No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner states the question presented as:

> Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

Respondent restates the question presented as:

> Whether life imprisonment is so grossly disproportionate as to violate the Eighth Amendment when imposed upon a seventeeen-year-old offender who violated his probationary sentence for a violent felony punishable by life imprisonment by committing another violent felony?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner, Terrance Jamar Graham, seeks review of the decision of the District Court of Appeal, First District of Florida, affirming his conviction and sentence found at Graham v. State, 982 So. 2d 43 (Fla. 1st DCA 2008). The Florida Supreme Court's unpublished disposition declining jurisdiction can be found at Graham v. State, 990 So. 2d 1058 (Fla. 2008) (Table).

JURISDICTION

Respondent accepts as accurate Petitioner's statement of jurisdiction in this case.

CONSTITUTIONAL PROVISION

Respondent accepts as accurate Petitioner's statement regarding the constitutional provision implicated in this case.

STATEMENT OF THE CASE AND FACTS[1]

In this case, Petitioner, after benefiting from the imposition of a three-year probationary sentence for a violent felony for which he could have been punished by life imprisonment, violated his probation by committing another violent felony and admitted to committing at least two more violent felonies. Based on Petitioner's proven inability to rehabilitate and escalating pattern of criminal conduct, the trial court revoked Petitioner's probation and sentenced him to life imprisonment.

Petitioner, Terrance Jamar Graham, and two accomplices, Brandon Johnson and Marcus Harris, planned to rob Bono's Bar-B-Q for several weeks. (App. 2.) Petitioner and Mr. Johnson went to Bono's Bar-B-Q on previous occasions near the closing hour and commented on the business being short-staffed late at night. (App. 2.) On July 18, 2003, Petitioner and Mr. Johnson called Yusef Gudmalin and asked him for a ride. (App. 2.) Once inside the vehicle, Petitioner and Mr. Johnson told Mr. Gudmalin that they were going to "do a lick." (App. 2.) Mr. Gudmalin drove Petitioner and Mr. Johnson to Bono's Bar-B-Q, where Petitioner and Mr. Johnson, wearing masks, entered

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[1] Citations herein reference Respondent's Appendix, which will be referenced as "App. X," or Petitioner's single-volume 107-page appendix, which will be referenced as "Pet. App. X."

the restaurant at approximately 11:00 to 11:30 p.m. through a rear door that was left unlocked by Mr. Harris. (App. 2–3.) Once inside, Petitioner and Mr. Johnson approached the restaurant manager, Paul William Diblasi, who was in the back room counting money. (App. 3.) Petitioner's accomplice, Mr. Johnson, hit Mr. Diblasi twice with a steel bar because Mr. Diblasi "wouldn't give [the money] up." (App. 3.) Mr. Diblasi turned around and started yelling at Petitioner and Mr. Johnson, and, after dropping the steel bar, Mr. Johnson and Petitioner ran out the back door, got back into Mr. Gudmalin's car, and fled the scene. (App. 3.)

On September 9, 2003, Petitioner's father called one of the investigating detectives, Detective Copeland, and told Detective Copeland that a couple of months ago he found what he thought were burglary tools and a black mask with the eyes cut out in his home. (App. 3.) Petitioner's father indicated to Detective Copeland that he believed Petitioner was committing burglaries and robberies with Mr. Johnson and another friend named Larry. (App. 3.) Petitioner's father guided Detective Copeland to his ex-wife's house, where Petitioner was hiding under a bed. (App. 3.) Petitioner admitted to Detective Copeland that he had committed the robbery of Bono's Bar-B-Q. (App. 3.)

On October 13, 2003, Petitioner was charged as an adult with one count of burglary with an assault or battery in violation of Sections 810.02(2)(a) and 810.02(2)(b), Florida Statutes, a first-degree felony punishable by life in prison; and attempted armed robbery in violation of Section 812.13(2)(b) and 777.04(1), Florida Statutes, a second-degree felony. (App. 3.) On October 20, 2003, Petitioner, who was

sixteen years old at the time of the offense, was certified as an adult following a hearing. (App. 3.)

On December 18, 2003, Petitioner pled guilty to both offenses and stipulated to the factual basis for the plea. (App. 4.) The trial court withheld adjudication and sentenced Petitioner to three years probation with the special condition of 12 months in the county jail (with 101 days credit) and 100 hours of community service. (App. 4.) During the plea colloquy, the trial court informed Petitioner–and Petitioner acknowledged–that he was agreeing to being sentenced as an adult and giving up his right to have the court consider the imposition of juvenile sanctions. (App. 4.) Accordingly, the trial court certified Petitioner as an adult for any future violations of Florida law. (App. 4.)

Petitioner was released from county jail on June 25, 2004. (App. 4.) On December 6, 2004, Petitioner was arrested on new felony charges of home-invasion robbery and fleeing and eluding. (App. 4.) As a result of the new offenses, on December 13, 2004, the State filed an affidavit of violation of probation charging Petitioner with willfully and substantially violating the following conditions of his probation:

- Condition (3), by possessing, carrying, or owning any weapon or firearm;
- Condition (4), by failing to live and remain at liberty without violating any law by committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer, Aggravated Chase, and Operating a Motor Vehicle While Driver's License is Suspended or Revoked;
- Condition (5), by associating with persons engaged in criminal activity, specifically Kirkland Lawrence and Meigo Bailey; and

- Condition (11), by failing to make court cost payments.

(App. 4.)

The trial court held hearings on the violation of probation on December 16, 2005, and January 13, 2006. (App. 5.) Although he understood that his exposure would be 66.75 months to life whether he admitted to any or all of the criminal violations of probation, Petitioner admitted only to the fleeing and eluding violation. (App. 5.) The State then proceeded to prove the remaining allegations within the affidavit. The facts adduced at the hearings, viewed in the light most favorable to the trial court's ruling, established the following:

At all relevant times, Petitioner was on probation for a first degree felony punishable by life in prison. (App. 5.) Petitioner was read the conditions of his probation on June 29, 2004, and understood those conditions. (App. 5.)

On December 2, 2004, Mr. Carlos Rodriguez Lopez was living on Barnhill Drive, Apartment 26, with his wife and stepson. (App. 5.) At approximately 7:00 p.m., Mr. Rodriguez was at home with his friend, Noel, who he knew from English class. (App. 5.) Shortly after 7:00 p.m., Mr. Rodriguez heard a knock at the front door. (App. 5.) Mr. Rodriguez asked who was there, but no one answered. (App. 5.) When Mr. Rodriguez heard the knock again, he went to the door to open it. (App. 5.) When he opened the door, Mr. Rodriguez was confronted with three armed black males—Petitioner, Mr. Kirkland Lawrence, and Mr. Miego Bailey. (App. 5.) Petitioner—who was seventeen years old at the time—put a pistol in Mr. Rodriguez's stomach and entered Mr. Rodriguez's house first, followed by his accomplices. (App.

5.)

Petitioner and his accomplices laid Mr. Rodriguez on the living room floor, Petitioner held his gun to Mr. Rodriguez's head, and Petitioner yelled at Mr. Rodriguez, asking him where the money was. (App. 5.) Mr. Rodriguez repeatedly responded nervously, "No money, no money." (App. 5–6.) Mr. Rodriguez was in fear that Petitioner was going to shoot him. (App. 6.) Petitioner and his accomplices also brought Noel out from the bathroom, and laid him on the living room floor. (App. 6.) Petitioner and his accomplices stole a gold crucifix and chain from Noel. (App. 6.) After a while, Petitioner and his accomplices let Mr. Rodriguez and Noel stand. (App. 6.) Petitioner and his accomplices put Mr. Rodriguez and Noel into the closet, put furniture against the door, and left. (App. 6.)

After Petitioner left, there was a shooting at the Art Museum and Miego Bailey was shot. After Petitioner dropped Bailey off at the hospital, he was involved in a car chase with police on Ring Lane. (App. 6.) After the chase concluded, Crime Scene Detective Shaun Kobylarz of the Jacksonville Sheriff's Office photographed the car and three guns that were inside the car, including a firearm on the floorboard of the passenger's side of the vehicle. (App. 6.)

Detective Cesar Parrales of the Jacksonville Sheriff's Office was assigned to a task force that was created as a result of a series of home-invasion robberies of Hispanic victims. (App. 6.) As part of his duties on the Hispanic robberies task force, Detective Parrales was involved in investigating and arresting Petitioner. (App. 6.) As part of his duty on the task force, Detective Parrales met with Mr. Rodriguez who

immediately identified Petitioner as a perpetrator. (App. 6.) Mr. Rodriguez also identified Meigo Bailey and Kirkland Lawrence as the other perpetrators. (App. 6.) Additionally, Detective Parrales also recovered Noel's gold chain and crucifix from Mr. Lawrence's person. (App. 6.)

Additionally, after Petitioner was arrested, Petitioner was interviewed by Detective Brian Kee of the Jacksonville Sheriff's Office, who was also assigned to the Hispanic home-invasion task force. (App. 6.) After being Mirandized, Petitioner agreed to speak with Detective Kee. (App. 6.) Petitioner initially told Detective Kee that he was in his father's black Cadillac and he picked up a boy named Meigo who had been shot, and Miego's friend, Lawrence, who Petitioner saw on the side of the street, and then dropped them off at the hospital. (App. 6–7.) Petitioner also told Detective Kee that the police chased him from the hospital and he was caught by police. (App. 7.)

Detectives Kee and Parrales continued to question Petitioner, asking him about two robberies—the shooting at the Art Museum in which Mr. Bailey was shot and the home-invasion robbery in which Mr. Rodriguez was victimized. (App. 7.) The detectives also indicated Mr. Rodriguez had identified Petitioner as a perpetrator. (App. 7.) Detective Kee then asked Petitioner, "Aside from the two robberies tonight how many more were you involved in?" (App. 7.) Petitioner responded, "Two or three before tonight." (App. 7.)

Based on the evidence presented, the trial court found Petitioner in violation of three conditions of his probation. (App. 7.) First, the trial court found Petitioner in

violation of Condition 3 by possessing, carrying, or owning a weapon or firearm. (App. 7.) Second, the trial court found Petitioner violated Condition 4 of his probation by failing to remain and live at liberty without violating any new laws by committing the offense of home-invasion robbery. (App. 7.) The trial court also acknowledged that Petitioner admitted violating Condition 4 by admitting guilt to fleeing and attempting to elude a law enforcement officer. (App. 7.) Finally, the trial court found Petitioner violated Condition 5 of his probation by associating with persons engaged in criminal activity. (App. 7.) The Court did not find Petitioner had violated Condition 11, failing to make court costs payments. (App. 7.)

Petitioner was sentenced on his violation of probation on March 7–8, 2006, April 7, 2006, and May 25, 2006. (App. 7.) Petitioner had a number of individuals make statements on his behalf, including Mary Lee Graham, his mother (App. 7–8); Lanisha Graham, his aunt (App. 8); Tavaris Deangelo Graham, his brother (App. 8); Harry Jones, his biological father (App. 8); and Petitioner himself.

Petitioner asked for leniency because of the family difficulties his incarceration has caused. (App. 8.) Petitioner claimed he "manned up" to his violation because he admitted to fleeing and eluding since he would have violated his probation for missing his curfew. (App. 8.) Petitioner admitted dropping Meigo Bailey off at the hospital because he was shot. (App. 8.) The trial court reiterated the importance to Petitioner of being candid at sentencing. (App. 8.) Petitioner also denied being involved in the home-invasion robbery and denied making any admissions about being involved in two prior robberies to police. (App. 8.)

The State presented victim impact letters from Paul Deblasi and Carlos Rodriguez. (App. 8.) The State also presented a letter Petitioner wrote before he was sentenced on the burglary with assault or battery and armed robbery charges in 2003. (App. 8.)

The State presented testimony from Sergeant Daniel Johnson of the Jacksonville Sheriff's Office. (App. 8.) Sergeant Johnson was approaching Memorial Hospital where dispatch had informed him a black vehicle was fleeing after dropping off a victim of a shooting. (App. 8.) As he approached the hospital in his cruiser, Sergeant Johnson observed the black vehicle exit the parking lot of the hospital at a high rate of speed with a disregard for traffic. (App. 8.) In fact, Sergeant Johnson and the vehicle next to him both had to abruptly put on their brakes firmly to avoid being in a crash. (App. 8.) Sergeant Johnson then attempted to stop the vehicle, but when it was apparent the vehicle was not going to stop, he began a pursuit reaching better than 90 miles per hour down residential roads. (App. 8–9.) Ultimately, Petitioner failed to negotiate a turn, and his vehicle struck a telephone pole. (App. 9.) Petitioner then fled the vehicle on foot, and Sergeant Johnson followed Petitioner as he was running through backyards. (App. 9.) Sergeant Johnson ultimately apprehended Petitioner after the foot chase. (App. 9.)

The trial court also heard additional testimony from the victim, Carlos Rodriguez. (App. 9.) Mr. Rodriguez testified that Petitioner was the first one through the door during the home-invasion robbery and that Petitioner put a gun to his stomach. (App. 9.) Mr. Rodriguez testified that Petitioner was the leader of the

perpetrators, because he was giving orders to the other men and seemed to be running the robbery. (App. 9.) Furthermore, Mr. Rodriguez testified that, as the home-invasion took place, Petitioner pointed a cocked gun at Mr. Rodriguez's head, putting Mr. Rodriguez in considerable fear. (App. 9.) Mr. Rodriguez explained that he and his family were "very scared" after the robbery and were attempting to "save money to be able to move somewhere else and . . . try to forget this." (App. 9.)

Finally, the trial court heard testimony from Kirkland Lawrence, one of Petitioner's co-defendants in the home-invasion robbery. (App. 9.) Mr. Lawrence testified that Petitioner was involved in the robbery and had a gun. (App. 9.) Mr. Lawrence also testified that he and an individual named Louis saw Mr. Rodriguez "going in the house with groceries one day," and, about a week before the robbery, he, Meigo Bailey, and Petitioner concocted the plan to engage in the home-invasion robbery. (App. 9.) Mr. Lawrence explained "everybody needed money." (App. 9.) Mr. Lawrence testified that Petitioner provided the vehicle for the robbery. (App. 9.) Mr. Lawrence testified that, during the robbery, the perpetrators were each "doing their own thing," and Petitioner said to Mr. Rodriguez, "Where the money at? Where the money at?" (App. 9.) Finally, Mr. Lawrence testified that he knew Petitioner was on probation and had to be home before his curfew. (App. 9–10.)

After hearing the testimony, the trial court found the following:

> THE COURT: Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his

probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge [*sic*], which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge. . . . And you get an opportunity and you throw it away. How old are you now?

THE DEFENDANT: Nineteen.

THE COURT: And how old were you when this started?

THE DEFENDANT: Seventeen.

THE COURT: And in less than two years—actually, a lot less than that, in a very short period of time you were back before the Court on a violation of probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

(App. 10–11.)

Having previously found Petitioner in violation of his probation, the trial court, by judgment rendered on May 25, 2006, adjudicated Petitioner guilty on count I, the burglary with an assault or battery, and sentenced Petitioner to life in prison with credit for 12 months and 496 days already served. (App. 11.) The trial court also adjudicated Petitioner guilty of attempted robbery with a weapon and sentenced Petitioner to 15 years in prison with 12 months and 496 days credit for time served, to run concurrently with count I. (App. 11.) The trial court also revoked and terminated Petitioner's probation. (App. 11.)

On June 14, 2006, Petitioner filed a Notice of Appeal of the final Order of Judgment and Sentence. (App. 11.) On June 23, 2006, Petitioner filed a second Notice of Appeal of the Order of Violation of Probation and the final Order of Judgment and Sentence. (App. 11.)

On January 19, 2007, Petitioner filed a Memorandum of Law in Support of Motion to Correct Sentencing Error and Illegal Sentence. (App. 11.) On May 2, 2007, Petitioner filed a Motion to Correct Sentencing Error and Illegal Sentence, pursuant to Rule 3.800(b)(2) of the Florida Rules of Criminal Procedure. (App. 11.) In his motion and memorandum, Petitioner alleged his sentence was illegal because it was in violation of the Florida and federal constitutional prohibitions on cruel and unusual punishment. (App. 11.) No ruling by the trial court appears in the record.

On April 10, 2008, the Florida First District Court of Appeal issued a twenty-two (22) page opinion extensively analyzing Petitioner's claim that his sentence violates the prohibitions on cruel and unusual punishment, rejecting his claim, and affirming his

conviction and sentence. (Pet. App. 1–22.) As to Petitioner's facial challenge, the Florida First District Court of Appeal determined that Petitioner's life sentence is not facially invalid under this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), because, as this Court has recognized, "death is different." (Pet. App. 4–12.) The First District rejected the claim that sentencing a juvenile to life imprisonment is cruel and unusual in all situations. (Pet. App. 6–12.)

The First District also rejected Petitioner's *per se* claim as contrary to international norms. (Pet. App. 12–15.) The First District recognized that this Court found in Roper that such reliance on international norms is "not controlling" and that, "[w]hile the weight given the international community is persuasive," based on the "broad authority that legislatures necessarily possess in determining the types and limits of punishment, as well as the discretion that trial courts possess in sentencing criminals," it "cannot be said to counter the individual rights of the state to impose its chosen sentencing scheme if that scheme is not held to be otherwise unconstitutional." (Pet. App. 12–15.)

The First District then rejected Petitioner's *as applied* challenge that his life sentence was grossly disproportionate to his offense, recognizing that the "record facts . . . establish that, after being placed on probation—an extremely lenient sentence for the commission of a life felony—appellant committed at least two armed robberies and confessed to the commission of an additional three." (Pet. App. 15–19.) The First District also recognized, "These offenses were not committed by a pre-teen, but a seventeen-year-old . . . ." (Pet. App. 17.) Further, the First District recognized,

"Additionally, these robberies involved the use of a weapon, and appellant himself held a gun to a man's head during the incident for which [his probation] was violated." (Pet. App. 17.) The First District also recognized that Petitioner, who wrote a letter expressing his remorse and promising to refrain from criminal activity when he "was given an unheard of probationary sentence for a life felony . . . rejected his second chance and chose to continue committing crimes at an escalating pace." (Pet. App. 18.) Accordingly, "the tested theory of rehabilitation" and Petitioner's "inability to rehabilitate" justified the life sentence Petitioner received in this case. (Pet. App. 18–19.)

Finally, the First District rejected Petitioner's claim that his sentence violated the United Nations International Covenant on Civil and Political Rights (ICCPR), concluding that, even if Petitioner had standing to raise such a claim, the treaty is not self-executing and no judicially enforceable right directly arises out of the ICCPR. (Pet. App. 19–22.) Accordingly, the First District affirmed Petitioner's conviction and sentence. (Pet. App. 22.)

Petitioner sought review in the Florida Supreme Court, and, on August 22, 2008, the Florida Supreme Court declined jurisdiction. (Pet. App. 107.)

REASONS FOR DENYING THE WRIT

Whether life imprisonment is so grossly disproportionate as to violate the Eighth Amendment when imposed upon a seventeeen-year-old offender who violated his probationary sentence for a violent felony punishable by life by committing another violent felony?

Petitioner is a violent recidivist. Petitioner violated his probationary sentence for a felony punishable by life under Florida law by engaging in an escalating pattern of criminal conduct, to wit: a home-invasion robbery at gunpoint and holding the gun to that victim's head, which Petitioner admitted was one of a number of robberies in which he engaged. Graham, 982 So. 2d at 52.

Petitioner has failed to demonstrate the need for granting his petition to resolve an asserted conflict amongst the federal circuits and state courts. See U.S. SUP. CT. R. 10(b). Indeed, three of the four cases upon which Petitioner relies were decided ***on independent state law grounds*** and involved entirely disparate facts from this case. In People v. Miller, 781 N.E.2d 300 (Ill. 2002), the Illinois Supreme Court invalidated a life sentence for a juvenile *convicted on a theory of accountability* based on the *Illinois Constitution proportionate penalties clause.* See id. at 307–08. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968), the Kentucky Court of Appeals determined that life imprisonment for a *fourteen-year old* rapist violated "*section 17 of the* [Kentucky] *Constitution* . . ." Id. at 375, 378. In People v. Dillon, 668 P.2d 697 (Cal. 1983), the California Supreme Court determined that life imprisonment for a juvenile convicted based on the *felony-murder rule* violated the *California Constitution's* cruel or unusual punishment clause. Id. at 700–01, 719–27 (italics

added).

In the last case upon which Petitioner relies on, Naovarath v. State, 779 P.2d 944 (Nev. 1989), the Supreme Court of Nevada determined that it constituted cruel and unusual punishment based on the Nevada and federal constitution to sentence a "*mentally and emotionally disordered thirteen-year-old*'" to life in prison for the singular offense of murdering his own molester. Id. at 945, 949. This lies in stark contrast to Petitioner, a violent recidivist who, at seventeen, was sentenced for violent crimes against a victim he did not know. Petitioner has established neither his assertion that "the state courts have not agreed with one another" about whether life imprisonment is a permissible punishment *under the Eighth Amendment* for a violent recidivist near the age of majority nor demonstrated any conflict amid the cases used as examples herein.

Compared to other defendants, many of whom are younger than Petitioner, the sentence of life imprisonment is not uncommon for a juvenile engaged in violent criminal activity, particularly where that juvenile is a recidivist. Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009) (upholding life sentence without parole for a seventeen-year-old convicted of kidnaping for ransom with bodily injury, but not death); State v. Warren, 887 N.E.2d 1145 (Ohio 2008) (upholding life sentence without parole for a *fifteen-year-old* convicted for kidnaping and forcibly raping a nine-year-old victim over two months); State v. Bunch, Case No. 06-MA-106, 2007 Ohio App. LEXIS 6314, 2007 Ohio 7211 (Ohio Ct. App. Dec. 21, 2007) (seventeen-year-old properly sentenced to 89 years in prison without parole, which he asserted was

a life sentence, for aggravated robbery, rape, kidnaping, and aggravated menacing); Blackshear v. State, 771 So. 2d 1199 (Fla. 4th DCA 2000) (finding a defendant properly sentenced to life imprisonment for violating his probation imposed when he was *thirteen years old* for three robberies with a firearm); State v. Green, 502 S.E.2d 819, 827-34 (N.C. 1998) (holding that mandatory life sentence for *thirteen-year-old* convicted of a first-degree sexual offense does not constitute cruel and unusual punishment); People v. Chacon, 43 Cal. Rptr. 2d 434, 441–42 (Cal. App. Ct. 1995) (holding life without parole for two *sixteen-year-olds* convicted of aggravated kidnaping of a youth authority facility librarian does not constitute cruel and unusual punishment); Manuel v. State, 629 So. 2d 1052 (Fla. 2d DCA 1993) (remanding to consider whether *thirteen-year-old* sentenced to life had counsel for prior juvenile convictions included in scoresheet which recommended life sentence for attempted murder and armed robbery); State v. Walker, 843 P. 2d 203, 213–14 (Kan. 1992) (life sentence for *fourteen-year-old* active participant in two aggravated kidnapings and an aggravated arson); State v. Foley, 456 So. 2d 979 (La. 1984) (*fifteen-year-old's* life sentence without the possibility of parole for aggravated rape proportional); White v. State, 374 So. 2d 843 (Miss. 1979) (life without possibility of parole for *sixteen-year-old* armed robber and kidnaper); People v. Isitt, 127 Cal. Rptr. 279 (Cal. Ct. App. 1976) (seventeen-year-old sentenced to life without parole for kidnaping and robbery with bodily harm); Rogers v. State, 515 S.W.2d 79 (Ark. 1979) (seventeen-year-old first-time offender rapist sentenced to life without parole); see also Jackson v. State, Case No. 10-07-00089-CR, 2008 Tex. App. LEXIS 698, *15–20 (Tex. App. Jan. 30, 2008) (upholding

life sentence, apparently with possibility of parole, for offender "less than 17" convicted of aggravated robbery on elderly persons, one of which was disabled, with a deadly weapon); State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) ("[W]e find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment."); State v. Ira, 43 P.3d 359 (N.M. Ct. App. 2002) (upholding 91½ year sentence for a fifteen-year old who repeatedly sexually assaulted his nine-year-old stepsister and indicating that possibility of parole "will not ripen for a very long time").

There is no conflict between this case and decisions of the federal circuits. In McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992), cert. denied, 507 U.S. 975 (1993), the Eleventh Circuit found the Eighth Amendment was not violated when a seventeen-year-old was sentenced to life in prison without the possibility of parole after being convicted of first-degree burglary and sexual assault. Id. at 531. The Florida Second District Court of Appeal affirmed per curiam without opinion. See McCullough v. State, 523 So. 2d 582 (Fla. 2d DCA 1988). Applying this Court's decisions in Harmelin v. Michigan, 501 U.S. 957 (1991) and Solem v. Helm, 463 U.S. 277 (1983), the Eleventh Circuit found that the defendant's convictions "involved a crime of violence against a person," and his sentence "[t]herefore . . . is not grossly disproportionate" and needed to go no farther. McCullough, 967 F.2d at 535; see also Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999) (finding thirteen-year-and-eleven-month-old defendant's consecutive sentences for single criminal episode of burglary, robbery with a dangerous weapon, rape, and forceable sodomy, which resulted in a 100-

year term of imprisonment, did not violate the Eighth Amendment), cert. denied, 531 U.S. 830 (2000).

Moreover, there is no conflict between the Florida state court and any relevant decisions of this Court. See U.S. SUP. CT. R. 10(c). Petitioner points to *no case* where a court has determined that this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), should be applied to prohibit life imprisonment involving a juvenile, much less a violent recidivist near the age of majority. Rather, those courts that have considered the applicability of Roper to a juvenile's term of life imprisonment have universally decided the issue *against* Petitioner's position. See United States v. Pete, 277 Fed. Appx. 730, 734 (9th Cir. 2008); United States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), vacated on other grounds, 128 S. Ct. 880 (2008); United States v. Salahuddin, 509 F.3d 858 (7th Cir. 2007); Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009); Culpepper v. McDonough, 2007 WL 2050970, *4–5 (M.D. Fla. July 13, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007); Pineda v. Leblanc, Case No. 07-3598, 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); Price v. Cain, Case No. 07-937, 2008 U.S. Dist. LEXIS 23474, *17–23 (W.D. La. March 4, 2008); Byrd v. Quarterman, Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10–12 (W.D. La. Oct. 24, 2007); cf. Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years

in prison).[2]

While Petitioner references this Court's death penalty decisions in Roper, Thompson v. Oklahoma, 487 U.S. 815 (1988), and Kennedy v. Louisiana, ___ U.S. ___, 128 S. Ct. 2641 (2008), this Court has found that "the death penalty is different from other punishments in kind rather than degree." Helm, 463 U.S. at 294. This Court recognized in Rummel v. Estelle, 445 U.S. 263 (1980):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodies in our concept of humanity.

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[2] State court decisions are in accord. See Connell v. State, Case No. CR-06-0668, 2008 Ala. Crim. App. LEXIS 108, *10 (Ala. Crim. App. May 30, 2008); People v. Metzger, Case No. B198096, 2008 Cal. App. Unpub. LEXIS 10492, *27–28 (Cal. Ct. App. Dec. 29, 2008); People v. Diaz, Case No. F052637, 2008 Cal. App. Unpub. LEXIS 10351, *13–17 (Cal. Ct. App. Dec. 22, 2008); People v. Demirdjan, 50 Cal. Rptr. 3d 184, 186–87 (Cal. App. Ct. 2006); State v. Allen, 958 A.2d 1214, 1233–36 (Conn. 2008); Wallace v. State, 956 A.2d 630, 638–41 (Del. 2008); Culpepper v. State, 971 So. 2d 259, 260–61 (Fla. 2d DCA 2008); People v. Griffin, 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); Sims v. Commonwealth, 233 S.W.3d 731, 732–33 (Ky. Ct. App. 2007); Gussler v. Commonwealth, 236 S.W.3d 22, 23–24 (Ky. Ct. App. 2007); Van Pao Thao v. State, Case No. A07-2137, 2008 Minn. App. Unpub. LEXIS 1271, *11 n.3 (Minn. Ct. App., Sept. 16 2008); In re Welfare of L.F.G.-L., Case No. A07-366, 2007 Minn. App. Unpub. LEXIS 1089, *9–10 (Minn. Ct. App. Nov. 6, 2007); State v. Medina, 622 S.E.2d 176, 182 (N.C. Ct. App. 2005); State v. Warren, 887 N.E.2d 1145, 1149 (Ohio 2008); State v. Bunch, Case No. 06-MA-106, 2007 Ohio 7211, 2007 Ohio App. LEXIS 6314, **11–12 (Ohio Ct. App. Dec. 21, 2007); Thomas v. State, Case No. 14-06-00066-CR, 2007 Tex. App. LEXIS 6212, *15–19 (Tex. App. Aug. 7, 2007), cert. denied, 2008 U.S. LEXIS 6542 (Oct. 6, 2008); State v. Rideout, 933 A.2d 706, 718-19 (Vt. 2007); see also Cobos v. Dennison, 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); State v. Avery, 649 S.E.2d 102, 108 (S.C. Ct. App. 2007); Gurerro v. State, Case No. 13-05-00709-CR, 2008 Tex. App. LEXIS 1837, *4–8 (Tex. Crim. App. March 13, 2008); Wills v. State, Case No. 06-04-00172-CR, 2005 Tex. App. LEXIS 7113, *7–8 (Tex. App. Aug. 31, 2005); State v. Ocak, Case No. 56006-9-I, 2006 Wash. App. LEXIS 1126, *2 (Wash. Ct. App. June 12, 2006).

Id. at 272 (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Further, this Court stated in Harmelin, "Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." 501 U.S. at 994. Simply stated, "death is different." See, e.g., Ring v. Arizona, 536 U.S. 584, 605–06 (2002); Gardner v. Florida, 430 U.S. 349, 357–58 (1977) ("[Death] is different in both its severity and its finality . . . [and] differs dramatically from any other legitimate state action.") (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.") (plurality opinion).

Moreover, outside the context of the death penalty, this Court has always examined whether a sentence is grossly disproportionate under the Eight Amendment by examining the sentence in relation to the offender's instant offense and prior offenses, not the individual characteristics of offender, such as age or mental capacity. See Lockyer v. Andrade, 538 U.S. 63,70–74 (2003); Ewing v. California, 538 U.S. 11, 29–30 (2003) (examining "gravity" of offender's offense and "long history of felony recidivism") (plurality opinion); Harmlin, 538 U.S. at 994 (Scalia, J.) (finding gross disproportionality should apply only to capital sentences) (plurality opinion); Id. at 997, 1001 (finding strict proportionality is not required "between crime and sentence") (Kennedy, J., concurring in part and concurring in judgment); Helm, 463 U.S. at

290–92 (court examines "the gravity of offense and the harshness of penalty" and how it compares to the other criminals in the same and other jurisdictions); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam); Rummel, 445 U.S. at 274 ("for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative"). Indeed, this Court has recognized that a state is permitted to make "a societal decision that when [a person who has previously committed a felony] commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to *the State's judgment* as to whether to grant him parole." Rummel, 445 U.S. at 278 (emphasis added).

Furthermore, as some of the courts rejecting Petitioner's position have recognized, the punishment that Petitioner seeks certiorari to argue is unconstitutionally applied to him here was the punishment that this Court approved as constitutionally permissible for a juvenile in Roper, life imprisonment. 543 U.S. at 560, 578–79, 125 S.Ct. 1183 (affirming a life sentence without the possibility of parole for a conviction based on juvenile conduct). Petitioner has failed to present any meritorious basis for granting certiorari or a basis that requires extension of Roper to a series of circumstances neither involving capital punishment nor contemplated within this Court's opinion in Roper.[3] Respondent urges this Court to deny certiorari.

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[3] Neither opinions of members of the "international community" (Pet. at 5), nor Petitioner's opinion of what is or is not "humane" (Pet. at 8) are a basis in this Court's rules to grant a Petition for Writ of Certiorari. See U.S. SUP. CT. R. 10.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

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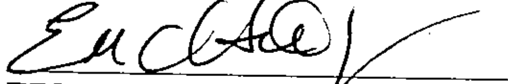

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No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S APPENDIX

A RESPONDENT'S ANSWER BRIEF IN FLORIDA FIRST DCA . . . *App. A-1*

No. 08-7412

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM, *Petitioner*,

vs.

STATE OF FLORIDA, *Respondent*.

<u>RESPONDENT'S PROOF OF SERVICE</u>

Comes now Respondent, by and through counsel, and hereby certifies that pursuant to United States Supreme Court Rule 29, a true and correct copy of Respondent's Brief In Opposition was mailed, postage prepaid on this 3rd day of February 2009, to opposing counsel , as designated below:

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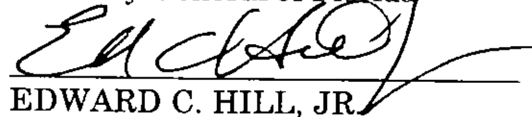

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