19-5859

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO:

EDWARD WESBY,
Petitioner,

V.

STATE OF FLORIDA
Respondent,/

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Pro Se Litigant

QUESTION PRESENTED

Whether Florida's current parole system provides a meaningful opportunity for release to juvenile offenders sentenced to life imprisonment with eligibility for parole, as required by **Miller v Alabama,** 567 U. S. 460 (2012)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest State Court to review the merits appears at (Appendix A) to the petition and is reported at **Westby v State**, SC19-212 (Fla. June 11, 2019)

The opinion of the Fourth District Court of Appeal of Florida appears at (Appendix B) to the petition and is reported at **State v Wesby**, 262 So. 3d. 818 (Fla. App. 4th Dist. 2019)

JURISDICTION

The date on which the highest State Court decided my case was June 11th. 2019. A copy of that decision appears at (Appendix A)

The jurisdiction of this Court is invoked under title 28 U. S. C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Constitution Amendment VIII

STATEMENT OF THE CASE

After being convicted of Second Degree Murder and Armed Robbery in 1976, when he was seventeen (17) years old, Wesby was sentenced to life imprisonment.

July 22, 2016, Wesby moved to be resentenced on the authority of **Miller v Alabama**, 567 U. S. 460 (2012), and the State Court's decision, **Atwell v State,** 197 So. 3d. 1040 (2016)

In a written response, Respondents argued that Wesby's motion should be denied without prejudice to refile it because he had not shown that he was not released on parole, or that his presumptive parole release date (PPRD) is functionally equivalent to life without parole.

A hearing was held on the motion, and the Respondents argued only that Wesby had not shown that his PPRD Was not within a normal lifespan. (App. C).

No issue was raised that Wesby had been paroled at some point, or that Wesby had failed to assert that he had not been paroled. Wesby has been continuously incarcerated since 1976, and has not been paroled, or otherwise release.

Finally, Respondent's made no argument that Wesby's PPRD was within a normal life span. (App. C).

After hearing arguments of the parties, the post conviction Court entered and order granting resentencing of Mr. Wesby. (App. D). No actual resentencing took place in Wesby's case.[1]

Respondents appealed the post conviction Court's order granting resentencing wherein the Fourth District Court Of Appeals reversed the order in a written opinion. See **Wesby v State**, 262 So. 3d. 818 (Fla. App. 4th Dist. 2019) (App. B).

The Florida Supreme Court denied discretionary review. (App. A) **Westby v State**, SC19-212 (Fla. June 11, 2019)

This petition follows.

[1] The jurisdiction to appeal a resentencing that never took place is a question no Court below has addressed. That question is not before this Court.

REASONS FOR GRANTING THE WRIT

In **Graham v Florida,** 560 U. S. 48 (2010), this court held that "the Eighth Amendment [to the United States constitution] forbids the sentence of life without parole" for juvenile offenders convicted of non-homicide offenses. Id. 560 U. S. at 74. This holding expanded the Supreme Court's previous pronouncement in **Roper v Simmons,** 543 U. S. 551, 571 (2005), that juvenile offenders "diminished culpability" militated against imposing the death penalty because the "penological justification for the death penalty" applies to juvenile offenders "with lesser force than to adults".

Both Roper and Graham emphasized that a juvenile offenders lessened culpability and greater capacity for charge require a sentencing Court to consider a juvenile offenders youth and attendant characteristics before determining that life without parole is a proportionate sentence. **Montgomery v Louisiana**, 136 S. Ct. 718, 734 (2016). In short, an offenders age is relevant to the eighth amendment, **Miller v Alabama**, 567 U. S. 460 (2012), and a sentencer must take the juvenile offenders age into account before imposing a particular penalty. Id..

In Miller, the Supreme Court considered the cases of two juvenile offenders convicted of homicide offenses and sentenced to life in prison without parole pursuant to sentencing schemes in their states that mandated the imposition of a life without parole sentence. **Miller,** 132 S. Ct. at 2460, ___ U. S. at ____. The

juvenile offenders argued that these mandatory sentencing schemes violated the Eighth Amendment by running afoul of Graham's admonition that "[a]n offenders age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." **Miller**, 132 S. Ct. at 2460, 567 U. S. at ___. (quoting Graham 560 U. S. at 75).

This Court agreed, reversed the sentences imposed and held that mandatory life without parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's Prohibition on Cruel and Unusual Punishments. **Graham** 130 S. Ct. at 2011, ____ U. S. at ____. The Court reasoned that Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability are greater prospects for reform, the Court explained, "they are less deserving of the most severe punishments." **Miller,** 132 S. Ct. at 2464, ___ U. S. at ____ (quoting **Graham** 560 U. S 68).

While Roper established a flat rule banning the death penalty for juvenile offenders, and Graham established a flat rule banning the imposition of a life sentence without parole for juvenile offenders who commit non-homicide offenses, Miller set out a different rule, (individualized sentencing) **Miller,** 132 S. Ct. at 2466 for homicide offenses. Miller's rule of individualized sentencing for juvenile offenders is given effect through a hearing where youth and its attendant

characteristics are considered as sentencing factors, since such a hearing is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. **Montgomery** 136 S. Ct. at 735.

The hearing doesn't replace but rather gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity. Id.

Miller requires that a sentencer consider the juvenile's chronological age and its hallmark features before imposing sentence. A sentencer must consider a juvenile's lessened culpability and greater capacity for change as compared to an adult. Miller, 132 S. Ct. at 2460. The sentencer must consider the juvenile offenders lack of maturity and underdeveloped sense of reasonability, that led to recklessness, impulsivity, and heedless risk-taking. Id at 2464.

This Court's requirement of individualized sentencing for juvenile offenders forbids a sentencer from treating every child as an adult, because doing so inevitably ignores the incompetencies associated with youth, and disregards the possibility of rehabilitation even when the circumstances' most suggest it. Id at 2468.

In essence, Miller established that life without parole for a juvenile offender is a disproportionate sentence under the Eighth Amendment. **Montgomery** 136 S. Ct. at 734.

Wesby is now in the 43rd year of a de facto "mandatory" life sentence that was imposed for a Second Degree Murder committed when he was 17 years old. After Miller, Wesby moved the trial Court for resentencing arguing his sentence violated the Eighth Amendment.

The post conviction Court granted the motion (App. D), and set a resentencing date. (App. C).

Respondents appealed the order to the Fourth District Court of Appeal of Florida arguing Wesby was eligible for parole thereby his sentence was not unconstitutional under Miller. The Fourth District held that the Florida Supreme Court had receded from its prior decision in **Atwell v State,** 197 So. 3d. 1040 (2016), in subsequent decisions see **State v Michel,** 257 So. 3d. 3 (Fla. 2018), and **Franklin v State**, 258 So. 3d. 1239 (Fla. 2018) holding, juveniles sentenced to parole eligible sentences were not required to be resentenced under Miller or Graham. See **State v Wesby,** 262 So. 3d. 818 (Fla. App. 4th Dist. 2019)

The Florida Supreme Court denied review, (App. A) this petition follows.

Florida's current parole system does not comport with Miller because the system does not afford juvenile's a meaningful opportunity to demonstrate an entitlement to release. The Florida Supreme Court concluded that Florida's parole system, as set forth in the statutes, doesn't provide for individualized consideration

of an offender's juvenile status at the time of the Murder. **Atwell,** 197 So. 3d. at 1041.

The Court went on to explain that Florida current 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. Id at 1042.

Under Florida's current parole system a juvenile has no opportunity to demonstrate that release is appropriate based on maturity and rehabilitation for a multiple reasons. Florida's Parole Commission relies on static, unchanging factors such as the crimes committed and previous offenses, when determining whether or not to grant an offenders release on parole. See Fla. Admin. Code R. 23-21.007. Under Graham, a juvenile's meaningful opportunity to obtain release must be based on demonstrated maturity and rehabilitation. Graham, 560 U. S. at 75. By relying on static factors, such as the offense committed, ignores the focus on the demonstrated maturity and rehabilitation that Graham and Miller require.

Next, an inmate seeking parole has no right to be present at the Commission meeting and has no right to an attorney. Although the hearing examiner sees the inmate prior to the hearing, the commissioners do not. Fla. Admin. Code R. 23-21.004(13); and 23-21.001(6). Third, there is only a limited opportunity for supporters of the inmate to speak on the inmate's behalf.

Finally, there is no right to appeal the commission's decision, absent filing a Writ of Mandamus. **Armor v Fla. Parole Comm'n**, 963 So. 2d. 305, 307 (Fla. App. 1st Dist. 2007).

This Court's Miller opinion emphasized that Graham and Roper's individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. Miller, 132 S. Ct. at 2475.

A cursory review of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed Second Degree Murder could be subject to one of the law's harshest penalties without the sentencer, or the Commission, ever considering mitigating circumstances.

In Florida, the decision to parole an inmate is an act of grace of the State and shall not be considered a right. §947.002 Fla. Stat..

There are no special protections expressly afforded to juvenile offenders and no consideration of the diminished culpability of the youth at the time of the offense. No Miller factors are a part of the equation.

When Wesby was sentenced for Second Degree Murder, the sentencing statute provided a sentence of up to life in prison. At the sentencing hearing, the defense could present mitigation; however, the mitigation was not for the purpose of individualizing Wesby's sentence based on his juvenile status.

The judge that sentenced Wesby never considered how children are different and how those differences counsel against irrevocably sentencing him to a lifetime in prison. Miller.

At the time Wesby was sentenced to life, no rules or statutes dictated how parole was administered. However, two years after Wesby's offense the Florida parole system adopted an objective parole release guidelines. Accordingly, this guidelines approach applied to all prisoners in the state. See Chapter 78-417 Laws of Florida..

Applying the objective parole guidelines to Wesby's life sentence, he has a salient factor score of 0 which equates to a matrix time range of 60-75 months for a youthful offender. There can be an additional 60-75 months for Wesby's concurrent 1st degree felony Armed Robbery.

In total Wesby matrix time range in month's would be 150 months or 12 ½ years before he could parole out. Wesby was received by the Florida Department of Corrections in 1976.

Twelve and one half years after the department received Wesby he should have been paroled on or about February 1989, more than thirty years ago. Instead, he has a presumptive parole release date of January 2025. This date is forty nine years from the date of Wesby's offense; with no guarantee it will become effective.

There is no right to parole, and Miller did not mandate that a juvenile sentenced to life was required to be release. Hence, the 2025 PPRD Wesby has can be suspended, or extended at the commissions discretion — which has already been done — without taking into account the differences among defendant's and crimes, or youth and rehabilitation.

Where Wesby should have been released to parole 30 years ago, but has not been release, he is in effect serving a de facto "mandatory" life sentence that can only be corrected by resentencing him in conformance with Chapter 2014-220. Laws of Florida which mandates a term of years with judicial review after 25 years.

CONCLUSION

Wherefore, Wesby moves this Honorable Court to grant Certiorari review to determine whether the Florida parole system applies the factors Miller mandated to juveniles sentenced to life.

All facts matters and issues herein alleged are true and correct under the penalty of perjury.

On this 29 day of August, 2019.

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