STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2013-000281

The State, Respondent,

vs.

John Bonner, Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The resentencing court did not err in sentencing Appellant to sixty years for burglary first. The issue is blatantly not preserved and is entirely without merit.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

Appellant was indicted on charges of burglary (first degree); grand larceny; burglary (second degree); kidnapping; armed robbery; and ABHAN. He proceeded to trial on November 17-18. 2009, before the Honorable J. Derham Cole and a jury. The jury found Appellant guilty as indicted. Judge Cole sentenced him as follows: burglary (first degree)–2009-GS-11-824–life in prison without parole; grand larceny–2009-GS-11-825–five (5) years; burglary (second degree)–2009-GS-11-826–fifteen (15) years; kidnapping–2009-GS-11-827–thirty (30) years; armed robbery–2009-GS-11-828–thirty (30) years; and ABHAN–2009-GS-11-829–ten (10) years consecutive to any other sentence.

At trial, several of Appellant's co-defendants testified regarding the events on the night of the burglaries. Kwame Douglas testified they all met at Appellant's house and Appellant discussed robbing a corner store. (R.181). They hatched a plan to wait in the bushes waiting for the victim, who ran the store, to emerge with the money from the store and go to her home, which was next door. They planned to grab the money and run. (R.182). The victim left the store with a gentleman, but did not have any money with her. (R.183). The perpetrators then waited around so they could break into the victim's home and find the money. (R.184).

One of the other co-defendants entered through a window of the victim's home and opened the front door. They waited until they believed she was asleep and entered the home looking for the money. (R.184-186). Appellant and another co-defendant kicked in the victim's bedroom door. When they entered, they fired a gun shot, and the victim began screaming. (R.186-187).

Douglas testified he entered the room and Appellant and the other co-defendant had the victim pinned asking her where the money was located. He testified they were beating the victim while they asked for the money. Douglas testified Appellant and the other co-defendant took off the victim's clothes and continued beating her. They demanded she give them the key to the store. When she did not, they placed her over one of the chairs or sofas and planned to sexually assault the victim. (188-189). She eventually told where the key to the store was located, and Appellant retrieved the key. (R.189).

Appellant and a co-defendant went to the store to get money from the store. An alarm went off in the store when Appellant and a co-defendant tried to get the money. The co-defendants all returned to the vehicles parked at a local apartment complex and eventually split up the money Appellant brought from the store. (R.190-192).

Testifying through an interpreter, the victim stated she worked at the corner store and lived in the house beside the store. (R.238). She testified she left the store around midnight and went home. After watching a little television, the victim went to bed, locking her bedroom door. (R.238). About two in the morning, people entered her bedroom and showed her a gun after firing a shot. The men started beating her demanding money. (R.239). She testified they took off the bottom part of her night dress. (R.240). After the men fled, the victim went to the neighbor to call for help. She spent two days in the hospital as a result of her beating. (R.242-243).

ARGUMENT

I. The resentencing court did not err in sentencing Appellant to sixty years for burglary first. The issue is blatantly not preserved and is entirely without merit.

Appellant contends the resentencing court erred in sentencing him to sixty years in prison on the burglary first charge. He maintains the charge constitutes a "*de facto* life sentence" and, therefore, violated the Eighth Amendment to the United States Constitution pursuant to Graham v. Florida, 560 U.S. 48 (2010). First, the issue is blatantly not preserved for review on appeal. Second, it is entirely without merit as Graham is inapplicable to a term-of-years sentence[1]. Third, Appellant has failed to provide the Court with sufficient data justifying extending the holding of Graham and, even if Graham applied to a term-of-years sentence, the sentence given in this case does not violate the mandates of Graham. Finally, to the extent Appellant is challenging the constitutionality of the portion of his aggregate sentence related to his consecutive ABHAN sentence, the issue is not appropriately before this Court because the circuit court judge only had jurisdiction over the burglary conviction and resentenced him solely on his first-degree burglary conviction.

PRESERVATION

First, the issue in this case is blatantly not preserved for review on appeal. Appellant presented argument in support of his contention that the resentencing court should not harshly punish him for the first degree burglary. However, once the trial court announced the sixty-year sentence on the conviction, Appellant remained silent. He

[1] "Term-of-years sentence" in this appeal is being used to denote a sentence for a specific number of years, i.e., sixty-year sentence, versus a life without parole sentence.

raised no issue regarding the length of the sentence; much less an argument the sentence was unconstitutional under the Eighth Amendment and Graham. The South Carolina Supreme Court "has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. State v. Winestock, 271 S.C. 473, 248 S.E.2d 307 (1978); see also, State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991) (failure to object to sentence at time of its imposition constitutes a waiver of the issue on appeal); State v. Walker, 252 S.C. 325, 166 S.E.2d 209 (1969) (disposing of the defendant's challenge to his sentence because it was not raised to the trial judge and such challenge did not implicate the subject matter jurisdiction of the trial court); Rhoad v. State, 372 S.C. 100, 108, 641 S.E.2d 35, 39 (Ct. App. 2007) (holding the length of a sentence is not preserved for appellate review in the absence of an objection to the trial judge); State v. Passmore, 363 S.C. 568, 586, 611 S.E.2d 273, 283 (Ct. App. 2005) (holding that despite the fact that the defendant was sentenced to greater than six months for contempt without the benefit of a jury trial, defendant failed to object to the sentence and the issue was not preserved for appellate review).

Appellant's failure to say anything after the imposition of the sentence, and especially his failure to challenge the constitutionality of the sixty-year sentence imposed renders it unpreserved for review on appeal. See State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012) ("Constitutional issues are not exempt from issue preservation requirements."); In re Care & Treatment of Corley, 365 S.C. 252, 258, 616

S.E.2d 441, 444 (Ct. App. 2005) ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal.").

Further, even if a general objection to his sentence is manufactured from his attempt to use Graham to mitigate the sentence prior to its imposition, his current attempts in his brief to raise arguments related to his life expectancy and the constitutionality of his sixty-year sentence are clearly not preserved for review on appeal. A party may not argue one ground at trial and another on appeal. State v. Brockmeyer, 406 S.C. 324, 355, 751 S.E.2d 645, 661 (2013); see also, State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (defendant may not argue one ground below and another on appeal).

Additionally, Appellant now attempts to complain about a seventy-year sentence, by arguing the ten-year consecutive sentence for ABHAN should be considered in conjunction with his sixty-year sentence for burglary.[2] This argument has never been made at any time. He did not challenge the ten-year consecutive ABHAN sentence in his original appeal and did not challenge it below on resentencing. He has never maintained his aggregate sentence is in violation of the Eighth Amendment. As a result, this issue is not preserved for review on appeal and this Court should decline to consider the ten-year sentence for ABHAN in its analysis.

Finally, Appellant's trial counsel admitted he preserved no issue for review on appeal. Specifically, in an Explanation of Appeal Pursuant to Rule 203(d)(1)(B), SCACR[3], counsel stated: "No issues were raised during the resentencing; however, the

[2] The State will also argue in the following merits section this Court is without jurisdiction to consider this sentence on appeal as it was not part of the remand after Appellant's original appeal.

[3] The State does not know the basis for the filing of the explanation. Additionally, as this case was originally filed pursuant to Anders v. California, 386 U.S. 738 (1967), the Record on Appeal has already

client insisted upon and appeal . . . ." (Explanation of Appeal filed concurrent with Notice of Appeal).

Accordingly, the issues raised by Appellant in his brief are clearly not preserved for review on appeal and should not be considered by this Court on appeal.

MERITS

Appellant's sentence is not in violation of Graham or the Eighth Amendment to the United States Constitution. First, Graham does not apply to a term-of-years sentence, and therefore, does not form a basis to find the sentence unconstitutional under the Eighth Amendment. Next, to the extent Graham and its dictates are applicable, the sentence given does not violate the requirements of Graham. Finally, Appellant cannot challenge the collective sentence he received, but may merely challenge the sixty-year sentence he received for burglary in the first degree because the other sentences are beyond the jurisdiction of the Court.

First, the South Carolina Supreme Court has held it is well settled in this State that an appellate court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless the statute itself violates the constitutional injunction against cruel and unusual punishment, or the sentence is the result of partiality, prejudice or pressure or corrupt motive. See Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) (citing Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971)). The imposition of a sixty-year sentence was clearly permissible under the burglary statute: "Burglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, 'life' means until death. The court, in its discretion, may

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been produced and filed with the Court so the State craves reference to the Court's file for the Explanation of Appeal.

sentence the defendant to a term of not less than fifteen years." S.C. Code Ann. § 16-11-311(B) (Supp. 2002). "A trial judge is allowed broad discretion in sentencing within statutory limits. A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant." Brooks v. State, 325 S.C. 269, 272, 481 S.E.2d 712, 713 (1997) (citing Garrett, 320 S.C. 353, 465 S.E.2d 349; State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974)).

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Pursuant to the Eighth Amendment, punishments must not be "inherently barbaric" and must be graduated and proportioned to the offense. Graham, 560 U.S. at 59; see Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense). However, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). Instead, "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (citations omitted).

The United States Supreme Court (USSC) has identified two categories of cases which have invoked review under the Eighth Amendment's cruel and unusual punishment clause: 1) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and 2) cases in which the Court implements the proportionality standard by certain categorical restrictions. See Graham, 560 U.S. at 59-61. Appellant has not raised a challenge to his term-of-years sentence based on the facts and circumstances of this case. Instead, he has raised a categorical challenge to the

imposition of a term-of-years sentence which results in a "*de facto* life sentence" in violation of Graham.

As the South Carolina Supreme Court has recognized, what constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by "evolving standards of decency that mark the progress of a maturing society." State v. Standard, 351 S.C. 199, 204, 569 S.E.2d 325, 328 (2002) (quoting Thompson v. Oklahoma, 487 U.S. 815, 821 (1988)). "[U]nder State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007), cert. denied, ___ U.S. ___, 128 S.Ct. 1872, 170 L.Ed.2d 751 (2008), the two principles to consider in determining whether a punishment is cruel and unusual are (1) the evolving standards of decency that mark the progress of a maturing society and (2) the proportionality between the punishment and the offense." State v. Williams, 380 S.C. 336, 346, 669 S.E.2d 640, 645 (Ct. App. 2008).

The USSC noted: "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" Atkins v. Virginia, 536 U.S. 304, 312, 122 S.Ct. 2242, 2247 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331(1989)). "The Legislature has the power, within constitutional limits, to define and punish crimes." State v. Washington, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000) (quoting Guinyard v. State, 260 S.C. 220, 226, 195 S.E.2d 392, 395 (1973)).

Furthermore, the court making such a determination should remember that "[i]t is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct.

App. 2008); see Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.").

The USSC's Eighth Amendment jurisprudence with respect to juveniles is articulated in three recent cases; including Roper v. Simmons, 543 U.S. 551 (2005); Graham; and Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012). In Roper, the Court held the death penalty cannot be imposed on juvenile offenders. It relied in significant part on its finding that because juveniles have lessened culpability they are less deserving of the most severe punishments. Roper, 543 U.S. at 569. In Graham, the USSC relied on this same proposition, and additionally stated: "The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 560 U.S. at 69. The Court then found life without the possibility of parole, which it characterized as "the second most severe penalty permitted by law," is not permitted under the Eighth Amendment for juveniles who commit non-homicide offenses. Id. at 81. Miller extended Roper and Graham by finding juveniles who commit murder cannot be sentenced to a mandatory life without parole. Miller, 132 S.Ct. at 2467. The case relied on and at issue in this case is Graham and whether it applies to Appellant's sentence.

Term of Years versus Life Without Parole

First, Graham explicitly applies only to a life without parole sentence. Specifically, the USSC stated: "The instant case concerns only those juvenile offenders sentenced to **life without parole** solely for **a** nonhomicide offense." Graham, 560 U.S. at 63 (emphasis added). The Court stressed that drawing a "clear line" was "necessary to prevent the possibility that **life without parole sentences** will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit **that punishment**." Id. at 74-75 (emphasis added). The Court reasoned that "[b]ecause 'the age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to **life without parole** for a nonhomicide crime." Id. (emphasis added).

The language chosen is important and specifically limits the reach of Graham. The Court could have stated the case concern those juvenile offenders sentenced to a "de facto life sentence" as argued by Appellant or a sentence which has the effect of a life sentence. The USSC specifically stated its holding concerned only those juveniles sentenced to "life without parole."

The analysis in Graham supports the conclusion the Court was only reviewing life without parole sentences. The Court relied on statistics regarding the number of states that allow life without parole for juveniles, statistics on the number of juveniles actually sentenced to life without parole, and the nature of a sentence to life without parole. The Court never discussed a "de facto" sentence or any term-of-years sentence length which it found to be the equivalent to a life without parole sentence. The Court solely addressed

its attention to sentences of juveniles to life without parole for a non-homicide offense. Graham, 560 U.S. 62-74. As explained in Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012):

> The Court's analysis in Graham supports this conclusion because the analysis did not encompass consecutive, fixed-term sentences. Since Graham involved a categorical challenge to a particular type of sentence, the Court first considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." The Court analyzed state and federal sentencing laws, tallying the number of jurisdictions that allowed juvenile nonhomicide offenders to be sentenced to "life without parole." The Court then examined "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute" and concluded that "[a]lthough these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent." Indeed, the Court found only "123 juvenile nonhomicide offenders serving life without parole sentences" in the United States. Based on this and other data, the Court concluded that the sentence of "life without parole for juvenile nonhomicide offenders ... is exceedingly rare. And it is fair to say that a national consensus has developed against it."
>
> The Court, however, did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders. This demonstrates that the Court did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments.

Bunch, 685 F.3d at 551-552 (internal citations omitted).

Additionally, other courts have examined the issue and find Graham stands solely for the proposition a life without parole sentence for a juvenile violates the Eighth Amendment. See e.g., Bunch, 685 F.3d at 552 (finding Bunch's eighty-nine year sentence did not violate Graham even though it may have been the functional equivalent

of a life without parole sentence and noting that the Supreme Court's analysis in Graham did not address such a situation); Walle v. State, 99 So. 3d 967, 973 (Fla. Dist. Ct. App. 2012) (declining to apply Graham to an aggregate ninety-two-year term of imprisonment for a juvenile non-homicide offender); Adams v. State, 288 Ga. 695, 701, 707 S.E.2d 359, 365 (Ga. 2011) (finding that the decision in Graham did not categorically bar anything other than life without parole sentences for juvenile non-homicide offenders); State v. Brown, 118 So. 3d 332, 341-342 (La. 2013) ("In our view, Graham does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime, and, absent any further guidance from the United States Supreme Court, we defer to the legislature which has the constitutional authority to authorize such sentences.").

However, several appellate courts, as cited in Appellant's brief, have reached a different conclusion and found that term-of-years sentences carrying the same practical effect as life sentences violate the Graham decision's explicit prohibition against life without parole sentences for juvenile non-homicide offenders.[4] These decisions all center around the USSC's language in Graham providing:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Graham, 560 U.S. at 75. Relying solely on this language completely ignores the USSC's directive which preceded it explaining: "The instant case concerns only those juvenile

[4] It is important to note the decisions cited by Appellant all involve cases in which the juvenile would not be eligible for release until well after his expected life expectancy. As will be discussed, Appellant's sixty-year sentence (the only sentence the circuit court or this Court have jurisdiction to consider), or even the full seventy-year sentence Appellant which complains of for the first time on appeal, does not render him eligible for parole only after his full life expectancy. He retains a meaningful opportunity for release.

offenders sentenced to life without parole solely for a nonhomicide offense." Graham, 560 U.S. at 63.

As the USSC has announced: "[A] State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." Oregon v. Hass, 420 U.S. 714, 719 (1975). The South Carolina Supreme Court recently articulated this same position indicating it can only apply constitutional rights under the United States Constitution as interpreted by the United States Supreme Court. See State v. Reid, Op. No. 27407 (S.C.Sup.Ct. filed July 2, 2014) (Shearouse Adv.Sh. No. 26 at 63 n.6). The State is free, of course, based on its own Constitution or law to impose greater restrictions. Appellant, however, has based his entire argument on Graham and the Eighth Amendment to the United States Constitution and not based on any South Carolina state law provision. Id.; see also, Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (instructing that state courts cannot interpret an amendment to the United States Constitution to provide greater protections than those provided by the precedent of the United States Supreme Court).

As a result, because the USSC specifically limited its holding to only those juveniles "sentenced to life without parole solely for a nonhomicide offense" this Court is without power to extend the holding to any other category of offender or offense. See Graham, 560 U.S. at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."); see also, Walle, 99 So.3d at 971 (finding "this court cannot expand the Supreme Court's ruling beyond the limitations it set forth in its opinion, specifically its holding that Graham applies solely to a single sentence of life without parole.").

As one of the Courts considering Graham's impact has noted:

> If we conclude that Graham does not apply to aggregate term-of-years sentences, our path is clear. If, on the other hand, under the notion that a term-of-years sentence can be a de facto life sentence that violates the limitations of the Eighth Amendment, Graham offers no direction whatsoever. At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the Graham majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to work with, however, we can only apply Graham as it is written. If the Supreme Court has more in mind, it will have to say what that is.

Henry v. State, 82 So.3d 1084, 1089 (Fla.App. 5 Dist. 2012) (footnotes omitted).[5]

Similar analysis was used in State v. Kasic, 228 Ariz. 228, 229, 265 P.3d 410, 411 (Ariz. Ct. App. 2011). In that case, Kasic argued the reasoning of the Graham decision warranted a finding that his aggregate sentence of nearly one-hundred-and-forty years for offenses he committed as both a juvenile and an adult was unconstitutional. Id. at 232, 265 P.3d at 414. However, the Court of Appeals rejected that argument. Id. In doing so, the Court of Appeals initially found that Graham did not categorically bar a term-of-years sentence like Kasic's based on the fact that the Supreme Court expressly limited its

[5] The bright line is nearly impossible to apply in a term-of-years sentence, which may be why the USSC specifically limited its holding to a sentence of life without parole. For example, is a sixty year sentence imposed on a twelve year old defendant the equivalent of a fifty or fifty-five year sentence imposed on a seventeen year old defendant? This is precisely the reason the USSC has stated you cannot compare sentences based on the age of the person sentenced. See Lockyer v. Andrade, 538 U.S. 63, 74 n.1 (2003) ("Two different sentences do not become materially indistinguishable based solely upon the age of the persons sentenced.").

decision in Graham solely to life without parole sentences for juvenile non-homicide offenders. Id. at 232-233, 265 P.3d at 414-415. Then, after concluding Kasic's aggregate term-of-years sentence was not categorically barred through Graham, the Court of Appeals considered whether Kasic's sentences taken individually and in the aggregate were grossly disproportionate to his crimes. Id. at 233-234, 265 P.3d at 415-416. Upon finding that they were not, the Court of Appeals held "that the Eighth Amendment does not prohibit Kasic's sentences for the crimes he committed as a juvenile." Id. at 234, 265 P.3d at 416.

Appellant was sentenced to a sixty-year sentence, and not a sentence of life without parole. The USSC's holding in Graham explicitly does not apply to his underlying sentence. As a result, this Court should not and cannot extend Graham to cover Appellant's sentence. Therefore, this Court should find Appellant's sentence does not violate the Eighth Amendment's prohibition on cruel or unusual punishment until such time as the USSC has considered a term-of-years sentence and found a certain sentence to be categorically invalid.

Extending Graham

Appellant has not met his burden of proof in order to extend Graham by demonstrating a categorical rule should be in place for lengthy term-of-years sentences which may or may not be "de facto life sentences." The specific and limited holding of Graham was not applicable to Appellant's case, and, as a result, the heavy burden remained on Appellant in raising a categorical constitutional challenge to lengthy term-of-years sentences for juvenile non-homicide offenders to establish a national consensus existed against such sentences. See Graham, 560 U.S. at 61 (indicating the first step in a

categorical constitutional challenge to a particular sentencing practice is to determine whether a national consensus exists against the challenged practice); see also Williams, 380 S.C. at 347, 669 S.E.2d at 646 ("[I]t is the heavy burden of the defendant to establish a national consensus against [a particular sentencing practice].").

Specifically, in seeking an extension of the holding in Graham to a type of sentence not addressed in the decision, Appellant did not cite, and still does not cite on appeal, to any data regarding the number of juveniles sentenced to sentences similar to his own or present any information regarding the number of jurisdiction that do and do not allow such sentences to be imposed upon offenders like him.[6] Without such objective indicia of society's standards, Appellant cannot demonstrate the particular sentencing practice he is presently challenging has been rejected in the United States on a near universal basis and cannot meet his burden of establishing a national consensus existed against the imposition of lengthy term-of-years sentences. Cf. Walle, 99 So. 3d at 971 (declining to apply the decision in Graham beyond its express limitations to a term-of-years sentence where "[t]he limited record before this court [did] not contain the vast amounts of information regarding societal values, penological theories, or psychological effects that the Supreme Court had at its disposal").

Appellant had the burden of providing the trial court, or at least this Court, with the type of data and information provided and considered in Graham. The Record in this case is woefully deficient. In the absence of a national consensus against sentences like Appellant's, there is no proper basis to categorically declare Appellant's sentence to be unconstitutional or to categorically extend the limited holding of Graham to his case.

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[6] His failure to articulate to the sentencing court any basis for his constitutional argument further demonstrates the blatant lack of preservation of the issue now before this Court.

Constitutionality under Graham

Even if the issue was preserved and this Court extended the Graham holding to a term-of-years sentence, the sixty-year sentence Appellant received is not unconstitutional as a "de facto life sentence." Graham indicated: "[The Eighth Amendment] 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. Graham does provide:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Graham, 560 U.S. at 75.[7]

Appellant contends he will not have a meaningful opportunity to obtain release. In this situation, he was sentenced to sixty-years in prison when he was seventeen years of age. He would have to serve eighty-five percent of his sentence, so he would be eligible for release after approximately 51 years on his burglary conviction[8]. Meaning he would be eligible for release on the burglary offense when he is approximately 68 years of age. Appellant would have a meaningful opportunity for release given his life expectance of 77 under section 19-1-150 of the South Carolina Code. Nothing in Graham guarantees a meaningful life after the opportunity for release. It merely prohibits a state from foreclosing any possibility of release at the time of sentencing.

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[7] Again, the State notes this opinion relates to a life without parole sentence and not to a lengthy term-of-years sentence such as Appellant's.

[8] As will be discussed in the following pages, the State submits this Court only has jurisdiction to consider Appellant's sixty-year sentence. Consideration of the ten year sentence for ABHAN, which the circuit court ran consecutive to any other sentence, would not be appropriate in this appeal.

Additionally, Appellant raises several other possible life expectancies, some of which are tied to race or other factors, as a basis for arguing Appellant lacked a meaningful opportunity for release. He fails to cite to the United States Social Security Administration which provides a life expectancy calculator based on Appellant's date of birth. Entering his gender and date of birth yields an expected life of 82.1 years.[9] The fact there is such a wide discrepancy in the projected life expectancy for Appellant indicates the unworkability of what Appellant proposes.

Appellant, even if Graham applies to his sentence, will have a meaningful opportunity for release. He is not foreclosed the possibility of release and is not guaranteed to die in prison as is someone with a sentence of life without parole. Appellant may spend a significant portion of his life in prison, but nothing in Graham forecloses that possibility.[10] Appellant seems to argue the Eighth Amendment requires Appellant be released within his natural life, or even more accurately, be released with some meaningful amount of his life remaining. This is simply not the requirement the USSC has placed on the state. The USSC specifically stated: "[The Eighth Amendment] does not require the State to release that offender during his natural life." Graham, 560 U.S. at 75.

Appellant's sixty-year sentence is not unconstitutional under Graham. He has a meaningful opportunity for release and nothing further is required.

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[9] See http://www.socialsecurity.gov/cgi-bin/longevity.cgi

[10] It is important to note that Appellant has not challenged his sentence as being grossly disproportionate to his crimes. His sentence is very fitting the crimes he committed, which were egregious, heinous, and without any concern for his victim. See Graham, 560 U.S. at 75 (recognizing that a juvenile non-homicide offender can constitutionally receive a sentence for an offense that would result in the offender spending the remainder of his life in jail); see also State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that first-degree burglary, armed robbery, and kidnapping are anything other than grave offenses of the 'most serious' nature.")

Jurisdiction

Appellant asks this Court to consider both his sixty-year sentence for burglary and his consecutive ten-year sentence for ABHAN, arguing his seventy-year sentence violates Graham. This Court, just as the circuit court on remand, is without jurisdiction to address the consecutive ten-year sentence for ABHAN as it was never before either court.[11]

"Generally, a [circuit court] judge is without authority to consider a criminal matter once the term of court during which judgment was entered expires." State v. Warren, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App. 2011); see State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) ("It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires."). The circuit court can obtain jurisdiction after an appeal. "Specifically, 'once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling.'" Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 198, 750 S.E.2d 78, 83 - 84 (2013) (quoting Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 351-352 (Ct. App. 2001)).

The circuit court then only has jurisdiction over the matter remanded to it from the appellate court. As this Court has stated: "'[A] trial court has no authority to exceed the mandate of the appellate court on remand.' The mandate of the appellate court is jurisdictional. The trial court has a duty to follow the appellate court's directions." Prince v. Beaufort Memorial Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) (internal citations and quotations omitted). Accordingly, the trial court correctly found it

[11] The circuit court recognized its lack of jurisdiction of the conviction and sentence for ABHAN and all of Appellant's remaining charges. Specifically, the court stated: "The only sentence I can impose today is a sentence for burglary in the first degree. That's the only case that's been sent back." (R.344-345).

only had jurisdiction over the sentence for burglary in the first degree as this was the only sentence addressed by this Court's opinion and the only sentence remanded to the circuit court for resentencing.[12]

As this Court knows and recently reiterated, appellate jurisdiction arises from section 14-3-330 of the South Carolina Code. See Levi v. Northern Anderson County EMS, Op. No. 5243 (S.C.Ct. App. Filed June 30, 2014)(Shearouse Adv.Sh. No. 26. at 105). In this case, the only final judgment before this Court is Appellant's resentencing on his burglary conviction. Accordingly, nothing allows this Court to exercise appellate jurisdiction over any other sentence as requested by Appellant.

Accordingly, this Court should find it can only consider the sixty-year sentence imposed by the circuit court for Appellant's conviction of burglary in the first degree. It should then conclude as discussed above the Graham opinion is inapplicable to a term-of-years sentence. In the alternative, the Court should conclude Appellant has failed to demonstrate Graham should be extended or, even if Graham should be extended, his sixty-year sentence is unconstitutional. Finally, even if this Court considered the entire seventy-year sentence, Appellant's aggregate sentence is not unconstitutional.[13]

[12] It should be noted that in his initial appeal to this Court, Appellant specifically acknowledged he only challenged the sentence to his burglary conviction and did not challenge any other conviction or sentence. See State v. Bonner, 400 S.C. 561, 564 n.4, 735 S.E.2d 525, 526 n.4 (Ct. App. 2012).

[13] Of course the State maintains none of these issues are preserved for review on appeal and believes the Court should not address any of the contentions raised by Appellant in his brief.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court be affirmed.

Respectfully submitted,

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July 8, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case Tracking No. 2013-000281

The State, Respondent,

vs.

John Bonner, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 8th day of July, 2014.

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