No. _____

In the Supreme Court of the United States

GARY REID,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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MAY 1, 2019

QUESTION PRESENTED

Whether the Florida Supreme Court erred in treating *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), a case arising under federal habeas review, as a decision on the merits of the underlying constitutional question.

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Petitioner Gary Reid respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida (Pet. App. 1a-8a) has not been released for reporting in the Southern Reporter. In an unpublished order (Pet. App. 9a), the Florida Supreme Court summarily quashed the decision of the district court following its decision in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018).

JURISDICTION

The judgment of the Third District Court of Appeal of Florida was entered on May 31, 2017. A timely motion to certify conflict of decisions was filed by the State of Florida on June 13, 2017, and the Third District Court of Appeal denied this motion on July 10, 2017. A notice invoking the discretionary jurisdiction of the Florida Supreme Court was filed by the State on July 24, 2017, and the Florida Supreme

accepted jurisdiction and quashed the district court's decision on January 3, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. 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.

II. 28 U.S.C. § 2254 provides in relevant part:

> State custody; remedies in Federal courts
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Florida's legislative and judicial response to *Graham* and *Miller*.

In 2014, Florida enacted legislation to bring its sentencing laws into compliance with *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 565 U.S. 1013 (2011). *See* Ch. 2014-220, Laws of Fla.; Fla. Stat. §§ 775.082, 921.1401, and 921.1402 (2014). Before sentencing a juvenile offender convicted of any crime punishable by life or de facto life in prison, the trial court must consider various factors "relevant to the offense and the defendant's youth and attendant

circumstances." Fla. Stat. § 921.1401(2)(a)-(j). Following a section 921.1401 sentencing, a juvenile homicide offender is entitled to a judicial sentence-review hearing after twenty-five years. Fla. Stat. §§ 775.082(3), 921.1402(2)(b). The question at this hearing is whether the juvenile offender has demonstrated maturity and rehabilitation. Fla. Stat. § 921.1402(6).

By its own terms, this legislation applies only to offenses committed on or after July 1, 2014. *See* Ch. 2014-220, § 8, at 2877, Laws of Fla. In 2015, the Florida Supreme Court held that the remedy for a *Graham* or *Miller* violation that occurred before 2014 was resentencing pursuant to the foregoing statutes. *Horsley v. State*, 160 So. 3d 393 (Fla. 2015). In applying chapter 2014-220 retroactively, *Horsley* emphasized that 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. *Horsley* stated the "Legislature has made its intent clear that parole is no longer a 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).

B. The Florida Supreme Court's conclusion in *Atwell* that the state parole process does not comport with *Graham* and *Miller*.

Although parole eligibility in Florida has been abolished for almost twenty-five years, in 2014 there were still thousands of parole-eligible inmates in the state, including many who were children at the time of the offense. 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 decisions in *Graham* and *Miller*.

Angelo Atwell was 16 years old when he was charged in 1990 with first-degree murder. He was convicted and automatically sentenced to life imprisonment with parole eligibility. *Atwell*, 197 So. 3d at 1041. The Florida Supreme Court reversed Atwell's sentence and remanded the case for resentencing under the new juvenile sentencing statutes. The court held that "Florida's existing parole system … does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*," and further held "that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional." *Atwell*, 197 So. 3d at 1041.

Florida's parole process, the *Atwell* 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 Fla. Stat. § 947.002). 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. Furthermore, in Florida the "decision to parole an inmate 'is an act of grace of the state and shall not be considered a right.'" *Id.* 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.* As a result, the "*Miller* factors are simply not part of the equation." *Id.*

The Florida Supreme Court concluded 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 held that "Atwell's sentence effectively resembles a mandatorily imposed life without parole sentence, and he did not receive the type of individualized sentencing consideration *Miller* requires." *Id.* at 1050. The *Atwell* court concluded that the "only way" to correct his unconstitutional sentence was resentencing under the new juvenile sentencing statutes. *Id.*

C. The Third District Court of Appeal of Florida grants Petitioner a resentencing hearing on the authority of *Atwell*.

Petitioner Gary Reid was charged in 1979 with one count of first-degree murder. He was a juvenile at the time of the offense. Petitioner pleaded guilty as charged and was automatically sentenced to life in prison with parole eligibility after

twenty-five years. His presumptive parole release date ("PPRD") is presently set for February 3, 2028, almost a half-century after the offense. (Pet. App. 2a).

Following *Miller*, Petitioner filed a motion for post-conviction relief asserting that his mandatory life sentence violated the Eighth Amendment. He argued that his parole eligibility did not cure this violation, since "the Florida parole system did not take into account children's diminished culpability and heightened capacity for change as required by the Supreme Court." (Pet. App. 2a-3a). The trial court denied Petitioner's motion and he appealed to the Third District Court of Appeal of Florida.

While Petitioner's appeal was pending, the Florida Supreme Court issued its decision in *Atwell*. The district court applied *Atwell* to Petitioner's case and held that it required resentencing: "If the parole system did not account for individual consideration of the *Atwell* defendant's juvenile status, and the *Atwell* defendant's life-with-parole sentence was indistinguishable from life-without-parole, then the same parole system as part of the same sentence for the same crime should be unconstitutional for Reid." (Pet. App. 4a). The appellate court "reversed the trial court's order denying [Petitioner's] motion for post-conviction relief and remand[ed] for a resentencing pursuant to section 921.1401." (Pet. App. 8a).

Respondent appealed this decision to the Florida Supreme Court. That court stayed Petitioner's case pending its decision in other cases involving juveniles serving lengthy sentences with parole eligibility.

D. The Florida Supreme Court recedes from *Atwell* following this Court's non-merits decision in *LeBlanc*.

While Petitioner's case was held in abeyance, the Florida Supreme Court issued two decisions which overruled *Atwell*. The court did so by relying entirely on a non-merits decision from this Court addressing a federal habeas claim.

In *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016), the Fourth District Court of Appeal of Florida vacated the defendant's mandatory life with parole sentence for a homicide committed when he was a juvenile. The State sought review before the Florida Supreme Court. The Florida Supreme Court ultimately overruled *Atwell* on the authority of this Court's decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), holding that "juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment …" *State v. Michel*, 257 So. 3d 3, 4 (2018). In doing so, *Michel* 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. The court rejected "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.*

Michel was a plurality decision, since only three justices of the Florida Supreme Court concurred with the opinion. *See Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994) (explaining that under the state constitution a majority opinion requires the concurrence of four justices). Its rationale became a majority opinion, however, in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). The question in *Franklin* was whether a juvenile non-homicide offender's sentence of 1,000 years in prison with a PPRD set

for 2352 was constitutional. The Florida Supreme Court again denied relief on the authority of *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).

Following its decisions in *Michel* and *Franklin*, the Florida Supreme Court summarily quashed the district court's decision in Petitioner's case and remanded the matter back to the intermediate appellate court for reconsideration in light of *Franklin*. (Pet. App. 9a). This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari since the Florida Supreme Court erred by treating *LeBlanc* as a merits decision, even though this Court never addressed the Eighth Amendment claim in *LeBlanc* on the merits.

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 improperly determined the scope of a constitutional right by relying on a federal habeas decision. But *LeBlanc* "expresse[d] no view on the merits of the underlying Eighth Amendment claim" and it did 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 remand this case to the Florida Supreme Court for reconsideration, given its misapplication of the scope and significance of *LeBlanc*.

A. The decision below conflicts with *LeBlanc* and this Court's longstanding practice in federal habeas cases of not reaching the merits of the case.

This Court routinely cautions in Anti-Terrorism and Effective Death Penalty Act cases ("AEDPA") that it has not reached the merits of the underlying federal claim. *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."). This is because in order to prevail on federal habeas review, the defendant must prove that the state court's decision "involved an unreasonable application of" clearly established federal law. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). In other words, the question for the federal court to resolve is not whether the state court's interpretation of a constitutional provision was *correct*, but rather whether it was *clearly unreasonable*. *See Renico v. Lett*, 559 U.S. 766, 779 (2010). This Court's decisions noting that its federal habeas precedent does not reach the merits of the underlying constitutional claim are legion.[1]

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[1] *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

That is precisely what this Court did in *LeBlanc*. That case involved a juvenile offender sentenced to life imprisonment for non-homicide offenses. His sentence was subject to Virginia's "geriatric release" program, which allowed him to petition for release at the age of sixty. 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 Virginia's geriatric release program did not provide juvenile offenders with a meaningful opportunity for release, and therefore the state court's ruling was an unreasonable application of *Graham*. *LeBlanc*, 137 S. Ct. at 1728.

This Court held that the Fourth Circuit "erred by failing to accord the state court's decision the deference owed under AEDPA." *Id.* This was because "[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)). *LeBlanc* analyzed the factors that the Virginia Parole Board must consider in determining whether to release a prisoner, including the "individual's history ... and the individual's conduct ... during incarceration." *Id.* at 1729. "Consideration of these

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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."); *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)).

factors," this Court said, "could allow the Parole Board to order a juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation.'" *Id.* (citing *Graham*, 560 U.S. at 75). *LeBlanc* held that it was therefore not "objectively unreasonable" to conclude that the geriatric release provision satisfied *Graham*.

LeBlanc made it clear it was not ruling on the underlying Eighth Amendment claim, since there were "reasonable arguments on both sides." *Id.* "With regards to [LeBlanc], these [arguments] include the contentions that the Parole Board's substantial discretion to deny geriatric release deprives juvenile non-homicide 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.* This Court "expresse[d] no view on the merits of the underlying Eighth Amendment claim" and did not "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Id.* at 1729 (brackets, internal quotes, and citations omitted).

The Florida Supreme Court in *Michel* never acknowledged this clear language. It instead found that *LeBlanc* had "delineated" the requirements of the Eighth Amendment. *Michel*, 257 So. 3d at 4. *Michel* held 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*, *Miller*, and *LeBlanc*]." *Id.* It claimed that "*LeBlanc* … has clarified that the majority's holding [in *Atwell*] does not properly apply United States Supreme Court precedent." *Id.* at 6.

In other words, the Florida Supreme Court has 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 simply incorrect. *Michel* erred in viewing *LeBlanc* as a merits decision, and repeated this error in *Franklin's* majority opinion.[2] *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018) ("[I]nstructed by [*LeBlanc*], we have since determined that the majority's analysis in *Atwell* improperly applied *Graham* and *Miller*."). Because the Florida Supreme Court relied entirely on these erroneously decided cases to quash the decision granting Petitioner a resentencing, (Pet. App. 9a), this Court should grant certiorari to rectify the state supreme court's misunderstanding of the scope of AEDPA jurisprudence.

B. The decision below conflicts with other state courts of last resort which correctly recognize that *LeBlanc* was not a merits decision.

Two other states recognize that *LeBlanc* does not resolve the question of whether any particular release mechanism satisfies *Graham* or *Miller*. In *People v. Contreras*, 411 P.3d 445 (2018), the California Supreme Court reviewed lengthy sentences imposed on two juveniles. While *Contreras* was pending, the California Legislature enacted an "elderly parole program." *Id.* at 458. In addressing whether that program satisfies *Graham's* requirement that juvenile offenders be afforded a meaningful opportunity for release, *Contreras* noted that *LeBlanc* "emphasized that it was applying the deferential standard of review required" by AEDPA. *Id.* at 460.

[2] Although this Court denied certiorari in *Michel*, that case was only a plurality opinion and therefore had no precedential value under Florida law. *See Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994). The petition for writ of certiorari in *Franklin*, a binding majority opinion, was filed on April 2, 2019 and remains pending.

The state supreme court left this Eighth Amendment issue for the lower courts to address: "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 non-homicide offender satisfies the Eighth Amendment concerns set forth in *Graham*." *Id.* at 461.

The Court of Appeals of Maryland likewise recognized that *LeBlanc* was not a merits decision. *Carter v. State*, 192 A.3d 695, 706 n.9 (Md. 2018). *Carter* addressed whether Maryland's parole process was a meaningful opportunity for release as contemplated by *Graham*. The *Carter* court found that *LeBlanc* provided "limited guidance" on this question, since *LeBlanc* "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. Carter* observed that "while such a geriatric release program might satisfy *Graham*, the Court has not reached such a holding." *Id.*

California and Maryland have correctly recognized that a non-merits federal habeas decision like *LeBlanc* does not control a case on direct review. Ohio similarly avoided this pitfall in *State v. Moore*, 76 N.E.3d 1127 (Oh. 2016). That case held that a juvenile's de facto life sentence violated *Graham*. Chief Justice O'Connor criticized the dissent's reliance on Sixth Circuit federal habeas decisions, because those decisions were based on the "'highly deferential' standard imposed by AEDPA." *Moore*, 76 N.E.3d at 1153 (O'Connor, C.J., concurring). She emphasized that "[w]e 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.

C. This is an important federal issue because a state court's improper reliance on an AEDPA decision results in constitutional claims going unscrutinized.

The deferential standard of review in AEDPA cases is 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)). Similarly, federalism and comity concerns require that state courts be given the first opportunity to adjudicate constitutional questions on the merits. *See, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009).

The Florida Supreme Court's misapplication of *LeBlanc* upends this framework. The court substituted rigorous analysis of Petitioner's Eighth Amendment claim with reliance on an AEPDA decision that did not even address the constitutional issue. Because a federal habeas court will properly decline to address the merits of any constitutional claim, given the restrictions on federal habeas review, it is incumbent on state courts to carefully scrutinize such claims on direct review. When state courts defer to this Court's AEDPA jurisprudence to determine the scope of a constitutional right, they effectively preclude a defendant from having the merits of his or her constitutional claim adjudicated in either state or federal court.

The Florida Supreme Court's decisions in *Michel*, *Franklin*, and Petitioner's case have thrust juvenile offenders back into a parole process that was deemed unconstitutional by *Atwell.* The *Atwell* court's holding has not been overturned by rigorous constitutional analysis, but instead by a misapplication of *LeBlanc*. This

Court should therefore grant certiorari, vacate the judgment, and remand this case for reconsideration with the understanding that *LeBlanc* was not a merits decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 1, 2019