant case, Petitioner was found guilty and sentenced on a homicide, but still maintains that his life sentence as to his nonhomicide offenses that were part of the same, single criminal episode are illegal under Graham. As the Second and Third District Courts of Appeal have both properly

recognized, a life-sentence under this fact pattern is not illegal under the express language of Graham. When offenses occur during a single criminal episode, and at least one offense is a homicide offense, there is no Eighth Amendment prohibition to sentencing a juvenile to life imprisonment for a nonhomicide offense at the same time.

The Eighth Amendment prohibits cruel and unusual punishment and is made applicable to the states through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 666–667(1962). Under the Florida Constitution, "the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art. I, § 17, Fla. Const; see e.g. Lightbourne v. McCollum, 969 So. 2d 326, 334-35 (Fla. 2007)(acknowledging that in 2002, the Florida Constitution was amended to provide that Florida's interpretation of the cruel and unusual punishment clause is be construed in conformity with the United States Supreme Court's decisions.). In declaring that a sentence of life without the possibility of parole (LWOP) imposed on a juvenile for a nonhomicide offense violates the Eighth Amendment, the Graham Court adopted a categorical approach to its analysis of whether a life sentence violated the

Eighth Amendment when imposed on a juvenile offender who did not also commit a homicide offense. Graham, 130 S. Ct. at 2022-23. This categorical approach had previously been limited to death penalty cases. See e.g. Coker v. Georgia, 433 U.S. 584, 592 (1977)(execution for rape violates Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 569 (2005)(execution of minor violates Eighth Amendment); and Atkins v. Virginia, 536 U.S. 304, 321 (2002)(execution of mentally retarded person violates Eighth Amendment).

In its analysis, the Graham Court carefully explains why its holding does not extend to nonhomicide sentences that are part of the same criminal episode as the homicide. The Supreme Court began its analysis with "objective indicia of national consensus." Id. at 2023[3]. It was the State and its amici position before the Court that there was no national consensus against the sentencing practice at issue. Id. However, the Court found this argument to be "incomplete and unavailing." Id. Writing,

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[3] "Six jurisdictions do not allow life without parole sentences for any juvenile offenders. . . . Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. . . . Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. . . . Federal law also allows for the possibility of life without parole for offenders as young as 13. . . ." Graham, 130 S. Ct. 2023.

> "[t]here are measures of consensus other than legislation." Kennedy, supra, at ----, 128 S.Ct., at 2657. Actual sentencing practices are an important part of the Court's inquiry into consensus. See Enmund, supra, at 794–796, 102 S.Ct. 3368; Thompson, supra, at 831–832, 108 S.Ct. 2687 (plurality opinion); Atkins, supra, at 316, 122 S.Ct. 2242; Roper, *supra*, at 572, 125 S.Ct. 1183; Kennedy, supra, at ----, 128 S.Ct., at 2657–58. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non–Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009) (hereinafter Annino).

Graham, 130 S. Ct. at 2023.

The Court then went on to note that the State argued that the study's "tally [was] inaccurate because it did not count juvenile offenders who were convicted of both a homicide and nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide." Id. In response to this concern, the Court specifically noted that:

> This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. **The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.**

Graham v. Florida, 130 S. Ct. at 2023.(emphasis added). In considering how to apply this language, the district courts of Florida have differed in their analysis.

a. *How the District Courts of Florida have approached this review.*

The Third and Fourth District Courts of Appeal have found that where a defendant commits a homicide offense, and during the same criminal offense commits a nonhomicide offense, a resulting life sentence on nonhomicide offenses does not violate Graham. This is premised, at least partially, on the fact that the homicide offense can be an aggravating factor in the sentencing of the nonhomicide offense. Although the Petitioner has relied on cases from the Second District Court of Appeal to establish its claim of conflict jurisdiction, in at least a broad sense, the Second District has also recognized that there is a possibility that a defendant may legally be sentenced to LWOP on a nonhomicide offense that was committed in the same criminal episode as a homicide.

Recently, in Graham v. State, 2014 WL 2740536, *1 (Fla. 4th DCA June 18, 2014)(4D14-825), the Fourth District affirmed the denial of a defendant's rule 3.800(a) motion to correct illegal sentence where the defendant was sentenced to life without possibility of parole for twenty-five years for first degree murder and received a LWOP sentence for kidnapping. In his

motion, he claimed that his life sentence as to the kidnapping was illegal because he was seventeen at the time he committed his offenses, in 1979. Citing to its previous opinion in Atwell v. State, 128 So. 3d 167, 169 (Fla. 4th DCA 2013), the court found that Graham applies only where a juvenile defendant is sentenced to life without possibility of parole for a non-homicide offense.

In Washington v. State, 110 So. 3d 1, 1-2 (Fla. 2d DCA 2012), the defendant was convicted in two separate trials of two counts of aggravated battery with a deadly weapon, two counts of first-degree felony murder, and two counts of kidnapping. Washington, reh'g denied (Mar. 28, 2012), review denied, 115 So. 3d 1002 (Fla. 2013). Washington received consecutive sentences of 15 years imprisonment on each of the aggravated batteries and life imprisonment without parole on the kidnapping and murder charges. Id. at 2-3. Thus, because the defendant had been convicted of felony murder, and due to its reversal and remand of a felony murder sentence in Arrington v. State, 113 So. 3d 20 (Fla. 2d DCA 2012), the Second District Court of Appeal reversed and remanded with instructions for the trial court to consider whether the defendant ***may*** qualify for relief and to exercise its own judgment in regards to the proportionality of the consecutive sentences. Washington, 111 So. 3d at 2. The court wrote that on remand the court was "required to resentence Mr.

Washington to life without possibility of parole for these homicides unless it determines under the facts of this case that such a penalty is disproportionate" Id. at 2.

As to the kidnapping sentences, the court found that whether the sentences of life without possibility of parole for the two kidnappings were authorized depended on the sentences ultimately imposed for the two felony murders. Id. However, the court noted that it was **not** required to reverse based on Graham. Id. The court wrote:

> Employing a categorical approach, the Supreme Court in Graham held that life without possibility of parole was a cruel and unusual punishment for all juvenile offenders who commit nonhomicide offenses. Graham, 130 S.Ct. at 2030. In so holding, **it noted an exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses.** See id. at 2023. Because the homicide offense can be an aggravating factor in the sentencing of the nonhomicide offense, the Supreme Court indicated that a life sentence without possibility of parole for a nonhomicide offense could be constitutional if it accompanied an authorized sentence of life without possibility of parole for a homicide offense. See id.
>
> Thus, the constitutionality of Mr. Washington's two life sentences without parole for the kidnappings probably hinges on whether the trial court, on remand, imposes life without parole for felony murders. Accordingly, we reverse these sentences and remand with instructions for the trial court to resentence for these offenses after it determines the appropriate sentences for the felony murders.

Washington v. State, 110 So. 3d at 2-3 (Fla. 2d DCA 2012), reh'g denied (Mar. 28, 2012), review denied, 115 So. 3d 1002 (Fla. 2013)(emphasis added).

To the extent that Lawton relies on the language in Washington where the Second District says that the nonhomicide life sentence would be constitutional "if it accompanied an authorized sentence of life without possibility of parole for a homicide offense," Washington was decided at a date prior to Miller v. Alabama, 132 S.Ct. 2455 (2012). As a result, the district court was unaware of and was not considering any question as to whether the state trial court, on remand in Washington, would sentence the defendant to life with parole after twenty-five (25) years. At the time of Washington, everyone still believed, pre-Miller, that LWOP was the only possible sentence (and lawful sentence) for all first-degree murders by juveniles tried as adults. Thus, there was no reason for the Second District Court to even entertain the possibility, let alone address it, under which the defendant received life with the possibility of parole after twenty-five years for the first degree murder as it was not a possibility to even consider at that time. The Respondent also notes that the offenses in Washington were 2006 offenses, unlike the instant case which occurred in the early 90's. Here, the offenses occurred at a time where life without possibility of parole was mandated for first degree murder when not imposing a death sentence.

Later, in Starks v. State, 128 So. 3d 91 (Fla. 2d DCA 2013), the Second District found that defendant Starks' life sentence

for burglary was not illegal under Graham because the burglary was committed during the same criminal episode as a murder, and in Graham the Supreme Court of the United States noted in dicta that there is an exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses. Starks v. State, 128 So. 3d 91, 92 (Fla. 2d DCA 2013)reh'g denied (Oct. 29, 2013). The Second District wrote:

> In the course of its opinion in Graham, the Supreme Court relied on the Annino study to find that there is a consensus against mandatory life sentences for juveniles who commit nonhomicide offenses. See Graham, 130 S.Ct. at 2023 (citing P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009)). In doing so, it responded to the State's argument that the study was not accurate because it did not include juveniles who were convicted of both a homicide and a nonhomicide offense, even when they received a life sentence for a nonhomicide. The Court found this distinction unpersuasive:
>
> > Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense. Id. at 2023.

Starks, 128 So. 3d at 93. The court found that the defendant fell within this exception because he had committed a homicide and nonhomicide during a single criminal episode. Id.

However, the First and Fifth District Courts of Appeal have disagreed with this approach. In Johnson v. State, --- So.3d ---,38 Fla. L. Weekly D953 (Fla. 1st DCA Apr. 30, 2013), the First District certified conflict with the Third District in Lawton and concluded that there was no exception in Graham for juvenile offenders who commit both homicide and nonhomicide offenses. (pending review); accord Jackson v. State, ---So.3d ----,38 Fla. L. Weekly 1334 (Fla. 1st DCA June 18, 2013). The Fifth District agreed with the reasoning in Johnson that Graham created a bright-line rule, that a defendant who was under eighteen when his nonhomicide offense was committed cannot be sentenced to life without parole. Weiand v. State, 129 So. 3d 434, 435 (Fla. 5th DCA 2013).

b. Non-Florida jurisdictions

Similar to the Third and Fourth Districts, courts from outside the State of Florida that have addressed this issue have found that there is no Eighth Amendment prohibition under these facts. For example, in Arredondo v. State, 406 S.W.3d 300, 304-05 (Tex. Crim. App. 2013), a Court of Criminal Appeals of Texas found that a juvenile defendant who was convicted of one count of capital murder, one count of aggravated kidnapping, and two counts of aggravated assault and received a life sentence on each of the four counts was not entitled to relief under Graham. In reaching its decision, the Texas court relied on the language

in Graham finding that the "Supreme Court made clear that its holding only concerned cases where juvenile offenders are sentenced to life without parole solely for nonhomicide offenses." Arredondo, 406 S.W.3d at 305. Likewise, courts in Delaware and California have also found that Graham would not apply where a defendant has committed both a homicide and nonhomicide offense in the same criminal episode. See e.g. People v. Bagsby, 2011 WL 4360100, *4 (Cal. Ct. App. Sept. 20, 2011)(finding that Graham did not assist a defendant who had been convicted of Second Degree Murder along with 10 counts of assault with a semi-automatic weapon because "[t]he court in Graham made it very clear that the new rule is specific to nonhomicide offenses.)(unpublished); Twyman v. State, 26 A.3d 215 (Del. 2011)(finding that postconviction relief was not warranted where juvenile was convicted of First-Degree Murder, Attempted First-Degree Murder, Conspiracy in the First Degree, Second-Degree, and related firearm offenses and was sentenced to two mandatory life sentences for Murder in the First Degree and Attempted Murder in the First Degree. Twyman was also sentenced to five years at Level V for Conspiracy in the First Degree, to twenty years at Level V for Murder in the Second Degree, and to terms of years for the firearm offenses. The Delaware court noted that while standing on its own attempted murder falls within the category of offenses for which a life-sentence

without parole may not be imposed on a juvenile; Graham held that the Eighth Amendment prohibits imposing a life sentence without parole on a juvenile who is sentenced "solely for a nonhomicide offense," which is not the case here because Twyman was sentenced on both homicide and nonhomicide offenses.)

Further, at least two federal district courts have recognized that "the Supreme Court has, at least tacitly, recognized that life without parole for a juvenile who has committed homicide does not violate the Eighth Amendment." See v. McDonald, 2013 WL 1281621,*23-24 (E.D. Cal. 2013) (unreported)(citing to the language in Graham that juvenile offenders who commit both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offender who committed no homicide.); Her v. Jacquez, 2011 WL 1466868, at *54 (E.D. California April 18, 2011)(unreported)(same); Williams v. Ryan, 2010 WL 3768151, at *30 (S.D.Ca.2010)(finding that Graham is not applicable to a petitioner who committed murder. On a petition proceeding pursuant to 28 U.S.C. § 2254, the defendant, a state prisoner, who was fifteen when he brought a handgun to school and shot fifteen people, killing two and wounding thirteen, argued that the life sentences violated the Eighth Amendment. The habeas court disagreed finding that the Supreme Court has never held that a sentence of LWOP for a juvenile who has committed

homicides violates the Eighth Amendment. The court noted: "But in finding that life without the possibility of parole was prohibited for juveniles who had not committed a homicide, the Supreme Court noted that 'juveniles offender who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide.'").

c. *In the instant case, Petitioner was sentenced on both homicide crimes and nonhomicide crimes that arose from the same, single, criminal episode.*

On review, Petitioner argues that the Third District mistakenly relied on the language in Graham that a juvenile offender who committed both homicide and nonhomicide crimes presents a different situation for a sentencing judge than juvenile offenders who committed no homicide. He claims that this language is mere dicta, formed no part of the Court's ruling, and that the Court did not announce an exception to its categorical rule. He also argues that Graham did not decide that a juvenile could be sentenced to LWOP for a homicide. However, this argument ignores the very language of Graham,what the Supreme Court decided and the limits that it was imposing.

Graham created an exception for those juveniles who were sentence to LWOP and had ***only*** committed nonhomicide offenses. The Supreme Court has never held that a sentence of LWOP for a juvenile who has committed homicides or other nonhomicide

offenses in the same criminal episode as the homicide violates the Eighth Amendment. On its face, the Court in Graham stated that "it is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination." Graham, *supra*, 130 S. Ct. at 2023.

Here, as recognized by the Third District,

> the record reveals that the trial court, in sentencing Lawton to life without parole for the attempted murder and the armed robbery, departed upward from the sentencing guidelines, and **properly considered the unscored homicide as an aggravating factor** justifying the departure sentence on the two nonhomicide offenses. . . . The sentence exemplifies the very rationale relied upon by the Supreme Court in Graham in differentiating between juvenile offenders who commit only a nonhomicide offense and those who commit both a homicide and nonhomicide offense.

Lawton v. State, 109 So. 3d 825, 829 (Fla. 3d DCA 2013)(emphasis added).

Petitioner's convictions of attempted murder and armed robbery were intertwined with the murder conviction. The sentencing court considered the fact that Lawton killed and intended to kill in the course of a single criminal episode. Considering the severity of the sentence, and in light of Lawton's culpability and the nature of the crimes, he does not fall within Graham, who did not commit a homicide, and thus the life sentences are not overly harsh when compared to the gravity

and number of crimes of which he was convicted. See e.g. *Graham*, 130 S.Ct. at 2027 (holding that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" and thus cannot be sentenced to life in prison without the possibility of parole). Indeed, while Lawton's attempted murder victim was fortunate enough to survive, Lawton possessed the same "intent to kill" that was not impacted by Graham's categorical proportionality ruling.

Lawton was sentenced to the second harshest punishment-life in prison without the possibility of parole-for committing a crime in conjunction with a crime that falls within the category of the worst offenses. Although "[l]ife without parole is an especially harsh punishment for a juvenile," Graham, 130 S.Ct. at 2027, such a sentence is not overly harsh when compared to the crime of which Lawton was convicted. This conclusion is buttressed by the Supreme Court's decision in Graham. In analyzing the constitutionality of Graham's sentence, the Court determined that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" and thus cannot be subjected to "the second most severe penalty permitted by law." Graham, 130 S.Ct. at 2028. Unlike the defendant in Graham, Lawton also committed capital murder and attempted murder and thus does not have "twice diminished moral culpability." Likewise, although

Lawton committed one of Florida's worst offenses, he was sentenced to the second harshest penalty. Cf Graham, 130 S.Ct. at 2032 (specifically restricting its holding to nonhomicide crimes).

In Graham, the Supreme Court specifically explained that the decision "concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Id. Petitioner posits that language should be ignored as it is dicta. However, this language is not simple dicta where it forms an integral and essential part of the Court's analysis. See e.g. Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582(7th Cir.2005) (Posner, J.) (arguing that "the holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome"); WWC Holding Co., Inc. v. Sopkin, 488 F.3d 1262, 1271 n.6 (10th Cir. 2007)("Because our analysis of the Telecommunication Act's provisions for assigning interstate and intrastate jurisdiction bears directly upon our review of the district court's holding and provides the rationale for our holding, it is integral to our decision and therefore not 'dicta.'"); In re Berwick Black Cattle Co., 394 B.R. 448, 456 (Bankr. C.D. Ill. 2008)("It is a well established principle that the holding of a case includes, besides the facts and outcome, the reasoning essential to that outcome."). Moreover, if Petitioner is correct that the Graham language,

regarding combined homicide and nonhomicide sentences, is only dicta that would mean that the Supreme Court did not reach or address that issue, since the facts were not before it. Consequently, that would mean that as to such a factual issue, prior case law from Florida state courts, and courts from outside the state, would have been left undisturbed as to combined homicide and nonhomicide LWOP sentences. See e.g. McNamee v. State, 906 So.2d 1171 (Fla. 4th DCA 2005)(upholding a juvenile's convictions and sentences to LWOP on first degree murder, robbery with a firearm, burglary of a dwelling while armed); Blackshear v. State, 771 So. 2d 1199 (Fla. 4th DCA 2000)(three LWOP sentences for armed robbery for defendant who pled guilty at 13 and later violated probation); Manuel v. State, 629 So.2d 1052 (Fla. 2nd DCA 1993)(remanding to consider whether thirteen year old sentenced to life had counsel for prior juvenile convictions included in scoresheet which recommended life sentence for attempted murder and armed robbery); State v. Walker, 252 Kan. 117, 843 P.2d 203 (1992)(life sentence for fourteen year old active participant in two aggravated kidnappings and an aggravated arson); State v. Foley, 456 So.2d 979 (La.1984)(fifteen year old's life sentence without the possibility of parole for aggravated rape proportional); White v. State, 374 So.2d 843 (Miss.1979)(life without possibility of parole for sixteen year old armed robber

and kidnaper); People v. Isitt, 55 Cal.App.3d 23, 127 Cal.Rptr. 279 (1976)(seventeen year old sentenced to life without parole for kidnapping and robbery with bodily harm); Rogers v. State, 257 Ark. 144, 515 S.W.2d 79 (1974)(seventeen year old first time offender rapist sentenced to life without possibility of parole); Howard v. State, 319 So.2d 219 (Miss.1975)(sixteen year old's twenty-five year sentence for attempted armed robbery not cruel and unusual); State v. Haley, 87 Ariz. 29, 347 P.2d 692 (1959)(not cruel and inhuman to sentence fifteen year old who committed robbery, aggravated assault, and lewd and lascivious acts to twenty-three to thirty years).

Accordingly, Lawton is not entitled to relief on either his robbery or attempted murder sentences because he was sentenced on a first-degree murder at the same time for offenses in the same criminal episode. Thus, when read in context, the Supreme Court was specifically applying Graham ***only*** to juveniles who had **not** committed a homicide offense. The Supreme Court has never held that a sentence of LWOP for a juvenile who has committed homicides violates the Eighth Amendment.[4] As the Court noted, juvenile offenders who committed both homicide and nonhomicide

[4] Even in Miller v. Alabama, 132 S.Ct. 2455 (2012), the Supreme Court only prohibited the mandatory imposition of LWOP. The Court did not find that a LWOP sentence can never be imposed on a juvenile who commits a homicide offense.

crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. The Supreme Court's discussion on this point in Graham cannot be swept away as mere dicta, where it is inextricably intertwined with the reasoning that resulted in its holding. Accordingly, in considering Lawton's age and the nature of his crimes, this Court should find that Petitioner is not entitled to relief on his LWOP sentences.

d. Although Petitioner received a parole eligible sentence on the first-degree murder, he is not entitled to relief on the nonhomicide offenses.

Next, Petitioner maintains that even if Graham created an exception for juveniles sentenced on homicide and nonhomicide offenses, this exception only applies where the sentence on the First-Degree Murder is LWOP. Thus, he argues that here the LWOP sentences on the nonhomicides are unconstitutional because those sentences exceed the sentence imposed on the homicide. When Lawton was sentenced in 1987, there was a statutory anomaly that provided a non-discretionary sentence for first-degree murder (life without parole eligibility for twenty-five years). Thus, the sentencing court imposed the maximum sentence authorized, once the death penalty had been waived by the State. See § 775.082(1), Fla. Stat. (1987). In 1987, a sentence of life without parole for the homicide would have been illegal. The

trial court did not and could not exercise any discretion in imposing this sentence.

While the First District Court of Appeal in Akins v. State, 104 So.3d 1173 (Fla. 1st DCA 2012), found that Graham precluded a life sentence, the case is factually distinguishable. In Akins, pursuant to a plea agreement, the juvenile was convicted of Second-Degree Murder (Count 1), Attempted First-Degree Murder (Count 2), two counts of Attempted Robbery With a Firearm (counts 3 and 4), and Shooting into an Occupied Vehicle (Count 5). Akins, 104 So.3d at 1174. He received concurrent sentences of twenty-seven years. Id. However, his conviction and sentence on Count 2 were reversed on appeal on the ground that the original indictment charged him with a non-existent crime. On retrial of Count 2, following a jury trial, the defendant was convicted as charged and sentenced to a term of natural life with no possibility of parole. Id. The defendant later challenged his life sentence without the possibility of parole for the attempted murder, and the district court stated that under the facts presented in the case, "that Graham precludes a life sentence in the present case." Akins, 104 So.3d at 1174.

Although the court seemed to hold that no life sentence could be imposed for any nonhomicide offense committed by a juvenile, even if the juvenile also committed a homicide, what the court stated was that, "Although appellant also committed a

homicide, he was sentenced for the homicide, not to life without parole, but to twenty-seven years in prison." Id. at 1175. Unlike Lawton, Akins was convicted of second degree murder, not first degree murder. The maximum possible sentence for second degree murder is a term of life imprisonment. When sentencing Akins for the second degree murder, the trial court, although having the discretion to impose a sentence of life, which would have been LWOP, the trial court consciously exercised its discretion and chose to impose a lesser sentence of twenty-seven years for the second degree murder. Akins thus recognizes an anomaly when the homicide conviction, as a result of a discretionary decision of the sentencing court, imposes less than the maximum that it could impose.

Here, by contrast, with the sentence for first degree murder, the trial court did impose the maximum sentence that was permitted under Florida statutory law. A secondary point is that the sentence imposed was also a life sentence, even though it was parole eligible after twenty-five (25) years. It still remained a sentence for which Lawton may never be released from prison. By contrast, Akins had a sentence of twenty-seven (27) years for the second degree murder committed in 1993, ensuring release on that offense at the end of twenty-seven (27) years, and holding out the possibility of early release, through gain time, which, for an offense dating back to the early 1990's,

could have resulted in significant awards of gain-time of the twenty-seven (27) year sentence resulting in a substantial decrease in the time to be served. See e.g. Fla. Stat. §§ 944.275(4)(a)(1993)(As a means of encouraging satisfactory behavior, the department shall grant basic gain-time at the rate of 10 days for each month of each sentence imposed on a prisoner . . . .) and §(4)(a)3(b)(1993)("For each month in which a prisoner works diligently, participates in training, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly.") and § (4)(e)(one time award of up to sixty days to an inmate who completes a GED) *et al*.

Thus, if this Court adopts Petitioner's argument, based on Akins, it would mean that for first degree murder cases, with related nonhomicides, at the time when the twenty-five year parole eligibility still existed (pre-1994); those combined offenses would have to be less than LWOP. On the other hand, since second degree murder, at the same period of time, permitted life sentences which were true life sentences, defendants could still have combined sentences of life and life, for the homicide and nonhomicide and the sentence would be legal. Akins was not reversed because the sentence on the nonhomicide was less than the homicide. Rather, the district

court reversed the LWOP on the attempted murder conviction because it believed that Graham did not authorize the imposition of such a sentence on a nonhomicide offense. Likewise, there is no true conflict with Washington. The fact that Lawton received a parole-eligible life sentence on the homicide is due only to the sentencing anomaly which existed at the time. This in no way diminished the authority set forth in Graham for the imposition of a LWOP sentence for a nonhomicide offenses committed within the same criminal episode as a homicide.

Finally, the State notes that neither Graham, nor any other Supreme Court case considering a similar issue, requires that the sentence on the homicide equal or exceed the sentence on the nonhomicide offense in order for the sentences to be lawful. Petitioner was being sentenced on several different counts for crimes that occurred during the same criminal episode. "In non-capital cases, the Eighth Amendment encompasses, at most, only a narrow proportionality principle." United States v. Raad, 406 F.3d 1322, 1323 (11th Cir.2005)(quotation marks omitted). It "does not require strict proportionality between crime and sentence," but instead "forbids only extreme sentences that are grossly disproportionate to the crime." United States v. Farley, 607 F.3d 1294, 1341 (11th Cir.2010) (quotation marks omitted). "[O]utside the context of capital punishment, successful

challenges to the proportionality of particular sentences [are] exceedingly rare." Solem v. Helm, 463 U.S. 277, 289-90, 103 S.Ct. 3001, 3009, 77 L.Ed.2d 637 (1983) (emphasis omitted). A sentence of life imprisonment without parole is appropriate here, on the nonhomicide offense, notwithstanding that this penalty could not be imposed for the commission of the nonhomicides standing alone. See e.g. Buford v. State, 403 So. 2d 943 (Fla. 1981)(Although the crime of sexual battery upon a person less than 12 years of age is a capital crime, the death penalty may not be imposed for the commission of this offense since under Florida law such penalty constitutes the type of "cruel and unusual punishment" forbidden by the Eighth Amendment to the United States Constitution. However, where the defendant is convicted of first-degree murder, defined as the unlawful killing of a human being during the commission of any sexual battery, a sentence of death is appropriate, notwithstanding the fact that this penalty could not be imposed for the commission of the sexual battery standing alone.). In the instant case, due to the nature of the crime that Lawton committed, the homicide which was committed along with the nonhomicides enhanced the sentence of the nonhomicide offenses. This circumstance is legal, and not a violation of the Eighth Amendment.

e. *Death Penalty cases provided limited value in analyzing these cases.*

Finally, Petitioner argues that the categorical ban related to LWOP should be enforced in the same manner as it is in relation to death penalty cases. First, again, in Graham the Supreme Court was not barring LWOP sentences on juveniles who committed both homicide and nonhomicide crimes. Second, Graham is an exception to the Court's traditional Eighth Amendment review of sentences not involving the death penalty. That review "contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" Graham, supra, 130 S.Ct. 2021]. As a result, Eighth Amendment death penalty cases "'are of limited assistance in deciding the constitutionality of the punishment' in a noncapital case." Solem, *supra*. Death penalty cases are different from others and the Supreme Court of the United States has imposed protections that the Constitution nowhere else provides. See e.g. Harmelin v. Michigan, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); see also Ring v. Arizona, 536 U.S. 584, 606, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)("[d]eath is different.").

The Supreme Court has never held that a sentence of LWOP for a juvenile who has committed homicides violates the Eighth Amendment. As the Court noted in Graham: "But in finding that life without the possibility of parole was prohibited for juveniles who had not committed a homicide, the Supreme Court noted that "juveniles offender who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide." Graham, 130 S. Ct. at 2023. Here, as Lawton committed a homicide offense along with his nonhomicide offenses, he is not entitled to relief and his sentences do not violate the categorical ban expressed in Graham. Accordingly, this Court should approve the decision of the Third District Court of Appeal and find that having committed a homicide and a nonhomicide offense during a single criminal episode, Lawton's sentences do not violate the Eighth Amendment as explained in Graham.

f. Petitioner's arguments are untimely

Finally, in its opinion the Third District properly recognized that Petitioner's arguments were an untimely attack on his sentence. The court wrote:

> Moreover, Lawton's argument that the sentences are disproportionate is predicated not upon the decision in Graham, but upon a sentencing scheme that existed in 1987, which provided a non-discretionary sentence for first-degree murder (life without parole eligibility for twenty-five years) that was less

> severe[7] than the discretionary maximum sentence for attempted first-degree murder (life without parole). Any such claim of disproportionality should have been raised on direct appeal or, at the latest, in a motion filed under Rule 3.850 within two years of his conviction and sentence becoming final. His proportionality claim as to the sentences imposed in case number 87-9838 are time-barred.

Lawton v. State, 109 So. 3d 825, 830 (Fla. 3d DCA 2013). Here, as there is no case from the U.S. Supreme Court or this Court holding that such sentences were illegal, let alone a holding that applied retroactively, the claim here was not cognizable in a 3.800(a) motion, and is also beyond the time limit for motions filed under Florida Rule of Criminal Procedure 3.850 motions.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court approve the Third District Court of Appeal decision in Lawton.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Counsel for the Petitioner: Andrew Stanton, Assistant Public Defender via electronic service at Appellatedefender@pdmiami.com and astanton@pdmiami.com on July 22, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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