No. 19-6260

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



**CRAIG CROSS** — PETITIONER

vs.

**STATE OF FLORIDA** — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

**Fourth District Court of Appeals, State of Florida**
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

# PETITION FOR WRIT OF CERTIORARI

CRAIG CROSS DC # 083510
Suwannee Correctional Institution Annex
5964 U.S. Hwy 90
Live Oak, Fla. 32060

## QUESTION(S) PRESENTED

Did the Florida Supreme Court violate *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 *Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), when deciding *Franklin v. State*, 258 So.3d 1239 (Fla. 2018) and *State v. Michel,* 257 So.3d 3 (Fla. 2018), thereby overturning *Atwell v. State*, 197 So.3d 1040 (Fla. 2016)?

## LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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## TABLE OF AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ X ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix __A____to the petition and is
[ ] reported at _____; or,
[ ] has been designated for p
ublication but is not yet reported; or, [X] is unpublished.

The opinion of the Seventeenth Judicial Circuit court appears at Appendix _____B____to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No. _____ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was May 2, 2019. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: August 2, 2019, and a copy of the order denying rehearing appears at Appendix C

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No._____ .

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 8: Cruel and Unusual Punishment

United States Constitution, Amendment 14: Due process

Florida Constitution, article I, section 9: Due process

Florida Statutes §§921.1401, 921.1402 and 775.082(1) (b)

## STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder in Broward County, Florida, the 17th Judicial Circuit. (App D) The offense occurred in 1983 when he was 17 years old. He was sentenced to life imprisonment with parole eligibility after 25 years. (App E).

In July 2015, Petitioner moved to vacate his sentences pursuant to *Miller v. Alabama*, 565 U.S. 1013 (2011), and other cases. (App F). A year and a half later (January 2017), the trial court ordered the State to respond. By that time *Atwell v. State*, 197 So.3d 1040 (Fla. 2016), had been decided, but *State v. Michel,* 257 So.3d 3 (Fla. 2018), was pending in the Florida Supreme Court. The State asked the trial court to "stay any Order to respond" until *Michel* was decided. The trial court granted that request.

After the Florida Supreme Court overruled *Atwell* in *State v. Michel*, 257 So.3d 3 (2018), and *Franklin v. State*, 258 So.3d 1239 (Fla. 2018), the State filed a response arguing that the trial court should deny Petitioner's motion to vacate his sentence.

The trial court entered an order summarily denying Petitioner's motion. (Petitioner filed a timely notice of appeal on March 1, 2019.

On April 13, 2019, Assistant Public Defender Paul Edward Petillo, E-Filed the Petitioner's Initial brief arguing two Points:

Point One: Asking the Court to certify a question of great public

importance. The United Stated Supreme Court's recent decision in *Madison v. Alabama*, 139 S.Ct. 718 (2019), calls into question the Florida Supreme court's reliance on a federal habeas decision -- *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (*per curiam*) -- in overruling *Atwell v. State*, 197 So.3d 1040 (Fla. 2016).

Point Two: Florida's parole process as applied to juvenile offenders violates the Eighth Amendment. Parole is so rarely granted it is like clemency. The process is saturated with a discretion not governed by any rules or standards. Parole release decisions are not based on a juvenile offenders maturity and rehabilitation. The harm of the substantive deficiencies in the parole process is compounded by its procedural deficiencies (no right to be present at the parole hearing, no right to counsel, etc.). Florida's parole process also violated due process under the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution.

On May 2, 2019, the Fourth District Court of Appeal of the State of Florida *per curium* affirmed without a written opinion the trial court's order denying appellant's postconviction motion.

On May 21, 2019, Petitioner Motioned the Court to stay Mandate based on *Atwell* being formally overruled in *Franklin v. State*, 258 So.3d 1239 (Fla. 2018),

(*State v. Michel*, 257 So.3d 3 (Fla. 2018), was a 3-1-3 decision), while certiorari for *Franklin* was pending before the United States Supreme Court. *Franklin v. Florida*, No. 18-8701.

On May 28, 2019, the United States Supreme Court denied certiorari and the Petitioner so notified the Court and filed an "Unopposed Motion to Allow Appellant 30 Days to file Pro Se Motion for Rehearing".

On June 21, 2019, the Petitioner filed his pro se Motion for Rehearing, Rehearing En Banc, and/or Seeking Written Opinion. (App G).

On August 2, 2019, the court denied the motion (App C)

.and issued its Mandate on August 23, 2019. (App A).

The Petitioner, because no written opinion was issued upon the court's denial of his appeal, by rule could not request discretionary review by the Florida Supreme Court.

This timely Petition then ensued.

## REASONS FOR GRANTING THE PETITION

Petitioner received a parole-eligible life sentence for a first-degree murder he committed when he was 17 years old. 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 *Graham*[1], *Miller*[2], *and Montgomery*[3]. Two years later the court overruled *Atwell* on the authority of *Virginia v. Leblanc*, 137 S.Ct. 1726 (2017) (*per curiam*). *State v. Michel*, 257 So.3d 3 (Fla. 2018); *Franklin v. State*, 258 So.3d 1239 (Fla. 2018).

Michel's petition for writ of certiorari to this Court was denied March 25, 2019. *Michel v. Florida*, No. 19-8116. Franklin's writ of certiorari to this Court was denied on May 28, 2019. *Franklin v. Florida*, No. 18-8701. It must be stressed, however, that this Court's denial of certiorari in *Michel* and *Franklin* "does not sprinkle holy water on any position argued below...." *Midwest Fence Corp. v. United States Dep't of Transp.*, 10 c 5627, 2018 WL 1535081, at *1 (N.D. Ill. March 29, 2018). As this Court stated in *Maryland v. Baltimore Radio Show*[4]:

> [T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the

[1] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)
[2] *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012)
[3] *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)
[4] *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 70 S.Ct. 252, 94 L. Ed . 562 (1950)

> Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated. *Id.* at 919.

This admonition will need to be repeated -- again.

The Florida Supreme Court's decisions in *Michel* and *Franklin* have been called into question by a recent decision of this Honorable Court -- *Madison v. Alabama*[5], discussed below.

In overruling *Atwell*, the Florida Supreme Court did not engage in a rigorous reexamination of Florida's parole process. Instead, it used *Virginia v. LeBlanc*[6] as a proxy for such an analysis. The Court stated: "[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)." *Michel*, 257 So.3d at 4.

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

[5] *Madison v. Alabama*, 586 U.S. ___, 139 S. Ct. 718, 203 L. Ed. 2d 103 (2019)
[6] *Virginia v. LeBlanc,* 582 U.S. ___, 137 S. Ct 1726, 198 L. Ed. 2d 186 (2017) (*per curiam*)

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.*

However, the supreme court overlooked that *LeBlanc* was a federal habeas decision that employed the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

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.* The 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*)). The 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 prisoners '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 *White v. Woodall*, 572 U.S. 415, 427 (2014)). "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.* 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).

The Florida Supreme court did not acknowledge this clear language; and it did not discuss the deferential AEDPA standard applied in *LeBlanc.* It said the Supreme Court had "clarified" and "delineated" the requirements of the Eighth Amendment when the high court explicitly stated it was not doing that. Further, the Florida Supreme Court lumped *LeBlanc* in with *Graham* and *Miller*, two cases decided on direct review.

The recent case of *Madison v. Alabama* brings all of this into focus. On direct review, this Court granted Madison relief on his Eighth Amendment claim that his dementia prevented him from understanding his death sentence. The Court noted that in *Dunn v. Madison*, 138 S.Ct. 9 (2017) (*per curiam*), it had denied Madison relief when his case was before the Court on Habeas review. The Court said that in *Dunn v. Madison* "we made clear that our decision was premised on AEDPA's 'demanding' and 'deferential standard.'" *Madison v. Alabama*, 139 S.Ct. at 725 (quoting *Dunn v. Madison*, 138 S.Ct. at 11-12). The Court stated that in *Dunn v. Madison* it had "'express[ed] no view' on the question of Madison's competency 'outside of the AEDPA context.'" *Id.* (quoting *Dunn v. Madison*, 138 S.Ct at 11-12).

The Court said: "Because the case now comes to us on direct review of the

state court's decision (rather than in a habeas proceeding), AEDPA's deferential standard no longer governs." *Madison*, 139 S.Ct. at 726. The Court stated:

> When we considered this case before, using the deferential standard applicable in habeas, we held that a state court could allow such an execution without committing inarguable error. *See Madison*, 583 U.S., at ___, 138 S.Ct., at 11-12 (stating that no prior decision had "clearly established" the opposite); *supra*, at ___. Today, we address the issue straight-up, sans any deference to a state court.

*Madison v. Alabama*, 139 S.Ct. at 727. And after addressing the "issue straight-up, sans any deference to a state court," *id.*, it granted Madison relief.

This Court stated in *LeBlanc,* as it had in *Dunn v. Madison*, that it "expresses no view on the merits of the underlying Eighth Amendment claim" 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). It is hard to get much clearer that that, but if more clarity were needed, *Madison v. Alabama* supplies it.

In short, when the United States Supreme Court states in one of its habeas decisions that it is not ruling on the merits, then it is not ruling on the merits. And lower courts must pay attention to that language. "It is not within [a state court's] province to reconsider and reject" decisions of the United States Supreme Court. *Delancy v. State*, 256 So.3d 940, 947 (Fla. 4th DCA 2018). And just as "state

statutes do not control over United States Supreme Court decisions on matters of federal constitutional law," *Sigler v. State*, 881 So.2d. 14, 19 (Fla. 4th DCA 2004), *aff'd*, 967 So.2d 835 (Fla. 2007), state court decisions don't either. "It is, rather, the other way around." *Id.*

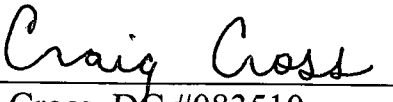
State courts must "follow both the letter and the spirit of [United States Supreme Court] decisions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982). Given *Madison v. Alabama*, the Florida Supreme Court needs to reconsider its decisions in *Michel* and *Franklin* and its reliance on *LeBlanc.*

The Florida Supreme Court should not adhere to its error in overruling *Atwell* and willfully ignore the United States Supreme Court's clarification in *Madison.*

## CONCLUSION

Given that *Virginia v. LeBlanc* was a federal habeas decision governed by the deferential AEDPA standard, and given that *Madison v. Alabama* demonstrates that AEDPA decisions like *LeBlanc* are not rulings on the merits, the rulings on *Michel* and *Franklin* are erroneous and violate *Graham, Miller, Montgomery,* and the Eighth Amendment. *Atwell* adheres to *Graham* and *Miller* and was incorrectly overruled, thereby violating Mr. Cross's constitutional rights under the Eighth Amendment as made applicable to the states by the Fourteenth Amendment. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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