IN THE SUPREME COURT OF FLORIDA

GERARDO GUZMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC13-687

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

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Guzman". Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. The following are examples of other references:

IB = Initial Brief

R = Record on Appeal

T = Transcripts

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Guzman was born on July 21, 1989. Between January 21, 2004, and February 11, 2004, when he was 14 years old, Guzman went on a three-week crime spree. As a consequence Guzman was charged as an adult with four counts of robbery, two batteries on a person over 65, one aggravated battery on a person over 65, and one burglary with an assault or battery (R. 3-5).

On February 28, 2005, when Guzman was 15 years old, he entered an open plea of guilty to all the charges (R. 6-8). At that time, Guzman understood he was facing "a hundred and one years in prison" and that on count 9, burglary with assault or battery, a life felony, he could be sentenced "up to life in prison" on that count (R. 6).

"The court wanted to craft a sentence which could rehabilitate the defendant while ensuring public safety. The State suggested that the court sentence the defendant on the burglary of a conveyance with an assault or battery, a life felony, to adult probation to run consecutive to other juvenile sanctions. After some discussion with the prosecutor and defense counsel, the court adjudicated the defendant delinquent and committed the defendant to a maximum risk residential commitment program for an indeterminate period of time, followed by juvenile probation, not to exceed his nineteenth birthday.

Upon his nineteenth birthday, the defendant would begin serving fifteen years of adult probation on the life felony charge. The defendant did not object to the sentence and did not appeal." Guzman v. State, 68 So. 3d 295, 296 (Fla. 4th DCA 2011) (***Guzman I***), review denied, State v. Guzman, 86 So. 3d 1114 (Fla. 2012); (R. 35-91).

"Shortly after the defendant turned eighteen, he was charged with the kidnapping and false imprisonment of his cousin with the intent to terrorize him. The probation officer also filed an affidavit and warrant for violation of probation [R. 92-95].

"While the jury was deliberating the kidnapping charge, the trial court conducted the final violation hearing based partly on evidence it heard during the trial. The State also called the defendant's probation officer. The defendant testified that he knew he was not permitted to commit new crimes while on probation.

"The court found the defendant had violated his probation. The jury found the defendant guilty as charged. At the sentencing hearing, defense counsel asked for a youthful offender sentence; the State requested a life sentence. The trial judge explained:

> I understand that young people sometimes do stupid impulsive things.... [ ][A]nd I'll give them a break and withhold and rehab and counseling and treatment and all that stuff,

even though the law tells me I'm suppose[sic] to punish them, I have a soft spot in my heart for young people that do stupid impulsive things....

[ ][T]his is a different—entirely different creature. This is not even in the same league as the young kid doing something stupid and impulsive, these are really, really serious crimes that, [ ] represent a danger to the community .... [and] the means by which to effectuate the robbery was to go out and purposely target the weakest, most vulnerable among us, including an 80-year-old woman, and batter them, one of them batter[ed] them in a severe way, that's not something any 13 or 14-year-old kid would do under the influence of anyone. That's—that's sociopathic behavior. That's scary behavior.... This—this is predatory reprehensible violent conduct that no one would do under any stretch of the imagination.

Nevertheless, the Court System recognized that he was young, that he was youthful, that he was perhaps under the sway or influence or dominion of this older reprehensible guy that picked him up and plied him—and they gave him the break of a lifetime, a bunch of juvenile sanctions and probation on a first PBL....
But instead in 2007 no longer the young naïve little 14 or 15-year-old, he goes out and commits another crime of violence, kidnapping, [ ] which he was found guilty following a jury trial. [ ][A]gain, predatory type sociopathic type behavior. And for the protection of the public ... I'll revoke and terminate his probation unsuccessfully for the burglary of a conveyance with an assault or battery, adjudicate him guilty, sentence him to life in prison....

....

> ... In [ ] the kidnapping, I will adjudicate him guilty, sentence him to life in prison.'"

Guzman v. State, 68 So. 3d at 296 - 297.

Guzman appealed the life sentences to the Fourth District Court of Appeal, see Guzman v. State, 4D09-4041. Finding the case controlled by the United States Supreme Court's decision in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), the District Court reversed and remanded the case for re-sentencing, holding:

> Here, the defendant is a member of that limited class of people, juvenile offenders who have committed non-homicide crimes, protected by the Eighth Amendment. *See Bell*, 2010 WL 3447218, at *10. The defendant was originally arrested when he was fourteen years old. Although he was an adult when he violated his probation, the probationary sentence was imposed for crimes he committed when he was fourteen. Under *Graham*, such a sentence violates the Eighth Amendment and is unconstitutional.
>
> The State argues that this case is distinguishable from *Graham* because the defendant was eighteen when he committed the offense that violated his probation. While true, he was separately sentenced to life for the new crime he committed when he was eighteen. He cannot, however, receive a life sentence for the crimes he committed when he was fourteen years old.
>
> ***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.** *See also Lavrrick v. State*, 45 So.3d 893 (Fla. 3d DCA 2010) (reversing a life sentence imposed on an eighteen-year-old defendant for violating probation imposed for non-homicide offenses

> committed while he was sixteen). **Any deviation from that rule casts doubt on the very underpinnings of the Supreme Court's decision. We therefore reverse the life sentence on the violation of probation and remand the case to the trial court for resentencing on the violation only.**
>
> *Reversed and Remanded.*

(Emphasis added)

Guzman v. State, 68 So. 3d at 298.

When the Court denied the State's petition for certiorari review, State v. Guzman, 86 So. 3d 1114 (Fla. 2012), Guzman went before the trial court for re-sentencing on March 28, 2012. Guzman asked the trial court for "concurrent guideline sentences" (Vol. 3, T. 7). The Criminal Punishment Code Scoresheet called for 143.85 as the "lowest permissible prison sentence in months" (or 11.9875 years) up to Life as the maximum sentence in years (R. 225-226).

The State asked the court to sentence Guzman to 60 years in prison, to run "concurrent with the life sentence that [he is] already serving" (Vol. 3, T. 7). The State submitted a 60-year sentence would satisfy *Graham* because:

> if we were to include his credit for time served, which at the time of sentencing on September 8, 2009 was eight hundred and thirteen days. *I'm not considering any gain time he might receive while in DOC.* **His date of release would be approximately June 30th, 2067 which would make this Defendant approximately seventy-seven years old on his date of release. Now if he receives gain time in the amount of -- generally it's about 15 percent in DOC. So it would be even lower than that. So he would have a**

> **meaningful opportunity of release under the sixty-year sentence.**

(Vol. 3, T. 8).

After listening from Guzman himself (Vol. 3, T. 8-10), and nothing further from defense counsel (Vol. 3, T. 10), the court ruled as follows:

> THE COURT: It's always tragic when the Court has to sentence a young person to a long term at prison. I guess that there are some philosophers out there that say in a sense that punishment is self-imposed. In other words, you do the act, you should expect the grim consequences to follow.
>
> **He's serving a life sentence on his substantive case. This is resentencing on his violation of probation. What the Fourth District said -- and I think they analyzed it correctly -- is *Graham* fashioned a bright-line rule.** And if it's a bright-line rule, it's a bright line. And if you start waffling with it, it's no longer a bright line. In other words, **the bright line is, is that you shall not impose a life sentence without parole on a defendant under the age of eighteen unless it's a homicide. But other than that, I have the full range of sentencing options available to me.** People could argue, well, it's a *de facto* or the functional equivalent. Well, if those are -- if that's the road we're going down, then it's no longer bright-line rule. Then we are really in -- Judge Mirman and I chatted about this before we came down because we both have these issues. And it's almost like we're having actuarial tables and figuring out life expectancies. And I don't -- that certainly is not a bright-line rule. And I don't know that that's the way Courts should exercise their discretion.
>
> I would say -- and the Fourth DCA said any deviation from that bright-line rule casts doubts on the very underpinnings of the Supreme Court's decision. And I think

> to some extent the logical and legal underpinnings of the case should inform the Court in the exercise of its discretion. In other words, if someone could point here in the Constitution in this textual section it bars you or prohibits you from that. No one can point to anything in the Constitution that says what *Graham* says.
>
> * * *
>
> What I am going to do, and based upon the authority of the appellate cases Thomas versus State, 78 So.3d 644; Gridine versus State, 37 Florida Law Weekly D69; and Henry versus State, 37 Florida Law Weekly D195, I'll revoke and terminate his probation unsuccessfully, **adjudicate him guilty, and sentence him to sixty years in the Department of Corrections with credit for time served . . . .**

(Vol. 3, T. 10-13).

Guzman again appealed the sentence to the Fourth District Court of Appeal, see Guzman v. State, 4D12-1354. Upon finding that "*Graham* strictly addressed actual life sentences—-and not lengthy term-of-years sentences that might constitute a *de facto sentence of life*--" the District Court affirmed the sixty-year sentence imposed by the trial court upon remand. Guzman v. State, 110 So. 3d 480 (Fla. 4th DCA 2013) (**Guzman II**), review granted, ___ So. 3d ___ (Fla. April 24, 2015). Guzman filed his Initial Brief on the Merits with the Court on April 30, 2015, and this, Respondent's Brief on the Merits follows.

SUMMARY OF ARGUMENT

In this case where Petitioner Guzman was **initially** sentenced to probation for an offense he committed when he was 14 years of age, and was released back into society, but then violated that probation by committing a new felony offense after reaching the age of eighteen, Guzman has already been given a "meaningful opportunity" to demonstrate maturity and amenability to rehabilitation as required by Graham v. Florida, 560 U.S. 48 (2010). Therefore, the 60-year sentence imposed pursuant to the Florida Criminal Punishment Code, is not controlled by Graham. Therefore, the District Court's decision affirming the sentence as not being controlled by Graham should be approved.

ARGUMENT

IMPOSITION OF A SIXTY-YEAR TERM OF YEARS SENTENCE FOLLOWING A VIOLATION OF PROBATION COMMITTED AFTER THE DEFENDANT TURNED EIGHTEEN DOES NOT VIOLATE THE EIGHT AMENDMENT UNDER GRAHAM V. FLORIDA.

A. Standard of Review.

The review of a decision of a district court of appeal construing a provision of the state or federal constitution concerns a pure question of law that is subject to *de novo* review. Henry v. State, 40 Fla. L. Weekly S147 (Fla. March 19, 2015); Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004).

B. The 60-year sentence imposed in this case upon violation of probation does not violate the 8th Amendment to the U.S. Constitution and is not controlled by the USSC ruling in *Graham* or this Court's ruling in *Henry*.

In the instant case, the defendant, Guzman, was placed on probation for an offense he committed when he was 14 years of age, and was released back into society, but then violated that probation by committing a new felony offense after reaching the age of eighteen. Therefore, Guzman has already been given a "meaningful opportunity" to demonstrate maturity and amenability to rehabilitation as required by Graham v. Florida, 560 U.S. 48 (2010). Therefore, the 60-year sentence imposed pursuant to the Florida Criminal Punishment Code, is not controlled by Graham. For that reason, Petitioners allegation that he is entitled to be resentenced in compliance with Chapter 2014-220, Laws Of Florida (§921.1401 Florida Statute and § 921.1402, Florida Statute), as suggested by Henry v. State, 40 Fla. L. Weekly S147 (Fla. March 19, 2015) is erroneous.

Graham v. Florida, 560 U.S. 48 (2010)

In Graham v. Florida, 560 U.S. 48 (2010), the United States Supreme Court found that *the sentence of life in prison without the possibility of parole* was cruel and unusual when applied to juvenile offenders who did not commit a homicide offense. *Id.* at 75. The facts of *Graham* specifically involved an offender who both committed his original offense and violated probation by committing another offense when he was less than eighteen

years old. The defendant in *Graham* initially engaged in a first-degree felony punishable by life while he was 16 years old. *Id.* at 53. After his release and at seventeen years of age, the defendant violated his probation by engaging in additional violent felonies and was sentenced to life in prison. *Id.* at 54-57. Indeed, the Supreme Court's opinion was unambiguous about Graham's age: "The night that Graham allegedly committed the robbery [which violated his probation], he was 34 days short of his 18th birthday." *Id.* at 55 (underline added).

The Supreme Court has also been clear that this categorical rule means the age of eighteen and no more: "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." Roper v. Simmons, 543 U.S. 551, 574 (2005); *see also* Graham, 68 U.S. at 78-79 (adopting Roper's categorical rule to juvenile life without parole cases).

The case at bar, however, involves a defendant who was placed on probation on February 28, 2005, while he was 15 years of age; then **after being released into society** from the one-year period of incarceration in a maximum juvenile facility, and the one year of secure residential facility, **and while out in society, while still serving the juvenile drug offender**

probation imposed by Judge Sweet in 2005, **five months after Guzman turned 18 years old** on July 21, 2007, on December 1, 2007, **Guzman committed the very vicious and violent crime of kidnapping of his own cousin.**

Guzman was charged with one count of kidnapping for the December 1, 2007 episode, and was found to have violated his probation by committing the new felony offense of kidnapping.

The State, thus, maintains that Guzman cannot and does not fall within the class of offender affected by *Graham*. Unlike *Graham*, Guzman did not engage in a violation of probation while he was a juvenile, but rather was on probation and committed his new crime as an adult. Guzman was 18 years and four months of age when he violated his probation. Thus, under Graham, Guzman could have been sentenced to life in prison upon violation of probation for the 2004 burglary offense. Nowhere in the Supreme Court's decision in Graham, does the Court prohibit a **term-of-years sentence** for offenders who were sentenced after violating an initially-imposed probationary sentence as an adult.

The United States Supreme Court in Graham held:

> In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. **This Court now holds that for a juvenile offender who did not**

> **commit homicide the Eighth Amendment forbids the sentence of life without parole.** This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime. *Roper*, 543 U.S., at 574, 125 S.Ct. 1183.
>
> **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*. It is for the State, in the first instance, to explore the means and mechanisms for compliance.** It bears emphasis, however, that *while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.* Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. ***It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.***
> (Emphasis added.)

Graham v. Florida, 560 U.S. at 74-75.

Graham's emphasized that the *categorical* rule "gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." Id., at 79. Explaining:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development.

Id, 560 U.S. at 79.

At bar, Guzman was placed on probation at the age of 15. When Guzman became an adult on July 21, 2007, he was "outside prison walls" fulfilling his "chance for reconciliation with society" while serving the "juvenile probation" that had been imposed in 2005. Instead of demonstrating maturity, "which is the foundation of remorse, renewal, and rehabilitation" Graham, at 79, Guzman instead four months later on December 1, 2007, committed the crime of kidnapping of his own cousin, for which he now stands sentenced to life in prison.

Here, as to the crimes he committed at the age of 14, Guzman was offered the opportunity to demonstrate "maturity and rehabilitation" by actually being released back into society at the age of 15. After reaching the age of eighteen, "the point

where society draws the line for many purposes between childhood and adulthood," Roper, 543 U.S. at 574,---indeed four months after reaching the age of majority---rather than demonstrate maturity and rehabilitation, Guzman engaged in new violent felony offenses. Accordingly, Guzman received more than the adult opportunity to demonstrate maturity and rehabilitation envisioned by Graham; Guzman was actually released into society as an adult. He demonstrated that he is incorrigible by committing a new, substantive offense after the age of 18.

Thus, Respondent submits that Guzman, who was placed on probation when **initially** sentenced at the age of 15 in 2005, was given the "meaningful opportunity" to demonstrate that he is amenable to rehabilitation, as required by Graham, but squandered the opportunity by committing the new felony as an adult on December 1, 2007. In this case, the State complied with all the requirements of Graham; therefore, the 60-year sentence imposed by the trial court, pursuant to the Criminal Punishment Code is legal, and no longer should be analyzed under the requirements of Graham.

The question presented in this case is whether a defendant who is released into society as an adult and demonstrates that he is incapable of maturity and rehabilitation has received the "meaningful opportunity for release" contemplated by Graham.

Respondent submits that question must be answered in the affirmative.

To grant relief to Guzman under these facts, would mean that ***any*** individual who committed a life felony as a *juvenile*, and was placed on 15-year probation for that crime, as Guzman was, and at the age of 25 violates probation by committing a new life felony, as Guzman did, that *individual* could claim the State would be *forever* prevented from sentencing that 25-year-old individual to life or a term of years, as Guzman was, because the individual committed the **original** crime when he was a juvenile. Under this hypothetical situation, the individual would have *originally* been given an opportunity to demonstrate maturity and rehabilitation as an adult during the actual release, by being on probation from the age of 15 to the age of 25, and demonstrated that he was incapable of doing so by committing new law violations as an adult. Thus, under that scenario, whether a lengthy term of years, or life imprisonment, **imposed at the age of 25 upon violation of the probation originally imposed when he was a juvenile**, does not violate the Eighth Amendment and or Graham, and does not fall under the purview of Henry. For that reason, the District Court's decision affirming the 60-year sentence imposed at bar on the basis that Graham does not apply, must be approved under the particular facts and circumstances of this case.

Henry v. State, 40 Fla. L. Weekly S147 (Fla. March 19, 2015)

In Graham, the Supreme Court held:

> 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. . . . [The Eighth Amendment] **does not require the State to release that offender during his natural life**.

560 U.S. at 75 (underline added).

A proper reading of Graham indicates "[a] State need not guarantee the offender eventual release, but . . . it must provide him or her with some realistic opportunity to obtain release before the end" of his natural life. Id., at 82.

Here, Guzman received his opportunity to demonstrate that he had matured and been rehabilitated by actually being released into society, something that is not only not required by Graham, but expressly reputed as unnecessary by the Supreme Court. As an adult, Guzman committed new offenses, demonstrating that he is---in fact---incorrigible and not subject to rehabilitation. Therefore, since Guzman was given the opportunity to show his maturity and amenability to rehabilitation when sentenced to probation at the initial sentencing hearing in 2005, Graham does not apply, and under these particular facts, the Eighth Amendment "does not require the State to release that offender during his natural life." 560 U.S. at 75.

In Henry, this Court concluded:

> *Graham* prohibits the state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future early release during their natural lives based on their demonstrated maturity and rehabilitation.

Henry v. State, 40 Fla. L. Weekly S147 (Fla. Mar. 19, 2015), and held that since the ninety (90) year sentence **given to Henry** did not provide a meaningful opportunity for release during Henry's natural life, the 90-year sentence **in Henry** was unconstitutional under *Graham*. Id.

This Court, in Henry, then decided:

> In light of *Graham*, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult. See id. at 70–71, 130 S.Ct. 2011 ("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.... This reality cannot be ignored."); Roper, 543 U.S. at 553, 125 S.Ct. 1183 ("Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." (citing Stanford, 492 U.S. at 395, 109 S.Ct. 2969)).
>
> **Because we have determined that Henry's sentence is unconstitutional under Graham, we conclude that Henry should be resentenced**

> **in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, ch.2014-220, Laws of Fla.** See Horsley v. State, --- So.3d ----, ---- - ----, No. SC13-1938, slip op. at 3, 2015 WL 1239284 (Fla.2015).

Id., and remanded Henry's case to his sentencing court in accordance with the opinion.

In this case, however, the question resolved in Henry is entirely irrelevant. Petitioner was originally sentenced to a sentence that included probation as a juvenile. However, as an adult, Petitioner, who had been released into society from the age of 15, engaged in new law violations that resulted in violation of his probation and the imposition of a life sentence. The question presented in this case is whether a defendant who is released into society as an adult and demonstrates that he is incapable of maturity and rehabilitation has received the "meaningful opportunity for release" contemplated by *Graham v. Florida,* 130 S. Ct. 2011 (2010), and, therefore, the sentence **imposed upon violation of probation** does not violate the Eighth Amendment.

Indeed, the question in Henry, whether there is a term of years that is the functional equivalent of life without parole, is entirely irrelevant to the disposition of this case and has no impact on the result of this case. Respondent's 60-year sentence was not solely the result of his juvenile conduct. Rather, Guzman was placed on probation, given a meaningful

opportunity to demonstrate maturity and rehabilitation as an adult during actual release, and demonstrated that he was incapable of doing so by committing new law violations as an adult.

The question presented at bar is whether a defendant who is actually released into society and committed new law violations as an adult has the "meaningful opportunity" for release to demonstrate maturity and rehabilitation and, therefore, his sentence does not violate the Eighth Amendment. In other words, the issue in this case is whether an adult can bootstrap the age they were placed on probation into the Eighth Amendment analysis when they received, not only the "meaningful opportunity" for release envisioned by *Graham*, but actual release. The issue considered in Henry is irrelevant to the issue presented in this case and has no impact on the disposition here.

Accordingly, the State maintains that since the sixty-year sentence **at bar** does not fall under the "unconstitutional" *Graham* sentences, Guzman is not entitled to the relief Henry received from this Court. At bar, Guzman obtained a meaningful opportunity for release by being sentenced to 15 years of probation, beginning at his 19th birthday. Guzman would, thus, have been free upon completion had he met the probationary terms. Instead Guzman committed a new offense, thereby violating his probation, after he turned 18 years of age.

Length of sentence imposed upon violation of probation at bar.

At the **re-sentencing** hearing held March 28, 2012, the State argued to the sentencing court that a 60-year sentence would satisfy *Graham* because:

> if we were to include his credit for time served, which at the time of sentencing on September 8, 2009 was eight hundred and thirteen days. *I'm not considering any gain time he might receive while in DOC.* **His date of release would be approximately June 30th, 2067 which would make this Defendant approximately seventy-seven years old on his date of release. Now if he receives gain time in the amount of -- generally it's about 15 percent in DOC. So it would be even lower than that. So he would have a meaningful opportunity of release under the sixty-year sentence.**

(Vol. 3, T. 8). Petitioner, Guzman, **agrees** that under the 60-year sentence imposed at bar, "Guzman would be released from prison at age 74 (14 + 60), **or at 65 with all gain time**" (IB, p. 13). It is clear, therefore, that the 60-year sentence at issue, was properly imposed under the Criminal Punishment Code, and affords Guzman the "opportunity to obtain release" before the end of his natural life, as required by Graham. This fact separates and distinguishes this case from the realms of Henry and the application of §§ 921.1401, 921.1402, Florida Statutes, which did not become effective until July 1, 2014, and are not to be given retroactive application.

Accordingly, because Guzman does not fall within the class of offenders affected by Graham, nor this Court's Henry opinion

either, this Court should **approve** the decision of the District Court affirming the 60-year sentence as not running afoul of Graham under the particular facts and circumstances of this case.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court approve the opinion of the Fourth District's decision in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been served to James W. McIntire, Assistant Public Defender, Guzman's Appellate Attorney, 421 Third Street, 6th Floor, West Palm Beach, FL by e-mail at appeals@pd15.state.fl.us, this 26th day of May, 2015.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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