No.

IN THE SUPREME COURT OF THE UNITED STATES

LEWIS TAYLOR, JR., PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

On Petition for a Writ of Certiorari to
the Fourth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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Lewis Taylor, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida.

OPINION BELOW

The opinion of the Fourth District Court of Appeal is reported as *Taylor v. State*, 2019 WL 6976735 (Fla. 4th DCA Dec. 16, 2019), and is reprinted in the appendix. App. 1.

JURISDICTION

The Fourth District Court of Appeal affirmed the trial court's order denying Taylor relief on December 19, 2019. App. 1. The decision was "Per Curiam. Affirmed." This decision was final, as the Florida Supreme Court has no jurisdiction to review such decisions. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 139 n. 4 (1987) (acknowledging that "[u]nder Florida law, a per curiam affirmance issued without opinion cannot be appealed to the State Supreme Court" and therefore petitioner "sought review directly in this Court."). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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 takes steps to comply with *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*.

In 2014, Florida amended its sentencing statutes to comply with *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 565 U.S. 1013 (2011). Ch. 2014-220, Laws of Fla., as codified in §§ 775.082, 921.1401, and 921.1402, Fla. Stat. (2014). Before sentencing a juvenile offender convicted in adult court of committing a serious offense, the judge must consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2)(a)-(j), Fla. Stat. (2014); *see also* Fla. R. Crim. P. 3.781. These factors mirror those outlined in *Graham* and *Miller*. *See Landrum v. State*, 192 So. 3d 459, 465 (Fla. 2016) (stating that section 921.1401, Florida Statutes, codified the *Miller* factors).

If the judge imposes a life sentence, or a lengthy term-of-years sentence, the juvenile offender will be eligible for a sentence-review hearing in most cases. § 921.1402(2)(a), Fla. Stat. (2014); Fla. R. Crim. P. 3.802. If the offender committed a crime other than first-degree murder, the offender is eligible for a sentence-review hearing after serving 20 years (unless the offender was previously convicted of certain felonies). §§ 775.082(3)(c), 921.1402(3)(d), Fla. Stat. (2014). If release is denied at the initial sentence-review hearing, the offender is eligible for an additional review hearing after serving 30 years. § 921.1402(3)(d), Fla. Stat. (2014).

At the sentence-review hearing, the emphasis is on the juvenile offender's maturity and rehabilitation. § 921.1402(6), Fla. Stat. (2014). If the judge determines that the offender "has been rehabilitated and is reasonably believed to be fit to

reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years." § 921.1402(7), Fla. Stat. (2014).

By its terms, and under Florida's constitution, this legislation applied only to offenses committed on or after July 1, 2014. Ch. 2014-220, § 8, at 2877, Laws of Fla.; Art. X, § 9, Fla. Const.[1] This raised a host of issues about what remedy, if any, would be available to the hundreds of juvenile offenders sentenced to life imprisonment, or lengthy term-of-years sentences, for offenses committed before July 1, 2014.

In March 2015, the Florida Supreme Court addressed some of those issues. First, the court held that *Miller v. Alabama* applied retroactively: it reversed a juvenile offender's life sentence for a first-degree murder committed in 1997.[2] *Falcon v. State*, 162 So. 2d 954 (Fla. 2015). Second, it held that lengthy term-of-years sentences violate *Graham* because they fail to provide a meaningful opportunity for release. *Gridine v. State*, 175 So. 2d 672 (Fla. 2015) (reversing 70-year sentence); *Henry v. State*, 175 So. 3d 675 (Fla. 2015) (reversing aggregate 90-year sentence). And, third, it held that the remedy for these violations would be resentencing under the new juvenile sentencing statutes. *Horsley v. State*, 160 So.

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[1] Article X, section 9, Florida Constitution, was amended effective January 2019 to allow the legislature to enact sentencing statutes that apply retroactively. But the Legislature has not done so with the juvenile resentencing statutes.

[2] Florida courts had uniformly held that *Graham's* categorical prohibition of life imprisonment for juvenile nonhomicide offenders was a substantive rule that applied retroactively. *E.g.*, *St. Val v. State*, 107 So. 3d 553, 554 (Fla. 4th DCA 2013) (applying *Graham* retroactively); *Kleppinger v. State*, 81 So. 3d 547, 549-50 (Fla. 2d DCA 2012) (same).

3d 393 (Fla. 2015). It rejected the State's argument that the remedy should be the "revival" of the repealed parole statutes. *Id.* at 395. The court said 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. The court said 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).

As the court noted, parole eligibility in Florida had long been abolished. Nonetheless, as of July 1, 2014, there were still 4,626 parole-eligible inmates in Florida's prisons,[3] including many juvenile offenders. 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 holdings in *Graham*, *Miller*, and *Montgomery*.

Atwell was 16 years old in 1990 when he committed first-degree murder and armed robbery. For first-degree murder he was sentenced to life imprisonment with parole eligibility after 25 years. *Atwell*, 197 So. 3d at 1041. This was the only penalty, other than death, that could legally be imposed for first-degree murder from 1972 to 1994. Ch. 72-724, Laws of Fla.; ch. 94-228, § 1, at 1045, Laws of Fla.

The Florida Supreme Court reversed Atwell's sentence and remanded for

[3] *See* Fla. Commission on Offender Review 2014 Annual Report 6, 8, available at https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf.

resentencing under the new juvenile sentencing statutes. The court held: "We conclude that Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and 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 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 § 947.002, Fla. Stat. (2015)). 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. The court stated that West Virginia, for example, "now requires its

parole board to take into consideration the 'diminished culpability of juveniles' during its parole hearings for juvenile offenders." *Id.* (citing W. Va.Code § 62-12-13b(b) (2015)). But in Florida, the "decision to parole an inmate 'is an act of grace of the state and shall not be considered a right.'" *Id.* (quoting § 947.002(5), Fla. Stat.). 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.* "The *Miller* factors are simply not part of the equation." *Id.*

The court said 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 said that "[u]sing Florida's objective parole guidelines, . . . a sentence for first-degree murder under the pre-1994 statute is virtually guaranteed to be just as lengthy as, or the 'practical equivalent' of, a life sentence without the possibility of parole." *Id.* at 1048. The court noted that parole is rarely granted: "In the fiscal year 2013-2014, only 23 of the approximately 4,626 eligible inmates, half a percent, were granted parole." *Id.* at 1046 n.4 (citation omitted). App. A43.

Atwell's case exemplified the deficiencies in Florida's parole process. His "presumptive parole release date" was set in year 2130, which was "one hundred and forty years after the crime and far exceeding Atwell's life expectancy." *Id.* at 1041. This date was based largely on "static factors," like the seriousness of the offense and prior record, that Atwell cannot change. *Id.* at 1041, 1044. Atwell, the

court said, "has no 'hope for some years of life outside prison walls.'" *Id.* at 1050 (quoting *Montgomery*, 136 S.Ct. at 737).

"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 court said the "only way" to correct his sentence was to remand for resentencing under the new sentencing statutes. *Id.*

Atwell was extended to juvenile offenders who were serving lengthy term-of-years sentence with parole eligibility. *Gladon v. State*, 227 So. 3d 651 (Fla. 4th DCA 2017) (holding that *Atwell* required resentencing of juvenile offender serving 99-year parole eligible sentence); *Marshall v. State*, 214 So. 3d 776 (Fla. 2d DCA 2017) (same). In two years, *Atwell* led to the release of at least 66 juvenile offenders with parole-eligible sentences. App. 60-61. Those offenders had been denied parole (most of them repeatedly), but they were able to demonstrate to a judge that they were rehabilitated and fit to reenter society; that is, they "demonstrate[d] the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736.

B. Taylor moves to correct his sentence pursuant to *Atwell*. While his motion was pending, the Florida Supreme Court overrules *Atwell* on the authority of *Virginia v. LeBlanc*. The trial court denies Taylor's motion to correct sentence, and the Fourth District Court of Appeal affirms.

In 1976, Petitioner Lewis Taylor, Jr., was convicted of robbery with a deadly weapon. App. 2. He was 16 years old at the time of the offense and 17 years old at the time of the conviction. App. 2. He was sentenced to 129 years in state prison. App. 5-6. Although this sentence is subject to parole, *see* section 947.16, Florida

Statutes (1975), Taylor has been in prison ever since—44 years.

In January 2017, Taylor moved to vacate his sentence pursuant to *Atwell*. App. 2-4. At that time, there was a split of authority on whether relief under *Atwell* was limited to those juvenile offenders with a presumptive parole release date set beyond the juvenile offender's life expectancy. *Compare Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016), *decision quashed*, 257 So. 3d 3 (Fla. 2018) (parole release date irrelevant); *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016) (parole release date must exceed life expectancy). The State moved to stay the proceedings until the Florida Supreme Court decided that issue in *State v. Michel*, SC16-2187, 2017 WL 3484282 (Fla. Jan. 18, 2017). App. 7-9. In the alternative, the State had "no objection to the defendant amending his motion so that he can demonstrate that he has a presumptive parole release date in excess of that of a normal life span. Such an amended motion would alleviate the need for a stay." App. 8.

Taylor responded to the State's motion. App. 10-11. He said he was not conceding that a presumptive parole release date was relevant under *Atwell*, but that nonetheless his presumptive parole release date (July 4, 2062) exceeded his life expectancy. App. 10.

The trial court granted the State's motion to stay. App. 12-13. The court did not mention the State's concession that Taylor would be entitled to resentencing if he showed that his presumptive parole release date exceeded his life expectancy.

In July 2018, the Florida Supreme issued its opinion in *State v. Michel*, 257 So. 3d 3 (2018), *cert. denied*, 139 S. Ct. 1401 (2019). The court did not address the

conflict issue concerning the presumptive parole release date. Instead, it overruled *Atwell* on the basis of *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (*per curiam*). *LeBlanc* was a decision applying the deferential standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). But the Florida Supreme Court erroneously treated it as a decision on the merits of the underlying constitutional claim. This was a serious mistake because the Florida constitution requires Florida courts to rule in lockstep with this Court's Eighth Amendment merits decisions. Art. I, § 17, Fla. Const.

Michel was a plurality decision, since only three justices 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). Nonetheless, in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), the court held 4-3 that *Michel* had overruled *Atwell*.

Franklin was a juvenile offender sentenced to concurrent 1000-year parole-eligible sentences for non-homicide offenses. The Florida Supreme Court denied him relief on the authority of *Michel* and *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).

In January 2019, two years after Taylor filed his motion to correct sentence, the State argued that his motion should be denied on the authority of *Michel* and

Franklin. The trial court agreed and summarily denied Taylor's motion. App. 14-15.

Taylor appealed to the Fourth District Court of Appeal. He argued, among other things, that this Court's recent decision in *Madison v. Alabama*, 139 S.Ct. 718 (2019), made it even clearer that the Florida Supreme Court's treatment of *LeBlanc* as a merits decision was a classic "deference mistake." App. 16-59. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. Chi. L. Rev. 643, 662 (2015) ("[Court 2] makes a deference mistake when it misapplies [Court 1's] opinion by failing to account for the deference regime under which the case was decided.") (hereinafter Masar & Ouellette).

The Fourth District Court of Appeal affirmed ("Per Curiam. Affirmed"). App 1. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari because the Florida Supreme Court treated *LeBlanc* as a merits decision even though this Court never addressed the Eighth Amendment claim on the merits.

The Florida Supreme Court 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 this Court in *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 correct this "deference mistake" and remand this case to the Fourth District Court of Appeal of Florida with instructions to evaluate Taylor's Eighth

Amendment claim on its merits.

A. *Michel* and *Franklin* conflict 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). The question for the federal court 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) ("Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*.") (emphasis in original). This Court's decisions noting that its federal habeas precedent does not reach the merits of the underlying constitutional claim are

legion.[4]

This Court's recent decision in *Madison v. Alabama*, 139 S. Ct. 718 (2019), brings 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. This 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. This 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). This 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.*

[4] *E.g.*, *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*, 575 U.S. 312, 319 (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 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)).

Madison, 138 S.Ct. at 11-12).

This 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. This Court said:

> 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.*, this Court granted Madison relief.

In *LeBlanc*, as in *Dunn v. Madison*, this Court stated it was not ruling on the merits of the underlying constitutional claim. *LeBlanc* 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*, 575 U.S. 312, 319 (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 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*.

This Court in *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.

The Florida Supreme Court 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. As Masur and Ouellette explain:

> [I]f a court holds that a right is not clearly established in the habeas or qualified immunity contexts, and that court is subsequently misunderstood to have held that a right is *clearly not established*, the mistake creates a precedent (at least in the opinion of the misinterpreting court) that may be precisely the opposite of what the first court would actually have decided had the issue been presented to it outside the prevailing deference regime.

Masur & Ouellette, 82 U. Chi. L. Rev. at 651 (emphasis in original).

The Florida Supreme Court in *Michel* erred in viewing *LeBlanc* as a merits decision, and it repeated this error in Franklin's majority opinion. *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*.").

Taylor was entitled to resentencing until *Michel* and *Franklin* erroneously overruled *Atwell* on the authority of *LeBlanc*. This Court should grant certiorari to rectify the Florida courts' 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.

Other courts have said that *LeBlanc* speaks only to the limitations of federal habeas review, not to the merits of the Eighth Amendment issue. In *People v. Contreras*, 4 Cal. 5th 349, 229 Cal.Rptr.3d 249, 411 P.3d 445 (2018), the California Supreme Court reviewed lengthy sentences imposed on two juvenile offenders. While the case was pending before the court, the California Legislature enacted an "elderly parole program." *Contreras*, 411 P.3d at 458.

In addressing whether that program satisfies *Graham's* requirement that juvenile offenders be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the California Supreme Court discussed *LeBlanc*. It said that this Court "had emphasized that it was applying the deferential standard of review required" by AEDPA, and that this Court had recognized that there were reasonable arguments on both sides of the Eighth Amendment issue. *Contreras*, 411 P.3d at 460. The court declined to resolve the issue of whether California's elderly parole program would satisfy the Eighth Amendment (leaving it for the lower courts to address first); and it recognized that, similarly, this Court had not resolved the issue of whether Virginia's geriatric release program satisfied the Eighth Amendment: "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 nonhomicide offender satisfies the Eighth Amendment concerns set forth in *Graham*." *Contreras*, 411 P.3d at 461.

Likewise, the Court of Appeals of Maryland recognized that this Court in

LeBlanc did not rule on the merits of the underlying claim. *Carter v. State*, 461 Md. 295, 315, 192 A.3d 695, 706 n.9 (Md. 2018). One of the issues in *Carter* was whether Maryland's parole process provides the meaningful opportunity for release required by *Graham*. In distinguishing parole from executive clemency, the court discussed *LeBlanc* and determined that that case provided "limited guidance…." *Id.* The court stated: "The Supreme Court 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.* The court stated: "[W]hile 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.

It is important that state courts "follow both the letter and the spirit of [this

Court's] decisions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982). And a "good rule of thumb for reading [this Court's] decisions is that what they say and what they mean are one and the same[.]" *Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016). Therefore, when this Court states in an AEDPA decision that it is not ruling on, or expressing a view of, the underlying federal claim, lower courts must respect that statement. The Florida Supreme Court did not.

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* upended this framework. The court substituted rigorous Eighth Amendment analysis with reliance on an AEPDA decision that did not 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.

If state courts treat this Court's AEDPA decisions as merits decisions, constitutional violations will inevitably result. For example, this Court stated that LeBlanc had a reasonable argument that Virginia's geriatric release program as applied to juvenile offenders violates the Eighth Amendment. If the program violates the Eighth Amendment, then any state with the same program is violating the Eighth Amendment. And if those states view *LeBlanc* as settling the question, that violation will persist despite this Court explicitly stating that it had not decided that issue. Again, that Madison was denied relief in *Dunn v. Madison*, but obtained it in *Madison v. Alabama*, vividly makes this point.

In *Atwell*, the Florida Supreme Court held that Florida's parole process violates the Eighth Amendment as applied to juvenile offenders. Nothing this Court said in *LeBlanc* undermines that holding. This Court did not "delineate" or "clarify" the requirements of the Eighth Amendment, and so the last true pronouncement about Florida's parole process as applied to juveniles was that it was unconstitutional.

The decisions in *Michel* and *Franklin* have thrust juvenile offenders like Taylor 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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