No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

FRANKY JOSEPH, PETITIONER

VS.

STATE OF FLORIDA, RESPONDENT.

On Petition For a Writ of Certiorari to
The Florida Third District Court of Appeal

APPENDIX A

Decision of State Court of Appeals

Third District Court of Appeal

State of Florida

Opinion filed June 12, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2215
Lower Tribunal No. 94-1289

Franky Joseph,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Milton Hirsch, Judge.

Carlos J. Martinez, Public Defender, and Jonathan Greenberg, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Linda Katz, Assistant Attorney General, for appellee.

Before LOGUE, LINDSEY and LOBREE, JJ.

PER CURIAM.

Affirmed. See Franklin v. State, 258 So. 3d 1239 (Fla. 2018); State v. Michel, 257 So. 3d 3 (Fla. 2018).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FRANKY JOSEPH, PETITIONER

VS.

STATE OF FLORIDA, RESPONDENT.

On Petition For a Writ of Certiorari to
The Florida Third District Court of Appeal

APPENDIX B

Decision of Florida State Court of Postconviction Court

10/12/5

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

FRANKY ST. LOUIS JOSEPH,

Defendant.
_____/

Case No. F94-1289
Judge Hirsch

FILED
OCT 12 2018
CLERK

ORDER GRANTING MOTION TO TERMINATE RE-SENTENCING HEARING AND DENY POST-CONVICTION RELIEF

THIS CAUSE came before this Court on the State's Motion to Terminate Re-sentencing Hearing and request that the Defendant's Motion for Post-Conviction Relief/Correct Illegal Sentence be denied (Motion). This Court, having reviewed the Motion, the Defendant's response thereto, the court files and records in this case, and being otherwise fully advised in the premises therein, hereby grants the State's Motion as follows.

This Court was in the midst of conducting a re-sentencing hearing based upon the Florida Supreme Court's decision in *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). In light of the Florida Supreme Court's recent decision in *State v. Michel*, SC16-2187 (Fla. July 12 2018), the prior decision in *Atwell* is not applicable to the instant case. The basis upon which this Court ordered the re-sentencing hearing no longer exists, and, is precluded by the decision in *Michel*.

In *Michel*, the trial court denied a post-conviction motion in which the defendant sought a re-sentencing hearing based on *Atwell*. The Fourth District

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Court of Appeal reversed and remanded, pursuant to *Atwell*, and ordered a re-sentencing hearing, while certifying conflict with the Fifth District Court of Appeal's decisions *Stallings* v. *State*, 198 So. 2d 1081(Fla 5th DCA 2017) and *Williams v. State*, 198 So. 3d 1084). [1] The Fourth District's *Michel* opinion held:

> Our reading of the Florida Supreme Court's decision in *Atwell* is that Florida's existing parole system does not provide the individualized sentencing consideration required by *Miller v. Alabama* [citation omitted]. Thus, as in *Atwell*, appellant is entitled to be resentenced pursuant to the sentencing provisions enacted in Chapter 2014-220, Laws of Florida.

The Florida Supreme Court reversed the Fourth District and quashed its opinion, without any remand for any determination or re-sentencing. Justice Polston issued the following opinion:

> As explained below, we 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 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Virginia v. LeBlanc*, 137 S.Ct. 1726. Therefore, such juvenile offenders are not entitled to resentencing under section 921.1402, Florida Statutes.
>
> . . .

[1] In *Williams*, the Fifth District, also addressing a sentence for first-degree murder, for a juvenile, of life with parole eligibility after 25 years, remanded the case to the trial court, with directions to the trial court to determine the PPRD, as the post-conviction record was silent as to that. Likewise, in *Stallings*, where the juvenile's life sentence for capital sexual battery was parole eligible, and the status of any currently pending presumptive parole release date was unclear in the post-conviction record, the Fifth District reversed the trial court's order denying the post-conviction motion and remanded with directions to determine Appellant's presumptive parole release date and the Commission's recommendations for his parole release date. In *Michel*, the defendant had not served the 25 year minimum mandatory and no pprd was mentioned.

> We hold that juvenile offenders' sentences of life with the possibility of parole after 25 years under Florida's parole system do not violate "*Graham*'s requirement that juveniles . . . have a meaningful opportunity to receive parole." *LeBlanc*, 137 S.Ct. at 1729. Therefore, such juvenile offenders are not entitled to resentencing under section 921.1402, Florida Statutes. Accordingly, we quash the Fourth District's decision in *Michel* and approve the Fifth District's decisions in *Stallings* and *Williams* to the *extent that they are consistent* with this opinion.

(Slip op. pp. 2, 9-10)(emphasis added). The above opinion by Justice Polston was joined in by Justices Canady and Lawson. A fourth justice, Justice Lewis, concurred in the result—reversal and quashing of the Fourth District's opinion--without a written opinion.[2] Three justices dissented. The decision in *Michel* is thus that of a majority. See Art. V, Section 3(a), Florida Constitution. ("The concurrence of four justices shall be necessary to a decision.").

While the supreme court's *opinion* in *Michel* was not joined by Justice Lewis, he concurred in result, thus indicating he joined the supreme court's *decision* quashing *Michel*. *See Floridians For A Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 834 (Fla. 2007) (explaining the distinction between opinion and decision); *see also Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994). Thus, while the *Michel* court did not create a binding precedential opinion, it created a binding decision: the disapproval of *Michel* and the approval of *Stallings* and *Williams*.

[2] It should be noted that Justice Lewis had previously joined in Judge Polston's *dissenting* opinion in *Atwell*. See *Atwell*, at 197 So.3d 1050-51. That *dissenting* opinion is incorporated in Justice Polston's present opinion in *Michel*, which also adds the newly issued decision in *LeBlanc*.

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The decision of the Florida Supreme Court in *Michel* is binding on this Court, and is dispositive of the issue of an entitlement to a re-sentencing hearing. The instant case is in the same posture as *Michel*. The Defendant's sentence is parole eligible, with a 25 year minimum mandatory, and no PPRD has been determined as yet, because the Defendant has not finished serving the minimum mandatory part of his sentence and has not been interviewed by the Parole Commission yet.

Michel is currently on rehearing. That decision is, however, binding at this juncture. *See Rock v. State*, 800 So. 2d 298, 299 (Fla. 3d DCA 2001). Thus, this Court is currently bound by *Michel*, and hereby terminates the re-sentencing proceeding and denies post-conviction relief.

SO ORDERED, in chambers in Miami, Miami-Dade County Florida, on this the 12 day of October, 2018.

MILTON HIRSCH
CIRCUIT COURT JUDGE

cc:

All counsel of record