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IN THE SUPREME COURT OF FLORIDA

ARTHUR O'DERRELL FRANKLIN,

Petitioner,

v.

CASE NO. SC14-1442

STATE OF FLORIDA,

First DCA Nos. 1D12-2516, 1D12-2517, 1D12-2518

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Franklin received concurrent 1,000-year sentences in three cases for crimes he committed in 1983, when he was 17 years of age. Relying on Graham v. Florida, 560 U.S. 48 (2010), Franklin filed a *pro se* motion for postconviction relief challenging these sentences, on which the trial court had retained jurisdiction for the first third of the sentence. The postconviction court removed the retention of jurisdiction but otherwise denied relief without conducting an evidentiary hearing or appointing counsel for Franklin, who is indigent.

Franklin appealed on grounds that he made a showing of an Eighth Amendment violation sufficient to require an evidentiary hearing and appointment of counsel. The First District Court of Appeal disagreed:

> Although he argued that the parole system would not provide him with a meaningful opportunity for release, this argument was conclusory at best. Without allegations indicating an inherent deficiency in the parole system's ability to address a 1,000-year sentence consistently with *Graham*, as opposed to a failure on Appellant's part to demonstrate maturity and rehabilitation, Appellant's claim was legally insufficient to establish that his parole-eligible term-of-years sentence is unconstitutional.
>
> The fact that Appellant's PPRD [presumptive parole release date] is currently set at September 1, 2352, does not establish a *Graham* error in the sentence.…
>
> We opine only that the claim before the circuit court did not provide the information or arguments

> necessary to hold Appellant's sentence unconstitutional, even assuming the truth of every fact alleged.

Franklin v. State, 39 Fla. L. Weekly D1018, 1019 (Fla. 1st DCA May 19, 2014). The court also suggested that Franklin's proper recourse is a challenge in circuit court to the legality of the actions of the Parole Commission. Id.

The court denied Franklin's motion for rehearing, clarification, certification, and rehearing en banc. Franklin filed a timely notice invoking this Court's jurisdiction. This brief follows.

SUMMARY OF THE ARGUMENT

Does parole eligibility on a 1,000-year sentence provide the meaningful opportunity for release based on demonstrated maturity and rehabilitation required by the Eighth Amendment under Graham v. Florida, 560 U.S. 48 (2010)? In holding that Franklin's presumptive parole release date of 2352 after serving almost 30 years of his sentence "does not establish a Graham error in the sentence," the First DCA expressly construed the Eighth Amendment. Further, in affirming the denial of appointed counsel to litigate his postconviction motion, the First DCA misapplied Graham v. State, 372 So. 2d 1363 (Fla. 1979), which calls for appointment of counsel if the motion reflects a colorable claim or justiciable issue. And in holding that Franklin's motion did not justify an evidentiary hearing, the First DCA misapplied Freeman v. State, 761 So. 2d 1055 (Fla. 2000), which requires an evidentiary hearing if a postconviction movant establishes a prima facie case based on a legally valid claim. The express construction of the Eighth Amendment and misapplication conflicts justify discretionary review.

This Court should accept this case to determine whether persons serving long, parole-eligible sentences can establish Eighth Amendment error under Graham v. Florida by pointing to PPRDs that fall well outside their life expectancies even after they have served decades in prison.

ARGUMENT

This Court should grant review in this Eighth Amendment case to resolve whether an offender serving a true or *de facto* life sentence for a nonhomicide committed at age 17 or younger can challenge the sentence via postconviction proceedings on grounds that parole eligibility provides no realistic opportunity for eventual release.

The First DCA expressly construed the Eighth Amendment and misapplied two decisions by this Court, justifying discretionary review.

Article V, Section 3(b)(3) of the Florida Constitution grants this Court authority to review district court decisions that expressly construe a provision of the state or federal constitution. Franklin's postconviction challenge to his 1,000-year, parole-eligible sentence for crimes he committed at age 17 rested on the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution as interpreted in Graham v. Florida. See Franklin, 39 Fla. L. Weekly at D1018 ("Below, he argued that his several concurrent sentences of 1,000 years in prison, imposed in 1984 for crimes committed in 1983, are unconstitutional under Graham"). In affirming the trial court's summary denial of relief and refusal to appoint counsel, the First DCA characterized Franklin's pro se motion as "conclusory at best," and stated: "The fact that Appellant's PPRD is currently set at September 1, 2352, does not establish a Graham error in the sentence." Id. at 1019. The court suggested that if the sentence was lawful when imposed, Franklin's sole recourse was to challenge, via write proceedings, the method by

which the Parole Commission set a PPRD outside his life expectancy. However, its holding was narrower: "We opine only that the claim before the circuit court did not provide the information or arguments necessary to hold Appellant's sentence unconstitutional, even assuming the truth of every fact alleged." Id. As reflected in the opinion, these facts include: (1) a 1,000-year sentence imposed in 1984, and (2) a PPRD in 2352 (3) after serving almost 30 years of that sentence. In holding these facts insufficient to create a prima facie case of cruel and unusual punishment necessitating an evidentiary hearing, the First DCA expressly construed the Eighth Amendment.

The district court also misapplied two decisions by this Court in affirming the denial of counsel and an evidentiary hearing on Franklin's pro se motion for postconviction relief. This Court's discretion to review district court decisions that expressly and directly conflict with this Court's decisions encompasses misapplication of its precedent. See Jaimes v. State, 51 So. 3d 445, 446 (Fla. 2010); Wallace v. Dean, 3 So. 3d 1035, 1040 (Fla. 2009).

On the necessity of appointment of counsel, the First DCA quoted a statement in Graham v. State, 372 So. 2d 1363 (Fla. 1979), that a trial court has no duty to appoint counsel to represent an indigent defendant on a postconviction motion "unless the application on its face reflects a colorable or justiciable issue or a meritorious grievance." Franklin, 39 Fla. L. Weekly at D1019 (quoting Graham,

372 So. 2d at 1366). Applying this language, the First DCA ruled that "due to the legal insufficiency of [Franklin's] claim, the trial court was… within its discretion to deny [his] request for counsel." Id.

The court misapplied Graham by relying on only part of its holding. The excerpt quoted by the district court is part of a longer passage which, read in its entirety, justifies appointment of counsel for Franklin. This Court explained in Graham v. State that "the adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel." The Court specified that doubts on the need for counsel must be resolved in favor of the indigent defendant. And the Court posed as the ultimate question whether, "under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims." 372 So. 2d at 1365-66. In applying a portion of the opinion but not its command to determine whether counsel was necessary for a fair and thorough presentation of the postconviction claim, with doubts resolved in favor of appointment, the First DCA misapplied Graham to reach a result in conflict with its holding.

The First DCA misapplied another of this Court's decisions in relying on statements in Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000), that "it is the defendant's burden to establish 'a prima facie case based upon a legally valid

claim,' and '[m]ere conclusory allegations are not sufficient to meet this burden.'" The district court used Freeman to rule that Franklin's assertion that he had a parole release date hundreds of years in the future after serving approximately 30 years of a 1,000-year sentence "failed to set forth a prima facie case for relief." Franklin, 39 Fla. L. Weekly at D1019. A prima facie case is one made "at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure." Black's Law Dictionary 1353 (4th Ed. 1951). A motion creating a prima facie case of a violation of Graham v. Florida would show "at first sight" that the offender's sentence deprives him of "some realistic opportunity to obtain release" during his lifetime. 560 U.S. at 82. Franklin made that showing. The First DCA misapplied Freeman as authority to rule he did not.

This is likely to be a recurring issue. Franklin committed his crimes in May 1983, several months before Florida closed off parole eligibility for new offenders. See § 921.001(8), Fla. Stat. (1983) ("The provisions of Chapter 947 shall not be applied to persons convicted of crimes on or before October 1, 1983"). He was born in October 1965, making him 48 years of age when this brief was filed. Florida has other offenders Franklin's age or older who are still serving parole-eligible sentences of life—*de jure* or *de facto*—for crimes they committed as juveniles before the demise of parole eligibility. As noted by Judge Thomas in his concurring opinion below, the constitutional validity of *de jure* life sentences with

parole eligibility for nonhomicides committed by juveniles has arisen in the Third District. See Franklin, 39 Fla. L. Weekly at D1021 (Thomas, J., concurring) (discussing Lewis v. State , 118 So. 3d 291 (Fla. 3d DCA 2013), and Cunningham v. State, 54 So. 3d 1045 (Fla. 3d DCA 2011)).

By contrast with this case, Lewis illustrates the Catch-22 confronting Franklin. There the Third DCA affirmed the denial of relief on a record showing that because of the Lewis' misconduct in prison, which included 43 disciplinary violations in a 14-year period, the Parole Commission increased the PPRD on his life sentence from a date corresponding to release at age 55 to one outside his life expectancy. The Third DCA concluded that Lewis received "precisely what Graham requires: … a meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation," but apparently failed "to take advantage of the opportunity offered to him under the parole system." 118 So. 3d at 293-94. Here the First DCA ruled that, even assuming the truth of Franklin's assertion that he had a PPRD 339 years hence after serving almost 30 years of his 1,000-year sentence, his motion was legally insufficient. This not only left the state without any obligation to refute Franklin's Graham claim with the type of parole review documentation made available to the Third DCA in Lewis, but also prevented Franklin from proving his case through appointed counsel and an evidentiary hearing. He could not get an evidentiary hearing and appointed counsel because,

according to the First DCA, his motion was legally sufficient. He could not better document his *pro se* claim because he was denied an evidentiary hearing and appointed counsel.

This Court should grant review in this case to determine whether parole eligibility alone precludes evidentiary hearings and appointment of counsel for postconviction challenges to sentences such as those in this case and Lewis. The answer to this question will guide bench, bar, and especially litigants such as Franklin.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Court grant discretionary review.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 24th day of July, 2014. I hereby certify that this brief is in Times New Roman 14 point font.

Respectfully submitted,

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ARTHUR O'DERRELL FRANKLIN,

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STATE OF FLORIDA,

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INDEX TO APPENDIX

APPENDIX A

Criminal law—Juveniles—Carrying concealed firearm—Minor in possession of firearm—Statutes are not facially invalid—Statements of juvenile—There is no merit to claim that prosecution failed to establish corpus delicti independently of juvenile's admissions

K.C., Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 2D13-1900. Opinion filed May 16, 2014. Appeal from the Circuit Court for Hillsborough County; Caroline Tesche, Judge. Counsel: Howard L. Dimmig, II, Public Defender, and John C. Fisher, Assistant Public Defender, Bartow, for Appellant. Pamela Jo Bondi, Attorney General, Tallahassee, and Cerese Crawford Taylor, Assistant Attorney General, Tampa, for Appellee.

(WALLACE, Judge.) K.C., a juvenile, appeals the order adjudicating him to be a delinquent child for the offenses of carrying a concealed firearm, section 790.01(2), Florida Statutes (2012), and being a minor in possession of a firearm, section 790.22(3), (5)(a). We affirm the circuit court's order.

On appeal, K.C. raises two issues. First, he argues that the circuit court erred in denying his motion for a judgment of dismissal. In support of his first argument, K.C. contends that the prosecution failed to establish the corpus delicti of the two offenses independently of his admissions. This argument is without merit; it does not warrant further discussion.

Second, K.C. argues that his adjudications of delinquency for the two firearms offenses must be reversed because sections 790.01(2) and 790.22(3) and (5) are facially invalid. In support of his second argument, K.C. relies on the First District's opinion in *Weeks v. State*, 39 Fla. L. Weekly D35 (Fla. 1st DCA Dec. 26, 2013). The firearm at issue in this case was a modern .38 caliber revolver, not an antique firearm or a replica of one. Accordingly, we reject K.C.'s second argument on the authority of this court's decision in *Walker v. State*, 39 Fla. L. Weekly D929 (Fla. 2d DCA May 2, 2014).

Affirmed. (ALTENBERND and MORRIS, JJ., Concur.)

* * *

Criminal law—Sentencing—Correction of scrivener's error in written sentence

NATHANIEL JACKSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case Nos. 2D13-2740, 2D13-3269. (Consolidated) Opinion filed May 16, 2014. Appeals pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pinellas County; Michael F. Andrews, Judge. Counsel: Nathaniel Jackson, pro se. Pamela Jo Bondi, Attorney General, Tallahassee, and Gillian N. Leytham, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Nathaniel Jackson appeals the denial of his motions filed under Florida Rule of Criminal Procedure 3.800(a). We affirm the denial of his motions but remand for correction of a scrivener's error in Mr. Jackson's written sentence.

In 1984, Mr. Jackson was found guilty by a jury of first-degree murder and armed robbery in case 84-965 and armed robbery in case 84-7995. The court sentenced Mr. Jackson to death for the murder conviction and imposed no sentence for the robbery conviction in case 84-965. In case 84-7995, the court sentenced Mr. Jackson to thirty years for the armed robbery conviction.

On October 29, 1991, pursuant to an agreement between the parties, the circuit court vacated Mr. Jackson's death sentence and sentenced him to life imprisonment with a twenty-five year mandatory minimum term. The court noted that Mr. Jackson's sentence of thirty years for armed robbery in related case 84-7995 was not vacated by its order and remained in full effect, but the court did not mention the robbery conviction in case 84-965.

Nevertheless, the revised written judgment and sentence reflected, for the first time, a thirty-year sentence for the robbery conviction in case 84-965. It appears that the sentence imposed for the robbery in case 84-965 was a scrivener's error by someone who was confused by the sentence that had been imposed in the other case. *See* Fla. R. Crim. P. 3.800 court cmt. ("[S]crivener's error refers to a mistake in the written sentence that is at variance with the oral pronouncement of sentence... but not those errors that are the result of judicial determination or error.").

Accordingly, we affirm the postconviction court's denial of Mr. Jackson's motions but remand with directions that the thirty-year sentence for robbery in case 84-965 be deleted.

Affirmed; remanded with directions. (ALTENBERND, CRENSHAW, and SLEET, JJ., Concur.)

* * *

Criminal law—Post conviction relief—Sentencing—Claim that concurrent sentences totaling 1000 years for non-homicide offenses committed when defendant was juvenile were unconstitutional under *Graham v. Florida* because they did not afford defendant a meaningful opportunity for release upon demonstration of maturity and rehabilitation—Extreme length of sentence does not in itself establish violation of *Graham* when sentence is parole eligible and no constitutional deficiency in parole system has been established—Because claim before circuit court did not provide information or arguments necessary to hold sentence unconstitutional, even assuming truth of facts alleged, defendant failed to set forth prima facie case for relief—Further, due to legal insufficiency of motion, trial court was not required to afford defendant an evidentiary hearing or attach records conclusively refuting claim, and trial court was within its discretion to deny defendant's request for counsel

ARTHUR O'DERRELL FRANKLIN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case Nos. 1D13-2516, 1D13-2517, 1D13-2518 (consolidated). Opinion filed May 19, 2014. An appeal from the Circuit Court for Duval County. Tatiana Salvador, Judge. Counsel: Nancy A. Daniels, Public Defender, Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Pamela Jo Bondi, Attorney General, Joshua R. Heller, Assistant Attorney General, Tallahassee, for Appellee.

(RAY, J.) In these consolidated cases, Arthur O'Derrell Franklin, Appellant, appeals the partial summary denial of his motion for postconviction relief. Below, he argued that his several concurrent sentences of 1,000 years in prison, imposed in 1984 for crimes committed in 1983, are unconstitutional under *Graham v. Florida*, 560 U.S. 48 (2010) [22 Fla. L. Weekly Fed. S328b], despite the fact that they are parole-eligible. The circuit court rejected this claim, and Appellant now argues that he was entitled to either resentencing or an evidentiary hearing and to counsel to assist him at either proceeding. We affirm due to the facial insufficiency of Appellant's claim.

Appellant's motion argued that his sentences are unconstitutional under *Graham* because they do not afford him a meaningful opportunity for release upon a demonstration of maturity and rehabilitation. This argument was premised on the length of the 1,000-year sentences and the fact that the sentencing court retained jurisdiction, under section 947.16(3), Florida Statutes (1982 Supp.), to approve or deny any decision by the Parole Commission to release him during the first third of his sentence, or for 333-1/3 years.

The State conceded that the retention of jurisdiction arguably removed any chance of Appellant's being released on parole. This concession was based partly on language in the sentencing court's order indicating, as the State phrased it, an "intention to essentially deny the Defendant any opportunity to be released during his lifetime." The State alleged that the retention of jurisdiction had "created" Appellant's presumptive parole release date ("PPRD"), which was set for September 1, 2352, as of the dates of the postconviction proceedings. The State then hypothesized that if the court struck the retention-of-jurisdiction language in the sentencing orders, Appellant's PPRD would be established within his lifetime. The court agreed with the State and entered an order removing the retention of jurisdiction[1] but otherwise denying Appellant's motion.

On appeal, Appellant suggests that, despite the relinquishment of jurisdiction, he may never receive a PPRD within his lifetime due to

the length of his sentence or perhaps other barriers within the parole process unrelated to his failure to demonstrate maturity and rehabilitation. He argues that he is entitled to a remand and the appointment of counsel to present these arguments to the circuit court at an evidentiary hearing.

A criminal defendant is not entitled to an evidentiary hearing on a motion for postconviction relief if "(1) the motion, files, and records in the case conclusively show that the [defendant] is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). It is the defendant's burden to establish "a prima facie case based upon a legally valid claim," and "[m]ere conclusory allegations are not sufficient to meet this burden." *Id.* This standard informs a trial court's discretionary decision to grant or deny a request for counsel because, according to our state supreme court, "[t]here is absolutely no duty to appoint counsel for an indigent defendant in a post-conviction relief proceeding unless the application on its face reflects a colorable or justiciable issue or a meritorious grievance." *Graham v. State*, 372 So. 2d 1363, 1366 (Fla. 1979).

The issue Appellant presented to the circuit court was based on the United States Supreme Court's holding in *Graham*, which forbids a sentence of life without the possibility of parole for a non-homicide offense committed by a juvenile. 560 U.S. at 77. *Graham* does not foreclose the possibility that a juvenile non-homicide offender will remain behind bars for the duration of his or her life if that offender ultimately proves to be "irredeemable." *Id.* at 75. What *Graham* requires is that a juvenile non-homicide offender have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* This Court has applied *Graham* to invalidate term-of-years sentences that amounted to de facto life sentences due to the combination of their lengths and the lack of parole eligibility. *E.g.*, *Floyd v. State*, 87 So. 3d 45, 46 (Fla. 1st DCA 2012); *Adams v. State*, 37 Fla. L. Weekly D1865 (Fla. Aug. 8, 2012). However, the extreme length of a sentence does not in itself establish a *Graham* violation when that sentence is parole-eligible and no constitutional deficiency in the parole system has been established.

In the proceedings below, Appellant alleged no facts, cited no legal authority, and made no argument to show that the Parole Commission is precluded from ever establishing a PPRD during his lifetime due to the sentence the court imposed. Although he argued that the parole system would not provide him with a meaningful opportunity for release, this argument was conclusory at best. Without allegations indicating an inherent deficiency in the parole system's ability to address a 1,000-year sentence consistently with *Graham*, as opposed to a failure on Appellant's part to demonstrate maturity and rehabilitation, Appellant's claim was legally insufficient to establish that his parole-eligible term-of-years sentence is unconstitutional.

The fact that Appellant's PPRD is currently set at September 1, 2352, does not establish a *Graham* error in the sentence. The Parole Commission, not the sentencing court, is responsible for setting a parole-eligible prisoner's PPRD and for periodically reviewing that determination. *See* §§ 947.13(1)(a), 947.16(4)-(5), 947.172, 947.174(2)-(3), Fla. Stat. (2013). If the Parole Commission violated the law or abused its discretion in establishing Appellant's current PPRD outside his life expectancy while being legally able to establish it otherwise, then that error is a matter for review in proceedings challenging the establishment of the PPRD, not in a motion challenging the legality of the sentence from the outset. *Cf. Johnson v. Fla. Parole Comm'n*, 841 So. 2d 615, 617 (Fla. 1st DCA 2003) (recognizing that prisoners may seek review of final orders of the Parole Commission in circuit court through a petition for an extraordinary writ); *Fla. Parole Comm'n v. Huckelbury*, 903 So. 2d 977 (Fla. 1st DCA 2005) (reviewing a circuit court's order on a petition challenging the suspension of an inmate's PPRD).

We opine only that the claim before the circuit court did not provide the information or arguments necessary to hold Appellant's sentence unconstitutional, even assuming the truth of every fact alleged. Because Appellant failed to set forth a prima facie case for relief, his motion was properly denied (to the extent it was). Moreover, due to the legal insufficiency of Appellant's claim, the trial court was not required to afford Appellant an evidentiary hearing or attach records conclusively refuting his claim. For the same reason, the court was within its discretion to deny Appellant's request for counsel. Accordingly, we AFFIRM. (SWANSON, J., CONCURS; THOMAS, J., CONCURS WITH OPINION.)

[1]We express no opinion on whether the striking of the retention of jurisdiction had any effect on the legality of Appellant's sentence.

(THOMAS, J., CONCURRING.) I concur in the majority opinion but write to explain my reasoning. These three consolidated cases involve crimes committed in 1983 by Appellant at the age of 17. Appellant was convicted of 20 felony counts, including 17 life felony counts for armed robbery, unarmed robbery, armed kidnapping, aggravated assault, and armed sexual battery against multiple female victims, one of whom was raped ten times by Appellant and his co-defendants. The sentencing court in 1984 found that these crimes inflicted lifelong physical and mental injuries on the victims.

Citing these facts and other considerations, the trial court sentenced Appellant to concurrent parole-eligible terms totaling 1,000 years in state prison. In addition, the court retained jurisdiction over one-third of Appellant's sentence; thus, the trial court could exercise a judicial veto over the Parole Commission's authority to grant Appellant parole. *See* § 947.16(3), Fla. Stat. (1982 Supp.).

Under the United States Supreme Court's opinion in *Graham v. State*, 560 U.S. 48 (2010), Appellant sought postconviction relief below in a rule 3.850 *pro se* motion. The trial court denied relief, but agreed to strike the original sentencing court's retention of jurisdiction of any parole decision during the first third of Appellant's sentence. Appellant now asserts through counsel that he is entitled to either an evidentiary hearing on his claim or resentencing with the appointment of counsel. Appellant claims he remains subject to a sentence imposed in violation of *Graham*, based on his Presumptive Parole Release Date ("PPRD") established under Chapter 947, Florida Statutes.

It is ultimately within the discretion of the Florida Parole Commission as to whether Appellant will be released on parole. *See* §§ 947.002, 947.16, 947.18, Fla. Stat. (1981). Based on this eligibility for parole, Appellant's sentence does not constitute cruel or unusual punishment under the Eighth Amendment to the United States Constitution, for the simple reason that Appellant remains eligible for parole release, and *Graham* did not hold that Appellant must actually receive parole to comply with the Eighth Amendment to the United States Constitution: "It bears emphasis, however, 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." *Graham*, 560 U.S. at 75.

In the first case, Appellant and a co-defendant forced their way into the victim's car while she was at a red light, then pushed the victim to the middle of the front seat, grabbed her hair, and slammed her head to the car floorboard. Appellant drove the car to another location. When the victim attempted to escape from the car, Appellant tackled her and smashed her head against the pavement, causing the victim to partially lose consciousness. Appellant then dragged the victim across

the pavement, causing a burn on her skin. Appellant and the co-defendant then drove to a secluded area where Appellant raped the victim as his co-defendant searched the car for items of value, eventually taking $200 from the victim's purse. The victim testified at trial that Appellant choked her during the sexual assault.

At the sentencing hearing, the victim testified that the crime had ruined her life. She now lived in constant fear, could not work, could no longer engage in marital relations with her husband, and was afraid to leave her home, because the attack occurred only a few blocks from her residence. The trial court noted that during the trial and sentencing, this victim stood almost the entire time, and at the end of her testimony completely "broke down and had to be helped from the courtroom after a long recess." The court further noted that this criminal episode was committed by Appellant and his co-defendant showing a "conscious, well thought out, premeditated intent to commit these shameful, terrorizing and demeaning acts of violence."

In the second case, Appellant and his co-defendant robbed a convenience store, held a knife to the back of a male employee, then forced a female employee to give them her car keys. Appellant and his co-defendant then forced the victim into the car's back seat at gunpoint and drove the victim to a secluded area. During this time, Appellant told the victim that this was not the first time he and his co-defendant had committed similar crimes and "they would never serve a single day in jail." Appellant's co-defendant then asked Appellant if they should "take her where they took the other one." Appellant replied that they should "take her to the new place we found."

The sentencing court noted that while en route to the crime scene, the "defendants told the victim that they knew her and knew she recently had a baby," which "terrified the victim." At the secluded area, Appellant sexually assaulted the victim while his co-defendant held a gun to her head. The two men then switched places, and Appellant held the gun "inches from the victim's head" while his co-defendant sexually battered her. The sentencing court noted that at some point, Appellant held the gun in the victim's ear and "told her he was going to blow her brains out."

Both Appellant and his co-defendant then searched the victim's car and stole jewelry from her, including her wedding ring, which the victim begged them to let her keep because it meant so much to her. After robbing the victim, one of the defendants then kicked her in the head before they stole her car and fled, leaving her "in a dazed condition until she found help."

At sentencing, the victim testified she was hospitalized for two weeks following the assault. Two days after the crime, "her physical and emotional condition deteriorated to the point that she had lost the use of her right arm and right leg" as a result of the emotional trauma caused by Appellant and his co-defendant. The trial court's sentencing order notes that the victim testified that "she lives in constant fear," could not care for her infant child, and "was not even emotionally able to leave her own home for six months following the crime." The victim's treating doctor testified that the acts committed against the victim "will have a crippling effect on all areas of her life—for the rest of her life." The doctor stated that the victim would need mental treatment for several years. During the sentencing hearing, the victim "shook uncontrollably during her testimony." She was "unable to be removed from her chair because of her emotional state for about 20 minutes."

In the third criminal episode, Appellant and two others forced their way into the victim's car and drove to a secluded area where all three men perpetrated various acts of sexual assault on her. The men then put the victim in the trunk of the car and drove to another location, where the assaults resumed. They later carried the victim to a railroad car where she was locked up for a period of hours, after which Appellant and one other co-defendant returned, removed the victim to a waiting car, and resumed the sexual assaults. Appellant was convicted of ten counts of sexual battery in this case. The sentencing order notes that the physician who performed the sexual battery exam testified that the victim suffered the worst injuries the physician had ever observed.

In the wake of *Graham*, Appellant argued that his 1000-year sentence, with the court retaining jurisdiction for 333-1/3 years, was disproportionate to his offenses, and thus in violation of the Eighth Amendment of the U.S. Constitution. Appellant also argued that his sentence violated the retroactive holding in *Graham*, because it denied him of any meaningful opportunity to obtain release within his lifetime. Thus, he requested the trial court to resentence him with a guideline sentence and order an evidentiary hearing.

The court denied the motion as to the disproportionate sentence argument, and it declined to resentence Appellant with a guideline sentence, because that option was not available under Chapter 921, Florida Statutes. Appellant does not challenge those rulings here.

The court below agreed to strike the original sentencing court's retention of jurisdiction of any parole decision during the first third of Appellant's sentence. Despite this grant of partial relief, however, Appellant asserts that he is entitled either to an evidentiary hearing on his claim under *Graham*, or a resentencing hearing that Appellant asserts must comport with *Graham*, by ensuring that Appellant receives a meaningful opportunity "for release based on demonstrated maturity and rehabilitation." In essence, Appellant asserts that the trial court should not have considered any legal arguments regarding his claim without the appointment of counsel.

The State argues that no counsel was necessary, as the arguments involved do not require a complex legal analysis. In addition, the State asserts that because it is undisputed that Appellant has been and remains eligible for parole, his sentences comply with *Graham* regardless of whether his PPRD is set far beyond his life expectancy.

I agree with the State on both points. Regarding the merits of Appellant's claim, Appellant is eligible for parole, thus, his sentences do not violate the decision in *Graham*. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without *possibility* of parole for juvenile offenders." (emphasis added)). *Graham* holds only that the State may not punish a juvenile convicted of a non-homicide crime with life in prison without the possibility of parole. *Graham*, 560 U.S. at 57 ("Because Florida has abolished its parole system, a life sentence gives a defendant no possibility of release unless he is granted executive clemency.") (citation omitted).

The State did not abolish parole eligibility for Appellant, who committed the above crimes before the effective dates of the sentencing guidelines legislation in Chapter 921, Florida Statutes. *See* Ch. 1984-328, Laws of Florida (effective Oct. 1, 1984, and adopting court rules implementing sentencing guidelines); *State v. Smith*, 537 So. 2d 982, 987 (Fla. 1989) (holding sentencing guidelines and elimination of parole eligibility unconstitutional until date legislature adopted relevant rules, but valid thereafter, and discussing history of sentencing guidelines, noting that "the elimination of parole was an integral part of the sentencing guidelines legislation, and we are convinced it could not be severed from the statute."). The United States Supreme Court has recognized that a life sentence with parole eligibility is necessarily a less punitive punishment than a non-parole-eligible sentence. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 662-63 (1974) (noting that when parole eligibility is removed, an "additional penalty" is imposed).

Appellant's sentences are parole eligible, and now that the trial court has ordered that it will no longer retain jurisdiction under section 947.16(3), Florida Statutes, the Florida Parole Commission will determine whether Appellant will be released from his 1,000-year

prison term and placed on community supervision. *See* §§ 947.002, 947.16(4), 947.18, Fla. Stat. The sentencing court has eliminated its authority to veto that decision by retaining jurisdiction, and while I render no opinion on whether this was a necessary act to comply with *Graham*, the State agreed to this action below and does not challenge it here.

I disagree with Appellant's argument that the Parole Commission has somehow calculated Appellant's PPRD in violation of the requirements of *Graham*. I further note that Appellant will receive periodic reviews by the Parole Commission, at least every seven years, where additional information can be considered. *See* §§ 947.16(5) & 947.174(2-3), Fla. Stat. In fact, Appellant acknowledged below that he has received periodic reviews from the Parole Commission.

Appellant's reliance on *Cunningham v. State*, 54 So. 3d 1045 (Fla. 3d DCA 2011), for the proposition that a parole-eligible inmate sentenced as a juvenile must have a PPRD established within his lifetime, is misplaced. Although the Third District in *Cunningham* noted that Cunningham had a PPRD in 2026, the context of that statement was simply to observe that Cunningham acknowledged that he was in fact eligible for parole as he had a PPRD in 2026, but not to hold that the date had to be within his natural lifetime. The court there further noted that Cunningham had a review in 2013, just as Appellant will receive his reviews by the Parole Commission. Even had the Third District held that an inmate sentenced for a crime committed when a juvenile must have a presumptive parole release date within his natural life, I would respectfully disagree, for the reasons stated above. *See also Atwell v. State*, 128 So. 3d 167, 169 (Fla. 4th DCA 2013) (holding inmate sentenced for first-degree murder not entitled to postconviction relief where crime was committed when inmate was a juvenile, but sentence provided parole eligibility after serving 25-year minimum mandatory). Furthermore, the Third District's decision in *Lewis v. State*, 118 So. 3d 291 (Fla. 3d DCA 2013), recognizes that an inmate sentenced for a crime committed as a juvenile has no right to an eventual release on parole, where the Parole Commission has set his PPRD in 2042 based on Lewis' misconduct in prison. And here, we cannot predict whether the Parole Commission will in fact one day accelerate Appellant's PPRD based on good conduct, such that he may in fact be released on parole. That decision must be made by the Parole Commission and will depend at least in part on Appellant's behavior.

I also find that Appellant's reliance on *People v. Cabellero*, 282 P.3d 291 (Cal. 2012), is misplaced. There, the defendant would not become eligible for parole until serving at least 110 years, and that court found the sentence to be the functional equivalent of a sentence of life without parole. Here, Appellant has always been, and remains, parole eligible.

Because Appellant has been and remains parole eligible, with periodic review for additional consideration, his sentence comports with the Eighth Amendment to the United States Constitution. Thus, under the undisputed facts of this case and the relevant law, Appellant is not entitled to postconviction relief, an evidentiary hearing, or resentencing, because his current sentence is legal under Florida law and is constitutional under federal law.

* * *

Workers' compensation—Compensable accidents—Murder—Death of store manager following injuries sustained when, as he was gathering shopping carts in employer's parking lot at night, he was struck by car driven by a criminal assailant who had planned the attack in reaction to decedent's allegedly sexually harassing assailant's girlfriend, who worked as cashier for same employer—Accident was compensable where decedent was in course and scope of his employment and injury and death arose from interaction of people connected only by the workplace—Judge of compensation claims erred in denying compensability

DILMA CELENY SANTIZO-PEREZ (WIDOW AS WELL AS MOTHER AND PERSONAL REPRESENTATIVE OF THE MINOR CHILDREN OF THE MARRIAGE ANA VICTORIA PIVIRAL-SANTIZO AND ANDREW ALEXIS PIVARAL-SANTIZO, SURVIVING DEPENDENTS OF MELVIN PIVARAL-RAMIREZ), Appellant, v. GENARO'S CORPORATION D/B/A KING'S FOOD and MEAT BAZAAR, Appellees. 1st District. Case No. 1D13-2674. Opinion filed May 19, 2014. An appeal from an order of the Judge of Compensation Claims. Shelley H. Punancy, Judge. Date of Accident: June 5, 2011. Counsel: Kimberly A. Hill of Kimberly A. Hill, P.L., Fort Lauderdale, for Appellant. R. Lee Dorough of Dorough, Calzada & Soto, L.L.P., Orlando, for Appellees.

(BERGOSH, GARY L., ASSOCIATE JUDGE.) In this workers' compensation case, the surviving dependents of Melvin Pivaral-Ramirez, an employee of King's Food and Meat Bazaar (King's), challenge an order of the Judge of Compensation Claims (JCC) that denies the compensability of his accident, injuries, and death. We conclude the JCC erred in denying compensability; we therefore reverse the appealed order and remand the case for the award of benefits available under the Florida Workers' Compensation Law.

Facts

Mr. Pivaral-Ramirez was the front-end manager for King's. On the evening of June 5, 2011, he began to gather shopping carts from King's parking lot. As he worked in the parking lot, a car hit him and sped away. Suffering from, *inter alia*, severe brain injuries leaving him in a vegetative state, he passed away in the hospital a few weeks later.

The driver of the car, Christopher Polanco, was apprehended that same night, and claimed his actions were in reaction to the decedent sexually harassing his girlfriend, a cashier at King's.[1] The criminal assailant confessed that he planned the attack for at least two to three weeks and knew Mr. Pivaral-Ramirez collected shopping carts from the store's parking lot each night. On the night of the murder, the assailant confessed, he borrowed the car from a friend, brought food to his girlfriend at the store, and then waited in the parking lot as it began to get dark. When Mr. Pivaral-Ramirez emerged from the store to collect the day's shopping carts, the assailant confessed, he became enraged, turned on the car's high beam headlights, and sped towards Mr. Pivaral-Ramirez, striking and ultimately killing him.

Analysis

The Workers' Compensation Law defines "injury" as "personal injury or death arising out of and in the course of employment." § 440.02(19), Fla. Stat. (2010). The Law also requires that an injury, to be compensable, "aris[e] out of work performed in the course and scope of employment." § 440.09(1), Fla. Stat. (2010). Here, the JCC concluded that, although the decedent was in the course and scope of his employment at the time of his injury, the injury did not arise out of his employment because there was no evidence that "anything in the decedent's employment was related to him being put at risk of being murdered," "[t]he vehicle used in the assault was not an implement of the employment," "[t]here is no evidence of a close proximity between the decedent and his assailant," and the location of the attack was merely "convenient" or "fortuitous" because, given the assailant's belief that his girlfriend was being sexually harassed by the decedent, "chances were the assault was inevitable, without regard to the employment." The JCC further concluded the "assailant could just as easily [have] hit [the decedent] with the vehicle or attacked him in some other way elsewhere." While some of these findings are proper as allowed by case law describing the factors a JCC may consider in determining the work-relatedness of an intentional act, the last conclusion is quite speculative.[2] *See Sentry Ins. Co. v. Hamlin*, 69 So. 3d 1065, 1071 (Fla 1st DCA 2011) (work-related risk); *Carnegie v. Pan Am. Linen*, 476 So. 2d 311, 312 (Fla. 1st DCA 1985) (implement of the employment); *Tampa Maid Seafood Prods. v. Porter*, 415 So.