

RECEIVED, 8/4/2014 14:23:39, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

ARTHUR O'DERRELL FRANKLIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-1442

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

JOSHUA R. HELLER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0502901

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE#
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
<u>ISSUE</u>	
WHETHER THE DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUED A CONSTITUTIONAL PROVISION AND WHETHER ITS DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THIS COURT? (RESTATED)	3
 <i>A. The District Court of Appeal Did Not Expressly Construe the Eighth Amendment.</i>	
	3
 <i>B. The District Court of Appeal's Decision Does Not Expressly and Directly Conflict With Any Decisions of This Court..</i>	
	4
 <u>1. Jurisdictional Criteria.....</u>	
	4
 <u>2. The decision below is not in "express and direct" conflict with <i>Graham v. State</i>, 372 So. 2d 1363 (Fla. 1979) or <i>Freeman v. State</i>, 761 So. 2d 1055 (Fla. 2000)..</u>	
	6
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE	10
<u>APPENDIX</u>	

TABLE OF CITATIONS

Cases

<i>Ansin v. Thurston</i> , 101 So. 2d 808 (Fla. 1958)	5
<i>Dept. of Health and Rehab. Serv. v. Nat'l Adoption Counseling Serv., Inc.</i> , 498 So. 2d 888 (Fla. 1986)	5
<i>Doe v. Milacki</i> , 771 So. 2d 545 (Fla. 3d DCA 2000)	4
<i>Fla. Dept. of Ag. v. Haire</i> , 836 So. 2d 1040 (Fla. 4th DCA 2003)	4
<i>Franklin v. State</i> , Case Nos. 1D12-2516, 1D12-2517, 1D12-2518, -- So. 2d --, 39 Fla. L. Weekly D1018	1
<i>Freeman v. State</i> , 761 So. 2d 1055 (Fla. 2000)	passim
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	4, 8
<i>Graham v. State</i> , 372 So. 2d 1363 (Fla. 1979)	passim
<i>Jenkins v. State</i> , 385 So. 2d 1356 (Fla. 1980)	5
<i>Powell v. Markham</i> , 847 So. 2d 1105 (Fla. 4th DCA 2003),	4
<i>Reaves v. State</i> , 485 So. 2d 829 (Fla. 1986)	5
<i>Rojas v. State</i> , 288 So. 2d 234 (Fla. 1974)	3

Statutes

Art. V, § 3(b) (3), FLA. CONST.....	3, 4
Section 947, Florida Statutes	6

Rules

Fla. R. App. P. 9.030(a) (2) (A) (iv)	4
---	---

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, ARTHUR FRANKLIN, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form [hereinafter referenced as "slip op."] as Appendix A. It also can be found at 39 Fla. L. Weekly D1018.

SUMMARY OF ARGUMENT

The First District's decision did not expressly construe the Eighth Amendment. Rather, the First District merely applied the decision in *Graham v. Florida* to determine what constituted a facially sufficient claim. Further, the First District's decision did not expressly and directly conflict, even by misapplication, with any decisions of this Court. Rather, the First District's decision properly and correctly applied those decisions. This Court lacks jurisdiction.

ARGUMENT

ISSUE: WHETHER THE DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUED A CONSTITUTIONAL PROVISION AND WHETHER ITS DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THIS COURT (RESTATED)

Petitioner, who if granted parole by the Parole Commission, would be immediately released on parole, attempts to obtain jurisdiction in this Court by contending that the First District's decision affirming his conviction expressly construes the Eighth Amendment and misapplies two decisions of this Court involving the appointment of counsel for post-conviction motions denied without an evidentiary hearing. Both assertions are meritless and this Court lacks jurisdiction.

A. The District Court of Appeal Did Not Expressly Construe the Eighth Amendment or Any Other Constitutional Provision.

Petitioner contends the decision of the First District Court of Appeal expressly construed the state or federal constitution. It did not. The Florida Constitution gives this court discretion to review a decision of a district court that "expressly construes a provision of the state or federal constitution." Art. V, § 3(b)(3), FLA. CONST. (bold and underline added). In order to support this Court's jurisdiction, the lower court must have "explain[ed], define[d] or overtly expresse[d] a view which eliminates some existing doubt as to a constitutional provision" *Rojas v. State*, 288 So. 2d 234, 235 (Fla. 1974). Merely applying a constitutional provision or precedent is insufficient. "Applying is not synonymous with Construing; the former is NOT a basis of our jurisdiction, while the Express construction for a constitutional provision is." *Rojas*,

288 So. 2d at 235 (caps in original).

Here, the First District did not expressly construe a state or federal constitutional provision. Rather, the First District applied existing United States Supreme Court precedent, namely *Graham v. Florida*, 560 U.S. 48 (2010), to determine what constituted a facially sufficient claim. In fact, the majority opinion does not discuss or even mention the Eighth Amendment at all. (Slip Op.) In fact, the gravamen of the First District's decision is that Petitioner's motion was facially insufficient. (Slip Op. at 4-5.) That is hardly expressly construing the Eighth Amendment.

This case is not of the same character as other cases where this Court has taken jurisdiction based on an express construction of the state or federal constitution. See, e.g., *Powell v. Markham*, 847 So. 2d 1105 (Fla. 4th DCA 2003), *reversed sub. nom. Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004); *Fla. Dept. of Ag. v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2003), *approved*, 870 So. 2d 774 (Fla. 2004); *Doe v. Milacki*, 771 So. 2d 545 (Fla. 3d DCA 2000), *approved*, 814 So. 2d 347 (Fla. 2002). This Court does not have jurisdiction on this basis.

B. The District Court of Appeal's Decision Does Not Expressly and Directly Conflict With Any Decisions of This Court.

1. Jurisdictional Criteria

Petitioner also contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). *Accord Dept. of Health and Rehab. Serv. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves*, 485 So. 2d at 830; *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). Also, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So. 2d at 1359.

In *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite *Graham v. State*, 372 So. 2d 1363 (Fla. 1979), and *Freeman v. State*, 761 So. 2d 1055

(Fla. 2000).

2. The decision below is not in "express and direct" conflict with *Graham v. State*, 372 So. 2d 1363 (Fla. 1979) or *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000).

Petitioner asserts express and direct conflict, via misapplication, with *Graham v. State*, 372 So. 2d 1363 (Fla. 1979). This, Petitioner asserts, is because the First District relied on only a portion of *Graham*, rather than its four elements (which Petitioner never actually applies or examines), which are weighed to determine whether appointment of counsel is "necessary for a fair and thorough presentation of the postconviction claim." (RJB. 6.)¹ Ironically, Petitioner's argument suffers from the same failure that he accuses the First District of.

The First District determined that Petitioner's original motion was "facial[ly] insufficient[]." (Slip Op. at 2.) His claim was that the length of his sentence, despite being parole eligible, *ispo facto* meant he had no meaningful opportunity for parole. However, Petitioner's motion before the trial court "alleged no facts, cited no legal authority, and

¹ Further, even if those four elements were applied, appointment of counsel was not necessary. Although the Court's consideration of legal argument (1) was somewhat adversarial, (2) it was not complex---as it was answerable by Defendant's judgment and sentence, a review of *Graham* and a review of Florida law on parole, (3) it did not require an evidentiary hearing involving the rules of evidence and procedure---because the question presented was resolvable as a matter of law, and (4) did not require substantial legal research, as even Petitioner's counseled brief before the First District cited only four cases on the merits of the issue, one of which is *Graham* itself, and only a review of Section 947, Florida Statutes, is otherwise necessary.

made no argument to show that the Parole Commission is precluded from ever establishing a [presumptive parole release date] during his lifetime imposed." (Slip Op. pp. 4-5.) And, the First District concluded "[w]ithout allegations indicating an inherent deficiency in the parole system's ability to address a 1,000-year sentence consistently with *Graham v. Florida*], as opposed to a failure on Appellant's part to demonstrate maturity and rehabilitation, Appellant's claim is legally insufficient" (Slip Op. pp. 4-5.)

Graham v. State, 372 So. 2d 1363 (1979), says nothing contrary. In that case, this Court denied the appointment of counsel for post-conviction relief to capital litigants. And, while this Court indicated that application of the four factors discussed in the margins may merit appointment of counsel in the post-conviction court's discretion, this Court made clear that "[t]here is no absolute 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." 372 So. 2d at 1366. In fact, the "uniqueness and finality of the death penalty" did not merit "appointment of counsel for each death row inmate for legal advice and future collateral relief" in *Graham v. State*. Rather, this Court held that there is "no constitutional requirement for the appointment of individual counsel for an application for post-conviction relief until a colorable or justiciable issue or meritorious grievance prima facially appears in the appellant's petition."

The First District's decision, therefore, is no misapplication of

Graham v. State. The First District found that Petitioner failed to allege any inherent deficiency in the parole system's ability to address his sentence consistency with *Graham v. Florida*, as opposed to a failure on his part to demonstrate maturity and rehabilitation, that indicated that he did not have a meaningful opportunity for release. (Slip Op. pp. 4-5.) That falls squarely in the holding and reasoning of *Graham v. State*.

Since the First District determined the post-conviction motion was facially insufficient, Petitioner's implicit claim is that the First District conflicted with or misapplied this Court's decision in *Graham v. State* for failing to require the appointment of counsel to help him prepare or amend his post-conviction motion. However, *Graham v. State* expressly contradicts such a claim, stating, that no state "require[s] an appointment of counsel prior to a claim for relief being filed." 372 So. 3d at 1366.

Petitioner also claims conflict through misapplication of *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000). This claim is without merit. Relying on a dictionary definition, Petitioner asserts, (again ironically) in conclusory fashion, the First District conflicted with *Freeman* because he did make a *prima facie* claim. However, nowhere does Petitioner address why the First District found his mere conclusory assertion that his lengthy presumptive parole release date *ipso facto* was insufficient to establish a *prima facie* case: that he failed to allege "an inherent deficiency in the parole system's ability to address a 1,000-year sentence consistently with *Graham v. Florida*, as opposed to a failure on Appellant's part to demonstrate maturity and rehabilitation." Stated otherwise, the First

District found that, because Petitioner did not even allege that the reason his opportunity for release was purportedly not "meaningful" was because of a problem with the parole system, rather than his own lack of maturity and rehabilitation, he had not alleged a facially sufficient claim.

Again, this entirely comports with *Freeman*. There, this Court found "[t]he defendant bears the prudent of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are insufficient to meet this burden." *Freeman*, 761 So. 2d at 1061. Because Petitioner failed to allege a deficiency in the parole system's ability to address his sentence and provide him a meaningful opportunity for release based on "maturity and rehabilitation," his claim was not facially sufficient. The First District properly and correctly applied *Freeman*, and Petitioner's conclusory allegations to this Court do not establish jurisdiction.²

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

² Petitioner also relies on Judge Thomas's concurring opinion. (PJB. 7-8.) While this is not a basis to grant jurisdiction, it is noteworthy that Judge Thomas actually determined that Petitioner was properly denied relief because since "it is undisputed that [Petitioner] has been and remains eligible for parole, his sentences comply with *Graham* [v. *Florida*] regardless of whether is [presumptive parole release date] is set far beyond his life expectancy." (Slip Op. at 13) (Thomas, J., concurring). Judge Thomas's opinion hardly merits this Court exercising jurisdiction, even if it had it, which it does not.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on August 4, 2014: Glenn P. Gifford, Esq., glen.gifford@flpd2.com, Counsel for Petitioner.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Trisha Meggs Pate
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/ Joshua R. Heller
By: JOSHUA R. HELLER
Assistant Attorney General
Florida Bar No. 0502901

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)
AG# L14-1-19110

Attorney for the State of Florida

IN THE SUPREME COURT OF FLORIDA

ARTHUR O'DERRELL FRANKLIN,

Petitioner,

v.

Case No. SC14-1442

STATE OF FLORIDA,

Respondent.

INDEX TO APPENDIX

- A. *Franklin v. State*, Case Nos. 1D12-2516, 1D12-2517, 1D12-2518, -- So. 3d --, 39 Fla. L. Weekly D1018 (Fla. 1st DCA April May 19, 2014).

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ARTHUR O'DERRELL
FRANKLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D13-2516

1D13-2517

1D13-2518

(consolidated)

Opinion filed May 19, 2014.

An appeal from the Circuit Court for Duval County.
Tatiana Salvador, Judge.

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), 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 jurisdiction¹ 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

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

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.

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.