Filing # 16601508 Electronically Filed 07/31/2014 10:44:34 PM

IN THE SUPREME COURT OF FLORIDA
CASE NOS.: SC12-578 & SC12-1223

LEIGHDON HENRY,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Appeal No.: SC12-578
L.T. Case Nos.: 5D10-3021
5D08-3779

SHIMEEKA DAQUIEL GRIDINE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Appeal No.: SC12-1223
L.T. Case Nos.: 1D10-2517

ON APPEAL FROM THE DISTRICT COURTS OF APPEAL,
FIRST & FIFTH DISTRICTS, STATE OF FLORIDA

SUPPLEMENTAL AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS PARTIALLY IN SUPPORT OF PETITIONERS

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 503-0441 facsimile

Attorney for Amicus Curiae
Florida Association of Criminal
Defense Lawyers

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF AMICUS IDENTITY AND INTEREST

The Florida Association of Criminal Defense Lawyers ("FACDL") adopts the statement from its first amicus brief, except as modified herein. While FACDL continues to support Petitioners insofar as they seek to vacate their current sentences, FACDL disagrees with Petitioners insofar as they advocate for parole as the preferred remedy. FACDL also disagrees with any concession by Petitioners that the new juvenile sentencing legislation, chapter 2014-220, Laws of Fla., does not apply to their cases or the cases of similarly situated juvenile offenders.

SUMMARY OF ARGUMENT

This Court should remedy the unconstitutional aspects of Petitioners' sentences and others like them through the new juvenile sentencing legislation, chapter 2014-220, Laws of Fla.

ARGUMENT

I. Introduction

If the Court concludes on the threshold question that Petitioners' sentences violate the Eighth Amendment as interpreted by *Graham v. Florida*, 560 U.S. 48 (2010), then the Court must answer the more difficult question of what remedy to order to correct the constitutional deficiencies in the sentences. This Court has asked for supplemental briefing on the impact, if any, of the recent juvenile sentencing legislation, *see* ch. 2014-220, Laws of Fla. The Court has posed the

same question in the two cases involving homicide, juvenile offenders, *Horsley v. State*, SC-1938 and *Falcon v. State*, SC13-865.

The Legislature enacted chapter 2014-220 (the "Bill") to remedy the constitutional deficiencies in Florida's sentencing laws, as applied to juveniles, in light of the U.S. Supreme Court's recent decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which invalidated mandatory life-without-parole sentences for children, and its predecessor decision, *Graham*, which invalidated life-without-parole sentences for children convicted of non-homicides. Rather than re-institute parole (a process under the executive branch) as the remedy to *Miller* and *Graham*, the Legislature exercised its prerogative to establish a judicial process as the remedy. *See* Ch. 2014-220, § 3, at 6-7, Laws of Fla. Specifically, under the Bill, juvenile, non-homicide offenders sentenced to terms of more than fifteen years for first degree and life felonies are eligible for a "sentence review hearing" in court with a right to counsel. *Id.* The timing and frequency of the sentence review hearings depends on the type of offense, and the first hearings may occur after 15, 20, or 25 years of the sentence is served. *Id.* At these sentence review hearings, judges (not parole commissioners) consider a host of factors, including whether the juvenile offender has "demonstrate[d] maturity and rehabilitation," to determine whether the offender's sentence should be modified. *Id.*

While the Bill is far from perfect from FACDL's perspective, the Bill is a reasonable constitutional response by the Legislature to *Graham*'s mandate. FACDL agrees that the Bill provides to juvenile, non-homicide offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[1] *Graham v. Florida*, 560 U.S. 48, 75 (2010). Both prosecutors and FACDL, as well as many other groups that advocate for juveniles, supported the bill as a reasonable compromise to remedy the constitutional deficiencies in Florida's sentencing laws. *See* Lloyd Dunkelberger, *Agreement Reached on Juvenile Sentencing*, The Ledger (Apr. 23, 2014), http://www.theledger.com/article/20140423/politics/140429612?p=3&tc=pg.

II. This Court can and should use its authority to craft a remedy for Petitioners and other similarly situated juveniles that is the same as, or adopts many of the features of the Bill, Chapter 2014-220.

Usually, FACDL supports the arguments of criminal defendants. In this rare instance, however, FACDL disagrees with the arguments of Petitioners, two juvenile offenders, insofar as they argue that the Bill cannot be applied to their cases. They posit two reasons that it cannot be applied. First, they point to the Bill's language limiting its application to offenses "committed on or after July 1, 2014." (*Henry* Supp. Br. 5 *citing* Ch. 2014-220, § 3, Laws of Fla.) Second, Mr.

[1] FACDL would adopt and incorporate herein by reference the arguments on pages 4-8 of the supplemental amicus brief served by the FSU Public Interest Center on July 16, 2014 in the *Horsley* case.

Henry, in particular, states that the Bill cannot apply to him because it fails to address "aggregate LWOP sentences." (*Henry* Supp. Br. 7.) FACDL respectively disagrees with both assertions for the reasons argued *infra*.

A. This Court can apply the Bill to Petitioners and others like them by severing the Bill's date-restrictive language or crafting a judicial or rule-based remedy that mirrors the Bill.

Petitioners and FACDL agree that if Petitioners' current sentences are deemed unconstitutional, then this Court must do something to remedy these unconstitutional sentences. This Court cannot do what the lower courts have done so far. That is, it cannot avoid remedying these unconstitutional sentences simply because the Legislature may have failed to do so. Petitioners and FACDL, however, disagree on the appropriate remedy.

Petitioners, in their original briefs, proposed as a remedy that this Court sever the statute that made parole unavailable (§ 921.002(1)(e), Fla. Stat.) as it is applied to juvenile, non-homicide offenders, thereby making the parole system under Chapter 947 available to such offenders. (*Gridine* Pet'r Initial Br. 30; *Henry* Pet'r Initial Br. 38.) Petitioners continue to support this parole remedy in their current briefs, though one petitioner acknowledges that Florida's parole system may need to be reformed to be compliant with *Graham*. (*Henry* Supp. Br. 10-15.) One petitioner argues that this Court should adopt the parole remedy over any "judicially redrafting [of the Bill] or creating a substantive rule of criminal

procedure," because, in his view, "redrafting" of the Bill or a new rule of criminal procedure would run afoul of the separation-of-powers principle. (*Henry* Supp. Br. 10.) FACDL disagrees with this last argument.

1. This Court, in accordance with the severance and separation-of-power principles should sever the date-restrictive language in the Bill.

Severing section 921.002(1)(e) to make parole available to Petitioners may have been the correct and most prudent solution before the enactment of the Bill. Indeed, though expressing "serious reservations" about whether Florida's parole system complied with *Graham*, FACDL tacitly supported Petitioners' parole argument. (FACDL Amicus Br. 3.) FACDL still does tacitly support the parole remedy in the alternative, with the same reservations, if this Court decides not to apply the Bill or its equivalent to non-homicide, juvenile offenses committed before July 1, 2014.

However, FACDL primarily advocates that the Bill, not a revival of the parole system, be the remedy adopted by this Court to bring Florida into full compliance with *Graham*, including for offenses that pre-date July 1, 2014. The severance and separation-of-powers doctrines on which Petitioners relied in their original briefs can and should be applied to sever the language in the Bill that limits the application of the Legislature's chosen *Graham* remedy (judicial sentence review hearings) to only offenses committed after July 1, 2014. *Cf. Nat'l*

Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (severing language from newly enacted legislation to ensure it was constitutional). The severance of such language is the preferred solution to make Florida fully *Graham*-compliant. It is legally more sound than the severance of section 921.002(1)(e), which results in the re-institution of parole for juvenile, non-homicide offenders.

As Petitioner Henry explained in his original brief (*Henry* Br. 45-46), "[s]everability is a judicially created doctrine which recognizes a court's obligation to uphold the constitutionality of legislative enactments where it is possible to remove the unconstitutional portions." *State v. Catalano*, 104 So. 3d 1069, 1080 (Fla. 2012) (quoting *Fla. Dept. of State v. Mangat*, 43 So.3d 642, 649 (Fla.2010)). This doctrine is "derived from the respect of the judiciary for the separation of powers, and is designed to show great deference to the legislative prerogative to enact laws."[2] *Id.* (internal quotation omitted).

By enacting the Bill, the Legislature clearly announced the eventual death of Florida's parole system. Over the last thirty plus years, "the Legislature has

[2] The four-part test for severing a statute is as follows: "(1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken." *Catalano*, 104 So. 3d at 1080.

consistently demonstrated its opposition to entrusting the decision of an inmate's release to a parole commission," as is discussed more fully in the petitioner's first supplemental brief in *Falcon*, No. SC13-865. As of June 2013, Florida had only 5,107 inmates eligible for parole, all of which were convicted for offenses occurring in 1995 or earlier. *See* Florida Commission on Offender Review, *Release Types*, (available at https://fcor.state.fl.us/release-types.shtml) (visited on July 30, 2014). Eventually, these inmates will be released or die in prison, and Florida's parole system will die with them. The Legislature – in response to *Miller* and *Graham* – could have breathed new life into the parole system by making it available for juvenile offenders. But it chose not to do so.

This Court should honor the Legislature's choice of a judicial sentence review hearing as the *Graham* remedy, and it should not breathe new life into a parole system that is run by the Executive Branch and has been declared virtually dead by the Legislature. While this Court must confront the Legislature when it enacts constitutionally invalid legislation, *see, e.g., McCall v. United States*, 134 So. 3d 894 (Fla. 2014), it should not reject legislative choices that are constitutionally compliant. The Legislature's choice for the remedy to *Graham* – judicial review hearings rather than a parole process in the executive branch – is a choice that complies with the Eighth Amendment that this Court should respect. As argued by the petitioner in *Falcon* (where the State, not the juvenile offenders,

are seeking the limited re-imposition of a parole system): "If the goal is to stay as faithful as possible to the basic separation-of-powers construct, then requiring the executive branch to expand its current, reduced-by-half, parole commission to carry out a newly acquired function that the Legislature has repeatedly eschewed is a very poor remedial choice." *Falcon*, No. SC13-865, Pet's Supp. Br. 12 (citing *Thomas v. State*, 135 So. 3d 590, 591-93 (Fla. 1st DCA 2014) (Osterhaus, J., specially concurring); *Washington v. State*, 103 So. 3d 917, 921-22 (Fla. 1st DCA 2012) (Wolf, J., concurring)).

Admittedly, the Bill is constitutionally deficient insofar as its plain language does not apply to juvenile, non-homicide offenders serving life without parole (or its functional equivalent) for offenses committed before July 1, 2014. As one petitioner correctly notes, "*Graham* has been held, time and again, to apply retroactively." (*Henry* Supp. Br. 6; *see also id.* 4-5 n.3 (collecting cases).) All of Florida's juvenile, non-homicide offenders serving life-without-parole sentences (or their equivalent such as Petitioners' sentences) must be provided a remedy under the Eight Amendment as interpreted by *Graham*. In other words, all such offenders – including those whose offenses occurred before July 1, 2014 – must be provided a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Graham*, 60 U.S. at 75. Severing the date-restrictive language will make the Bill fully comply with *Graham* and the Constitution.

Severing the restrictive-date language from the Bill to make it fully *Graham* compliant will not offend the constitutional principle of separation of powers. This Court has applied a "strict" doctrine of separation of powers that has two fundamental prohibitions: (1) no branch may encroach on the powers of another, and (2) no branch may delegate to another branch its constitutionally assigned power. *Fla. Dept. of State, Div. of Elections v. Martin*, 916 So. 2d 763, 769 (Fla. 2005). This Court has never suggested that the severance of unconstitutional language from a statute violates the separation of powers. *See, e.g., id.* at 769, 773-74 (discussing both separation of powers and the severance doctrine).

In fact, this Court would do more damage to the separation of powers doctrine if, by way of the severance doctrine, it delegated to the Executive Branch (i.e. the parole commission) a power (the granting of parole) that the Legislature has repeatedly said the Executive Branch should no longer have. Severance of the date-restrictive language in the Bill would do the least damage to the separation of powers doctrine. It merely would mean that the same branch chosen by the Legislature (the Judicial Branch) to implement the *Graham* remedy for offenses committed after July 1, 2014 would also implement the *Graham* remedy for offenses committed before July 1, 2014. The adoption of such a solution by this Court would ensure Florida fully complies with the federal Constitution and, at the same time, this Court would pay the proper deference to the Legislature's choice.

2. This Court could exercise its rule-making authority or other judicial authority to provide a remedy that mirrors the Bill.

In its original amicus brief, FACDL thoroughly explained why this Court's procedural rule-making authority provided a viable option for this Court to ensure that Florida fully complied with *Graham*. The State, in its original answer brief, largely agreed with FACDL. (*Henry* State's Answer Br. 29.) One petitioner, however, objected on the ground that doing so would violate the prohibition on the Court issuing substantive rules and the separation-of-powers doctrine. (*Henry* Reply Br. 9.) At oral argument, one justice commented that the State's proposal (and presumably FACDL's proposal) was "insane." It was not insane. Nor is the FACDL's proposal an illegal or unconstitutional solution for the reasons previously discussed in FACDL's first amicus brief.

As litigants and amici in the related cases have pointed out, this Court already has a rule of procedure that – just like the Legislature's Bill – permits trial courts to review and modify sentences after they have become final. *See* Fla. R. Crim. P. 3.800(c); *see, e.g., Falcon*, No. SC13-865, Pet's First Supp. Br. 20. The time period for a judicial sentence review and modification under Rule 3.800(c) is sixty days after the conviction and sentence become final. In contrast, under the Legislature's Bill, the time periods for a judicial sentence review and modification for juvenile offenders are 15, 20, or 25 years into the sentence depending on the nature of the offense. *See* ch. 2014-220, § 3, at 5-6, Laws of Fla. Under its rule-

making authority, this Court could adopt a rule of procedure similar to Rule 3.800(c) that applies only to juvenile offenders and tracks the review and modification periods specified in the Bill.

Moreover, the Court need not "enact" substantive law in adopting this rule. The factors specified in the Bill are largely drawn from the constitutional law already established by the U.S. Supreme Court in *Graham* and *Miller*. A rule adopted by this Court could merely refer to the Constitution for the substantive law to be applied. This is exactly what the Court did when it adopted Fla. R. Crim. P. 3.850. No one would seriously contend that Rule 3.850 "enacts" substantive law merely because criminal defendants routinely invoke the Sixth Amendment right to counsel, as established by *Strickland v. Washington*, 466 U.S. 668 (1984), when prosecuting Rule 3.850 motions. Similarly, no one could seriously contend that a new Rule 3.800(c)-like rule adopted by this Court for juvenile offenders would "enact" substantive law merely because juveniles would use the new rule to invoke the Eighth Amendment right against cruel and unusual punishments, as established by *Graham*.

Finally, if the Court does not agree that it can use its rule-making authority to adopt a rule of procedure that mirrors the procedural aspects of the Bill and implements the substantive constitutional law, it should rely on some other constitutional authority that it possesses to make Florida fully *Graham*-compliant.

The briefs in the related *Horsley* case discuss this Court's inherent power to "fill gaps in criminal statutes," including the Court's all-writs power. *Horsley*, No. SC13-1938, Walling Supp. Br. 9-10. This Court should exercise whatever authority it can to ensure Florida fully complies with the federal Constitution.

B. The Bill can be applied to juvenile offenders serving "aggregate LWOP sentences."

Petitioner Henry contends that the Bill does not apply to juvenile offenders serving "aggregate LWOP sentences." (*Henry* Supp. Br. 7.) FACDL disagrees.

As an initial matter and as Mr. Henry clarifies on page 8 of his supplemental brief, his reference to "aggregate LWOP sentences" is limited to "aggregate, consecutive sentences." (*Henry* Supp. Br. 8 (emphasis added).) The problematic application of the Bill discussed in Mr. Henry's supplemental brief does not apply to aggregate concurrent sentences. Thus, the potential deficiency in the Bill noted by Mr. Henry would apply to a limited number of juvenile offenders. It would not affect juvenile offenders serving a single, LWOP-equivalent sentence or those serving multiple LWOP-equivalent sentences that run concurrent to one another.

The fact that the Legislature may have overlooked a relatively atypical fact pattern like Mr. Henry's case is not surprising. Whenever new legislation is enacted, fact patterns will present themselves that were not expressly contemplated in the legislation. As a result, determining under what category a particular fact pattern falls in a piece of legislation may prove difficult. But this difficulty does

not render the Legislation invalid. *Cf. State v. Barnes*, 686 So. 2d 633, 637 (Fla. 2d DCA 1996) ("The fact that a legislative body may have chosen clearer language to achieve the desired statutory goal does not render the statute actually drafted unconstitutionally vague."). This difficulty does not allow this Court to ignore the Bill and revive a parole system repeatedly rejected by the Legislature.

In any event, *Graham*, Florida sentencing law, and the Bill can be reconciled to ensure that the Bill would apply to Mr. Henry and others like him. Importantly, Mr. Henry has not yet been sentenced under the Bill. If this Court were to determine that Mr. Henry's aggregate, consecutive sentences violated *Graham*, this Court necessarily would have to vacate all of Mr. Henry's sentences and remand with instructions that he be re-sentenced under the Bill (assuming this Court agrees that the Bill can applied retrospectively as argued in Part I.A above). At that point, the case would return to the trial judge to determine whether to run Mr. Henry's sentences consecutively or concurrently.

Whether a trial judge has discretion to impose sentences consecutively or concurrently varies depending on the circumstances. *See generally* William H. Burgess, *Florida Sentencing* § 1:55, (2013-14 ed.). Generally, in the absence of any specific direction from the trial judge, multiple offenses charged in the same charging document or arising from the same incident run concurrently, and multiple offenses charged in different charging documents or arising from different

incidents run consecutively. *See* § 921.16(1), Fla. Stat. (2006); Burgess, *supra* § 1:55. Either way, trial judges generally retain discretion to specifically direct whether sentences run concurrently or consecutively. *See* § 921.16(1), Fla. Stat. (2006); Burgess, *supra* § 1:55.

This Court has recognized that sentencing judges cannot exercise their discretion to impose sentences consecutively or concurrently so as to circumvent the Legislature's intent to provide a defendant an opportunity for release. *See Palmer v. State*, 438 So. 2d 1 (Fla. 1984). In *Palmer*, a defendant was convicted of thirteen robbery counts arising from the same incident. *Id.* Each robbery count carried a mandatory minimum of three years, meaning, under each count, the defendant would be ineligible for parole (which was available at the time) for the first three years of each sentence. To maximize the defendant's ineligibility for parole, the judge exercised his discretion to impose all thirteen sentences consecutively. *See id.* As a result, the defendant was ineligible for parole for thirty-nine years (13 x 3), despite the clear legislative intent at the time to make the defendant eligible for parole after only three years. *See id.* at 2-3. This Court, concerned with the circumvention of the legislative will, reversed the trial judge's discretionary decision to impose the sentences consecutively. *See id.* at 3.

In a similar vein, if the sentencing court in Mr. Henry's case (or in other similar cases involving juvenile offenders) exercised its discretion to impose

consecutive sentences as a means to circumvent the Legislature's intention in the Bill to provide a sentence review hearing at specified intervals, then the appellate courts should and must reverse such discretionary decisions as an abuse of discretion. To allow such discretionary decisions to stand would be to permit sentencing judges to thwart the clear will of the Legislature to provide meaningful sentence review hearings within the times prescribed in the Bill.

This Court, however, need not address this particular issue at this time. It may simply vacate Mr. Henry's sentences and remand with instructions that the trial judge re-sentence Mr. Henry under the Bill. If the trial judge still exercises his discretion to impose consecutive sentences in the same manner as he did before, then the lower appellate court will have to address the concerns raised by Mr. Henry in his supplemental brief. Furthermore, this Court need not address the situation where a statute mandates the imposition of multiple consecutive sentences; the constitutionality of such a statute as applied to a juvenile, non-homicide offender can be addressed in a later case.

CONCLUSION

FACDL requests that this Court ensure compliance with *Graham* by implementing Chapter 2014-220 to Petitioners' cases, as well as to the cases of others in the same situation as Petitioners.

Respectfully Submitted,

/s/ Bryan S. Gowdy

CREED & GOWDY, P.A.
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 503-0441 facsimile

Attorneys for Amicus Curiae
Florida Association of Criminal
Defense Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to: Peter Webster, pwebster@carltonfields.com, David Luck, dluck@carltonfields.com, and Christopher B. Corts, ccorts@richmond.edu (Counsel for Petitioner Henry); Gail Anderson, gail.anderson@flpd2.com (Counsel for Petitioner Gridine); and Kellie Anne Nielan and Wesley Harold Heidt, CrimAppDAB@myfloridalegal.com (Office of the Attorney General), on this 31st day of July, 2014.

/s/ Bryan S. Gowdy
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Bryan S. Gowdy
Attorney