No.

IN THE SUPREME COURT OF THE UNITED STATES

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BUDRY MICHEL, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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On Petition for a Writ of Certiorari to
the Supreme Court of Florida

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. The Florida Supreme Court held, contrary to the plain language of this Court, and contrary to the holdings of the high courts of other states, that this Court ruled on the merits of the underlying Eighth Amendment claim in *Virginia v. LeBlanc*, 582 U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017). The question presented is:

Whether a state court can treat a federal habeas decision of this Court as a ruling on the merits contrary to the plain language of the decision?

2. Whether former juvenile offenders sentenced to life imprisonment with parole eligibility after 25 years are afforded a meaningful opportunity to obtain release under the Eighth Amendment when parole officials are not required to consider maturity and rehabilitation or the mitigating attributes of youth?

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## PETITION FOR A WRIT OF CERTIORARI

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Budry Michel respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

## OPINION BELOW

The opinion of the state supreme court is reported as *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and is reprinted in the appendix. App. A1-A13.

## JURISDICTION

The state supreme court affirmed Petitioner's sentence on July 12, 2018. App. A1. It denied rehearing on October 24, 2018. App. A14. On January 9, 2019, Justice Thomas extended the time for filing a petition for writ of certiorari to February 21, 2019. The Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

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."

Section 1 of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law…."

Florida's juvenile sentencing statutes, sections 921.1401 and 921.1402, Florida Statutes (2014), are reprinted in the appendix at A21.

## INTRODUCTION

When this Court holds that a federal court has overstepped its bounds under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this Court often states that it is not ruling on, or even expressing a view of, the underlying constitutional claim.[1] This Court did that with unmistakable clarity in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017). After observing that there was a reasonable argument that Virginia's geriatric release program violated the Eighth Amendment

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[1] *E.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 n.3 (2018) ("Because our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue.") (citations omitted); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) ("We express no view on the merits of the underlying question outside of the AEDPA context."); *Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) ("We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy."); *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016) (stating it was expressing "no view on the merits" of the claim); *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) ("Without ruling on the merits of the court's holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse."); *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) ("Because we consider this case only in the narrow context of federal habeas review, we express no view on the merits of the underlying Sixth Amendment principle.") (quotation simplified); *White v. Woodall*, 572 U.S. 415, 420-21 (2014) ("We need not decide here, and express no view on, whether the conclusion that a no-adverse-inference instruction was required would be correct in a case not reviewed through the lens of § 2254(d)(1)."); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) ("The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial."); *Renico v. Lett*, 559 U.S. 766, 779 (2010) ("Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*.") (emphasis in original); *Smith v. Spisak*, 558 U.S. 139, 149 (2010) ("Whatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law.'") (quoting 28 U.S.C. § 2254(d)(1)).

as applied to juvenile offenders, and that "[p]erhaps the logical next step from *Graham* [*v. Florida*, 560 U.S. 48 (2010)] would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but perhaps not," *LeBlanc*, 137 S. Ct. at 1729, this Court stated (*id.*):

> These arguments cannot be resolved on federal habeas review. Because this case arises "only in th[at] narrow context," the Court "express[es] no view on the merits of the underlying" Eighth Amendment claim. *Woods*, *supra*, at ——, 135 S.Ct., at 1378 (internal quotation marks omitted). Nor does the Court "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Marshall v. Rodgers*, 569 U.S. ——, ——, 133 S.Ct. 1446, 1451, 185 L.Ed.2d 540 (2013) (per curiam ); *accord*, *Woodall*, *supra*, at ——, 134 S.Ct., at 1703. The Court today holds only that the Virginia trial court's ruling, resting on the Virginia Supreme Court's earlier ruling in *Angel*, was not objectively unreasonable in light of this Court's current case law.

Contrary to this plain language, the Florida Supreme Court held that this Court in *LeBlanc* did rule on the underlying Eighth Amendment claim. *State v. Michel*, 257 So. 3d 3 (Fla. 2018). This misconception, together with the requirement that Florida rule in lockstep with this Court on Eighth Amendment issues,[2] led the court to overrule its decision issued two years earlier that Florida's parole system fails to comply with *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 565 U.S. 1013 (2011); and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). That decision—*Atwell v. State*, 197 So. 3d 1040 (Fla. 2016)—had resulted in the release of over 55 parole-eligible juvenile offenders. App. A44. These offenders had been

[2] Art. I, § 17, Fla. Const. (stating in part: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

denied parole (most of them repeatedly), but they were able to demonstrate to a judge that they were rehabilitated and fit to reenter society; that is, they "demonstrate[d] the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

But the prison door has been shut on the remaining juvenile offenders—like Petitioner Budry Michel—whose sentences are subject to a parole process that fails to comply with *Graham*, *Miller*, and *Montgomery*. And the Florida Supreme Court's misconception of *LeBlanc* may shut the prison door on other juvenile offenders, as the court considers new issues—or reconsiders old ones—through the lens of its misconception. Accordingly, Michel respectfully requests that this Court summarily reverse the judgment of the Florida Supreme Court and remand with instructions that the court reconsider its decision in light of *LeBlanc's* plain language. Alternatively, this case presents a perfect vehicle for determining the kind of parole process that will satisfy *Graham*, *Miller*, and *Montgomery*.

## STATEMENT OF THE CASE

### 1. Florida works to comply with *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*.

In 2014, Florida amended its sentencing statutes to comply with *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 565 U.S. 1013 (2011). Ch. 2014-220, Laws of Fla., as codified in §§ 775.082, 921.1401, and 921.1402, Fla. Stat. (2014). Before sentencing a juvenile offender convicted in adult court of committing a serious offense, the judge must consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2)(a)-(j), Fla. Stat.

(2014); *see also* Fla. R. Crim. P. 3.781. App. A21-A22. These factors mirror those outlined in *Graham* and *Miller*. *See Landrum v. State*, 192 So. 3d 459, 465 (Fla. 2016) (stating that section 921.1401, Florida Statutes, codified the *Miller* factors).

If the judge imposes a life sentence, or a lengthy term-of-years sentence, the juvenile offender will be eligible for a sentence-review hearing in most cases. § 921.1402(2)(a), Fla. Stat. (2014); Fla. R. Crim. P. 3.802. App. A23-A25. If the offender committed first-degree murder and killed, intended to kill, or attempted to kill the victim, the offender is eligible for a sentence-review hearing after serving 25 years (unless the offender was previously convicted of certain felonies). §§ 775.082(1)(b)1., 921.1402(2)(a), Fla. Stat. (2014). If the offender committed first-degree murder and did not kill, intend to kill, or attempt to kill the victim, the offender is eligible for a sentence-review hearing after serving 15 years (if the sentence exceeded 15 years). §§ 775.082(1)(b)2., 921.1402(2)(c), Fla. Stat. (2014).

At the sentence-review hearing, the emphasis is on the juvenile offender's maturity and rehabilitation. § 921.1402(6), Fla. Stat. (2014). If the judge determines that the offender "has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years." § 921.1402(7), Fla. Stat. (2014).

By its terms, and under Florida's constitution, this legislation applied only to offenses committed on or after July 1, 2014. Ch. 2014-220, § 8, at 2877, Laws of Fla.;

Art. X, § 9, Fla. Const.[3] This raised the issue of what remedy, if any, would be available to the hundreds of juvenile offenders sentenced to life imprisonment, or lengthy term-of-years sentences, for offenses committed before July 1, 2014.

In March 2015, the Florida Supreme Court addressed that issue. First, the court held that *Miller v. Alabama* applied retroactively: it reversed a juvenile offender's life sentence for a first-degree murder committed in 1997.[4] *Falcon v. State*, 162 So. 2d 954 (Fla. 2015). Second, it held that lengthy term-of-years sentences violate *Graham* because they fail to provide a meaningful opportunity for release. *Gridine v. State*, 175 So. 2d 672 (Fla. 2015) (reversing 70-year sentence); *Henry v. State*, 175 So. 3d 675 (Fla. 2015) (reversing aggregate 90-year sentence). And, third, it held that the remedy for these violations would be resentencing under the new juvenile sentencing statutes. *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). It rejected the State's argument that the remedy should be the "revival" of the repealed parole statutes. *Id.* at 395. The court said the Legislature "has consistently demonstrated its opposition to parole, abolishing this practice for non-capital felonies in 1983, for first-degree murder in 1994, for all capital felonies in 1995, and for any sentence imposed under the Criminal Punishment Code in 1997." *Id.* at 407. The court said the "Legislature has made its intent clear that parole is no longer a

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[3] Article X, section 9, Florida Constitution, was amended effective January 2019 to allow the legislature to enact sentencing statutes that apply retroactively. But the Legislature has not done so with the juvenile resentencing statutes.

[4] There was no dispute that *Graham's* categorical prohibition of life sentences for juvenile nonhomicide offenders was a substantive rule that applied retroactively. *E.g.*, *St. Val v. State*, 107 So. 3d 553, 554 (Fla. 4th DCA 2013) (applying *Graham* retroactively); *Kleppinger v. State*, 81 So. 3d 547, 549-50 (Fla. 2d DCA 2012) (same).

viable option," *id.* at 395, and that it "elected to provide for subsequent *judicial* review in the sentencing court of original jurisdiction, rather than review by a parole board." *Id.* at 407 (emphasis in original).

As the court noted, parole eligibility in Florida had long been abolished. Nonetheless, as of July 1, 2014, there were still 4,626 parole-eligible inmates in Florida's prisons,[5] including many juvenile offenders. In *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), the Florida Supreme Court conducted an in-depth analysis of Florida's parole system as applied to juvenile offenders and found that it failed to comply with this Court's holdings in *Graham*, *Miller*, and *Montgomery*.

Atwell was 16 years old in 1990 when he committed first-degree murder and armed robbery. For first-degree murder he was sentenced to life imprisonment with parole eligibility after 25 years. *Atwell*, 197 So. 3d at 1041. This was the only penalty, other than death, that could legally be imposed for first-degree murder from 1972 to 1994. Ch. 72-724, Laws of Fla.; ch. 94-228, § 1, at 1045, Laws of Fla.

The Florida Supreme Court reversed Atwell's sentence and remanded for resentencing under the new juvenile sentencing statutes. The court held: "We conclude that Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional." *Atwell*, 197 So. 3d at 1041.

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[5] *See* Fla. Commission on Offender Review 2014 Annual Report 6, 8, available at https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf.

Florida's parole process, the court said, fails to recognize "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 1042. The parole process "fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by *Miller*." *Id.* at 1042. By statute, "Florida's parole process requires 'primary weight' to be given to the 'seriousness of the offender's present offense and the offender's past criminal record.'" *Id.* at 1041 (quoting § 947.002, Fla. Stat. (2015)). The court noted that Florida's Commission on Offender Review, the body that makes parole decisions, is not required to consider mitigating circumstances, and that, in any event, 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*." *Id.* at 1048.

Unlike other states, the "Florida Legislature did not choose a parole-based approach to remedy sentences that are unconstitutional under *Graham* and *Miller*." *Id.* at 1049. The court stated that West Virginia, for example, "now requires its parole board to take into consideration the 'diminished culpability of juveniles' during its parole hearings for juvenile offenders." *Id.* (citing W. Va.Code § 62-12-13b(b) (2015)). But in Florida, the "decision to parole an inmate 'is an act of grace of the state and shall not be considered a right.'" *Id.* (quoting § 947.002(5), Fla. Stat.). Florida's parole process affords "no special protections . . . to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the

offense." *Id.* "The *Miller* factors are simply not part of the equation." *Id.*

The court said that "[e]ven a cursory examination of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed a capital offense could be subject to one of the law's harshest penalties without the sentencer, or the Commission, ever considering mitigating circumstances." *Id.* It said that "[u]sing Florida's objective parole guidelines, . . . 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." *Id.* at 1048.

The court noted that parole is rarely granted: "In the fiscal year 2013-2014, only 23 of the approximately 4,626 eligible inmates, half a percent, were granted parole." *Id.* at 1046 n.4 (citation omitted). App. A43.

Atwell's case exemplified the deficiencies in Florida's parole process. His "presumptive parole release date"[6] was set for the year 2130, which was "one hundred and forty years after the crime and far exceeding Atwell's life expectancy." *Id.* at 1041. This date was based largely on "static factors," like the seriousness of the offense and prior record, that Atwell cannot change. *Id.* at 1041, 1044. Atwell, the court said, "has no 'hope for some years of life outside prison walls.'" *Id.* at 1050 (quoting *Montgomery*, 136 S.Ct. at 737).

"Atwell's sentence effectively resembles a mandatorily imposed life without

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[6] A "presumptive parole release date" is the "tentative parole release date as determined by objective parole guidelines." § 947.005(8), Fla. Stat. (2018). As explained *infra* at pp. 30-31, it is not a formal release date.

parole sentence, and he did not receive the type of individualized sentencing consideration *Miller* requires." *Id.* at 1050. The court said the "only way" to correct his sentence was to remand for resentencing under the new sentencing statutes. *Id.*

**2. Petitioner Budry Michel moves to correct his sentence; the trial court denies the motion; the Fourth District Court of Appeal reverses; and the State seeks review in the Florida Supreme Court.**

Budry Michel was convicted in Broward County of first-degree murder and armed robbery. The offenses occurred in 1991 when Michel was 16 years old.

The trial court sentenced Michel to life imprisonment with the possibility of parole after 25 years for the first-degree murder and 5½ years in prison (with 3 years jail credit) for the armed robbery.

In 2013, Michel moved to vacate his mandatory life sentence on the ground it violated the Eighth Amendment and *Miller v. Alabama*. He finished his sentence for the armed robbery years earlier. The trial court denied the motion and he appealed.

The Fourth District Court of Appeal reversed on the authority of *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016). App. A20. The court rejected the State's argument that resentencing was required under *Atwell* only when the juvenile offender's presumptive parole release date exceeds the offender's life expectancy (as Atwell's did), but it certified that its decision was in conflict with the decisions of the Fifth District Court of Appeal on that issue. *Michel*, 204 So. 3d at 101.

The State sought review of *Michel* in the Florida Supreme Court under the court's certified-conflict jurisdiction. Art. V, § 3(b)(4), Fla. Const. It again argued

that *Atwell* required resentencing only when the presumptive parole release date exceeds the offender's life expectancy. *State's Initial Brief*, Case No. SC16-2187, 2017 WL 10439278. The State could have argued that *Atwell* should be overruled, but it did not.[7] *State's Reply Brief*, Case No. SC16-2187, 2017 WL 10439281 at *3-*4 (conceding that "if a juvenile offender's PPRD places him or her in the same category as the defendant in *Atwell* such that his or her sentence becomes the functional equivalent of life, he or she is entitled to resentencing.").

Michel argued that *Atwell* was based on the broad principles that govern juvenile sentencing in serious cases, and that Atwell's presumptive parole release date was not pivotal to the court's holding. *Michel's Answer Brief*, Case No. SC16-2187, 2017 WL 10439279. He argued that two of the court's recent decisions supported that view. In *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), the court reversed a juvenile offender's discretionary life sentence for second-degree murder in part because it would be disproportionate to grant resentencing to juvenile offenders convicted of first-degree murder (who thus received a mandatory life sentence) and deny resentencing to juvenile offenders convicted of the lesser offense of second-degree murder. Similarly, Michel argued, assuming the presumptive parole release date has any accuracy as a measure of maturity and rehabilitation (a dubious assumption given Florida's parole process, *see infra* at pp. 33-39), then it would be disproportionate to grant resentencing to a juvenile offender with a

[7] Once the Florida Supreme Court accepts review, it may consider any issue presented to it, not just those issues that give rise to its jurisdiction. *Nock v. State*, 256 So. 3d 828, 832 (Fla. 2018).

presumptive parole release date beyond the offender's lifetime and deny it to a juvenile offender with a presumptive parole release date within the offender's lifetime. And in *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016), the court held that resentencing under the new sentencing statutes would not be limited to juvenile offenders sentenced to de facto life sentences; rather, "all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220, a sentence longer than twenty years, are entitled to judicial review." *Id* at 8.

Michel also argued that although his sentence is parole eligible after 25 years, it must be treated as a life sentence because parole in Florida is not the normal expectation in the vast majority of cases; parole is so rarely granted (one-half of one percent of parole eligible inmates per year) that it is more like clemency, the "remote possibility of which does not mitigate the harshness of the sentence." *Graham*, 560 U.S. at 70.

### 3. The Florida Supreme Court reverses on the authority of *Virginia v. LeBlanc*.

Two and a half months after the briefing was completed in *Michel*, this Court decided *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017). The State did not ask the Florida Supreme Court to order supplemental briefing to address whether *Atwell* should be overruled in light of *LeBlanc*. Nor did the State file *LeBlanc* as supplemental authority.[8]

[8] Fla. R. App. P. 9.225 ("A party may file notice of supplemental authority with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after service of the party's last brief in the cause.").

Similarly, the Florida Supreme Court did not order the parties to address the applicability of that decision. Instead, one year to the day after *LeBlanc* was decided, the court issued its opinion in *Michel* and overruled *Atwell* on the basis of *LeBlanc*: "[W]e hold that juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017)." *State v. Michel*, 257 So. 3d 3, 4 (2018). App. A1.

The court stated that the "more recent decision of *LeBlanc*, 137 S.Ct. 1726, has clarified that the majority's holding [in *Atwell*] does not properly apply United States Supreme Court precedent." *Michel*, 257 So. 3d at 6. It said: "We reject the dissent's assertion that we must adhere to our prior error in *Atwell* and willfully ignore the United States Supreme Court's clarification in *LeBlanc*." *Id.*

The court did not address whether the presumptive parole release date was pivotal to its holding in *Atwell*; it did not address its decisions in *Landrum* and *Kelsey*; and it did not employ its traditional stare decisis analysis in deciding whether to overrule *Atwell*.[9] Instead, whether mistakenly or purposely, it treated

[9] Florida's stare decisis doctrine is robust. "Stare decisis does not yield based on a conclusion that a precedent is merely erroneous." *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012). In *Strand v. Escambia Cty.*, 992 So. 2d 150, 159 (Fla. 2008), the court set forth three factors it must consider before overruling a decision. The court did not consider those factors in the case at bar.

*LeBlanc* as a decision on the merits and ruled in lockstep with it.

The court subsequently denied rehearing. App. A14.

*Michel* was a plurality opinion (3-1-3), with Justice Lewis concurring in result without opinion. *Michel*, 257 So. 3d at 8. Arguably, that meant *Michel* was not binding precedent. *See Santos v. State*, 629 So.2d 838, 840 (Fla. 1994). But in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018) (App. A15), the court held 4-3 that *Michel* had overruled *Atwell*. In short, *Michel* is binding precedent because the Florida Supreme Court held that it was in a 4-3 decision.

Franklin was a juvenile offender sentenced to concurrent 1000-year parole-eligible sentences for non-homicide offenses. The Florida Supreme Court denied him relief on the authority of *Michel* and *LeBlanc*: "[I]nstructed by a more recent United States Supreme Court decision, *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017), we have since determined that the majority's analysis in *Atwell* improperly applied *Graham* and *Miller*." *Franklin*, 258 So. 3d at 1241 (citing *Michel*, 257 So. 3d at 6).

**4. The Florida Commission on Offender Review sets Michel's presumptive parole release date.**

Two weeks after the Florida Supreme Court issued its decision in *Michel*, the Florida Commission on Offender Review conducted Michel's parole hearing and set a presumptive parole release date of February 7, 2028, and with another interview in March 2025. App. A30.

Michel filed an inmate initiated review of his presumptive parole release under Florida Administrative Code Rule 23-21.012 and section 947.173, Florida

Statutes (2018). App. A33. He argued that although the commission wrote in its order that "[m]itigation was considered," it found nothing that warranted "mitigation of severity of offense behavior" under Florida Administrative Code Rule 23-21.010(5)(b)l. App. A34. As Michel argued, "[t]his notwithstanding that Michel was 16 years old at the time of the offense; that the jurors in his case wrote to the trial judge 'asking if there is any lee-way within the sentencing guidelines which would benefit Budry Bobby Michel' . . . ; that Michel was a LifePath Group Project lead facilitator and mentor; that he was a DIRECT Program facilitator and gold medal graduate; that he was the leader of the Gavel Club; that he obtained his GED and was an inmate teaching assistant; that he has made contributions to the Peyton Tuthill Foundation's Hearts of Hope Scholarship Program"; that he had two letters of recommendation from officers at his correctional facility (both writing, "it is my belief that he is rehabilitated and will do well once released," and explaining the basis for that belief); and that he had provided the commission with nearly 70 certificates of achievement. App. A34-A35.

Michel also argued that the commission did not consider his diminished culpability due to youth and immaturity and it did not consider whether he has shown maturity and rehabilitation as required by *Graham* and *Miller*. He argued that unless the Commission does so it will be violating both the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. He asked the commission to recalculate his presumptive parole release date by "considering his diminished culpability due to youth and

immaturity and by considering whether he has shown maturity and rehabilitation as evidenced by his exceptional program performance." App. A36-A40.

The commission denied his request. App. A42.

## REASONS FOR GRANTING THE PETITION

### I. The Florida Supreme Court's decision conflicts with *Virginia v. LeBlanc* and with the decisions of the highest courts of other states.

The Florida Supreme Court has decided an important federal question in a way that conflicts with decisions of this Court and decisions of other state high courts: it determined the scope of a constitutional right by relying on a federal habeas decision of this Court that expressly stated it was not a ruling on the merits of the underlying constitutional claim.

Admittedly, there is not a deep split of authority on this issue. But that is because this Court states so plainly and so frequently that its AEDPA decisions are *not* rulings on the merits of the underlying federal claim (*see* note 1, *supra*, at 3); and state courts, until now, have respected these admonitions. In *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017), this Court stated with unmistakable clarity that it "expresses no view on the merits of the underlying Eighth Amendment claim" and it does not "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *LeBlanc*, 137 S.Ct. at 1729 (brackets, internal quotation marks, and citations omitted). This Court should summarily reverse and remand to the Florida Supreme Court to reconsider its decision in light of this clear language.

#### 1. The decision below conflicts with *LeBlanc*.

LeBlanc was a juvenile offender sentenced to life imprisonment for

nonhomicide offenses. His sentence was subject to Virginia's "geriatric release" program, which would allow him to petition for release at age 60. After arguing unsuccessfully in state court that his sentence violated *Graham*, he filed a habeas petition under 28 U.S.C. § 2254. The district court granted the writ and the Fourth Circuit affirmed, holding that the geriatric release program did not provide juvenile offenders a meaningful opportunity for release based on demonstrated maturity and rehabilitation, and therefore the state court's ruling was an unreasonable application of *Graham*. *LeBlanc*, 137 S.Ct. at 1728. Virginia petitioned for a writ of certiorari and this Court granted it.

This Court held that the Fourth Circuit "erred by failing to accord the state court's decision the deference owed under AEDPA." *Id.* This Court stated that "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Id.* (quoting *Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) (per curiam)). This Court looked at the factors that the Virginia Parole Board must consider in determining whether to release a prisoner. Those factors include the "'individual's history ... and the individual's conduct ... during incarceration,' as well as the prisoner's 'inter-personal relationships with staff and inmates' and '[c]hanges in attitude toward self and others.'" *Id.* at 1729. "Consideration of these factors," this Court said, "could allow the Parole Board to order a former juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation.'" *Id.* (citing *Graham*, 560 U.S., at 75). Accordingly, it was not "objectively

unreasonable" to hold that the geriatric release provision satisfied *Graham*.

This Court made it clear that it was not ruling on the underlying Eighth Amendment claim. There were "reasonable arguments on both sides." *Id.* (quoting *Woodal*, 134 S.Ct., at 1707). "With regards to [LeBlanc], these [arguments] include the contentions that the Parole Board's substantial discretion to deny geriatric release deprives juvenile nonhomicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison." *Id.* But those arguments "cannot be resolved on federal habeas review." *Id.* Again, this Court said it "expresses no view on the merits of the underlying Eighth Amendment claim" and it does not "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Id.* at 1729 (brackets, internal quotation marks, and citations omitted).

In *Michel*, the Florida Supreme Court did not acknowledge this clear language. It *sua sponte* held that this Court in *LeBlanc* had "delineated" the requirements of the Eighth Amendment.[10] *Michel*, 257 So. 3d at 4. The court stated: "[W]e hold that juvenile offenders' sentences of life with the possibility of parole

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[10] *LeBlanc* was decided after the briefing in *Michel*. The State did not bring *LeBlanc* to the court's attention, and the court did not order supplemental briefing to address it. Deciding an important issue without briefing by the parties raises due process concerns. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 252 (2002) (stating that *sua sponte* appellate decisions are "inconsistent with the fundamental principles of due process"); *see also Colorado Republican Fed. Campaign Comm. v. Fed. Election Com'n*, 518 U.S. 604, 626 (1996) "[I]t is ordinarily 'inappropriate for us to reexamine' prior precedent 'without the benefit of the parties' briefing….'") (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 855, 856 (1996)).

after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in [*Graham*, *Miller*, and *LeBlanc*]." *Id.* It said that the "more recent decision of *LeBlanc* … has clarified that the majority's holding [in *Atwell*] does not properly apply United States Supreme Court precedent." *Id.* at 6. It said: "We reject the dissent's assertion that we must adhere to our prior error in *Atwell* and willfully ignore the United States Supreme Court's clarification in *LeBlanc*." *Id.*

Thus, the Florida Supreme Court concluded that when this Court held that the state court's decision in *LeBlanc* was not "objectively unreasonable," that meant that the geriatric release program was constitutional. But that is not what this Court held, and it is not what this Court said. What this Court said was that it was not deciding the constitutionality of Virginia's geriatric release program.

And, if anything, *LeBlanc* would appear to support the ruling in *Atwell*. This Court held that "it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham's* requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole." *LeBlanc*, 137 S. Ct. at 1729. And Justice Ginsburg's concurrence emphasized that Virginia's parole system requires the parole board to consider the "rehabilitation and maturity" of the offender. *Id.* at 1730 (Ginsburg, J., concurring).

But in *Atwell* the court noted that the Florida Commission on Offender Review is not required to consider mitigating circumstances, and that, in any event,

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." *Atwell*, 197 So. 3d at 1048. As the court stated: "Even a cursory examination of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed a capital offense could be subject to one of the law's harshest penalties without the sentencer, or the Commission, ever considering mitigating circumstances." *Id.* at 1049.

**2. The decision below conflicts with the decisions of other state high courts.**

Other courts have said that *LeBlanc* speaks only to the limitations of federal habeas review, not to the merits of the Eighth Amendment issue. In *People v. Contreras*, 4 Cal. 5th 349, 229 Cal.Rptr.3d 249, 411 P.3d 445 (2018), the California Supreme Court reviewed lengthy sentences imposed on two juvenile offenders. While the case was pending before the court, the California Legislature enacted an "elderly parole program." *Contreras*, 411 P.3d at 458.

In addressing whether that program satisfies *Graham's* requirement that juvenile offenders be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the California Supreme Court discussed *LeBlanc*. It said that this Court "had emphasized that it was applying the deferential standard of review required" by AEDPA, and that this Court had recognized that there were reasonable arguments on both sides of the Eighth Amendment issue. *Contreras*, 411 P.3d at 460. The court declined to resolve the issue of whether California's elderly parole program would satisfy the Eighth

Amendment (leaving it for the lower courts to address first); and it recognized that, similarly, this Court had not resolved the issue of whether Virginia's geriatric release program satisfied the Eighth Amendment: "Like the high court in *LeBlanc*, we decline to resolve in this case whether the availability of an elderly parole hearing at age 60 for a juvenile nonhomicide offender satisfies the Eighth Amendment concerns set forth in *Graham*." *Contreras*, 411 P.3d at 461.

Likewise, the Court of Appeals of Maryland recognized that this Court in *LeBlanc* did not rule on the merits of the underlying claim. *Carter v. State*, 461 Md. 295, 315, 192 A.3d 695, 706 n.9 (Md. 2018). One of the issues in *Carter* was whether Maryland's parole process provides the meaningful opportunity for release required by *Graham*. In distinguishing parole from executive clemency, the court discussed *LeBlanc* and determined that that case provided "limited guidance…." *Id.* The court stated: "The Supreme Court explicitly did not decide whether geriatric release would satisfy the Eighth Amendment, but only that the Fourth Circuit had not accorded the state court decision on the issue the deference due under AEDPA and that the state court decision was 'not objectively unreasonable.'" *Id.* The court stated: "[W]hile such a geriatric release program might satisfy *Graham*, the Court has not reached such a holding." *Id.*

Florida appears to be the only state to have concluded that this Court ruled on the merits in *LeBlanc*. It is important that state courts "follow both the letter and the spirit of [this Court's] decisions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982). Therefore, when this Court states

in an AEDPA case that it is not ruling on, or expressing a view of, the underlying federal claim, lower courts must respect that statement. It is especially important that Florida courts do so because they must rule in lockstep with this Court's Eighth Amendment decisions. Art. I, § 17, Fla. Const. Other state courts do so as well. *See* Samuel Weiss, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 Harv. C.R.-C.L.L. Rev. 569, 596 n.76 (2014) (surveying states that rule in lockstep with this Court's Eighth Amendment jurisprudence). If state courts treat this Court's AEDPA decisions as merits decisions, constitutional violations will inevitably result. For example, this Court stated that LeBlanc had a reasonable argument that Virginia's geriatric release program as applied to juvenile offenders violates the Eighth Amendment. If the program violates the Eighth Amendment, then any state with the same program is violating the Eighth Amendment. And if those states view *LeBlanc* as settling the question, that violation will persist despite this Court explicitly stating that it had not decided that issue.

In *Atwell*, the Florida Supreme Court held that Florida's parole process violates the Eighth Amendment as applied to juvenile offenders. Nothing this Court said in *LeBlanc* undermines that holding. This Court did not "delineate" or "clarify" the requirements of the Eighth Amendment, and so the last true pronouncement about Florida's parole process as applied to juveniles was that it was unconstitutional. This is not to deny that the Florida Supreme Court could overrule *Atwell*; but if it does, the court must once again engage in a rigorous constitutional

analysis so it can determine whether the parole process, as applied to juvenile offenders, complies with *Graham*, *Miller*, and *Montgomery*. But the court did not do that. Instead, whether mistakenly or purposely, it treated *LeBlanc* as a decision on the merits and concluded it was obligated to overrule *Atwell*.

In *State v. Moore*, 2016-Ohio-8288, 149 Ohio St. 3d 557, 76 N.E.3d 1127 (Oh. 2016), the Ohio Supreme Court ruled that a juvenile offender's de facto life sentence violated *Graham*. Chief Justice O'Connor, in a concurring opinion, criticized the dissent's reliance on Sixth Circuit federal habeas decisions because such decisions are based on the "'highly deferential' standard imposed by AEDPA." *Moore*, 76 N.E.3d at 1153 (O'Connor, C.J., concurring).[11] She stated: "We who sit at the pinnacle of a state judiciary should be reluctant to adopt the limited standards of federal habeas jurisdiction as a proper proxy for the rigorous constitutional analysis that claims like Moore's deserve." *Id.* at 1155 (O'Connor, C.J.).

The Florida Supreme Court erroneously treated *LeBlanc* as a proxy for the rigorous constitutional analysis that Michel's claim deserved.

**3. This is an important federal issue.**

AEDPA decisions are premised on the belief that states will make "good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). Along the

[11] *See also Commonwealth v. Foust*, 2018 PA Super 39, 180 A.3d 416, 433 n. 16 (Pa. Super. Ct. 2018) (finding unpersuasive other state court decisions upholding de facto life sentences for juvenile offenders because many of those decisions relied on *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012), *cert. denied*, 569 U.S. 947 (2013), a federal habeas case).

same lines, federalism and comity concerns mandate that state courts be given the first opportunity to adjudicate constitutional questions on the merits. *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009); *see also* Tiffany R. Murphy, *Federal Habeas Corpus and Systemic Official Misconduct: Why Form Trumps Constitutional Rights*, 66 U. Kan. L. Rev. 1, 14 (2017) (noting that federal habeas jurisprudence "emphasizes . . . respect or comity, thus allowing the state the first opportunity to fix any constitutional errors"); *cf. Cone v. Bell*, 556 U.S. 449, 472 (2009) (noting that de novo review, rather than the deferential AEDPA standard, applies when a state court does not reach the merits of a constitutional claim).

The Florida Supreme Court's decision undercuts these premises. The court made no attempt to "honor constitutional rights," as it avoided deciding the Eighth Amendment claim by relying on an AEPDA decision that does not address the constitutional issue (or, stated another way, the court reversed a well-reasoned decision that Florida's parole process is unconstitutional as applied to juvenile offenders by relying on an AEPDA decision—*LeBlanc*—that does not address the constitutional issue).

If courts use this Court's AEDPA jurisprudence to determine the scope of a constitutional right, the net effect will be a closed loop that will preclude a defendant from having the merits of his or her constitutional claim adjudicated, either in federal or state court. A federal habeas court will decline to address the merits of a constitutional claim because of the restrictions on federal habeas review, out of respect for the state courts' prerogative to decide constitutional questions on

their own. But when the defendant turns to the state and asks it to do precisely this exercise, the state court turns to AEDPA jurisprudence to determine the scope of the right. This means that no court—state or federal—is rigorously analyzing the underlying constitutional question.

Again, the Florida Supreme Court used *LeBlanc* as a proxy for overruling *Atwell*. The net effect is to plunge juvenile offenders like Michel back into a parole process that was deemed unconstitutional in *Atwell*—a decision that has not been overturned by rigorous constitutional analysis, but instead by a mistaken reading of *LeBlanc*. It is important for this Court to address the Florida Supreme Court's mistake because, as a result of it, Florida's Eighth Amendment juvenile-sentencing jurisprudence cannot move forward, and, as the court reconsiders previous decisions, it may move backwards. This is especially problematic for Florida, a state that has a disproportionate number of juvenile offenders with lengthy sentences. *See Graham*, 560 U.S. at 64.

Therefore, Michel respectfully requests that this Court grant certiorari, vacate the judgment, and remand to the Florida Supreme Court to reconsider its decision in light of *LeBlanc's* plain language.

### II. This Court should grant certiorari to determine the kind of parole process that will satisfy *Graham*, *Miller*, and *Montgomery*.

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), this Court held that states could remedy *Miller* violations by resentencing juvenile homicide offenders or permitting them to be considered for parole. *Id.* at 736. Parole will afford the "opportunity for release . . . to those who demonstrate the truth of *Miller's* central

intuition—that children who commit even heinous crimes are capable of change." *Id.* at 736. Therefore, juvenile offenders "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37.

This case is a perfect vehicle for deciding what that opportunity should look like. First, the Florida Supreme Court in *Atwell* already conducted a rigorous constitutional analysis of the parole process and found it inadequate. Second, Florida's new juvenile sentencing statutes offer a valuable contrast to the parole process and highlight its inadequacies.

**1. How Parole Works in Florida**

Florida's parole system is a creature of the Florida Constitution, statute, and administrative code. Art. IV, § 8, Fla. Const.; § 947.001, et. seq., Fla. Stat.; Fla. Admin. Code R. 23-21.001, et. seq. It is administered by the Florida Commission on Offender Review (formerly the Parole Commission), an agency within the executive branch. § 20.32, Fla. Stat. (2018).

Parole is rarely granted. Only one-half of one percent of parole-eligible inmates, or one to two percent of inmates receiving a parole release decision, are granted parole each year: approximately 22 per year. App. A43. At that rate, and with 4,275 parole eligible inmates remaining in 2018 (*id.*), it will take 194 years to parole these inmates. This means the vast majority of them will die in prison.

The rarity with which parole is granted should not be surprising. Parole is "an act of grace of the state and shall not be considered a right." § 947.002(5), Fla. Stat. (2018); Fla. Admin. Code R. 23-21.002(32). It is not enough to be rehabilitated.

"No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison." § 947.18, Fla. Stat. (2018). "Primary weight" must be given to the "seriousness of the offender's present criminal offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2018).

No inmate will be released without a "satisfactory release plan." Fla. Admin. Code R. 23-21.002(44). This has two components: gainful employment and suitable housing. *Id.* Thus, the inmate must show he "will be suitably employed in self-sustaining employment or that he will not become a public charge." § 947.18, Fla. Stat. (2018); Fla. Admin. Code R. 23-21.002(44)(b). And the inmate must show he has a "transitional housing program or residence confirmed by field investigation to be sufficient to meet the living needs of the individual seeking parole, or sufficient financial resources or assistance to secure adequate living accommodations." Fla. Admin. Code R. 23-21.002(44)(a). If the inmate shares housing, the commission must be satisfied that the other occupants will not "pose an undue risk to the inmate's ability to reintegrate into society." Fla. Admin. Code R. 23-21.002(44)(e).

The parole process begins with the calculation of a "presumptive parole release date." This date is established by selecting the number of months within a matrix time range and adding months for factors that aggravate the "severity of offense behavior." Fla. Admin. Code R. 23-21.010(5)(a)1. The commission's discretion to choose aggravating factors and the number of months to assign those factors is not limited by rule, standard, or guideline. (The aggravating factors listed in rule 23-21.010(5)(a)1. are examples only.) And it should be self-evident that the

commission knows the number of months that an inmate has served (in the case of first degree murder, 300 months) and that it assigns the number of months in view of that fact. (Michel's experience, outlined below, will make this clearer.)

The commission may consider whether there are "[r]easons related to mitigation of severity of offense behavior" or "[r]easons related to likelihood of favorable parole outcome…." Fla. Admin. Code R. 23-21.010(5)(b). In keeping with the statutory directive that rehabilitation is not enough, the commission will not consider even "clearly exceptional program achievement" but it may "after a substantial period of incarceration." Fla. Admin. Code R. 23-21.010(5)(b)2.j.

The matrix time range is the intersection of the "salient factor score," which is 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," *Atwell*, 197 So. 3d at 1047, and the "offender's severity of offense behavior." Fla. Admin. Code R. 23-21.002(27). The only concession that Florida's parole process makes to juvenile offenders is the use of a "Youthful Offender Matrix," which modestly reduces the matrix time ranges. Fla. Admin. Code R. 23-21.009(6). *See* App. A32. (This meagre reduction is easily nullified by assigning more months in aggravation.)

Michel was convicted of a capital felony (severity of offense behavior six) and his salient factor score was one (although he had no prior criminal history, his offense at conviction included robbery). Fla. Admin. Code R. 23-21.007(6). Therefore, his matrix time range was 90-135 months. Had Michel been an adult offender, his matrix time range would have been 120-180 months. Fla. Admin. Code

R. 23-21.009(5). App. A32.

Both the commission investigator and the commission set Michel's matrix time range at 135 months, the top of the range; they did not explain why the top of the range was selected, although setting at the top of the range appears to be customary. The commission investigator recommended that 198 months in aggravation be added to the matrix time range: 78 months for "processed disciplinary report record" and 120 months for the "egregious circumstance" that the victim was on life support for two years. App. A30. (This was a mistake: the commission learned at the hearing that the victim was on life support for two days, not two years. App. A33.) The commission investigator recommended that Michel's presumptive parole release date be set at August 7, 2021 (333 months after his "time begins date of November 7, 1993"). App. A30.

The commission rejected the investigator's recommendation: it added 276 months in aggravation to the matrix time range: 60 months for use of a weapon; 156 months for processed disciplinary report record (doubling the investigator's recommended 76 months); and 60 months for concealing the firearm behind a payphone. The commission set Michel's presumptive parole release date at February 7, 2028, and a subsequent interview with a commission investigator in seven years: March 2025.

The presumptive parole release date—even if it is within the inmate's lifetime—merely puts the inmate at the base of the mountain. It is not a release date. "[A] *presumptive* parole release date is only *presumptive*. It is discretionary

prologue to the Commission's final exercise of its discretion in setting an inmate's effective parole release date." *May v. Florida Parole and Probation Commission*, 424 So. 2d 122, 124 (Fla. 1st DCA 1982) (emphasis in original). It is "only an estimated release date." *Meola v. Department of Corrections*, 732 So. 2d 1029, 1034 (Fla. 1998); § 947.002(8), Fla. Stat. (2018) (stating it is only a "tentative parole release date as determined by objective parole guidelines."). "The Parole Commission reserves the right (and the duty) to make the final release decision when the [presumptive parole release date] arrives." *Meola*, 732 So. 2d at 1034. There are many more steps along the way that can derail an inmate's chance at release.

After the presumptive parole release date is established, a subsequent interview will be conducted to determine if there is new information that might affect that date. Fla. Admin. Code R. 23-21.013; § 947.174(1)(c), Fla. Stat. (2018). After the subsequent interview, the commission investigator will make another recommendation, which the commission is free to reject, and the commission may modify the presumptive parole release date "whether or not information has been gathered which affects the inmate's presumptive parole date." Fla. Admin. Code R. 23-21.013(6).

The next step requires the presumptive parole release date to become the "effective parole release date," which is the "actual parole release date as determined by the presumptive release date, satisfactory institutional conduct, and an acceptable parole plan." § 947.005(5), Fla. Stat. (2018); § 947.1745, Fla. Stat. (2018). The inmate is again interviewed by the commission investigator. Fla.

Admin. Code R. 23-21.015(2). The investigator discusses the inmate's institutional conduct and release plan and makes a recommendation. *Id.* If the commission finds that the inmate's release plan is unsatisfactory, it may extend the presumptive parole release date up to a year. Fla. Admin. Code R. 23-21.015(8).

If the commission orders an effective parole release date, it can postpone that date based on an "unsatisfactory release plan, unsatisfactory institutional conduct, or any other new information previously not available to the Commission at the time of the effective parole release date interview that would impact the Commission's decision to grant parole…." Fla. Admin. Code R. 23-21.015(13).

If the effective parole release date is postponed, the commission investigator may conduct a rescission hearing to withdraw it. Fla. Admin. Code R. 23-002(41). Rescission can be based on "infraction(s), new information, acts or unsatisfactory release plan…." Fla. Admin. Code R. 23-019(1)(b).

Following a rescission hearing, the commission may: proceed with parole; vacate the effective parole release date and extend the presumptive parole release date; or "vacate the prior effective parole release date, and decline to authorize parole…." Fla. Admin. Code R. 23-019(10)(a)-(c).

In addition to the hurdles outlined above, the commission is also authorized to "suspend" the presumptive parole release date on a finding that the inmate is a "poor candidate" for parole release. Fla. Admin. Code R. 23-0155(1); *Florida Parole Commission v. Chapman*, 919 So. 2d 689, 691 (Fla. 4th DCA 2006). In her dissent, Justice Pariente pointed out that the inmate's presumptive parole release date in

*Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016), had been suspended since 1999. *Michel*, 257 So. 3d at 17-18 (Pariente, J., dissenting). There appear to be no standards governing how long the commission may "suspend" a parole date.

**2. Florida's parole process violates the Eighth Amendment because it does not provide juvenile offenders a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.**

The touchstone of this Court's juvenile-sentencing jurisprudence is the "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). Certain punishments are disproportionate when applied to children because children are different. They lack maturity; they are more vulnerable and easy to influence; and their traits are less fixed, so they are more likely to become responsible, law-abiding adults. *Miller*, 567 U.S. at 471. In short, "because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68 (citing *Roper*, 543 U.S. at 569).

"From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). But Florida's parole process does not recognize this. The commission is not required to consider either the mitigating attributes of youth or the juvenile offender's maturity and rehabilitation. As the Florida Supreme Court said in *Atwell*, 197 So. 2d at 1048: "Even a cursory examination of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed a capital offense could be subject to one of the law's harshest

penalties without the sentencer, or the Commission, ever considering mitigating circumstances." *Id.* at 1049. "The *Miller* factors," the court said, "are simply not part of the equation." *Id.*

In this respect, Virginia's geriatric release program is more suitable for juvenile offenders than Florida's parole process. In Virginia, the parole board must consider factors that could allow it "to order a former juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation.'" *LeBlanc*, 137 S.Ct. at 1729 (citing *Graham*, 560 U.S. at 75). Other states that have chosen parole as the method for complying with *Graham* and *Miller* have modified their parole statutes to require consideration of the *Miller* factors. *E.g.*, Cal. Penal Code § 4801(3)(c); Conn. Gen. Stat. Ann. § 54-125a(f); Md. Code Regs. 12.08.01.18(3); W. Va. Code Ann. § 62-12-13b(b).

Instead of maturity, rehabilitation, and the diminished culpability of youth, Florida's parole process focuses on the "seriousness of the offender's present offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2018). These are static factors that the offender cannot change. Whether a juvenile offender has reformed should be "weighed more heavily than the circumstances of the crime itself." Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California's Youth Offender Parole Hearings*, 40 N.Y.U. Rev. L. & Soc. Change 245, 294 (2016). Florida's parole process fails to weigh it at all. Rehabilitation is not enough. Even clearly exceptional program achievement will normally not be considered in establishing a presumptive parole release date.

Further, parole is less likely to be granted to juvenile offenders than adult offenders. To be released, inmates must have gainful employment and suitable housing. Adult offenders are more likely to have the resources—education, job skills, and family support—to obtain those things. Juvenile offenders, on the other hand, often have been imprisoned since they were children, and imprisoned in an environment that focuses on punishment rather than rehabilitation. *See* § 921.002(1)(b), Fla. Stat. (2018) ("The primary purpose of sentencing is to punish the offender."); *State v. Chestnut*, 718 So. 2d 312, 313 (Fla. 5th DCA 1998) ("[T]he first purpose of sentencing is to punish, not rehabilitate."). It is unlikely they obtained job skills before they were incarcerated, and it is more likely they have lost contact with friends and family. "[J]uvenile offenders who have been detained for many years are typically isolated, and many will lack connections and support from the community. This isolation makes it more difficult for them to present a solid release plan to the decision maker, and it means that they are less likely to have individuals in the community advocate for their release." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 421 (2014). This is one example of a parole standard that is "systematically biased against juvenile offenders." Caldwell, 40 N.Y.U. Rev. L. & Soc. Change at 292.

The harm of the substantive deficiencies in the parole process is compounded by its procedural deficiencies. Both deficiencies are made vivid by Florida's juvenile sentencing statutes, enacted in response to *Graham* and *Miller*. Juvenile homicide

offenders serving the more serious sentence of life *without* the possibility of parole have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Those offenders will be sentenced by judges who "seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Graham*, 560 U.S. at 77. Those judges will be required to consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2), Fla. Stat. (2014). If a lengthy sentence is imposed, the juvenile offender will be entitled to a subsequent sentence-review hearing, at which the judge will determine whether the offender is "rehabilitated and is reasonably believed to be fit to reenter society…." § 921.1402(6), Fla. Stat. (2014). At sentencing, and at the sentence-review hearing, those offenders will be entitled to be present, to be represented by counsel, to present mitigating evidence on their own behalf, and, if the offender cannot afford counsel, to appointed counsel. § 921.1402(5), Fla. Stat. (2014); Fla. R. Crim. P. 3.781; Fla. R. Crim. P. 3.802(g).

The Florida Commission on Offender Review, on the other hand, is not a "sentencing court." *Holston v. Fla. Parole & Probation Commission*, 394 So. 2d 1110, 1111 (Fla. 1st DCA 1981). The commission never sees or hears the inmate, as inmates are prohibited from attending the commission meeting. Fla. Admin. Code R. 23-21.004(13). "Certainly, it is important for the prisoner to speak directly to the decision maker. A decision maker needs to be persuaded by the prisoner that he or she is truly remorseful and reformed." Russell, 89 Ind. L.J. at 402.

Finally, the rarity with which parole is granted makes it more like clemency. Of the 1499 parole release decisions made in fiscal year 2017-2018, only 14, or 0.93% were granted. App. A43. By contrast, the overall parole approval rate in Texas for fiscal year 2017 was 34.94 percent.[12]

In *Graham*, 560 U.S. at 71, this Court stated that the "remote possibility" of clemency "does not mitigate the harshness of [a life] sentence." This Court cited *Solem v. Helm*, 463 U.S. 277 (1983), where that argument had been rejected. *Id.*

In *Solem*, the defendant was sentenced to life imprisonment without parole for a nonviolent offense under a recidivist statute. Solem argued that his sentence violated the Eighth Amendment. The state argued that the availability of clemency made the case similar to *Rummel v. Estelle*, 445 U.S. 263 (1980), in which this Court upheld a life sentence with the possibility of parole. This Court rejected that argument because clemency was not comparable to the Texas parole system it reviewed in *Rummel*. *Solem*, 463 U.S. at 300-03.

In *Rummel*, this Court agreed that even though Rummel was parole eligible after serving 12 years "his inability to enforce any 'right' to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years." *Rummel*, 445 U.S. at 280. However, "because parole is 'an established variation on imprisonment of convicted criminals,' . . . a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be

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[12] TEX. BD OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT FY 2017, at 4, available at: https://www.tdcj.texas.gov/bpp/publications/FY%202017%20AnnualStatistical%20Report.pdf

imprisoned for the rest of his life." *Id.* at 280-81 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

This Court said in *Solem* that in affirming Rummel's sentence it "did not rely simply on the existence of some system of parole"; it looked "to the provisions of the system presented…." *Solem*, 463 U.S. at 301. Parole in Texas was a "regular part of the rehabilitative process"; it was "an established variation on imprisonment of convicted criminals"; and "assuming good behavior it is the normal expectation in the vast majority of cases." *Id.* at 300-01 (citation omitted). And because the law "generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time[,] . . . it is possible to predict, at least to some extent, when parole might be granted." *Id.* By contrast, clemency was "an *ad hoc* exercise of executive clemency." *Id.* at 301.

In Florida, parole is no longer a "regular part of the rehabilitative process." *Solem*, 463 U.S. at 300. It is almost impossible "to predict . . . when parole might be granted." *Id.* at 301. It is not "the normal expectation in the vast majority of cases"; and it is not "an established variation on imprisonment of convicted criminals." *Id.* at 300-01. Instead, it is more like commutation: "an *ad hoc* exercise of executive clemency" (*id.* at 301) and a "remote possibility." *Graham*, 560 U.S. at 71.

In *Miller* this Court said it is the "rare juvenile offender whose crime reflects irreparable corruption", *id.* 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68), and that the "appropriate occasions for sentencing juveniles to [life imprisonment] will be uncommon." *Id.* at 479. This means the

"sentence of life without parole is disproportionate for the vast majority of juvenile offenders" and "raises a grave risk that many are being held in violation of the Constitution." *Montgomery*, 136 S. Ct. at 736. But if parole is rarely granted, or if the parole procedures for sorting the rehabilitated from the irreparably corrupt are inadequate, then there is the "grave risk" that many juvenile offenders "are being held in violation of the constitution." *Id.* That grave risk is present in Florida.

For these reasons, Michel respectfully requests that this Court grant certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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