18-7803

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HEGSTROM
Petitioner

v.

STATE OF FLORIDA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Dennis Hegstrom DC# 062463
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QUESTIONS PRESENTED FOR REVIEW

Dennis Hegstrom is currently serving a mandatory life sentence, with the possibility of parole after 25 years, for a homicide he committed in 1977 when he was just 7 months past his 18th birthday. As it stands, he has served roughly 42 years on his life sentence. Since 2001, he has been interviewed by Florida's parole commission four times and has been denied parole each time; his current Presumptive Parole Release Date ("PPRD") is 2089. Although Hegstrom may have a *possibility* of obtaining parole, it is highly unlikely that he will ever receive it given that 2089 is well beyond his life expectancy; and this is true despite his demonstrated maturity and rehabilitation in the decades since his crimes.

In light of recent advances in neuroscience and developmental psychology, demonstrating that there is no difference between a 17-year-old and a late adolescent in terms of development, he asks this Court the following two questions:

(1) Is It Time to Extend the Eighth Amendment Protections Enunciated in *Miller v. Alabama* to Late Adolescent Homicide Offenders Like Hegstrom (*i.e.*, 18 to 21-year-olds), Who Are Serving Mandatory Life Sentences With No Hope of Future Release; If So,

(2) Should *Miller* Also Be Extended to Late Adolescent Homicide Offenders Whose Life Sentences Are Parole-Eligible, Where the Parole System Does Not Consider as a Mitigating Factor an Offender's Youth and Immaturity at the Time of the Offense and Does Not Afford Offenders a Meaningful Opportunity to Obtain Release Based on Demonstrated Maturity and Rehabilitation?

INTERESTED PARTIES

There are no interested parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Dennis Hegstrom, *pro* se, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his motion to correct unconstitutional sentence filed in the state trial court in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. The denial of his motion was rendered on November 3, 2017, and affirmed on appeal by the Third District Court of Appeal on November 7, 2018.

OPINIONS BELOW

The unpublished decision of the highest state court to review the merits of Hegstrom's motion to correct unconstitutional sentence appears in Appendix A-1.

The order of the Miami-Dade County Circuit Court summarily denying Hegstrom's motion appears in Appendix A-2.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Part III of the Rules of the Supreme Court of the United States. The decision of the Third District Court of Appeal, affirming the state trial court's denial of Hegstrom's motion to correct unconstitutional sentence, was rendered on November 7, 2018. This petition is timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Hegstrom's question involves the Eighth Amendment to the United States Constitution. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

STATEMENT OF THE CASE

In 1977, Hegstrom was indicted with robbery and first-degree murder. At the time of the offenses, he was 18 years and 7 months old. He entered a plea of not guilty to both charges and proceeded to jury trial. On November 10, 1977, a jury found him guilty as charged. Following the jury's verdict, the trial court sentenced him to a mandatory term of life imprisonment with the possibility of parole after 25 years on the murder charge and to a consecutive 100-year sentence on the robbery charge. Appendix A-3 at 1; Appendix A-2 at 1.

Hegstrom appealed his judgment of conviction and sentence to Florida's Third District Court of Appeal. On October 7, 1980, the Third District affirmed the conviction and sentence on the murder charge, but vacated the conviction and sentence on the robbery charge due to double jeopardy implications. *See Hegstrom v. State*, 388 So. 2d 1308 (Fla. 3 DCA 1980). The Florida Supreme Court, however, reversed the Third District's decision and remanded with instructions for the trial court to reinstate Hegstrom's conviction on the robbery charge, but not the sentence. *See State v. Hegstrom*, 401 So. 2d 1343 (Fla.1981). The life sentence on the murder charge is the only sentence that remains in full force.

Following this Court's decisions in *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), Hegstrom filed a *pro se* motion to vacate his mandatory life sentence on the murder charge. He made a two-fold argument .He argued (1) that *Miller* should be applied to him even though he was over the age of 18 at the time of the homicide, and (2) that *Miller* should be applied to him even though his mandatory life sentence is parole-eligible after 25 years. Appendix A-3.

With regard to his first argument, Hegstrom contended that although he was over the age of 18 at the time of the homicide, he should be afforded the same Eighth Amendment protections as that afforded to those under 18. In support, he cited recent scientific articles concerning adolescent brain development to show that there was no real difference between him, an 18-year-old offender, and a 17-year-old offender, in terms of development. He also quoted this Court's decision in *Roper v.*

Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), wherein Justice Kennedy acknowledged that "[t]he qualities that distinguish juveniles from adults *do not disappear when an individual turns 18.*" *Id.*, 543 U.S. at 569-70 (emphasis added). Appendix A-3 at 2-13.

Regarding the second part of his argument, Hegstrom contended that although his life sentence is parole-eligible, it still violates the Eighth Amendment's ban on cruel and unusual punishment. In support, he showed that Florida's parole system does not consider as a mitigating factor a late adolescent offender's youth and immaturity at the of the offense and does not afford offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. He explained that in his case, Florida's parole commission gave him a Presumptive Parole Release Date ("PPRD") of 2092—a date that is well beyond his life expectancy—and thus made it clear that he should not expect parole in his lifetime.[1] He explained that the commission treated him in this manner despite the undeniable maturation and rehabilitation he has demonstrated in the decades since his crime. Appendix A-3 at 2-13.

As relief, Hegstrom sought a resentencing hearing pursuant to chapter 2014-220, Laws of Florida, to address the Eighth Amendment principles articulated in *Graham* and *Miller*.[2] In his post-conviction motion, Hegstrom outlined the extensive

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[1] After establishing Hegstrom's PPRD at 2092, the parole commission has conducted four subsequent parole interviews. As a result of the subsequent interviews, the parole commission has reduced Hegstrom's PPRD by a mere 3 years, specifically to 2089. And that is where his PPRD currently stands.

[2] In the wake of *Miller*, the Florida Legislature passed Chapter 2014-220, Laws of Florida, codified in Sections 775.082, 921.1401, and 921.1402 of the Florida Statutes, in order to address the concerns of *Miller*.

mitigating evidence he could present at a resentencing hearing which would support a lesser sentence. Specifically, he explained that if he was afforded an individualized resentencing hearing, he could demonstrate not only that he was young and immature at the time of his offense, but also that he was intoxicated to the extent that he blacked out when he committed the crime; that he grew up in a dysfunctional home environment from which he could not extricate himself; and that he had never before been arrested, much less convicted, of any violent offenses prior to the offenses in this case. And he explained that all of these factors were not considered by the sentencing court because life was mandatory under § 775.082(1), Fla. Stat. (1977). Appendix A-3 at 2-13.

Shortly after Hegstrom filed his motion, the state trial court denied his request for resentencing. In so doing, the court noted that Hegstrom was requesting resentencing under *Miller* even though he was over 18 at the time of his crime. And the court found that,

> Hegstrom has presented... extensive argument regarding his youthfulness and intoxication at the time of his offense, his difficult childhood, and his lack of violent prior criminal history. Hegstrom believes that he is able to show substantial development in maturity and rehabilitation, and has attached proof of his participation in programs available in prison and letters of support. He also attached scholarly articles on the development of the juvenile brain.

Appendix A-2 at 2-3.

Nonetheless, the court concluded that Hegstrom was not entitled to be resentenced. The court claimed that Hegstrom failed to "cite to any case where

Miller/Graham relief has been afforded where the triggering offense occurred after the age of eighteen." Appendix A-2 at 3.

Hegstrom appealed the denial of his motion to Florida's Third District Court of Appeal. In his initial brief, Hegstrom reiterated his position. With the assistance of a public defender, he explained that an 18-year-old offender has the same impulsivity and diminished culpability as a juvenile. He cited recent scientific articles on adolescent brain development to show that an 18-year-old's brain is virtually indistinguishable from a 17-year-old's brain in terms of development. And he argued that, just as it is unconstitutional to sentence a 17-year-old offender to an automatic life sentence for a homicide offense, so is it unconstitutional to sentence an 18-year-old offender to a mandatory life sentence. He argued that in light of recent advances in neuroscience and developmental psychology, imposing a mandatory life sentence on an 18-year-old offender constitutes disproportionate punishment in violation of the Eighth Amendment. In addition to the studies on neuroscience and developmental psychology, he also cited a recent federal court decision extending *Miller* to an 18-year-old offender. *See Cruz v. United States*, 2018 U.S. Dist. LEXIS 52924 (U.S. Dist. Conn., March 29, 2018) (extending *Miller* to an 18-year-old homicide offender). As relief, he requested that the Third District Court of Appeal reverse the case for a hearing where he could better develop the record.

On November 7, 2018, the Third District Court of Appeal issued a decision *per curiam* affirming the state trial court's denial of his motion for resentencing under *Miller*. Although the Third District did not write an opinion explaining its

decision, it cited several Florida appellate decisions to support its position, along with this Court's recent decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726, 198 L. Ed. 2d 186 (2017). In so doing, the Third District agreed with the trial court that *Graham* and *Miller* do not apply to those who were over the age of 18 at the time of their crime. The Third District also concluded that *Graham* and *Miller* do not apply to life sentences that are parole-eligible. Appendix A-1 at 2.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. In Light of Recent Advances in Neuroscience and Developmental Psychology, It's Time to Extend *Miller v. Alabama* to Late Adolescent Homicide Offenders (*i.e.*, 18 to 21 year-olds) Who Are Serving Mandatory Life Sentences with No Hope of Future Release.

A. Constitutional Developments in the Treatment of Juveniles by the Criminal Justice System.

In *Roper*, this Court held that the death penalty cannot be imposed on juvenile offenders. *Id.*, 543 U.S. at 575. The Court reasoned that the "death penalty is reserved for a narrow category of crimes and offenders," and that "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

In *Graham*, this Court held that the Eighth Amendment is violated when juveniles convicted of non-homicide offenses are sentenced to life imprisonment without a meaningful opportunity to obtain release. *Id.*, 560 U.S. at 75. The Court explained that while the state is not required to release a juvenile during his natural life, the state is forbidden "from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

In *Miller*, this Court held that the Eighth Amendment prohibits the imposition of a mandatory sentence of life imprisonment without the possibility of parole for those under the age of 18 at the time of their crime, including those convicted of homicide. *Id.*, 567 U.S. at 465. The Court explained that a judge must have the opportunity to look at all of the circumstances involved before determining that life without the possibility of parole is the appropriate penalty. *Id.* at 479.

And most recently, in *Montgomery v. Louisiana*, this Court held that because

Miller announced a new substantive rule of law, it must be applied retroactively to cases on collateral review. 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

Roper, *Graham*, *Miller*, and *Montgomery* are all rooted in the same idea: that "children are different," *Miller*, 567 U.S. at 481, and because they are different, they should be treated differently when they enter the criminal justice system. In light of a child's diminished culpability and capacity for change, this Court noted that juveniles "'are less deserving of the most severe punishments,'" *id.* at 471 (quoting *Graham*, 560 U.S. at 68), and the occasion for imposing the harsh sentence of life in prison with no hope of future release "will be uncommon," *id.* at 479. This is because the characteristics of youth—"transient rashness, proclivity for risk, and inability to assess consequences"—not only lessens a child's "moral culpability" but also "enhances the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 472 (quoting *Graham*, 560 U.S. at 68).

"[D]evelopments in psychology and brain science," this Court explained, "continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. at 68. While most adults are able to appreciate the risks and consequences of their behavior, youth, on the other hand, "is a time of immaturity, irresponsibility, impetuousness, and recklessness." *Miller*, 567 U.S. at 476 (quotation marks and citation omitted). Equally important, youth is "a condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* (quotation marks and citation omitted).

Relying on scientific studies, this Court explained that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Miller*, 567 U.S. at 471 (quotation marks and citation omitted). The actions of a juvenile "are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Graham*, 560 U.S. at 68 (quotation marks and citation omitted). And because "a greater possibility exists that a minor's character deficiencies will be reformed," it "would be misguided" to treat a juvenile offender in the same fashion as an adult. *Id.* (quotation marks and citation omitted).

Ultimately, the idea of treating juvenile offenders differently when they enter the criminal justice system is based, at least in part, on "'the evolving standards of decency that mark the progress of a maturing society.'" *Miller*, 567 at 469-470 (internal quotation marks omitted (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). In other words, most individuals in today's society would agree that it is simply indecent to treat an immature, irresponsible, and impetuous 17-year-old as if they were a fully mature adult.

B. Because a Late Adolescent's Brain is No Different from A 17-Year-Old's Brain In Terms Of development, t he Evolving Standards of Decency demand that Late Adolescents be Treated the Same as Juveniles When They Enter the Criminal Justice System.

Hegstrom understands that this Court has previously drawn the line at 18. *See Roper*, 543 U.S. at 574 (explaining that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood");

Miller, 567 U.S. at 465, 471. Nonetheless, in light of recent advances in neuroscience and developmental psychology which occurred post *Roper/Miller*, he submits that it is time to extend *Miller* to late adolescent offenders like himself, who are serving mandatory life sentences with no hope of future release.

In 2016, Dr. Laurence Steinberg, an expert on adolescent brain development and professor of psychology at Temple University, published a very telling article on adolescent brain development. During the study, Dr. Steinberg, along with many other renowned experts, examined more than 5,000 individuals between ages 10 and 30 years from 11 countries in Africa, Asia, Europe and the Americas. In so doing, these experts found that although there were some variations in the magnitude of the observed age trends, the developmental patterns were largely similar in the 5,000 individuals across all 11 countries.[3]

After outlining the specific methods and procedures used during the study, Dr. Steinberg explains that "self-regulation develops linearly and gradually over the course of adolescence, reaching a plateau somewhere during the mid-20s, whereas reward seeking follows an inverted U-shaped pattern, increasing between preadolescence and late adolescence, *peaking at around age 19*, and then declining as individuals move into and through their 20s."[4] Dr. Steinberg continued: "regardless of where it was measured in this large international sample, sensation

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[3] *See* Steinberg L, Icengole G, Shulman EP, *et. al.*, *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation.* Dev. Sci. 2017;00:e12532. Doi: 10.1111/desc.12532 (accepted October 18, 2016).

[4] *Id.* at 11 (emphasis added).

seeking is higher during middle and late adolescence than before or after."[5]

Thus, the results of the study "are consistent with portrayals of adolescence as a time of heightened sensation seeking in the face of still developing self-regulation, *a combination that has been linked to the greater prevalence in risk taking during adolescence than before or after.*"[6] In other words, "adolescence is a time when individuals are inclined to pursue exciting and novel experiences *but have not yet fully developed the capacity to keep impulsive behavior in check.*[7]

In light of Dr. Steinberg's findings, it seems only right—or decent, if you will—to start treating late adolescent offenders (*i.e.,* 18 to 21-year olds) the same as juveniles. Indeed, when recent scientific advances are considered, late adolescents should be afforded the same Eighth Amendment protections as that afforded to juveniles when they enter the criminal justice system. It is not insignificant that, based on Dr. Steinberg's findings, an 18-year-old offender, like Hegstrom, would have been more likely to make an impulsive and bad decision than, say, a 17-year-old. And yet Hegstrom, the 18-year-old offender, is the one being denied Eighth Amendment protections.

This Court has already recognized that the "[p]arts of the brain involved in behavior control *continue to mature through late adolescence,*" *Graham*, 560 U.S. at 68 (emphasis added), and "[t]he qualities that distinguish juveniles from adults *do*

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[5] *Id.*

[6] *Id.* at 12 (emphasis added).

[7] *Id.* (emphasis added).

not disappear when an individual turns 18." *Roper*, 543 U.S. at 569-70 (emphasis added). Dr. Steinberg's most recent study simply confirms what this Court seems to have already known—that there is no real difference between a 17-year-old and a late adolescent in terms of development. The next logical step, then, is to extend *Miller* to late adolescent offenders like Hegstrom, who are serving mandatory life sentences with no hope of future release.

C. Increased Understanding of Adolescent Brain Development Has Led to Both State and Federal Legislators Creating Greater Restrictions and Protections for Late Adolescents in a Range of Areas of The Law, and Several Other Countries have begun to treat Late Adolescents Similar to the Way They Treat Juveniles. It Is Time for the Criminal Justice System in America to Follow Suit.

The trend of treating late adolescents differently from adults goes beyond the appropriate punishment in criminal cases. Indeed, many experts, legal professionals, and even elected officials are now recognizing that individuals in late adolescence are in many ways developmentally closer to their peers under 18 than to adults, who are fully neurologically developed. In response to that understanding, both State and Federal legislators have created not only greater restrictions but also protections for late adolescent offenders in a range of areas of the law.

In 1984, for example, the U.S. Congress passed legislation which incentivized states to set their legal age for alcohol purchases at age 21. *See* 23 U.S.C. § 158 (1984). Another noteworthy example is how, in recent years, several states (including California, Hawaii, New Jersey, Maine, and Oregon) have raised the

legal age to purchase cigarettes to age 21.[8] Equally significant, many car rental companies have set minimum rental ages at 20 or 21, and imposed higher rental fees for individuals under the age of 25.[9]

Moreover, the Federal Government has extended additional protections to late adolescents. Under the Free Application for Federal Student Aid Act (FASFA), the Federal Government considers individuals under the age of 23 as legal dependants of their parents.[10] Similarly, the Federal Revenue Service allows students under the age of 24 to be dependants for tax purposes.[11] And the Affordable Care Act allows individuals under the age of 26 to remain on their parents' health insurance.[12]

The trend is clear: late adolescents, like juveniles, are different from adults, and they should be treated accordingly. They *can't* buy alcohol. They *can't* buy cigarettes in some states. They *can't* rent cars at some of the biggest companies in America. And yet they *can* receive a sentence of life in prison with no hope of future release—a sentence that has been described by this Court as the "harshest possible penalty" for a young person. *Miller*, 567 U.S. at 489. This defies reason and common

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[8] Jenni Bergal, *Oregon Raises Cigarette-buying Age to 21*, WASH. POST, (August 18, 2017), https://www.washingtonpost.com/national/health-science/oregon-raises-cigarette-buying-age-to-21/2017/08/18/83366b7a-811e-11e7-902a-2a9f2d808496 story.html?utm term= 132d118c0d10.

[9] *See, e.g., What are Your Age Requirements for Renting in the US and Canada*, ENTERPRISE.COM, https://www.enterprise.com/en/help/faqs/car-rental-under-25.html; *Rest rictions and Surcharges for Renters under 25 Years of Age*, BUDGET.COM, https://www.budget.com/budgetWeb/html/en/common/agePopUp.html; *Under 25 Car Rental*, HERTZ.COM, https:/www.hertz.com/rentcar/misc/index.jsp?targetPage=Hertz Renting to Drivers Under 25.jsp.

[10] *See Dependency Status*, FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/fafsa/filling-out/dependancy.

[11] *See Dependants and Exemptions 7*, I.R.S., https://www.irs.gov/fags/filling-requirements-status-dependants-exemptions/dependants-exemptions-dependants-exemptions-7; 26 U.S.C. § 152 (2008).

[12] 42 U.S.C. § 300gg-14 (2017).

sense, and offends "'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 469-470 (quoting *Estelle*, 429 U.S. at 102).

It is time to start treating late adolescent offenders the same way juveniles are treated when they enter the criminal justice system. It is the right thing to do; it is the decent thing to do. Several other countries—like England, Finland, France, Germany, Italy, Sweden, and Switzerland—have all started to take a more broad approach in the treatment of late adolescents who commit crimes, treating 18 to 21-year-olds similar to those under the age of 18.[13]

It is time for the criminal justice system in America to follow suit.

[13] Ineke Pruin & Frieder Dunkel, TRANSITION TO ADULTHOOD & UNIV. OF GRIEFSWALD, BETTER IN EUROPE? EUROPEAN RESPONSES TO YOUNG ADULT OFFENDING: EXECUTIVE SUMMARY 8-10 (2015).

II. Because *Miller v. Alabama* Should be Extended to Late Adolescent Homicide Offenders like Hegstrom, It Should Also be Extended to those whose Mandatory Life Sentences Are Parole-Eligible, where the Parole System Does Not Consider as a Mitigating Factor an Offender's Youth and Immaturity at the Time of Their Offense and Does Not Afford Offenders a Meaningful Opportunity to Obtain Release Based on Demonstrated Maturity and Rehabilitation.

If this Court concludes that *Miller* should be extended to late adolescent homicide offenders like Hegstrom, then it should also conclude that *Miller* invalidates a parole system, like Florida's, that does not consider as a mitigating factor youth and immaturity at the time of the offense and does not afford late adolescent offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. In other words, *Miller's* Eighth Amendment protections should be extended to late adolescent offenders, whose sentences are parole-eligible, where *Miller* factors are simply not part of the parole equation.

A. Some States Have Changed Their Parole Policies as Applied to Juvenile and Late Adolescent Offenders so as to Comply with *Graham* and *Miller*.

In the wake of *Graham* and *Miller*, some states have changed their parole policies as applied to juvenile and late adolescent offenders. Examples follow.

In 2014, the West Virginia State Legislature changed its parole policies as applied to juvenile homicide offenders so as to comply with *Miller*. The new legislation provides:

> (a) When a person who is serving a sentence imposed as the result of an offense or offenses committed when he or she was less than eighteen years of age becomes

> eligible for parole pursuant to applicable provisions of this code... the parole board shall ensure that the procedures governing its consideration of the person's application for parole ensure that he or she is provided a meaningful opportunity to obtain release and shall adopt rules and guidelines to do so that are consistent with existing case law.
>
> (b) During a parole hearing involving a person described in subsection (a) of this section, in addition to other factors required by law to be considered by the parole board, the parole board shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration. The board shall also consider the following:
>
> (1) A review of educational and court documents;
>
> (2) Participation in available rehabilitative and educational programs while in prison;
>
> (3) Age at the time of the offense;
>
> (4) Immaturity at the time of the offense;
>
> (5) Home and community environment at the time of the offense;
>
> (6) Efforts made toward rehabilitation;
>
> (7) Evidence of remorse; and
>
> (8) Any other factors or circumstances the board considers relevant.

W. Va. Code, § 62-12-13b (effective June 6, 2014).

The State of Missouri passed similar legislation. Following this Court's decision in *Montgomery*, 136 S. Ct. 718, wherein this Court concluded that *Miller*

applies retroactively to cases on collateral review, the Missouri Legislature amended state law to permit those who were sentenced to mandatory life without parole for offenses committed when they were juveniles to petition for parole after serving 25 years. *See* Mo. Rev. Stat. § 558.047. The amended law provides, in pertinent part, that:

> Any person sentenced to a term of imprisonment for life without eligibility for parole before August 28, 2016, who was under eighteen years of age at the time of the commission of the offense or offenses, may submit to the parole board a petition for a review of his or her sentence... after serving twenty-five years of incarceration on the sentence of life without parole.

Mo. Rev. Stat. § 558.047.1.1.

When a juvenile offender petitions the board for a review, the Missouri statute requires the parole board to hold a hearing to determine whether parole is appropriate. *See* Mo. Rev. Stat. § 558.047.4. It also enumerates factors that the board "shall consider":

> (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;
>
> (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;
>
> (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;
>
> (4) The person's institutional record during incarceration; and

> (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing.

Mo. Rev. Stat. § 558.047.5.

Significantly, the Missouri statute also incorporates by reference the following additional factors that the board must consider (*see id.*):

> (1) The nature and circumstances of the offense committed by the defendant;
>
> (2) The degree of the defendant's culpability in light of his or her age and role in the offense;
>
> (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;
>
> (4) The defendant's background, including his or her family, home, and community environment;
>
> (5) The likelihood for rehabilitation of the defendant;
>
> (6) The extent of the defendant's participation in the offense;
>
> (7) The effect of familial pressure or peer pressure on the defendant's actions;
>
> (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
>
> (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and
>
> (10) A statement by the victim or the victim's family member as provided by [other specified statutes].

California is yet another state that changed its parole policies in the wake of *Graham* and *Miller*. But significantly, they applied the changes to not only juvenile offenders, but also to those who were 25 years of age or under at the time of their crimes. California's legislation states:

> (c) When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

See West's Ann. Cal. Penal Code § 4801 (effective January 1, 2018).

B. Many Other States, like Florida, Have Done Nothing to Bring Their Parole Policies, as Applied to Juvenile and Late Adolescent Offenders, Into Compliance with *Graham* and *Miller*.

While West Virginia, Missouri, and California have made substantial changes to their parole policies as applied to juvenile and late adolescent offenders, many other states, like Florida, have done nothing of the sort.

In *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), Justice Pariente, writing for the majority, explained how the parole process in Florida works, and she did so quite comprehensively:

> An inmate who is eligible for parole has an initial interview with a hearing examiner. That examiner uses a salient factor score-a numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome-as well as the statutory severity of the inmate's offense to determine a corresponding range of months on a matrix

that automatically indicates a range of presumptive parole release dates. *See* [*Florida Parole Comm'n v. Spaziano*, 48 So. 3d 714, 722 n.7 (Fla. 2010)]. The presumptive parole release dates are the earliest dates an offender may be released from prison as determined by objective parole guidelines. *Id.*

Under Florida statutory law, the objective parole criteria applied by the Commission must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." § 947.002, Fla. Stat. (2015). The hearing examiner may consider the aggravating and mitigating circumstances—none of which provide for the level of consideration of the diminished culpability of youth at the time of the offense as sentencing judges now consider post-*Miller*—that warrant a decision outside the given matrix time range, but must provide written justification for altering the presumptive parole release date. *See* § 947.172(3), Fla. Stat. (2015); *see also Spaziano*, 48 So. 3d at 723. The hearing examiner then makes a written recommendation to the Commission of a presumptive parole release date, which is reviewed by a panel of no fewer than two commissioners appointed by the chair. § 947.172(2), Fla. Stat. (2015).

Subsequent parole interviews are conducted to determine whether information has been gathered that could affect the presumptive parole release date. § 947.174, Fla. Stat. (2015). When the inmate's presumptive parole release date nears and if the inmate's institutional conduct and parole release plan are satisfactory, the presumptive parole release date becomes the effective parole release date. § 947.1745, Fla. Stat. (2015). The Commission then engages in a final review process to determine if release is still appropriate and will authorize or modify the effective parole release date accordingly. *Id.*

...

> In most respects, a sentence of life with the possibility of parole for first-degree murder, based on the way Florida's parole process operates under the existing statutory scheme, actually resembles a mandatorily imposed life sentence without parole that is not "proportionate to the offense and the offender." *Horsley* [*v. State*, 160 So. 3d 393, 406 (Fla. 2015)] Based on Florida's objective parole guidelines, an individual who was convicted of a capital offense ... will have a presumptive parole release date of anywhere from 300 to 9,998 months in the future. Fla. Admin. Code R. 23-21.009 (2014). Importantly, the statute requires "primary weight" in the consideration of parole to be given "to the seriousness of the offender's present offense ... and the offender's past criminal record." § 947.002, Fla. Stat. (2015).
>
> If an offender convicted of first-degree murder has a high salient score, that offender's range of months for the presumptive parole release date could span from hundreds of months to nearly ten thousand months. Fla. Admin. Code R. 23-21.009 (2014). This range of months, which encompasses hundreds of years, could be lawfully imposed without the Commission on Offender Review even considering mitigating circumstances. The Commission is only required to consider mitigating and aggravating circumstances if it wishes to impose a presumptive parole release date that falls outside the given range of months. Fla. Admin. Code R. 23-21.010 (2010). Further, the enumerated mitigating and aggravating circumstances in rule 23-21.010 of the Florida Administrative Code, even if utilized, do not have specific factors tailored to juveniles. In other words, they completely fail to account for *Miller*.
>
> Using Florida's objective parole guidelines, then, a sentence for first-degree murder under the pre-1994 statute is virtually guaranteed to be just as lengthy as, or the "practical equivalent" of, a life sentence without the possibility of parole.

Atwell, 197 So. 3d at 1047-48 (citations and quotations in original), *overruled by Franklin v. State*, 43 Fla. L. Weekly S556 (Fla. November 8, 2018).

In this case, Hegstrom's life sentence, although it is parole eligible, "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, [and] no hope." *Graham*, 130 S. Ct. at 2032-33. Since 2001, Hegstrom has been interviewed by the Commission four times, specifically in 2001, 2006, 2011, and 2013. Following his initial interview procedure, the Commission set his PPRD at 4/30/2092. Since then, despite Hegstrom's above-satisfactory disciplinary record and above-satisfactory program participation, which he outlined in detail in his request for resentencing under *Miller*, the Commission has reduced his PPRD by a mere 3 years, *i.e.*, to 2089, and that is where it currently stands. Thus it is clear that Florida's parole commission does not intend to afford him any "chance for fulfillment outside prison walls." *Graham*, 130 S. Ct. at 2032-33.

As Hegstrom's case makes clear, it is virtually impossible to get paroled on a life sentence in Florida, even for those who were young and immature at the time of their offense and who have demonstrated both maturity and rehabilitation during their time in prison.

Statistics show that in FY 2017-18, there were 4,275 parole eligible inmates in Florida. Out of those 4,275, the Commission made 1,499 parole decisions. In so doing, the Commission granted parole to just 14 inmates. Sadly, that is less than half a percent.[14] Thus, parole-eligible sentences in Florida are parole-eligible in name only, regardless of the age of the offender.

Accordingly, because Florida and many other states offer no special

[14] 2018 FCOR Annual Report, https:/www.fcor.fl.us/reports/annual%202018%20WEB.pdf.

protections to late adolescent offenders like Hegstrom, *Miller* should be extended to late adolescent offenders, who are serving mandatory life-with-parole sentences, but have no real hope of future release.

C. This Court's Holding in *Virginia v. LeBlanc* Did Not Answer the Constitutional Question Presented In This Case.

In rejecting Hegstrom's request for resentencing under *Miller*, Florida's Third District Court of Appeal cited *LeBlanc* for the proposition that *Miller* does not apply to life sentences that are parole-eligible. Appendix A-1 at 2.

But the Third District's reliance on *LeBlanc* is misplaced. The holding in *LeBlanc* does not answer the constitutional question presented in this case—*i.e.*, whether *Miller* should be extended to late adolescent offenders like Hegstrom, who are serving parole-eligible life sentences, where the parole system does not consider as a mitigating factor an offender's youth and immaturity at the time of their offense and does not afford offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

In *LeBlanc*, this Court held that it was not objectively unreasonable for a Virginia state court to conclude that Virginia's geriatric release program, which employs normal parole factors and allows for conditional release after a defendant reaches age 60 or 65, "satisfied *Graham's* requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." *Id.*, 137 S. Ct. at 1729. Significantly, this Court did not hold that the geriatric relief afforded to Virginia state prisoners is in compliance with the Eighth Amendment. Rather, the

Court only held that the "state court ... did not diverge so far from *Graham's* dictates as to make it 'so obvious that ... there could be no fairminded disagreement about whether the state court's ruling conflicts with" Supreme Court precedent. *Id.*, 137 S. Ct. at 1729 (citation and internal quotation omitted).

In holding that the Virginia program was not a sufficiently unreasonable application of Supreme Court precedent to warrant federal habeas relief, this Court did not approve of the geriatric program in any way. *Id.*, 137 S. Ct. at 1729. In fact, the Court specified that it was *not* deciding whether Virginia's geriatric program conforms to current case law, because that was a decision that "cannot be resolved on federal habeas review." *Id.* Indeed, this Court explained that it "express[ed] no view on the merits of the underlying Eighth Amendment claim." *Id.* at 1728 (citation omitted). This Court did, however, observe that Mr. LeBlanc had a "reasonable" argument on the merits and that "perhaps the logical next step from *Graham* would be to hold that a geriatric release program does not satisfy the Eighth amendment, but perhaps not." *LeBlanc*, 137 S. Ct. at 1729 (citation and inner quotation marks omitted). The Court explained: "there are reasonable arguments on both sides." *Id.* (citations omitted). In other words, because Mr. LeBlanc was seeking federal habeas relief under 28 U.S.C. § 2254(d)(1), the merits of the underlying Eighth Amendment claim could not be resolved "in that narrow context." *Id.*

Accordingly, contrary to the Third District Court of Appeal's findings, the holding in *LeBlanc* does not answer the constitutional question presented in this

case. Because many states, like Florida, do not consider as a mitigating factor a late adolescent offender's youth and immaturity at the time of their offense and does not afford offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, this Court should extend *Miller* to such individuals.

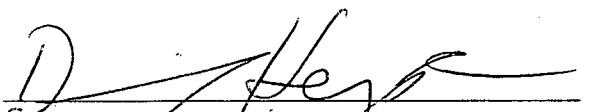
CONCLUSION

This Court has acknowledged that a juvenile offender "will on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham*, 560 U.S. at 70-71. And "[t]his reality cannot be ignored." *Id.* at 71. But isn't the same true for Dennis Hegstrom, an 18-year-old offender? While a line must be drawn somewhere, 18 is no longer acceptable in light of recent advances in neuroscience and developmental psychology. Simply put, things have evolved since this Court drew the line at 18 in *Roper* and *Miller*.

Thus, Hegstrom prays this Court will extend the Eighth Amendment protections enunciated in *Miller* to late adolescent homicide offenders like himself, who are serving mandatory life sentences with no hope of future release. He also prays this Court will extend *Miller* to late adolescent homicide offenders who are serving mandatory life sentences with parole eligibility, where the parole system does not consider as a mitigating factor youth and immaturity at the time of the offense and does not afford offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

South Bay, Florida
January 28, 2019

Respectfully Submitted,



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