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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

GERARDO GUZMAN, Petitioner/Appellee,	)	
v.	)	Case No. SC13- _____
	)	4th DCA CASE NO. 4D12-1354
STATE OF FLORIDA, Respondent/Appellant.	)	

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Mr. Gerardo Guzman, was the Defendant and Respondent, the State of Florida, was the prosecution in the Criminal Division of the Circuit Court of the 19th Judicial Circuit, in and for St. Lucie County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court. The Decision of the District Court is reported as *Guzman v. State*, 2013 WL 949889, 38 Fla. L. Weekly D617b (Fla. 4th DCA March 13, 2013) and is attached as Appendix A.

STATEMENT OF THE CASE AND FACTS

In February 2004, an information was filed in the Nineteenth Judicial Circuit charging, Petitioner-Appellee, Gerardo Guzman, with three counts of robbery, one count of attempted robbery, one count of aggravated battery on a person over the age of 65, one count of burglary of a conveyance with an assault or battery and one count of simple battery. At that time the offenses were committed, Petitioner was fourteen years old.

Petitioner entered pleas of guilty to all counts. Juvenile sanctions were imposed, followed by fifteen years probation. In September, 2009, Petitioner was found to have violated his probation on count nine, burglary of a conveyance with an assault or battery, committing the new substantive offense of kidnapping. The court imposed concurrent sentences of life in prison without the possibility of parole on both the probation violation and the new offense.

On July 27, 2011, the Fourth District Court of Appeal held that the sentence of life without the possibility of parole imposed on the probation violation constituted cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution in light of ***Graham v. Florida***, 130 S.Ct. 2011 (2011). The case was remanded for resentencing. The life sentence on the new substantive count, which was committed when Petitioner was eighteen years old, was affirmed. ***Guzman v. State***, 68 So. 3d 295 (Fla. 4th DCA 2011).

Petitioner was before the trial court for resentencing on March 28, 2012. The trial court noted that the Fourth District had held that "*Graham* fashioned a bright line rule prohibiting the imposition of a life sentence without parole on a person who commits an offense, other than a homicide, while under the age of eighteen" and that "any deviation from that rule casts doubt on the very underpinnings of the Supreme Court's decision" ***Guzman***, 68 So. 3d at 298. After opining that the ***Graham*** opinion was without constitutional foundation, the court sentenced Petitioner to 60 years in prison with credit for 813 days time served.

On appeal to the Fourth District, Petitioner argued that the 60 year sentence constituted a de facto life sentence as his sentence would not end until he was 74 years of age and, even if he earned all possible gain time, he could not be released until he was 65 years old. Additionally, Petitioner argued that the 60 year sentence did not allow him to a meaningful opportunity to demonstrate maturity and rehabilitation as required by ***Graham***.

The Fourth District affirmed the 60 year sentence, finding that "*Graham* strictly addressed actual life sentences –and not lengthy term-of-years sentences that might constitute a de facto sentence of life." (Appendix A, page 1). Quoting from the Fifth District decision in ***Henry v. State***, 82 So.2d 1084, 1089 (Fla. 5th DCA 2012)(affirming a ninety year sentence) (footnotes omitted), the Fourth District held

> 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. 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 n o logical difference whether the sentence is "life" or 107 years. 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.

(Appendix A, pages 2-3).

The Fourth District went on to discuss the divergent opinions issued by other districts and even inside other districts, recognizing that the Second District had affirmed a ninety-two year sentence in ***Walle v. State***, 99 So. 3d 967 (Fla. 2012), while the First District had reversed an eighty year sentence in ***Floyd v. State***, 87 So. 2d 45 (Fla. 1st DCA 2012), but affirmed a seventy-seven year sentence in ***Gridine v. State***, 89 So. 3d 909 (Fla. 1st DCA 2011). See Appendix A, page 3). The Fourth District concluded

> We agree with the Fifth District's *Henry* and the Second District's *Walle* decisions. While we understand the temptation to acknowledge that certain term-of-years sentences might constitute "de facto" life sentences, we are compelled to apply *Graham* as it is expressly worded, which applies only to actual life sentences without parole. Without further guidance from our supreme court or the United States

> Supreme Court, it is logistically impossible to determine what might or might not constitute a de facto life sentence—assuming such a concept is to be considered in the first instance. We should not burden our trial courts by directing them to function as actuaries in determining each individual defendant's particularized life expectancy and thereupon craft a sentence which does not run afoul of *Graham*. Until such time as we receive further instruction, the only reasonable path is to abide by the plain wording of *Graham* and find that it does not apply to a term-of-years sentence.

(Appendix A, page 4).

The Fourth District certified conflict and certified the same two questions of great public importance as the First District Court certified in ***Adams v. State***, 37 Fla. L. Weekly D1865 (Fla. 1st DCA Aug. 8, 2012):

> 1. DOES ***GRAHAM V. FLORIDA***, —– U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), APPLY TO LENGTHY TERM–OF–YEARS SENTENCES THAT AMOUNT TO DE FACTO LIFE SENTENCES?
>
> 2. IF SO, AT WHAT POINT DOES A TERM–OF–YEARS SENTENCE BECOME A DE FACTO LIFE SENTENCE?

(Appendix A, page 4).

Petitioner filed a Timely Notice of Discretionary Review on April 4, 2013.

SUMMARY OF THE ARGUMENT

This Honorable Court has the authority pursuant to Article V, Section 3 (b)(4) of the *Florida Constitution* to review a decision of a district court of appeal once that court has certified a question of great public importance. This Honorable Court also had authority pursuant to Article V, Section 3 (b)(4) of the *Florida Constitution* to review a decision of a district court of appeal as the district court of appeal has certified the decision entered below to be in direct conflict with a decision of another district court on the same question of law. As the opinion of the Fourth District in Guzman below did both, this Honorable Court has jurisdiction over this cause.

ARGUMENT

THIS HONORABLE COURT HAS AUTHORITY PURSUANT TO ARTICLE V, SECTION 3(B)(4) OF THE FLORIDA CONSTITUTION (1980) TO REVIEW THIS DECISION OF A DISTRICT COURT OF APPEAL WHICH (A) CERTIFIED CONFLICT WITH OPINIONS OF OTHER DISTRICT COURTS, AND (B) CERTIFIED TWO QUESTIONS OF GREAT PUBLIC IMPORTANCE.

(A) This Honorable Court has authority pursuant to Article V, Section 3(b)(4) of the *Florida Constitution* (1980) to review a decision of a district court of appeal when that court has certified conflict with a decision of another district court of appeal. *See* ***State v. Frierson***, 926 So. 2d 1139 (Fla. 2006).

In its decision below, the Fourth District certified conflict with decisions of the First District Court of Appeal in ***Adams v. State***, 37 Fla. L. Weekly D1865 (Fla. 1st DCA August 8, 2012), ***Smith v. State,*** 93 So. 2d 371 (Fla. 1st DCA 2012), ***Floyd v. State***, 87 So. 2d 45 (Fla. 1st DCA 2012), ***Gridine v. State***, 89 So. 2d 909 (Fla. 1st DCA 2011), and ***Thomas v. State***, 78 So. 2d 644 (Fla. 1st DCA 644).

In ***Thomas***, 78 So. 2d at 646, the defendant was sentenced to 50 years in prison. The First District held that a term-of-years sentence may qualify as the functional equivalent of the life sentence at some point, but this was not it. While in ***Adams***, the court found that a sentence which required the defendant to serve at least 58.5 years in prison was a de facto life sentence and required reversal under *Graham*. ***Id***. at 37 Fla. L. Weekly D1865. Similarly in ***Floyd***, 87 So. 3d at 47, the

First District held that an 80 year sentence was the functional equivalent of a life sentence. While the First District affirmed the lengthy sentences imposed in ***Smith***, 93 So. 2d at 371 and ***Gridine***, 89 So. 2d at 909, it still held the possibility that a term of years sentence could be unconstitutional.

This Court has accepted jurisdiction on ***Gridine v. State*** in SC12-1223 on October 11, 2012 and Petitioners initial brief was filed November 29, 2012. On November 6, 2012, this Court accepted jurisdiction in ***Henry v. State***, SC Case No.: SC12-578 and Petitioner's initial brief was filed on February 27, 2013. Notice of Discretionary jurisdiction was filed in ***State v. Floyd***, SC Case No. SC12-1206, and this Court ordered proceedings stayed pending the resolution of ***Gridine***. The Fourth District correctly certified conflict with ***Gridine*** and ***Floyd*** and stated that agreed with the decision of the Fifth District in ***Henry***.

As review is presently pending before this Court in ***Gridine***, discretionary jurisdiction is established by reference to the cited case. ***Jollie v. State***, 405 So. 2d 418 (Fla. 1981). In ***Jollie***, this Court recognized that the "randomness of the District Court's processing" should not control a party's right to Supreme Court review. ***Jollie***, 405 So. 2d at 421. Hence, this Honorable Court has discretionary jurisdiction to accept review of the instant cause from the Fourth District because the cited authority, ***Gridine***, is presently pending before this Court.

(B) This Honorable Court has authority pursuant to Article V, Section 3(b)(4) of the *Florida Constitution* (1980) to review a decision of a district court of appeal when that district court has certified a question of great public importance. *See* ***Gage v. State***, 480 So. 2d 1291 (Fla. 1985).

The Fourth District certified two questions of public importance in the decision issued below:

> 1. DOES ***GRAHAM V. FLORIDA***, ––– U.S. ––––, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), APPLY TO LENGTHY TERM–OF–YEARS SENTENCES THAT AMOUNT TO DE FACTO LIFE SENTENCES?
>
> 2. IF SO, AT WHAT POINT DOES A TERM–OF–YEARS SENTENCE BECOME A DE FACTO LIFE SENTENCE?

(Appendix A, page 4).

As the Fourth District stated, the same two questions were certified to this Court by the First District in ***Adams***, 37 Fla. L. Weekly D1865 at 2-3. Petitioner filed his notice of discretionary jurisdiction in *Adams* on August 17, 2012. On October 19, 2012, this court stayed proceedings in that case pending the resolution of *Gridine*.

CONCLUSION

Petitioner respectfully requests this Honorable Court to accept discretionary review over the instant cause and review it on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief on Discretionary Jurisdiction has been furnished by e-file to the Supreme Court at https://www.myflcourtaccess.com; and to Georgina Jimenez-Orosa, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, FL 33401, by email at CrimAppWPB@MyFloridaLegal.com on this 12th day of April, 2013.

s/Ellen Griffin
Counsel for Gerardo Guzman

s/James W. McIntire
Counsel for Gerardo Guzman

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the above brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P.* 9.210(a)(2), this 12th day of April, 2013.

s/Ellen Griffin
Counsel for Gerardo Guzman

s/James W. McIntire
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