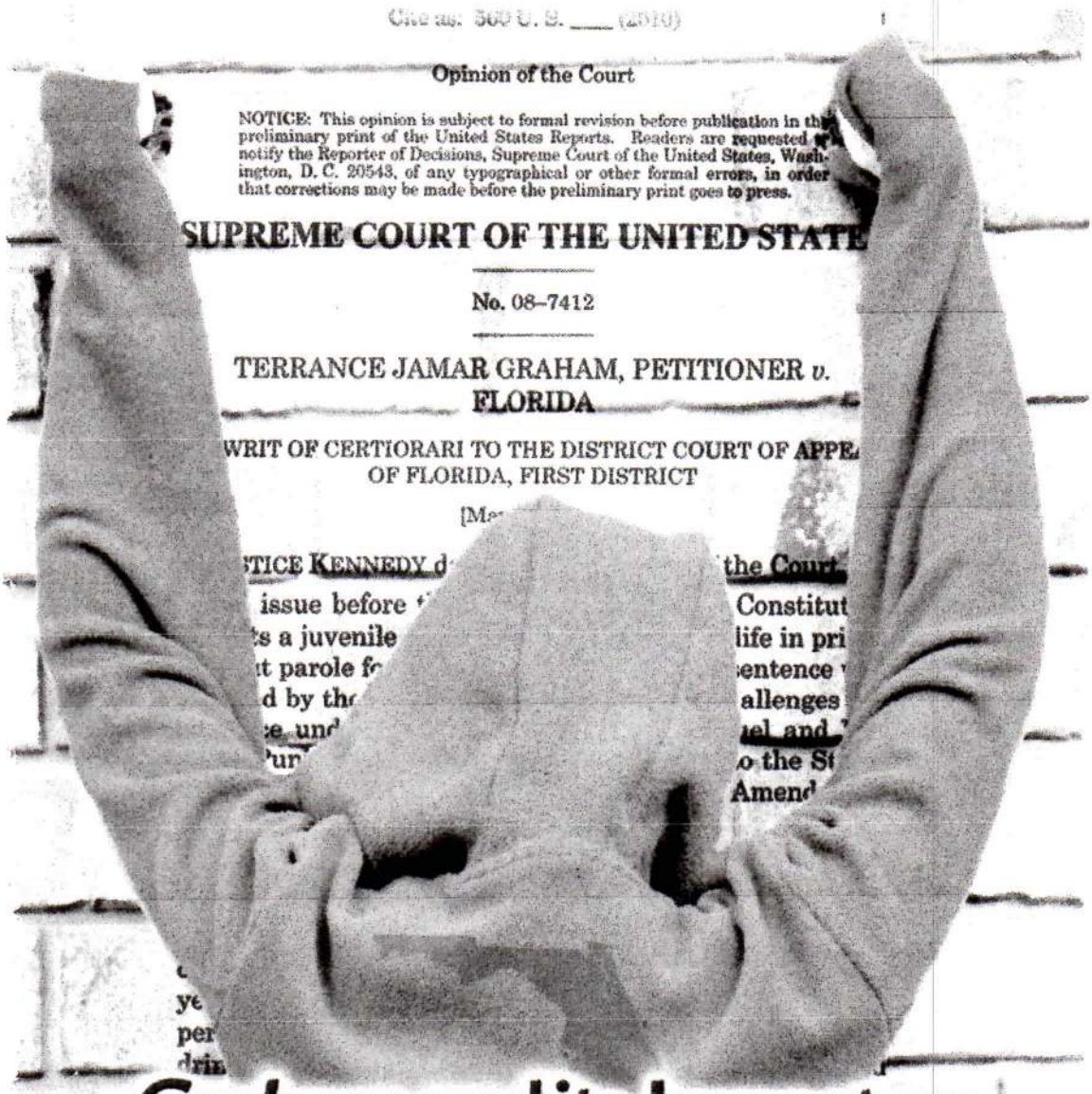
F·L·O·R·I·D·A
# DEFENDER

Volume 25, No. 4 | A Publication of the Florida Association of Criminal Defense Lawyers | Winter 2013/2014


Cite as: 560 U. S. ____ (2010)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–7412

TERRANCE JAMAR GRAHAM, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

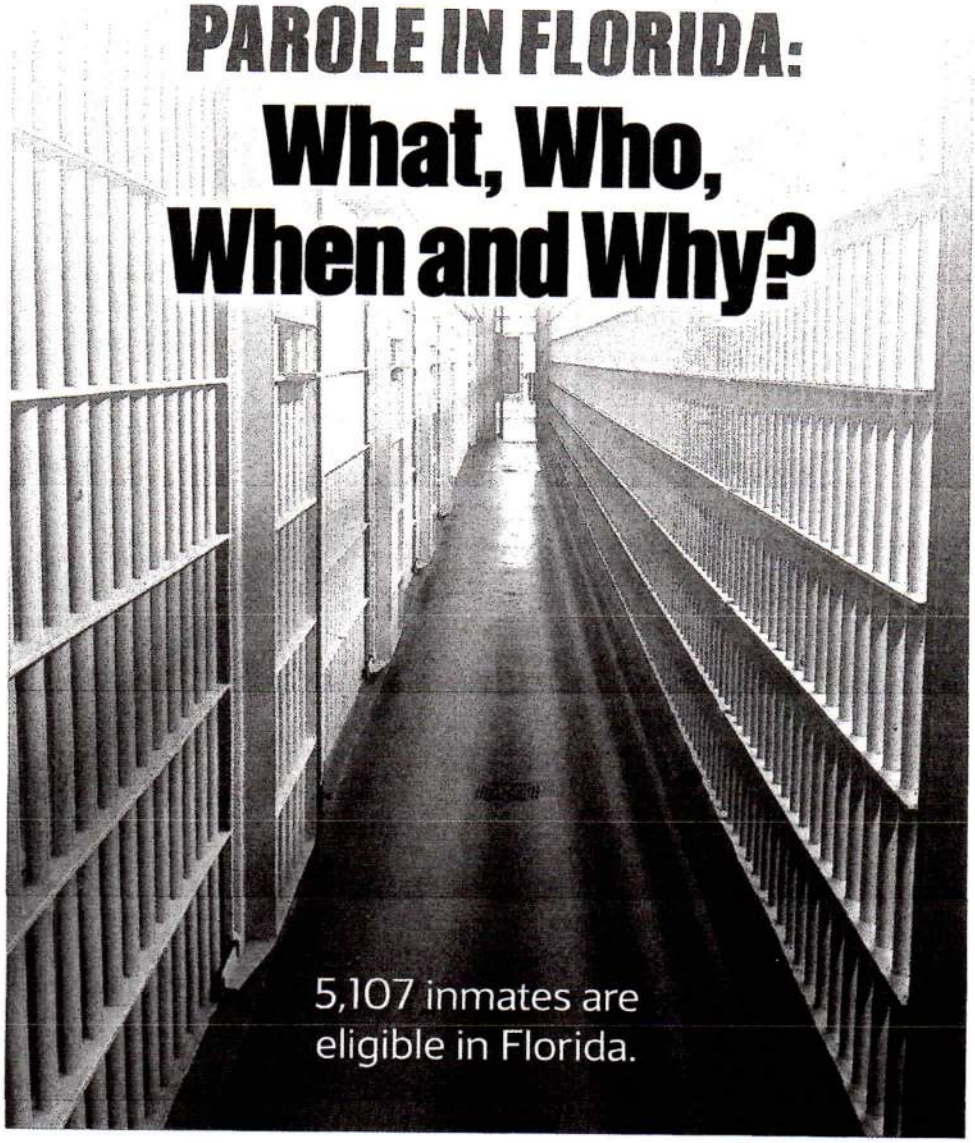
[May

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents the issue before the Court

# *Graham* and its Impact on Juvenile Sentencing in Florida

# PAROLE IN FLORIDA: What, Who, When and Why?




by
Reggie
Garcia, Esq.

Parole is a discretionary release and an act of grace from the state.[1] No inmate can claim a right to parole.[2]

Though once a prominent feature of Florida's criminal justice system, parole's phase-out began in 1983 when the Florida Supreme Court promulgated the sentencing guidelines which became applicable to all felonies, except capital felonies, committed after October 1, 1983.[3] Despite this change in the state's sentencing scheme, parole-sentencing remained in effect for certain capital felonies until October 1, 1995, when it was abolished for all capital felonies committed after this effective date.[4]

There are still 5,107 inmates who are eligible for parole, serving time in the State of Florida for felony convictions. Most of these inmates have received life sentences and are required to serve a minimum of 25 years before becoming eligible for parole.

So, some people may ask, "Why should we even consider parole?"

Some inmates are innocent and were wrongfully convicted; others had minor roles and obtained very long sentences disproportionate to their co-defendants; many were very young and have been model inmates; and in some cases, the victim's family shows compassion and supports the inmate's release.

Having recently argued three murder cases and one sexual battery case, this article describes the technical, complicated and long process and encourages inmates, their families and lawyers to have a successful strategy, plan and realistic expectations.

## THREE COMMISSIONERS

Appointed by the Governor and the Florida Cabinet and confirmed by the Florida Senate, there are three commissioners appointed to six-year terms.[5] The current chair is Tena M. Pate who was appointed by Governor Bush in 2003 and reappointed by Governor Crist and Governor Scott in 2011. One of the most respected officials in state government, Chair Pate previously served as Florida's Victim Rights Coordinator under Governors Bush, Chiles and MacKay and for the State Attorney in the First Judicial Circuit.

Bernard R. Cohen, Sr. is the Vice Chair and was appointed by Governor Scott in 2012 to an unexpired term. He served in several executive and management positions for 33 years at the Florida Department of Corrections and is a retired Captain in the United States Army Reserves. Commissioner Cohen is an expert in corrections matters, including transition and "re-entry" programs.

Melinda N. Coonrod was appointed by Governor Scott in July 2012 to a full six-year term. She is a distinguished lawyer, former state prosecutor for six years in the Second Judicial Circuit and the former supervising hearing officer at the Florida Department of Agriculture and Consumer Services presiding over hundreds of administrative license cases.

Commissioners are limited to two consecutive sixyear terms.[6] Retired and former commissioners also may hear cases when a current commissioner is unavailable or there is a temporary opening.[7] Hearings are held most Wednesdays in Tallahassee and occasionally in various Florida counties.[8]

## TYPES OF HEARINGS

### Initial Interview

Parole will not be considered. The purpose of this hearing is only to establish a Presumptive Parole Release Date (PPRD) and the Next Interview Date (NID). The Commission evaluates many factors in establishing the PPRD.[9]

### Request for Review

Considers every matter with which the inmate takes issue or exception (salient factor score; severity of offense behavior; aggravating or mitigating factors; etc.) regarding the establishment of his PRRD. To obtain this review, the *inmate must first file a request within* 60 days of the Commission Action after the initial hearing.[10]

### Subsequent Interview

Determines if any changes should be made in the PPRD and establishes the NID. The Commission can elect to make no change, reduce or extend the PPRD.[11]

### Effective Interview

Determines if the inmate will be granted parole. The Commission can elect to grant parole, extend the PPRD or decline to authorize parole.[12]

### Extraordinary Review

Reviews an order outlining the reasons for the Commission's decision to decline to authorize parole. The Commission can elect to move the order to suspend the PPRD and schedule the NID, grant parole or extend the PPRD.[13]

### Extraordinary Interview

When the PPRD is in suspended status, the inmate receives an Extraordinary Interview to determine if the inmate's PPRD should be removed from a suspended status. The Commission can elect to make no change in the PPRD or establish an Effective Parole Release Date (EPRD) within the next two years, or grant parole.[14]

### Parole Supervision Review

Reviews the parolee's progress while on parole. The Commission may elect to make no change or modify the reporting schedule and/or conditions of parole and schedule the next review date.[15]

## RECENT APPROVALS

As of June 30, 2013 there are 5,107 inmates eligible for parole. Between January 2010 and December 2012, the FPC granted 135 inmates after considering 629 that were parole eligible. During this most recent three-year period, five parolees were "revoked" *for various violations,* usually drug or alcohol use.[16] So approximately 21 percent were approved and of those 4 percent were revoked. Of the inmates not approved, the key is when will they be interviewed again and do they have a realistic opportunity to ever be paroled. In addition to the inmate's crime and prison record, the two most important considerations are the victim's and families' positions and the state attorney's position.

Between January 2010 and December 2012, the Florida Parole Commission granted parole to 135 inmates after considering 629 who were eligible. Since then, 4 percent of those approved had their parole revoked for various violations.

## PRESUMPTIVE PAROLE RELEASE DATE (PPRD)

The PPRD is defined by Florida law and "means the tentative parole release date as determined by objective parole guidelines."[17] The "objective parole guidelines" reflect the name of the 1978 parole law and, per Section 947.165, "shall be the criteria upon which parole decisions are made."[18] The legislature delegated this authority to the FPC, requiring only that it be based on "an acceptable research model" on the "seriousness of the offense" and on the likelihood of a "favorable parole outcome."[19] The FPC current "objective parole guidelines" became effective in September 1981 and the six main considerations remain today.[20]

The FPC "hearing examiner" interviews the inmate and makes a recommendation. The FPC Commissioners determine the "salient factor score," "offense severity level," "matrix time range," and "aggravating and mitigating factors." These factors involve statutory, administrative and policy considerations.

For example, the "aggravating factors" determined by the FPC Commissioners in my recent murder cases were: use of firearms; multiple victims; use of alcohol; pecuniary motive; and unreasonable risk.

Also considering the "institutional conduct record," and program participation, the commissioners calculate the number of months from the start of the sentence to establish the PPRD. It can affirm or modify this date at subsequent hearings.[21]

While good institutional conduct, a lack of disciplinary reports and successful completion of programs are positive indicators, the law actually says "no person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison."[22] The FPC Commissioners have to make an affirmative finding that "there is reasonable probability that, if the person is placed on parole, he or she will live and conduct him or herself as a respectable and law- abiding person and that the person's release will be compatible with his or her own welfare and the welfare of society."[23]

## THE "NEXT" OR "SUBSEQUENT" HEARING

At the "initial" hearing and every "subsequent" hearing, the most important decision is when to review the case

again. It can be scheduled between two and seven years and is the best indicator of whether the FPC is even remotely open-minded to a future parole release.

A new law effective July 1, 2013, increases the intervals between parole interview dates from two to seven years for inmates convicted of kidnapping or attempted kidnapping; or robbery, certain burglaries, or breaking and entering—or an attempt thereof of any of these crimes—"in which a human being is present and a sexual act is attempted or completed."[24]

It is anticipated these changes will impact less than 50 inmates and the FPC will maintain its considerable discretion as to scheduling subsequent interviews. While not stated in the new law, or its Final Bill Analysis, the legislative intent likely was to reduce the number of hearings crime victims and/or their families have to attend.

## SPECIAL "RE-ENTRY" PROGRAMS

Another important decision is whether the FPC recommends "program participation" for the inmate at Everglades Correctional Institute in Miami (also known as the "FIU Corrections Transition Program"); Sumter CI in Bushnell; or Wakulla CI in Crawfordville near Tallahassee. Wakulla is the state's first "Faith-Based Prison." Successful completion of these very specialized and intensive re-entry programs is essentially a "condition-precedent" to any eventual parole release.

## PAROLE FOR POST-GRAHAM DEFENDANTS?

Recent developments have caused parole-sentencing to reemerge as a key legal and policy issue in Florida. This revival was triggered by questions that have arisen in the legal field surrounding the sentencing for juvenile felony offenders and whether the schemes in place protect the constitutional rights of this class. It appears that the Florida courts are moving towards the reimplementation of parole sentencing for juvenile felony offenders.

Debate surrounding this particular issue was brought into motion following the U.S. Supreme Court's decision in *Graham v. State*. This case involved a petitioner, Terrance Jamar Graham, who, at the age of 16, committed armed burglary and attempted robbery.[25] Under a plea agreement, the Florida trial court sentenced Graham to concurrent three-year terms of probation and withheld adjudication of guilt.[26]

Graham's probation officer filed an affidavit with the trial court that stated that Graham had violated the conditions of his probation by committing other crimes.[27] The trial court adjudicated him guilty of the earlier charges, revoked his probation and sentenced him to life in prison for the burglary.[28] This life sentence for a non-capital felony gave the defendant no possibility of release unless he was granted executive clemency.[29] Graham challenged the constitutionality of his sentence under the Eighth Amendment's Cruel and Unusual Punishment Clause but the First District Court of Appeal affirmed, concluding that his sentence was not disproportionate to the crime.[30] The Florida Supreme Court denied review and the U.S. Supreme Court granted certiorari.[31]

Writing for the majority, Justice Kennedy relied on precedent to reaffirm the notion that juvenile offenders are less deserving of the most severe punishments due to their lessened culpability.[32] The Court also noted that it has been 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.[33] Based on these findings the Court concluded that juvenile offenders who did not kill or intend to kill have a twice diminished moral culpability.[34] The Court also found no justification for life without parole sentencing for juvenile non-homicide offenders through the four tenets of penological theory (retribution, deterrence, incapacitation and rehabilitation).[35] The Court held that the imposition of life without parole sentences on juvenile offenders who did not commit homicide is prohibited by the Eighth Amendment.[36] In making this determination, the Court stated that a state is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime but they must give these types of defendants "some meaningful opportunity to obtain release after demonstrated maturity and rehabilitation."[37]

In 2012, the Supreme Court heard another case dealing with the parole eligibility of juvenile felony offenders. In *Miller v. Alabama* the Court heard challenges brought by petitioners in Alabama and Arkansas who had each received life sentences without the possibility of parole following their convictions for capital felonies.[38] The petitioners in each of these cases had been tried as adults despite the fact that they were 14 years old at the time of the commission of their crimes.[39] The trial courts had imposed statutorily mandated sentences of life imprisonment, without the possibility of parole, on each of the petitioners.[40] Both of the petitioners challenged the constitutionality of their sentences, arguing that sentencing schemes that mandate life in prison without parole for juvenile homicide offenders violated the Eighth Amendment.[41]

The Court reaffirmed the mismatches between the culpability of juvenile offenders and the severity of a penalty as well as the diminished penological justifications for imposing the harshest sentences on juvenile offenders.[42] The Court concluded that since the imposition of mandatory life-without-parole sentences on juvenile homicide offenders precludes the sentencer from taking into account the offender's age and the characteristics attendant to it, the practice violates the principles of proportionality and is unconstitutional under the Eighth Amendment.[43]

The *Miller* precedent immediately created a predicament in the Florida legal system, where a mandatory sentencing scheme was in place for capital felonies. Effective in October, 1995, Florida law provided two sentencing options for

persons convicted of a capital felony--death or life imprisonment without the possibility of parole.[44] The statute requires that postconviction proceedings be held to determine if the defendant should be punished by death, but no postconviction deliberation is required for a life sentence.[45]

The issue surrounding the incongruity between section 775.082 (1) of the Florida Statutes and the Supreme Court's decisions in *Graham* and *Miller* was addressed in cases brought before the First, Second and Third District Courts of Appeal.[46] However, the majority opinions in these cases failed to provide definitive direction in regard to available alternatives for the sentencing of juveniles convicted of capitol felonies in Florida.[47] However, several cases have recently emerged in which the Florida courts have addressed this issue directly and focus has been placed on parole-sentencing as a viable alternative.

In *Horsley v. State*, the Fifth District Court of Appeal applied the principle of statutory revival and reverted to the 1993 version of section 775.082 of the Florida Statutes to establish a proper sentencing criteria for juveniles convicted of capital felonies.[48] The Court held that the Supreme Court's decision in *Miller* invalidated this Florida statute and the only sentence now available in the state for a charge of capital murder committed by a juvenile is life imprisonment with possibility of parole after 25 years.[49] The question of whether the *Miller* precedent operates to revive the prior sentence of life with parole eligibility after 25 years previously contained in that statute has been certified as a question for the Florida Supreme Court.[50]

On September 17, 2013 , the Florida Supreme Court heard oral arguments in the cases of *Henry v. State* and *Gridine v. State*, each of which involved the question of whether the *Graham* precedent is violated when concurrent sentences that became the functional equivalent of a life sentence are imposed on a juvenile for non-homicide offenses.[51] The petitioners in each of these cases urged the Court to reinstate parole-sentencing for juvenile non-homicide offenders.[52] The Florida Association of Criminal Defense Lawyers filed an amicus curiae brief in support of the petitioners and argued that the Court should adopt a new rule that would permit a sentencing court to review a juvenile's conviction and sentence for a non-homicide crime sometime later in their life after they have developed and fully formed.[53] This rule would allow the sentencing court to review the offender's progress in prison and determine whether they have been rehabilitated and are "fit to reenter society."[54]

It is not yet certain how Florida courts will ensure that juvenile offenders are provided with a "meaningful opportunity" for release in compliance with *Graham*. However, this debate over an adequate remedy has brought parole-sentencing back into strong consideration within the legal realm.

## DIFFERENT THAN "EXECUTIVE CLEMENCY"

Although not mutually exclusive, parole is different than "executive clemency," which is a power vested in the Governor through the State's Constitution.[55] "Executive Clemency" may include a commutation of sentence which requires approval by the Governor and two members of the Florida Cabinet.[56] Since 1980, there have been 147 commutations of sentences granted by six governors.[57]

Inmates must serve one-third of their sentence, or one-half if they have a minimum mandatory sentence, before being eligible to apply for executive clemency.[58]

[1] Fla. Stat. §947.002 (5) (1997).
[2] *Id.*
[3] Florida Parole Commission, History of the Florida Parole Commission: Seven Decades of Service to the State. https://fpc.state.fl.us/History.htm (last visited Sept. 19, 2013); In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So. 2d 848, 849 (Fla. 1983).
[4] Stop Turning Out Prisoners Act, ch. 294, §4(1), 1995 Fla. Laws 2717, 2718; Fla. Stat. §775.082(1) (2011).
[5] Fla. Stat. §947.02 (1997); Fla. Stat. §947.03 (2000); Fla. Stat. §947.04 (2001).
[6] Fla. Stat. §947.03 (1) (2000).
[7] Fla. Stat. §947.04 (1) (2001).
[8] Fla. Stat. §947.06 (2010).
[9] Fla. Admin. Code Ann. r. 23-21.006 (2010).
[10] Fla. Admin. Code Ann. r. 23-21.012 (2006).
[11] Fla. Admin. Code Ann. r. 23-21.013 (2013); Fla. Stat. §947.174 (2013).
[12] Fla. Admin. Code Ann. r. 23-21.015 (2006).
[13] Fla. Admin. Code Ann. r. 23-21.0155 (2013).
[14] Fla. Admin. Code Ann. r. 23-21.0161 (2006).
[15] Fla. Stat. §947.19 (1997).
[16] Email from Molly Koon Kellogg, Director of Communications, Florida Parole Commission, to author (Aug. 29, 2013, 15:07 EST) (on file with author).
[17] Act of June 26, 1978, ch. 417, §13(2), 1978 Fla. Laws 1381, 1381; Fla. Stat. §947.005 (8) (2010); Fla. Stat. §947.165 (1) (2013); Fla. Stat. §947.172 (1997).
[18] Act of June 26, 1978, ch. 417, §12(1), 1978 Fla. Laws 1381, 1381; Fla. Stat. §947.001 (1978); Fla. Stat. §947.165 (2013).
[19] *Id.*
[20] FPC Policy Memorandum entitled "Objective Parole Guidelines" by and for the Florida Parole Commission (undated) (on file with the Florida Parole Commission).
[21] Fla. Stat. §947.172 (1997); Fla. Stat. §947.173 (1973).
[22] Fla. Stat. §947.18 (2008).
[23] *Id.*
[24] Ch. 2013-119, Laws of Fla.
[25] *Graham v. Florida*, 130 S. Ct. 2011, 2018 (U.S. 2010).
[26] *Id.*
[27] *Id.* at 2019.
[28] *Id.* at 2020.
[29] Fla. Stat. §921.002(1)(e) (2003).
[30] 982 So. 2d 43, 53 (2008), reviewed, 130 S. Ct. 2011 (U.S. 2010).
[31] 990 So.2d 1058 (2008); 129 S.Ct. 2157 (2009).
[32] *Graham*, 130 S. Ct. at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 556 (U.S. 2004)).
[33] *Graham*, 130 S. Ct. at 2026 (quoting

**SEE PAGE 28**

REGGIE GARCIA Esq. is an AV-rated lawyer and state government lobbyist in Tallahassee. A member of FACDL, he represents clients in parole, executive clemency and other criminal justice matters before Florida's executive and legislative branches. He is a 1985 graduate of the UF Fredric C. Levin College of Law. He acknowledges use of public information from the FPC and thanks FSU Law student James T. Baumann for assisting with editing, drafting and footnotes. The author also thanks Bryan S. Gowdy, Esq., the Jacksonville lawyer who represented Mr. Graham, for his review of the Post-*Graham* section.