No. 19-7418

IN THE

SUPREME COURT OF THE UNITED STATES

JODY GIFFORD,– PETITIONER,

vs.

MARK INCH, AND ASHLEY MOODY,– RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FLORIDA THIRD DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

JODY GIFFORD; DC# 105686

Everglades Correctional Institution

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000

(Phone Number) Warden

QUESTION(S) PRESENTED

Whether the courts below decided an important federal question in a way that conflicts with the relevant decisions of this Honorable Court when they denied --without a resentencing hearing -- Petitioner's motion to vacate an illegal sentence and request for a resentencing hearing asserting that Petitioner's life sentence with virtually no parole for a murder offense committed at the age of 15 violates the Eighth Amendment of the United States Constitution.

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 CITED

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[ ] is unpublished.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[ ] is unpublished.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 publication but is not yet reported; or,

[X] is unpublished.

The opinion of the Eleventh Judicial Circuit in and for Miami-Dade 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[X] is unpublished.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 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. ___ A _____.

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

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

The date on which the highest state court decided my case was September 25, 2019. A copy of that decision appears at Appendix A.

[ ] A timely petition rehearing was thereafter denied 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. ___ A _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 8

Bail-Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 14

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At age 15, in 1986, Jody Gifford was charged in the State of Florida, with: a. One Count of First Degree Murder; b. One Count of Conspiracy to Commit Murder; c. One Count of Attempted First Degree Murder; d. One Count of Attempted Robbery with a Deadly Weapon (an electrical cord). e. One Count of Armed Burglary of an Occupied Dwelling with a Dangerous Weapon (electrical chord). Following a guilty plea, the Petitioner was convicted of all the above stated charges and sentenced on One Count of First Degree Murder to life in prison with a minimum mandatory of 25 years before being eligible for parole consideration. On One Count of Conspiracy to Commit Murder to 30 years in prison consecutive to Count One. On One Count of Attempted First Degree Murder to natural life in State prison consecutive to the conspiracy to commit murder. For the Attempted Robbery with a Deadly Weapon, the Petitioner was sentenced to 30 years to run consecutive to the Attempted First Degree Murder charge. For the Armed Burglary of an Occupied Dwelling with a Dangerous Weapon, the Petitioner was sentenced to a natural life to run consecutive to the Attempted Robbery with a deadly weapon charge.

On July 31, 1995, the trial court modified Petitioner's life sentence for Attempted First Degree Murder to a thirty (30) year sentence.

On November 23, 2016, the Petitioner filed a motion to vacate an illegal life sentence for First Degree Murder that was denied on January 23, 2019.

On April 9, 2019, the Petitioner filed a motion to correct illegal sentence on the Armed Burglary of an Occupied Dwelling with a Dangerous Weapon, which was granted on July 2, 2019, and the Petitioner life sentence on this count was modified to forty (40) years. The court provided that all sentences are running concurrently.

The Petitioner appealed the trial court's denial of Petitioner's motion to vacate an illegal life sentence for First Degree Murder that was denied on January 23, 2019. The Florida Third District Court of Appeal denied Petitioner's appeal on September 25, 2019.

STATEMENT OF THE FACTS

On February 19, 1986, the Petitioner, and codefendant Anthony Hatcher. were allowed entry into the victim's house located at 1526 NW 31 Street, Miami, Florida. Once inside the home, Petitioner hid in the bedroom closet and Anthony Hatcher hid under codefendant Estelle Arwood's bed. Petitioner and codefendant Hatcher remained hidden until the victim (Vaughn Robinson) was alone in her home. At such time, they came out of hiding and attacked the victim. The victim was able to reach the police over the phone and request help. The Petitioner and codefendant interrupted the victim's conversation wirh police and the victim was strangled with an electrical chord. The Petitioner's codefendant (Estelle Artwood) was the victim's step-daughter who established that Petitioner was in agreement with her about killing her step-mom and Dad because they disapproved of her having a black boyfriend.

REASONS FOR GRANTING THE PETITION

The lower courts' decisions erred in failing to correct an illegal sentence, where the Petitioner was sentenced to life with virtually no parole for first-degree murder when the offense took place when the Petitioner was 15 years of age and lacked the moral culpability of an adult. The lower courts' decisions conflict with the relevant decisions of this Honorable Court in Roper[1], Graham[2], and Miller[3]. This case is a timely opportunity to correct an injustice. Additionally, the decision below is erroneous, and the issue that it addresses is important.

I. The State court erred in denying the Petitioner's motion to vacate an illegal sentence and request for a resentencing hearing, based only on the fact that the Petitioner is a parole eligible offender, without taking into consideration (1) that there is no right to parole in Florida, (2) Petitioner Presumptive Parole Release does not afford the Petitioner a meaningful opportunity for release, and (3) the reasoning laid out in Roper, Graham, and Miller, supra, stating that science has proof that juveniles should be treated differently apply to this type of cases also.

The United States Constitution bars "cruel and unusual punishment." U.S. Const. Amend. VIII. This provision is applicable to the States through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV. A

[1] Roper v. Simmons, 543 U.S. 551 (2005)
[2] Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011 (2010)
[3] Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012)

sentence of life imprisonment with virtually no possibility of parole ("LWOP") for a juvenile under the age of eighteen is cruel and unusual.

In 2005, the United States Supreme Court held that the Eighth Amendment of the United States Constitution prohibits the death penalty for crimes committed by juveniles, meaning any person under the age of 18. See *Roper v. Simmons*, 543 U.S. 551 (2005).

In 2012, this Honorable Court prohibited mandatory sentences of life without parole for homicide juvenile offenders. See *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed 2d 407 (2012) which cited *Graham*, and *Roper*, supra. Now, the age of eighteen for a juvenile offender as set forth in Miller, supra, should be extended to 24 based on the reasoning in *Roper*, *Graham*, and *Miller*, the latest case, stating that it is unconstitutional to sentence a juvenile offender to life for a homicide offense. In the same way, Petitioner's life sentence for a first-degree murder offense committed at age 15 is unconstitutional as well. Petitioner's parolable life sentence for a first-degree murder offense should receive the same benefit as Miller, supra, because there is no right to parole in Florida and Petitioner's presumptive parole release date does not afford another opportunity at civilian life as an adult.

In *Miller, supra,* the United States Supreme Court held the sentence of life without parole unconstitutional as applied to a juvenile convicted of murder in the course of arson. The Court's analysis rested heavily on the principle that "[t]he Eighth Amendment's prohibition of cruel and unusual punishment

``guarantees individuals the right not to be subjected to excessive sanctions. Roper, 543 U.S., at 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1. That right, we have explained, ``flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense. Ibid. (quoting Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). *Miller v. Alabama*, 183 L. Ed. 2d 407, 418 (2012). The Court emphasized that both case law and science recognize that children are different from adults - they are less culpable for their actions and at the same time have a greater capacity to change and mature.

The *Miller* Court relied again upon a body of research confirming the distinct emotional, psychological and neurological status of youth. The Court stated that *Roper* and *Graham*, relied on three significant gaps between juveniles and adults. First, children have a `` 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Roper, 543 U.S., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Second, children ``are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited ``contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child's character is not as ``well formed as an adult's; his traits are ``less fixed and his actions less likely to be ``evidence of irretrievabl[e] deprav[ity]. Id., at 570, 125 S. Ct. 1183, 161 L. Ed.

2d 1. *Miller v. Alabama*, 183 L. Ed. 2d 407, 419 (2012). The Court further explained that

> [o]ur decisions [in Roper and Graham] rested not only on common sense-on what ``any parent knows but on science and social science as well. Id., at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. In Roper, we cited studies showing that `` '[o]nly a relatively small proportion of adolescents' who engage in illegal activity `` 'develop entrenched patterns of problem behavior.' Id., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in Graham, we noted that ``developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds-for example, in ``parts of the brain involved in behavior control. 560 U.S., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825.5 We reasoned that those findings-of transient rashness, proclivity for risk, and inability to assess consequences-both lessened a child's ``moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his `` 'deficiencies will be reformed.' Id., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting Roper, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1).

Miller v. Alabama, 183 L. Ed. 2d at p. 419.

On the above stated facts and law, Petitioner submits to this Honorable Court that while the process of physiological and psychological growth alone will lead to rehabilitation for most adolescents, research over the last fifteen years on interventions for juvenile offenders has also yielded rich data on the effectiveness of programs that reduce recidivism and save money, underscoring that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. Indeed, there is compelling evidence that many juvenile offenders, even those charged with serious and violent offenses, can and do achieve rehabilitation and change their lives to

become productive citizens. See Second Chances, 100 Years of the Children's Court Giving Kids a Chance to make a Better choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), (showing that many individuals who were adjudicated delinquent to juvenile court - many for violent offenses including attempted murder and armed robbery changed the course of their lives.) As *Graham* recognized and held, the reduced culpability of adolescents as well as their distinctive status under the Constitution makes the sentence of juvenile life without parole unconstitutional. In the instant case, Petitioner's life sentence with virtually no parole is unconstitutional as well.

Petitioner submits to this honorable Court that parole is so rarely granted in Florida that Petitioner has little chance of ever being released. Here is a summary of the Florida Commission on Offender's Review's release decisions from the years 2012 to 2017:

Fiscal year	Parole Eligibility	Parole Release	Parole	Percentage Release	Percentage
2017-	4275	1499	14	0.93%	0.33%
2016-	4438	1242	21	1.69%	0.47%
2015-	4545	1237	24	1.94%	0.53%
2014-	4561	1300	25	1.92%	0.55%
2013-	4626	1437	23	1.60%	0.50%
2012-	5107	1782	22	1.23%	0.43%

(Source: Florida Commission on Offender's Review's Report)

The above referenced table shows that 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. In

2017, for example, only 14 of the 1499 parole release decisions, or 0.93%, were granted. By contrast, the overall parole approval rate in Texas for fiscal year 2017 was 34.94 percent.[4]

At this rate, and with 4,275 parole legible inmates remaining in 2018, it will take 194 years to parole these inmates. This means the vast majority of them will die in prison. Indeed, given the age of this population, few parole-eligible inmates will be alive within 20 years. Consider, for example, that there were 5107 parole eligible inmates in 2013; last year that number was down to 4275. Of those 832 inmates, 129 were paroled. The rest-703 of them-undoubtedly die in prison, though a few might have been released at the expiration of lengthy sentences.

The rarity with which parole is granted should not be surprising. Parole in Florida 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).

[4] 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

The Florida 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 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.

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 v. State*, 197 So.3d 15 1040, 1047 (Fla. 2016), 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). However, this meager reduction is easily nullified by assigning more months in aggravation.

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. 1988); § 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 that right (and the duty) to make the final release decision when the [presumptive parole release date] arrives." *Meola v. Department of Corrections*, 732 So.2d 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). 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. 23-21.019(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; of "vacate the prior effective parole release date, and decline to authorize parole... ." Fla. Admin. Code R. 23-21.019(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. 23-21.0155(1); *Florida Parole Commission v. Chapman*, 919 so. 2d 689, 691 (Fla. 4th DCA 2006). In her dissent in *State v. Michel*, 257 So.3d 3 (Fla. 2018), 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.

As noted in the above argument, the touchstone of the United States Supreme 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 v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotation marks omitted). 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 v. Florida*, 560 U.S. 48, 68 (2010) (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.

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 Florida 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. § 912.1402(5), Fla. Stat. (2014); Fla.R.Crim.P. 3.781; Fla.R.Crim.P. 3.802(g). But there is no right to appointed counsel in parole proceedings. "Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." *Russell* 89 Ind. L.J. at 425. Counsel can do what an inmate cannot: investigate, collect, and present "factual information so that the release decision is based on a full presentation of the relevant evidence. *Id.* at 426.

Further, the Florida Commission on Offender Review 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.

The rarity with which parole is granted makes it more like clemency. In *Graham* 560 U.S. at 71, the Court stated that the "remote possibility" of clemency "does not mitigate the harshness of [a life] sentence." The Court cited *Solem v. Helm*, 463 U.S. 277 (1983), where that argument has 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 the Court upheld a life sentence with the possibility of parole. The 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*, the 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 imprisoned for the rest of his life." *Id.* at 280-81 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

The 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* the 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. Accordingly, Petitioner's sentence violate the Eighth Amendment.

Juvenile offenders like Petitioner also have a liberty interest in a realistic opportunity for release based on demonstrated maturity and rehabilitation. Florida's parole system denies him his liberty interest without due process of law.

For adults, there is no liberty interest in parole to which due process applies unless that interest arises from statutes or regulations. *Swarthout v. Cooke*, 562 U.S. 216 (2011); *Greenholtz v. Inmates of Nebraska Penal Correctional Complex*, 442 U.S. 1, 7 (1979). Florida tries not to create a liberty interest in parole. § 947.002(5), Fla. Stat. (2018) ("It is the intent of the Legislature that the decision to parole an inmate is an act of grace of the state and shall

not be considered a right."); Fla. Admin. Code R. 23-21.001 ("There is no right to parole or control release in the State of Florida.").

Again, however, children are different. The Eighth Amendment requires that they be sorted from adults and given a meaningful opportunity to demonstrate maturity and rehabilitation, as argued above. Accordingly, they do have a liberty interest to which due process applies. See *Brown v. Precythe*, 2:17-CV-04082-NKL, 2015 WL 4980872 (W.D. Mo. Oct. 31, 2017); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015); *Greiman v. Hodges*, 79 F. Supp. 3d 933 (S.D. Iowa 2015).

As argued above, the Florida Commission on Offender Review does not comply with *Miller's* substantive and procedural requirements. Therefore, Petitioner's sentence violates not only the Cruel and Unusual Punishment Clauses, but also his right to due process under the Fourteenth Amendment and article I, section 9, of the Florida Constitution.

On all of the above, Petitioner states that a sentence of life with virtually no parole serves no legitimate penological purpose when imposed on a person under 18, it is unconstitutional. On this line, the *Miller* Court declared that

> the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because `` '[t]he heart of the **retribution** rationale' relates to an offender's blameworthiness, `` 'the case for retribution is not as strong with a minor as with an adult.' Graham, 560 U.S., at -- - --, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting Tison v. Arizona, 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); Roper, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Nor can **deterrence** do the work in this context, because `` 'the same characteristics that render juveniles

> less culpable than adults' -their immaturity, recklessness, and impetuosity-make them less likely to consider potential punishment. Graham, 560 U.S., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting Roper, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Similarly, **incapacitation** could not support the life-without-parole sentence in Graham: Deciding that a ``juvenile offender forever will be a danger to society would require ``mak[ing] a judgment that [he] is incorrigible-but `` 'incorrigibility is inconsistent with youth.' 560 U.S., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. App. 1968)). And for the same reason, **rehabilitation** could not justify that sentence. Life without parole ``forswears altogether the rehabilitative ideal. Graham, 560 U.S., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825. It reflects ``an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. Ibid.

Miller v. Alabama, 183 L. Ed. 2d at p. 420. (Emphasis added).

Moreover, from the above stated analysis, the Miller Court expressed that Graham concluded establishing that life-without-parole sentences, like capital punishment, violates the Eighth Amendment when imposed on children. To be sure, Graham's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. See id., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825. *Miller v. Alabama*, 183 L. Ed. 2d at p. 419. The Miller Court also noted that "none of what it said about children-about their distinctive (and transitory) mental traits and environmental vulnerabilities-is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Miller v. Alabama*, 183 L.

Ed. 2d at p. 420. The Graham and Miller's reasoning applies to Petitioner's life sentence with virtually no parole.

The Miller Court declared that youth was an important matter in determining the appropriateness of sentencing a juvenile to a lifetime of incarceration without the possibility of parole. *Miller v. Alabama*, 183 L. Ed. 2d at p. 420. The Miller opinion built upon the rulings in Roper and Graham establishing that an offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. *Miller v. Alabama*, 183 L. Ed. 2d at p. 421.

Miller relied on Graham to affirm that a sentence of life without parole on a juvenile share some characteristics with death sentences that are shared by no other sentences. 560 U.S., at --, 130 S. Ct. 2011, 176 L. Ed. 2d 825. Imprisoning an offender until he dies alters the remainder of his life ``by a forfeiture that is irrevocable." Ibid. (citing Solem v. Helm, 463 U.S. 277, 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)). And this lengthiest possible incarceration is an ``especially harsh punishment for a juvenile, because he will almost inevitably serve ``more years and a greater percentage of his life in prison than an adult offender." Graham, 560 U.S., at -- - --, 130 S. Ct. 2011, 176 L. Ed. 2d 825. *Miller v. Alabama*, 183 L. Ed. 2d at p. 422. Research further bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release

because there will be no release. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. See Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http: See also, Wayne A Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn. 141-47 (1998) (discussing the "psychological toll" associated with LWOP, including citations to cases and sources suggesting that LWOP may be a fate worse than the death penalty). Thus, a life sentence with virtually no parole for a juvenile is antithetical to the goal of rehabilitation.

The Petitioner submits to this Honorable Court that this is the type of case where the Petitioner's young age (15) at the time of the offense should be taken into consideration in assessing whether a true injustice occurred.

On the above states facts, arguments and law, it is submitted to this Honorable Court that the lower courts erred in not ruling that Petitioner's life sentence with virtually no parole for a murder offense committed at the age of 15 was in violation of the United States Constitution.

II. The Question Presented is Important.

Petitioner is presenting an important Federal question of constitutional dimension in which the lower courts did not reasonably extend the standard prescribed by this Court in Roper, Graham, and Miller, supra, appropriately to the facts of the Petitioner's case. Petitioner affirmatively asserts that this case would have had a different outcome if the lower court had conducted an

evidentiary hearing to determine whether the decisions of this Honorable Court in Roper, Graham, and Miller, supra, could be extended to juvenile offenders serving life with virtually no parole available to them. There is no doubt that an evidentiary hearing on the question presented in this petition would have resulted in the trial court finding that the same factors used to grant relief in Roper, Graham, and Miller, supra, were present in the instant case.

In this case, this Honorable Court should set a new precedent requiring that cases like the Petitioner's be set for an evidentiary hearing to determine whether the appropriate sentence was imposed on a juvenile offender.

Finally, review of the decision below is important because while this Court has already provided a tremendous service to the cause of treating juvenile offenders serving life sentences without parole this Court's duty is not finished. Juvenile offenders under the age of eighteen, although serving a parolable life sentence that amounts to no parole suffer from the same injustice as juveniles serving a life sentence without parole. Therefore, this honorable Court should afford similar treatment based upon judicial precedents already set by this Court. Anything less than this, would be a disservice to a class of offenders who this Honorable Court has already determined lack a fully developed cognitive ability to weigh the consequences of their actions and make rational decisions.

In sum, lower courts across this nation would benefit greatly from this Court's input on an issue like Petitioner's. Moreover, a decision in this case would no doubt bring more justice to the juvenile cause of this country and underscore

how awesome the Constitution of this great country, the United States of America, is. Therefore, this Court should grant the petition.

CONCLUSION

The Petitioner respectfully prays that this Honorable Court grants his petition for a writ of certiorari.

Respectfully submitted,

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