IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-2079

THOMAS KELSEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Public Defender Association, Inc., ("FPDA") consists of nineteen elected public defenders who supervise hundreds of assistant public defenders and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members and staff have tremendous practical experience with juvenile clients facing sentencing in adult court. All FPDA members are deeply committed to promoting the interests of fairness, proportionality, and rehabilitation when it comes to juvenile sentencing. The FPDA has a particular interest in the petitioner's case because the outcome will have a significant impact on other similar cases involving clients of FPDA members.

SUMMARY OF THE ARGUMENT

Despite the fact that Mr. Kelsey's sentence was pending appeal when this Court decided *Henry v. State*, 175 So. 3d 675 (Fla. 2015), the district court declined to afford him the full remedial provisions of *Henry*. This case can be resolved on the grounds that Mr. Kelsey is entitled to the benefit of *Henry* as a pipeline case.

However, the certified question is broader than just pipeline cases. It encompasses all juveniles who were resentenced following a violation of *Graham v. Florida*, 560 U.S. 48 (2010) to a lengthy term of years sentence without any review mechanism, and whose sentences became final prior to *Henry*. This Court should afford the benefit of *Henry* to pipeline and final cases alike.

The holding in *Henry* was a development of fundamental significance, justifying its retroactive application. It placed beyond the authority of the State the power to sentence a juvenile to more than twenty years in prison without judicial review at a *Graham* resentencing hearing. It also satisfies the *Stovall*/*Linkletter* "purpose, reliance, and effect" test by significantly impacting the constitutional liberty interests of all juvenile defendants entitled to resentencing pursuant to *Graham*, without posing a threat to judicial economy in its retroactive application.

Fundamental principles of fairness and uniformity weigh in favor of answering the certified question broadly and in the affirmative.

ARGUMENT

ALL JUVENILES WHO RECEIVED A *GRAHAM* RESENTENCING HEARING SHOULD RECEIVE JUDICIAL SENTENCING REVIEW, WITHOUT REGARD FOR WHETHER THEIR SENTENCE IS PENDING DIRECT APPEAL OR FINAL.

Mr. Kelsey's unconstitutional life sentence was imposed on March 26, 2010. Although he was resentenced on January 17, 2014 to forty-five years in prison, the sentencing order did not include any provision for judicial review pursuant to chapter 2014–220. The direct appeal of his new sentence was pending when *Henry v. State*, 175 So. 3d 675 (Fla. 2015) was decided. That case did not hold that the remedy for a *Graham*[1] violation is simply resentencing to a lesser term of years. Rather, "resentencing pursuant to chapter 2014–220 is the proper remedy for a sentence that violates *Graham*." *Lawton v. State*, 40 Fla. L. Weekly S195 at *1 (Fla. 2015).

When this Court "renders a decision favorable to criminal defendants … 'such decisions apply in all cases to convictions that are not yet final—that is convictions for which an appellate court mandate has not yet issued.'" *Falcon v. State*, 162 So. 3d 954, 960 (Fla. 2015) (quoting *Hughes v. State*, 901 So. 2d 837, 839 (Fla. 2005)).

[1] *Graham v. Florida*, 560 U.S. 48 (2010).

Henry was decided months before the district court's opinion in Mr. Kelsey's case. Because *Henry* was decided while his direct appeal was pending, he is entitled to the full benefit of that decision. *Hughes*, 901 So. 2d at 839.

The certified question, however, encompasses more than just pipeline cases. The First District asked whether "a defendant whose initial sentence for a nonhomicide crime violates *Graham v. Florida*, and who is resentenced to concurrent forty-five year terms, is entitled to a new resentencing under the framework established in chapter 2014–220, Laws of Florida?" This question includes juveniles who were resentenced following a *Graham* violation to a term of years sentence without judicial review, and whose sentences became final before *Henry* was decided. This Court should answer the certified question in a manner that affords relief to *all* juveniles serving lengthy prison sentences that were imposed after a *Graham* resentencing but lack judicial review pursuant to chapter 2014-220.

Retroactive application of chapter 2014-220 to final cases is appropriate in light of the fact that *Henry* was a constitutional development of fundamental significance. Although the State acquires an interest in finality once a case is final, this interest must be balanced against competing equitable principles. *Falcon*, 162 So. 3d at 960. The doctrine of finality can be set aside when

> a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Id. (quoting *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980)).

A change of law is retroactive in Florida when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So. 2d at 931. *Henry* indisputably emanated from this Court and is constitutional in nature. The only question is whether *Henry* satisfies the third *Witt* prong.

Major constitutional changes that amount to a development of fundamental significance generally fall into two broad categories. *Id.* at 929. The first are legal changes that "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties." *Id.* The second are "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v. Denno*, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]." *Id.* *Henry* falls within both categories. It should therefore be given retroactive effect even in final cases.

A. *Henry* placed beyond the authority of the State the power to resentence a juvenile offender following a *Graham* violation to a term of years sentence in excess of twenty years without judicial review.

Prior to *Henry*, various district courts of appeal held that a term of years sentence exceeding a juvenile's life expectancy and without a review mechanism did not violate *Graham*. *Henry* quashed these decisions and held that *Graham* is not limited to "sentences denominated under the exclusive term of 'life in prison.'" *Henry*, 175 So. 3d at 680. Rather, *Graham* applies to any sentence where a juvenile is deprived of a meaningful opportunity to obtain release during his or her life based upon demonstrated maturity and rehabilitation. *Id.* *Henry* further held that the remedy for a *Graham* violation is resentencing pursuant to chapter 2014-220. *Id.*

Henry was a watershed decision that stripped the State of the authority to impose certain penalties on juveniles. Specifically, the State lost the power during a *Graham* resentencing to impose a sentence in excess of twenty years lacking a review mechanism. *See* § 775.087(3)(c), Fla. Stat. (2014) (any sentence in excess of twenty years imposed on a juvenile for a non-homicide offense punishable by life must include judicial review); Fla. R. Crim. P. 3.781(a) (retroactively applying chapter 2014-220 to *Graham* resentencings).

Because *Henry* categorically limited the punishment that can be imposed on juveniles at a *Graham* resentencing hearing, it constitutes a "development of fundamental significance." *Witt*, 387 So. 2d at 931. If *Henry* is not applied retroactively to *all* juvenile offenders previously resentenced pursuant to *Graham*, some juveniles will spend decades in prison while others with "indistinguishable cases" will have an opportunity to seek early release simply because their cases were in the pipeline when *Henry* was decided. *See id.* at 925. "The patent unfairness of depriving indistinguishable juvenile offenders of [the opportunity for judicial review of their sentences], based solely on when their cases were decided, weighs heavily in favor of applying [*Henry*] retroactively." *See Falcon*, 162 So. 3d at 962.

B. *Henry* satisfies the *Stovall/Linkletter* "purpose, reliance, and effect" test.

The application of the three-part *Stovall*/*Linkletter* test likewise shows that *Henry* was a development of fundamental significance requiring retroactive application. This test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect of retroactive application of the rule on the administration of justice." *Witt*, 387 So. 2d at 926.

i. *Henry*'s purpose: safeguarding the constitutional liberty interests of juvenile defendants.

"Foremost among [the *Stovall*/*Linkletter*] factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 244, 249 (1969); *see also Hughes*, 901 So. 2d at 849 (Lewis, J., concurring in result) ("the purpose served by a new rule of law is a key factor in determining retroactivity in Florida"). This Court has found the retroactive application of a new rule to be required where the rule "significantly impacts a defendant's constitutional liberty interests." *Callaway v. State*, 658 So. 2d 983, 986 (Fla. 1995), *receded from on unrelated grounds*, *Dixon v. State*, 730 So. 2d 265 (Fla. 1999).

To illustrate, in *Callaway* the Court held that a change of law precluding the consecutive imposition of habitual-offender sentences on convictions arising from a single incident satisfied the *Witt* test. *Id.* at 986-87. The new rule's purpose was to prevent doubly enhanced sentences. *Id.* Although some courts had been imposing such sentences over the last six years, the Court found that "the administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window" were required to serve sentences "two or more times as long as similarly situated defendants who happened to be sentenced after" the new rule. *Id.* at 987. *Callaway* emphasized that the "concern for fairness and uniformity in individual

cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality." *Id.*

The purpose of *Henry* is to prevent the imposition of excessive and disproportionate sentences on juvenile offenders without regard for their inherent capacity for change. Its new rule significantly impacts the constitutional liberty interests of all juveniles who were resentenced following a *Graham* violation. A juvenile serving a lengthy sentence who has been granted sentencing review has an opportunity for early release upon a showing of genuine rehabilitation. *See* § 921.1402(2)(d), Fla. Stat. (2014). In the absence of any review mechanism, a similarly situated juvenile would be forced to serve out his entire sentence, "even if he spends the next [several decades] attempting to atone for his crimes and learn from his mistakes." *See Graham*, 560 U.S. at 79.

The administration of justice would be "detrimentally affected if [juvenile] defendants who had the misfortune" to be resentenced prior to *Henry* were required to serve out sentences without any review mechanism, in contrast to "similarly situated defendants who happened to be sentenced after" *Henry* or whose cases were in the pipeline. *See Calloway*, 658 So. 2d at 987. Such disparate treatment of juveniles, a class that is "constitutionally different from adults for purposes of sentencing," *Miller v. Alabama*, 132 S.Ct. 2455, 2464

(2012), shows that *Henry* should be retroactively applied to all juvenile offenders to ensure uniformity and fairness in the sentencing of Florida's children.

ii. Reliance on the old rule; effect of the new rule.

The last two prongs of the *Stovall*/*Linkletter* test also weigh in favor of *Henry*'s retroactive application. The time period in which the old rule was relied upon is brief. Only five years elapsed between *Graham* and *Henry*. In many cases in which a juvenile became entitled to resentencing following *Graham*, proceedings were held in abeyance pending further guidance from the Legislature. In other cases in which a juvenile did receive a *Graham* resentencing, such as this one, a direct appeal of that sentence was pending when *Henry* was decided. Retroactive application of *Henry* will only affect the remaining narrow class of juveniles whose cases following a *Graham* resentencing became final prior to *Henry*.

Finally, applying *Henry* to non-pipeline cases will only marginally impact the administration of justice. The retroactive application of a new rule has less of an effect when it concerns sentences rather than guilt-phase convictions. *See, e.g., Gantorius v. State*, 693 So. 2d 1040, 1042 (Fla. 3d DCA 1997). In such situations, there is "no need to address the issues of guilt or innocence, no need to track down witnesses or engage in lengthy and costly preparation of old cases for trial." *Id.*

Applying *Henry* to final cases presents even less of a burden in cases in which the chapter 2014-220 factors were already considered. Full blown *Miller/Graham* resentencings require consideration of "the defendant's actions during commission of the offense, the defendant's prior involvement in the criminal justice system, the impact his actions have had upon the victim's family, the defendant's age and level of maturity at the time he committed the offense, and other aggravating and mitigating factors." *Lightsey v. State*, --- So. 3d ---, 2015 WL 9315734 at *2 (Fla. 3d DCA 2015). In cases where a juvenile has received a pre-*Henry* individualized sentencing following a *Graham* violation, conversely, a court would merely need to amend the sentencing order to include the juvenile's eligibility for review.

A consistent theme throughout this Court's retroactivity jurisprudence is a concern for evenhanded justice. As reiterated in *Dixon*, the principle animating this Court's retroactivity holdings is "fundamental fairness and uniformity in sentences between similarly situated prisoners" where a change in law "significantly impacts a defendant's constitutional liberty interests." *Dixon*, 730 So. 2d at 267. This cannot be squared with a situation in which some juveniles have an opportunity to prove their rehabilitation and seek early release, while others languish in prison for decades with no hope in sight. *Henry* should be

applied to *all* children sentenced to more than twenty years following a *Graham* resentencing hearing.

CONCLUSION

Based on the foregoing, the FPDA urges this Court to answer the certified question broadly and in the affirmative to ensure the fair and uniform sentencing of children throughout Florida.

Respectfully submitted,

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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 counsel for the petitioner, Glen Gifford, Office of the Public Defender, 301 S. Monroe St., Suite 401, Tallahassee, FL 32301; counsel for the respondent, Trisha Meggs Pate, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399; and to all amicus counsel who have filed amicus notices, this 18th day of January, 2016.

I further certify that this brief has been prepared using Times New Roman 14 point font.

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