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

DAVID E. JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 1D12-3854

Opinion filed April 30, 2013.

An appeal from the Circuit Court for Nassau County.
Robert M. Foster, Judge.

David E. Johnson, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Giselle D. Lylen and Donna A. Gerace, Assistant Attorneys General, Tallahassee, for Appellee.

PER CURIAM.

David E. Johnson challenges the denial of his motion to correct illegal sentences under Florida Rule of Criminal Procedure 3.800(a), claiming he is entitled to relief under the Supreme Court's decisions in Graham v. Florida, 130 S. Ct. 2011 (2010), and Miller v. Alabama, 132 S. Ct. 2455 (2012). We agree in part, and remand for resentencing only on his conviction for burglary with an assault.

In 2009, Johnson was convicted of two offenses: first-degree murder and burglary with an assault; he was sentenced to life imprisonment without parole separately on both counts. Johnson, who was a juvenile at the time of the offenses, asserts that his mandatory life sentence without the possibility of parole on the first-degree murder conviction is improper under Miller, which held that a mandatory life without parole sentence imposed on an offender under the age of eighteen at the time of the crime violates the Eighth Amendment's prohibition against cruel and unusual punishments. 132 S.Ct. at 2464. He also asserts that his life sentence without the possibility of parole on the burglary with an assault conviction is improper under Graham, which held that imposition of a life without parole sentence on a juvenile offender violates the Eighth Amendment. 130 S. Ct. at 2023.

We reject Johnson's challenge to his mandatory life sentence on the first-degree murder conviction because this Court has held that Miller does not apply retroactively. See Gonzalez v. State, 101 So. 3d 886 (Fla. 1st DCA 2012); see also Geter v. State, 37 Fla. L. Weekly D2283 (Fla. 3d DCA Sept. 27, 2012) (holding similarly). Miller is not retroactive because its holding is a procedural rather than substantive change in sentencing law, only the latter having retroactive effect. Gonzalez, 101 So. 3d at 887 (adopting Geter's reasoning).

On the other hand, Johnson's life sentence without parole for the

nonhomicide crime of burglary with an assault is in violation of the categorical rule announced in Graham, which created a new fundamental constitutional right whose application has retroactive effect. See St. Val v. State, 38 Fla. L. Weekly D471 (Fla. 4th DCA Feb. 27, 2013); Kleppinger v. State, 81 So. 3d 547 (Fla. 2d DCA 2012); Geter, 37 Fla. L. Weekly D2283. The Supreme Court created a bright-line rule in holding that those who were under eighteen "when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." Graham, 130 S. Ct. at 2030. As such, we are required to reverse Johnson's sentence on the nonhomicide offense and remand for resentencing.

To be sure, the Supreme Court in Graham did not foreclose the imposition of a life sentence with the possibility of parole on a juvenile offender for a nonhomicide offense, such as burglary with an assault. The Court held that a "State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Id. at 2034. But because Florida law does not authorize parole for Johnson's nonhomicide crime, the court below is necessarily limited to imposing a sentence of a term of years to comply with Graham, the outer boundaries of which are uncertain. Gridine v. State, 89 So. 3d 909 (Fla. 1st DCA 2011) (upholding seventy year sentence for attempted first-degree murder); Floyd

v. State, 87 So.3d 45 (Fla. 1st DCA 2012) (eighty-year sentence, consisting of consecutive forty-year sentences, unconstitutional).

To the extent it is asserted that Graham does not apply where a juvenile offender has committed both a homicide and a nonhomicide crime, we recently passed upon and rejected that argument, albeit under slightly different facts. Akins v. State, 104 So. 3d 1173, 1175 (Fla. 1st DCA 2012) (holding life without parole unconstitutional for the nonhomicide crime of attempted first-degree murder; offender convicted of homicide and sentenced to twenty-seven years). The factual difference between Johnson's situation (one victim) and that of the juvenile offender in Akins (two victims) does not justify a limitation on Graham's categorical rule. Indeed, one could argue that the commission of a homicide by Akins on one victim along with an attempted first-degree murder on another victim makes a stronger case for distinguishing Graham in favor of more severe punishment on the nonhomicide charge. But this Court chose not to do so. As such, we cannot agree with the dissent on this point.

We do, however, certify conflict with the Third District, which recently held that Graham does not apply to a juvenile offender who was "convicted of both homicide and nonhomicide offenses which arose out of a single criminal episode." Lawton v. State, No. 3D11-2505, 2013 WL 811661 (Fla. 3d DCA, Mar. 6, 2013) (reading Graham to create an "exception" that allows for imposition of life without

parole for a nonhomicide offense committed with a homicide in a single criminal episode).

In this regard, we make one observation. The notion that Graham is limited to cases involving only nonhomicide offenses (and does not apply where a juvenile offender is convicted concurrently of homicide and nonhomicide offenses) is linked to dicta from Graham that formed no part of the Court's holding. Instead, it addressed only an empirical point that Florida attempted to make about the relevance of incomplete data in a study presented to the Court that attempted to calculate the number of juvenile offenders incarcerated in Florida for nonhomicide offenses. In questioning the accuracy of the study upon which Graham relied, the State pointed out that the gross number of juvenile offenders incarcerated in Florida for nonhomicide offenses was substantially understated.

> The Annino Study incorrectly excludes a substantial number of juveniles (approximately 73) who are serving life sentences without parole for non-homicides simply because these juveniles – *in addition to these non-homicide offenses* – are also serving separate sentences for other crimes in which death or intent to kill occurred. . . . Each was sentenced to life without parole for a non-homicide offense; the fact that they are also serving sentences on other charges does not alter this fact.

State of Fla. Br. at 34 (emphasis in original). As such, the state asserted that "a more accurate portrayal" of the data shows "that about half, 150 of 301, of the juvenile offenders" in Florida were serving life sentences for a nonhomicide offense. Id. It did so, not to limit the possible application of a categorical rule, but

to counter the perception that life sentences for nonhomicides were rare and thereby "unusual" under the Eighth Amendment. Id. ("Juvenile life sentences for non-homicides are hardly a rare event.").

In response to the State's point about this data, the Supreme Court stated as follows:

> The State contends that [the Annino] study's tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. See Brief for Respondent 34; Tr. of Oral Arg. in *Sullivan v. Florida*, O. T. 2009, No. 08–7621, pp. 28–31. This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Graham, 130 S. Ct. at 2023. Thus, the Court distinguished the State's empirical point and thereafter placed reliance on the Annino Study (which it completed on its own) to further its legal analysis of whether a national consensus against life without parole for nonhomicides had been established. As this Court said in Akins,

> [W]e do not take this as a renunciation of the rule stated elsewhere in Graham that juveniles may not constitutionally be punished for nonhomicide crimes by life imprisonment with no possibility of parole. We see nothing in Graham that would permit imposing life sentences without parole for nonhomicide offenses, even if the

> juvenile has committed a homicide in some earlier episode or, as here, was earlier sentenced to a term of years for a homicide.

Akins, 104 So. 3d at 1175-76. We agree, and find that this language from Graham was not intended to create an exception for juvenile offenders who commit homicide and nonhomicide offenses in a single criminal episode involving one victim.

In conclusion, it is plain that the offenses that Johnson committed were atrocious, and left incalculable human suffering in their wake. Indeed, he will serve the remainder of his life in prison for the homicide offense he committed; and the trial court may choose to impose a lengthy term of years for the burglary with an assault offense on the same victim. We thus AFFIRM the denial of Johnson's motion to correct illegal sentence on the homicide offense, but REVERSE and REMAND for Johnson to be resentenced on his burglary with an assault conviction; CONFLICT CERTIFIED.

LEWIS and MAKAR, JJ. CONCUR; THOMAS, J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION.

THOMAS, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur with the majority's opinion rejecting Appellant's argument that he cannot be sentenced to a mandatory term of life imprisonment without parole for his conviction of first-degree murder, and with the majority opinion's certification of conflict with Lawton v. State, No. 3D11-2505, 2013 WL 811661 (Fla. 3d DCA March 6, 2013). I respectfully dissent, however, from the majority's opinion that holds that Appellant cannot be sentenced to life imprisonment for the crime of burglary with an assault, because here, unlike in Akins v. State,[1] Appellant was sentenced to life imprisonment for first-degree murder, and the murder was committed against the same victim who was the victim of the nonhomicide crime. Thus, this case is distinguishable from Akins.

Appellant was indicted for first-degree premeditated and felony murder, burglary with an assault or battery, and robbery while armed with a knife, with all crimes perpetrated against the same female victim, Antonia M.B. Gerald. The murder and burglary were committed by Appellant when he was approximately three weeks shy of his 18th birthday. During Appellant's trial, he was convicted of murder and burglary with an assault, and the State dismissed the robbery charge.

Evidence at trial established that Appellant confessed to a witness who testified at trial that he went to Ms. Gerald's home with the intent to rob her,

[1] 104 So. 3d 1173 (Fla. 1st DCA 2012).

because he heard she had "lots of money." Appellant told this witness that Ms. Gerald resisted when he attempted to rob her and, during the struggle, he wanted to "cut [the victim's] head off." Appellant stabbed Ms. Gerald to death and took her purse. Her body had multiple stab wounds, and a broken knife was found near her body.

Because of the above facts, this case is not controlled by our decision in Akins. In fact, in Akins, the juvenile was convicted of murdering one victim and attempting to murder another victim. Akins challenged his life sentence without the possibility of parole for the attempted murder, and this court stated that "[w]e . . . hold that Graham precludes a life sentence **in the present case.**" Akins, 104 So. 3d at 1174 (emphasis added). Furthermore, in Akins, although this court seemed to hold that no life sentence could be imposed for any nonhomicide offense committed by a juvenile, even if the juvenile also committed a homicide, this court stated, "Although appellant also committed a homicide, he was sentenced for the homicide, **not to life without parole, but to twenty-seven years in prison.**" Id. at 1175 (emphasis added).

Further supporting this view of Akins is the concluding paragraph of the majority's opinion, which states:

> We see nothing in Graham that would permit imposing life sentences without parole for nonhomicide offenses, even if the juvenile has committed a homicide in some earlier episode, or, as here, was earlier sentenced to a term of years for a homicide.

Id. at 1175-76 (emphasis added). Thus, the majority opinion in Akins specifically noted and relied on the fact that Akins was not sentenced to life in prison without the possibility of parole for the homicide, and therefore, the majority determined that Akins could not be sentenced to life imprisonment without parole for the nonhomicide crime committed against another victim.

In contrast, here, there is only one victim who was burglarized and then brutally murdered. More importantly, the trial court imposed the mandatory term of life imprisonment without parole for murder, and life imprisonment without parole for burglary with an assault or battery. Therefore, this case is not controlled by our decision in Akins.

Neither is the decision of the United States Supreme Court in Graham v. Florida, 130 S. Ct. 2011 (2010), controlling here. In Graham, the Supreme Court held that a state could not impose a life sentence without possibility of parole for a nonhomicide offense under the Eighth Amendment's cruel and unusual clause, reversing this court's contrary decision. The Court in Graham did not address whether a juvenile could be sentenced to life imprisonment without parole for a nonhomicide crime committed against a victim whom the juvenile also murdered. Therefore, because Graham is not dispositive here, we should affirm Appellant's life sentence without parole for both the homicide and nonhomicide crimes. See Lawton, supra.

It is not cruel and unusual punishment to sentence Appellant to life imprisonment without the possibility of parole for committing a burglary with an assault, during which he brutally stabbed the victim of the burglary to death. Thus, I respectfully dissent in part.