IN THE SUPREME COURT OF FLORIDA

ARTHUR O'DERRELL FRANKLIN,

Petitioner,

vs.

CASE NO. SC14-1442

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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ARGUMENT

I. Because parole eligibility cannot provide Franklin an opportunity based on rehabilitation and maturity for release from the 1,000-year sentences he is serving for crimes committed at age seventeen, he is entitled to resentencing under Chapter 2014-220, Laws of Florida.

The Answer Brief rests on three mistaken premises: First, the state suggests that this Court's holding in Atwell v. State, 197 So. 3d 1040 (Fla. 2016), that parole eligibility fails to satisfy Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 132 S.Ct. 2455 (2012), applies only to Atwell. Second, Respondent asserts that Franklin received a de facto section 921.1401 sentencing hearing in 1984, obviating the need for another. Third, it points to the burden of resentencings on the courts, prosecutors, and victims.

Contrary to Respondent's argument (Ans. brf. at 39-40), Atwell cannot be limited to its facts. There this Court held:

> The Supreme Court has emphasized—and this Court's own case law has followed—that the Eighth Amendment requires a trial court to "take into account the differences among defendants and crimes" before imposing a sentence that is, in effect, a sentence to a lifetime in prison. Miller, 132 S.Ct. at 2469 n. 8; see Horsley, 160 So. 3d at 399; Falcon, 162 So. 3d at 959. Atwell's sentence effectively resembles a mandatorily imposed life without parole sentence, and he did not receive the type of individualized sentencing consideration Miller requires. The only way to correct Atwell's sentence, consistent with this Court's case law

> in Horsley, is to resentence Atwell in conformance with chapter 2014–220, Laws of Florida.

197 So. 3d at 1050. Franklin's sentence also "effectively resembles a mandatorily imposed life without parole sentence." His eleven parole reviews, never yielding a presumptive parole release date below 2350, are conclusive evidence of this Court's repeated observation that "[p]arole is, simply put, 'patently inconsistent with the legislative intent as to how to comply with Graham and Miller." 197 So. 3d at 1049 (quoting Horsley v. State, 160 So. 3d 393, 395 (Fla. 2015)).

The state's argument that Franklin received a de facto section 921.1401 hearing (Ans. brf. at 23-28) is also untenable. Kelsey v. State, 206 So. 3d 5 (Fla. 2016), establishes that for any nonhomicide offender serving a sentence greater than 20 years, resentencing under section 921.1401 is necessary to trigger eligibility for judicial sentence review under section 921.1402:

> [I]t is clear that we intended for juvenile offenders, who are otherwise treated like adults for purposes of sentencing, to retain their status as juveniles in some sense. In other words, we have determined through our reading of the Legislature's intent in passing chapter 2014–220, Laws of Florida, that juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation.

Id. at 10.

> In Henry [v. State, 175 So. 3d 675 (Fla. 2015)], we determined that the Legislature's remedy was the

> appropriate remedy in these cases, and the Legislature has determined that the "means and mechanisms for compliance" with Graham are to provide judicial review for juvenile offenders who are sentenced to terms longer than twenty years. Therefore Kelsey is entitled to resentencing under those provisions.

Kelsey v. State, 206 So. 3d at 1. Unless sentence is imposed under section 921.1401, a defendant cannot receive sentence review under section 921.1402:

> (c) Notwithstanding paragraphs (a) and (b), a person convicted of an offense that is not included in s. 782.04 but that is an offense that is a life felony or is punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, or an offense that was reclassified as a life felony or an offense punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(d).

§ 775.082(3)(c), Fla. Stat. (2014).

> (d) A juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) is entitled to a review of his or her sentence after 20 years. If the juvenile offender is not resentenced at the initial review hearing, he or she is eligible for one subsequent review hearing 10 years after the initial review hearing.

§ 921.1402(2)(d), Fla. Stat. (2016).

For offenders such as Franklin who have reached their sentence review periods, resentencing and sentence review will be a unitary proceeding under both sections 921.1401 and 921.1402. Of the two statutes, only section 921.1402 permits a court to weigh the Graham and Miller factors of demonstrated maturity and rehabilitation:

> (6) When determining if it is appropriate to modify the juvenile offender's sentence, the court shall consider any factor it deems appropriate, including all of the following:
>
> (a) Whether the juvenile offender demonstrates maturity and rehabilitation.
>
> (b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.
>
> (c) The opinion of the victim or the victim's next of kin. The absence of the victim or the victim's next of kin from the sentence review hearing may not be a factor in the determination of the court under this section. The court shall permit the victim or victim's next of kin to be heard, in person, in writing, or by electronic means. If the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.
>
> (d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person.
>
> (e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.

> (f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.
>
> (g) Whether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.
>
> (h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.
>
> (i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

§ 921.1402(6), Fla. Stat.

Further, the court's explanation for the sentence it imposed (recounted at Ans. brf. at 37-39) failed to satisfy section 921.1401 as implemented by Florida Rule of Criminal Procedure 3.781. "The court shall make specific findings on the record that all relevant factors have been reviewed and considered by the court prior to imposing a sentence of life imprisonment or a term of years equal to life imprisonment." Rule 3.781(c)(1). The judge in Franklin's 1984 sentencing did not make these findings. Nor were these finding made in any of the subsequent proceedings relied upon by the state.

Third, Respondent cautions that resentencing hearings after an offender has served decades in prison cause "an unnecessary burden … on courts and prosecutors across the State." (Ans. brf. at 44) Its complaint is overstated. As

noted above, a resentencing of an offender who has reached his judicial review period will necessarily involve the criteria in section 921.1402. Under section 921.1402, the focus is primarily on the offender, not the offense. As to the defendant's offenses, section 921.1402 requires only that the victim or victim's next of kin be heard, with the option of presenting a statement from the previous sentencing hearing. § 921.1402(6)(c). Only if the state chooses to emphasize the circumstances of the offenses, akin to its rendition of the case and facts in the answer brief in this case, will resentencing/review hearings for offenders such as Franklin become onerous. But the burden will be of the state's choosing.

Finally, the answer brief's detailed account of Franklin's crimes more than thirty years ago in the Statement of Case and Facts should not prevent this Court from following its own precedent and ordering the resentencing and judicial sentence review required by Florida and federal law. In Stephenson v. State, 197 So. 3d 1126, 1129 (Fla. 3d DCA 2016), the Third DCA correctly observed:

> Under our reading of Graham and Henry, whether the juvenile offender's long prison sentence is the result of a single, horrific crime charged under one case number or, as here, multiple, horrific crimes charged under multiple case numbers, is of no moment with regard to Florida's recent Eighth Amendment jurisprudence. In Florida, the constitutional inquiry remains the same: whether the juvenile offender has a meaningful opportunity during the offender's natural life to obtain release.

Resentencing and judicial sentence review will provide Franklin that opportunity. The Eighth Amendment decisions in Graham, Henry, and Kelsey permit nothing less.

II. A pro se, postconviction pleading, not time-barred, which alleges that the movant is serving a parole-eligible sentence for an offense committed before he turned eighteen but has a presumptive release date outside his life expectancy, states a prima facie case for relief.

Respondent merely relies on the district court opinion. Franklin rests on his argument in the Initial Brief on the Merits.

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 and Sharon S. Traxler, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 23rd day of March, 2017. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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A. Franklin v. State, 141 So. 3d 210 (Fla. 1st DCA 2014)

APPENDIX A

141 So.3d 210
District Court of Appeal of Florida,
First District.

Arthur O'Derrell FRANKLIN, Appellant,
v.
STATE of Florida, Appellee.

Nos. 1D13–2516, 1D13–2517, 1D13–2518.
|
May 19, 2014.
|
Rehearing Denied July 8, 2014.

Synopsis

Background: Defendant filed a petition for post-conviction relief. The Circuit Court, Duval County, Tatiana Salvador, J., denied the petition. Defendant appealed.

[Holding:] The District Court of Appeal, Ray, J., held that defendant's claim that his several concurrent sentences of 1,000 years in prison were unconstitutional under *Graham v. Florida* was facially insufficient.

Affirmed.

Thomas, J., filed a concurring opinion.

West Headnotes (3)

[1] **Criminal Law**
Sentencing
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1580 Particular Issues
110k1580(12) Sentencing
Defendant's post-conviction relief claim that his several concurrent sentences of 1,000 years in prison were unconstitutional under *Graham v. Florida* was facially insufficient; defendant alleged no facts, cited no legal authority, and made no argument to show that the Parole Commission was precluded from ever establishing a presumptive parole release date (PPRD) during defendant's lifetime.

1 Cases that cite this headnote

[2] **Criminal Law**
Necessity for Hearing
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1652 In general
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.

Cases that cite this headnote

[3] **Criminal Law**
Petition or Motion
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1574 Petition or Motion
110k1575 In general
It is the post-conviction defendant's burden to establish a prima facie case based upon a legally valid claim, and mere conclusory allegations are not sufficient to meet this burden.

Cases that cite this headnote

Attorneys and Law Firms

*211 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.

Opinion

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, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), 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.

[1] 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.

*212 [2] [3] 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, 130 S.Ct. 2011. *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, 130 S.Ct. 2011. 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*, — So.3d —, 2012 WL 3193932, 37 Fla. L. Weekly D1865 (Fla.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.* *213 *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.

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, 130 S.Ct. 2011, 176 L.Ed.2d 825 (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, 130 S.Ct. 2011.

*214 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 ***215** 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, — U.S. —, —, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (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, 130 S.Ct. 2011 ("Because Florida has abolished its parole system, a life sentence gives a defendant ***216** 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); Smith v. State, 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, 94 S.Ct. 2532, 41 L.Ed.2d 383 (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 ***217** 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. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291 (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.

All Citations

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Footnotes

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

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