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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-685

TORRENCE LAWTON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

As in the initial brief, "life without parole" will be abbreviated as LWOP throughout the brief. Unless otherwise indicated, all emphasis is supplied.

SUMMARY OF THE ARGUMENT

Torrence Lawton was sentenced to LWOP solely for a nonhomicide offense. The State relies on cases that do not fully support its position. The First and Fifth District Courts of appeal forbid nonhomicide LWOP sentences even when accompanied by a lawful LWOP sentence for murder. The Second District agrees at least that a nonhomicide LWOP sentence must be accompanied by a lawful LWOP sentence for murder. Only the Fourth District has joined the Third. Neither the Fourth District nor any other case the State relies on provides any analysis beyond the Third District's arguments in *Lawton*. The federal cases the State cites do not support its position.

The State refuses to recognize *Graham*'s key dividing line between LWOP and parole-eligible sentences. It treats Mr. Lawton's parole-eligible sentences as though they were equivalent to LWOP. In doing so, it obscures the fact that its own reasoning supports Mr. Lawton's position. It believes that the Supreme Court excluded homicide *cases* from *Graham* because they were excluded from the Annino Study. But the Annino study excluded only cases were the juvenile was sentenced to LWOP for the homicide. *See* Annino at 6 n.20.

The State would discount capital cases as "of limited assistance" in interpreting *Graham*. In fact, the Supreme Court expressly equated juvenilel

LWOP with the death penalty. The Court should apply *Graham*'s categorical bar just as does categorical bars on the death penalty: Count by count.

ARGUMENT[1]

I. THE THIRD DISTRICT'S EXCEPTION TO *GRAHAM* IN THE COURTS.

There are three possible answers to the question now before the Court:

1. *Graham* means what it says – the Constitution does not "permit[] a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." 560 U.S. at 42.

2. A juvenile may only be sentenced to LWOP for a nonhomicide offense if he is also sentenced to LWOP for murder – A juvenile may not be "sentenced to life without parole solely for a nonhomicide offense." *Graham* at 63.

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[1] As an initial matter, the Court must apply the broader "cruel or unusual" standard when deciding Mr. Lawton's state-constitutional claim. The State acknowledges that article I, section 17 was amended in 2002. It nevertheless maintains that the Court should apply the amended version, interpreting it in conformity to the Eighth Amendment to the United States constitution, which prohibits only "cruel *and* unusual" sentences. Answer Brief at 8. Mr. Lawton stands convicted of crimes that occurred fifteen years before the amendment. This Court has held that it is the version of section 17 in effect at the time of the crime that controls. *See Adaway v. State*, 902 So. 2d 746, 747 n.17 (Fla. 2005).

The distinction between the to standards is a "critical" one representing "a radical change in state constitutional law." *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *Armstrong v. Harris*, 773 So. 2d 7, 21 (Fla. 2000). The Court has relied on this distinction in finding that article I section 17 categorically bars the death-penalty for juveniles, well before the United States Supreme Court decided *Roper v. Simmons*, 543 U.S. 551 (2005). Mr. Lawton must prevail under the Florida Constitution if his LWOP sentences for nonhomicide offenses are "unusual." The Supreme Court has already established that even for homicides, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012). Responding to this statement, Justice Roberts noted that a "common synonym" for uncommon is "unusual." *Id.* at 2482 (Roberts, C.J., dissenting).

3. There is no "flat ban" or categorical bar on LWOP for juvenile nonhomicide offenses. So long as the juvenile is also convicted of murder a judge has unfettered discretion to sentence him to die in prison, no matter how soon he might have been released if murder were his only crime.

The First and Fifth District Courts of Appeal have held that *Graham* created a flat ban on any LWOP sentence for a nonhomicide offense committed by a juvenile – even if the child receives a valid LWOP sentence for a murder. *See Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA April 30, 2013); *Jackson v. State*, 38 Fla. L. Weekly D1334 (Fla. 1st DCA June 8, 2013) (opinion on rehearing); *Weiand v. State*, 129 So. 3d 434 (Fla. 5th DCA 2013). The Second District has held that may be sentenced to LWOP for nonhomicides, but only if the juvenile is also sentenced to LWOP for murder. *See Starks v. State*, 128 So. 3d 91 (Fla. 2d DCA 2013); *Washington v. State*, 110 So. 3d 1, 2-3 (Fla. 2d DCA 2012), *rev. denied* 115 So. 3d 1002 (Fla. 2013). Only the Fourth District Court of Appeal agrees with *Lawton*'s misreading of *Graham*. *See Orange v. State*, 39 Fla. L. Weekly D1887 (Fla. 4th DCA Sept. 3, 2014).[2]

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[2] The Answer Brief mistakenly relies on *Graham v. State*, 143 So. 3d 953 (Fla. 4th DCA 2014) as evidence that the Fourth District agrees with *Lawton*. Mr. Graham's 1979 sentences carried the possibility of parole. After the Answer Brief was filed, however, the Fourth District issued *Orange*, adopting the Third District's position without independent analysis. Orange was convicted of first-degree murder and four counts of robbery and sentenced to LWOP on all five charges. The district court held that the LWOP sentence for homicide violated *Miller*. As to the nonhomicide counts, however, it adopted *Lawton*. The court reversed the LWOP sentence for *homicide*, but left the nonhomicide LWOP sentences standing.

The State maintains that the Second District support the Third's "homicide-case" exception to *Graham's* flat ban on LWOP sentences for homicide crimes, "under this fact pattern." Answer Brief, 7-8, 11-16. It also finds support in decisions from other states and the federal courts. The State is wrong about the Second District, and none of the other cases offer anything beyond a facile reading of the same dicta underlying the *Lawton* opinion.

The Second District does not approve of LWOP nonhomicide sentences where the defendant is sentenced to less than LWOP for murder. In *Starks v. State*, 128 So. 3d 91 (Fla. 2d DCA 2013), the defendant was sentenced to LWOP for both second-degree murder and burglary. The court affirmed, citing the same dicta relied upon by *Lawton*. But in *Washington v. State*, 110 So. 3d 1, 2-3 (Fla. 2d DCA 2012), *rev. denied* 115 So. 3d 1002 (Fla. 2013), the court concluded that in *Graham*:

> … 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.**

Id. at 4.

In *Washington*, as well as its companion case *Arrington v. State*, 113 So. 3d 20 (Fla. 2d DCA), *rev. denied* 104 So. 3d 1087 (Fla. 2012), the court anticipated *Miller*, holding that the Eighth Amendment forbade mandatory LWOP for

juveniles convicted of felony murder – at least when the juvenile was not the actual killer. Washington was sentenced to LWOP for two counts of felony-murder and kidnapping. Because Washington could be sentenced to a non-LWOP sentence for homicide on remand, the court also vacated the kidnapping sentences, reasoning that they could only stand, if they "accompanied an authorized sentence of life without possibility of parole for a homicide offense." 110 So. 3d at 4.

The State would distinguish *Washington* because, "At the time of *Washington*, everyone believed, pre-*Miller*, that LWOP was the only possible sentence (and lawful sentence) for all first-degree murders by juveniles …" Answer Brief at 14. This is exactly wrong. The entire point of *Arrington* and *Washington* was that the court believed that LWOP could **not** be the only possible sentence for first-degree murder. *See Arrington*, 113 So. 2d at 27 (A court "must also have discretion to impose a lesser sentence when life without the possibility of parole would be disproportionate to the crime.")

The State finds support in cases from Texas, California, and Delaware. *See* Answer Brief, 16-18, *citing Arredondo v. State*, 406 S.W.3d 300 (Tex. Crim. App. 2013); *People v. Bagsby*, 2011 WL 4360100, 4(Cal. Ct. App. Sept. 20, 2011) (unpublished opinion); *Twyman v. State*, 26 A.3d 215, 1 (Del. July 25, 2011) (unpublished disposition); *People v. Cabanillas*, 2011 WL 1143230, 28 (Cal. Ct. App. Mar. 30, 2011) (unpublished opinion). As stated in the initial brief, none of

these cases goes beyond a superficial invocation of the same dicta the Third District relied on. *See* Initial Brief at 9 n.4.

The federal cases the State cites do not support its position at all. *See* Answer Brief, 18-19, *citing See v. McDonald,* 2013 WL 1281621 (E.D. Cal. 2013) (unpublished magistrates recommendation); *Her v. Jacquez*, 2011 WL 1466868 (E.D. California April 18, 2011) (unpublished opinion), *affirmed* 472 Fed. Appx. 457 (11th Cir. 2012); *Williams v. Ryan*, 2010 WL 3768151 (S.D.Cal. 2010) (unpublished opinion). Her and Williams were both eligible for parole on their homicide *and* nonhomicide charges. *See Her* at 4; *Williams* at 3. *See* was sentenced to LWOP for murder and conspiracy to commit murder, *See* at 1, and there is no indication Mr. See asked the magistrate to consider the conspiracy separately from the murder.

II. *GRAHAM*'S CATEGORICAL LINE: LWOP VS. PAROLE-ELIGIBLE SENTENCES.

The State tries to blur the bright line of *Graham*'s categorical rule. Under *Graham* the difference between LWOP and parole-eligibility is everything. The Supreme Court rejected LWOP's abandonment of all hope for rehabilitation and redemption. "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by **a forfeiture that is irrevocable.**" 560 U.S. at 69. LWOP

"means good behavior and character improvement are immaterial." *Id.* at 70 (quoting *Naovorath v. State*, 779 P.2d 944 (Nev. 1989). It "forswears altogether the rehabilitative ideal." *Id.* at 74.

The State waves this crucial distinction away. Mr. Lawton's parole-eligible sentence is merely "a sentencing anomaly." Answer Brief, 25, 29. The State distinguishes the First District's decision in *Akins* because Akins' homicide sentence was sure to end in twenty-seven years, while "[Mr.] Lawton may never be released from prison." The real anomaly is the same for both Akins and Mr. Lawton: the murder sentence does not forswear rehabilitation. Only the nonhomicide LWOP sentence does. They both face LWOP "solely for a nonhomicide offense."

Obscuring *Graham*'s key distinction allows the State to ignore the fact that its own reasoning compels relief for Mr. Lawton. It believes that the Supreme Court excluded homicide *cases* from *Graham* because they were excluded from the Annino Study.[3] But the Annino study excluded only cases were the juvenile was sentenced to LWOP for the homicide. *See* Annino at 6 n.20. ("There may be other individuals in the country with JLWOP sentences for these crimes that are not included in this study because they also have a JLWOP sentence for homicide.")

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[3] P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non–Homicide Offenses: Florida Compared to Nation* 2 (Sept. 14, 2009).

III. CAPITAL CASES

The State also struggles against the plain fact that the Supreme Court equated the death penalty with juvenile LWOP sentences. It quotes *Solem v. Helm*, 463 U.S. 277 (1983), to the effect that death-penalty cases "are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case," and devotes an entire subsection to this theme. Answer Brief, 29-32. In fact, *Graham* viewed LWOP "as akin to the death penalty [and] treated it similarly to that most severe form of punishment." *Miller*, 132 S.Ct. at 2466. The Supreme Court has made it perfectly clear that the State is wrong:

> That correspondence—Graham 's "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," 560 U.S., at ——, 130 S.Ct., at 2038–2039 (ROBERTS, C.J., concurring in judgment)—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.

Id. at 2466.

The State ignores this in order to avoid what follows: If juvenile LWOP and the death penalty are equivalent categorical bans, they must be enforced in the same way. A lawful death sentence for homicide does not authorize a capital sentence for every accompanying charge. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that a defendant could not be sentenced to death for the rape

of an adult. In *Buford v. State*, 403 So. 2d 943 (Fla. 1981), this Court applied *Coker* to a defendant sentenced to death on two counts: first-degree murder and capital sexual battery. The Court concluded that *Coker* compelled it to hold that the death sentence for the sexual battery violated the Eighth Amendment. *Id.* at 951. It vacated the death sentence for sexual battery and ordered that Buford be resentenced to life imprisonment with the opportunity for parole after twenty-five years on that count. *Id.* at 954. There is no constitutional reason to treat the Eighth-Amendment ban on capital punishment for adult nonhomicide sentences and the ban on LWOP for juvenile nonhomicide offense.[4]

IV. TIMELINESS

Mr. Lawton's sentence violate *Graham*'s categorical ban on LWOP sentences for nonhomicide offenses committed by juveniles. *Graham*'s retroactivity is uncontroversial. *See, e.g. Johnson*, *supra*; *St. Val v. State*, 107 So. 3d 553 (Fla. 4th DCA 2013); *Kleppinger v. State*, 81 So. 3d 547 (Fla. 2d DCA 2012); *Geter v. State*, 115 So. 3d 375 (Fla. 3d DCA 2013).

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[4] The State appears argue that *Buford* would allow a death sentence for sexual battery so long as it is accompanied by even a lesser sentence for death. Answer Brief at 30. *Buford* went the opposite way. Even though Buford was lawfully sentenced to death for murder, the Court vacated his death sentence for sexual battery and remanded with directions to resentence him to life without the opportunity for parole for twenty-five years. *Id.* at 954.

CONCLUSION

For the foregoing reasons, the Court should remand with directions to vacate the LWOP sentences for attempted murder and armed robbery and sentence him to a term not to exceed 30 years or 40 years, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Court's e-filing portal to counsel for the Respondent, Nicole Hiciano, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, on September 29, 2014.

/s/Andrew Stanton
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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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