No.

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE MOSS, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MAURICE MOSS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D19-3575

[March 18, 2020]

Appeal of order denying rule 3.850 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas J. Coleman, Judge; L.T. Case No. 88-005583 CF10C.

Carey Haughwout, Public Defender, and Paul Edward Petillo, Assistant Public Defender, West Palm Beach, for appellant.

No brief filed for appellee.

PER CURIAM.

Affirmed. See Franklin v. State, 258 So. 3d 1239, 1240 (Fla. 2018), and *cert. denied sub nom. Franklin v. Florida*, 139 S. Ct. 2646 (2019).

WARNER, GERBER and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD
COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

Case No.: 88005583CF10C

Judge: ROTHSCHILD

MAURICE MOSS,
Defendant.
_____/

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCES

The Defendant, MAURICE MOSS, by and through undersigned counsel, and pursuant to Florida Rule of Criminal Procedure 3.800, as well as *Miller v. Alabama*[1] and *Falcon v. State*,[2] respectfully moves this Court for an Order vacating and setting aside the sentences imposed in this case and granting a resentencing hearing. As grounds in support of this motion, the Defendant alleges the following:

1. Mr. Moss was convicted of 1st Degree Murder, Robbery Weapon, and two counts of Attempted Robbery Deadly Weapon in the Circuit Court for the 17th Judicial Circuit, in and for Broward County, Florida, on February 9, 1989. The conviction was the result of a trial.
2. On March 9, 1989, Mr. Moss was sentenced to life imprisonment with a mandatory minimum 25 years imprisonment for the 1st Degree Murder and 66 months imprisonment for the remaining counts.
3. There is no appeal/post-conviction history relevant to the issue raised in this motion.
4. Mr. Moss' date of birth is October 22, 1970. The offense was committed on March 12, 1988, before the Defendant was 18 years old.
5. In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court held that juveniles may not be sentenced to a mandatory term of life in prison under the Eighth Amendment. The Court reasoned that such a harsh sentence "precludes consideration of his chronological age

[1] 132 S. Ct. 2455 (2012).
[2] 162 So. 3d 954 (Fla. 2015).

*** FILED: BROWARD COUNTY, FL BRENDA D. FORMAN, CLERK 1/10/2017 5:31:02 PM.****

and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (citations omitted).

6. The Florida Supreme Court held that *Miller's* constitutional prohibition against the imposition of mandatory life sentence on juveniles is to be retroactively applied. *Falcon v. State*, 162 So. 3d 954 (Fla. 2015); *Horsely v. State*, 160 So. 3d 393 (Fla. 2015).
7. Thereafter, the U.S. Supreme Court held that *Miller* is retroactive and further explained that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Miller* at 2465).
8. More recently, the Florida Supreme Court held that *Miller* applies to mandatory life sentences imposed on juveniles who were convicted and sentenced under the old parole system. *See Atwell v. State*, 197 So. 3d. 1040 (Fla. 2016). In so holding, the Court explained that based on the way Florida's parole process operates under the existing statutory scheme, a life sentence with the possibility of parole actually resembles a mandatorily imposed life sentence. This is because many presumptive parole dates, especially those for first-degree murder, are set beyond an inmate's expected lifespan. *Id.*
9. The life sentence imposed upon Mr. Moss is in violation of the U.S. Constitution.
10. The Defendant seeks an Order from this Court vacating and setting aside the sentences imposed in this case and granting a resentencing hearing. In accordance with *Falcon* and *Horsely,* the Defendant is entitled to a sentencing hearing pursuant to the newly enacted §§ 921.1401, 921.1402(2) (2014), Fla. Stat.

WHEREFORE, the Defendant respectfully requests that this Honorable Court enter an Order vacating and setting aside the sentences imposed in this case and granting a resentencing hearing.

HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

S/ ADAM ISRAEL GOLDBERG
_____
ADAM ISRAEL GOLDBERG
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, , at courtdocs@sao17.state.fl.us, Broward County Courthouse, Fort Lauderdale, Florida, this January 10, 2017.

HOWARD FINKELSTEIN
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17th Judicial Circuit

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IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA)	CASE NO: 88-5583 CF10C
)	
)	JUDGE: COLEMAN
)	
v.)	
)	
MAURICE MOSS)	
)	
Defendant)	

RESPONSE TO DEFENDANT'S MOTION FOR

POST-CONVICTION RELIEF

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and responds to the Defendant's Motion for Post-Conviction Relief, pursuant to Fla.R.Crim.P. 3.850, and the Order of this Honorable Court, as follows:

1. The defendant in this matter was found guilty at trial of murder in the first degree, two counts of attempted robbery with a firearm, and one count of robbery with a firearm (Exhibit I). He was sentenced to life imprisonment, with a 25 year mandatory minimum, for murder in the first degree, and 5½ years in prison for the remaining charges to run concurrently with each other, but consecutive to the murder count, on February 9, 1989 (Exhibit I).

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2. On January 18, 2017, this Honorable Court issued an Order for the State to respond to a motion to correct illegal sentence in this matter. That motion was stayed pending the resolution of the conflict between the Fourth DCA in *Michel v. State*, 204 So.3d 101 (Fla. 4th DCA 2016), and the Fifth DCA in *Williams v. State*, 197 So.3d 569 (Fla. 5th DCA 2016) and *Stallings v. State*, 198 So.3d 1081 (Fla. 5th DCA 2016). Since the basis of the stay has been resolved by the decisions of the Florida Supreme Court, the State can now properly address the motion for post-conviction relief.

3. The motion of the defendant must be denied, because he is parole eligible in the above-styled matter. The allegation of the defendant that he is entitled to be resentenced based on *Miller v. Alabama*, 132 S.Ct. 2455 (2012) is without merit. Although the State of Florida agrees that the defendant was under the age of 18 at the time the crime in this matter was committed, a sentence under *Miller* is only unconstitutional where the defendant committed the crime under the age of 18 *and* the sentence was a mandatory life sentence with no possibility of parole. *Id.* at 2469. Because the defendant is parole eligible under the statute, *Miller* has no application to this case, and the sentence for murder in the first degree is legal. *Franklin v. State*, 43 Fla.L. Weekly S557 (Fla. November 8, 2018); *Michel v. State*, 43 Fla.L. Weekly S298 (Fla. November 1, 2018). See also *State v. Wesby*, Case No. 4D16-4246 (Fla. 4th DCA January 9, 2019); *State v. West*, Case No. 4D16-4252

(Fla. 4th DCA January 9, 2019). Consequently, this Honorable Court must deny the motion for post-conviction relief.

WHEREFORE, the State of Florida respectfully requests this Honorable Court to deny the Defendant's Motion for Post-Conviction Relief.

I HEREBY CERTIFY that a copy of the foregoing was furnished by e-mail to Christine Sharmae Robbins, Esquire (discovery@browarddefender.org) and (crobbins@browarddefender.org), Attorney for the Defendant, Maurice Moss, this 15th day of January, 2019.

MICHAEL J. SATZ
State Attorney

By: _____

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**** FILED: BROWARD COUNTY, FL Brenda D. Forman, CLERK 2/1/2019 3:11:34 PM.****

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

MAURICE MOSS,
Defendant.
_____/

CASE NO.: 88-5583CF10C

JUDGE: COLEMAN

ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCES

THIS CAUSE comes before the Court upon Defendant's Motion to Vacate, Set Aside, or Correct Sentences, filed pursuant to Florida Rule of Criminal Procedure 3.850 on January 10, 2017. Having considered Defendant's motion, the State's Response to Defendant's Motion for Post-Conviction Relief filed on January 15, 2019, applicable law, and being otherwise fully advised in the premises, this Court finds as follows:

In his motion, the Defendant argued that, pursuant to Miller v. Alabama, 132 S.Ct. 2455 (2012), he could not be sentenced to a mandatory life sentence because he was under the age of 18 when he committed the instant first degree murder. This Court finds that the Defendant is not entitled to be resentenced pursuant to Miller because he is eligible for parole. This Court adopts the reasoning as set forth in the response of the State, which contains a thorough recital of the relevant issues and law. Said response has previously been provided to Defendant and remains a part of the court file. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion is hereby **DENIED**.

The Defendant has thirty (30) days from the date of rendition of this Order to file an appeal.

DONE AND ORDERED on this 31 day of January, 2019, in Chambers, Fort Lauderdale, Broward County, Florida.

THOMAS J. COLEMAN
CIRCUIT JUDGE

Copies furnished to:

Joel Silvershein, Assistant State Attorney, Appeals Division, courtdocs@sao17.state.fl.us

Christine Robbins, Assistant Public Defender, Attorney for Defendant, discovery@browarddefender.org

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D19-3575

MAURICE MOSS,
Appellant

V.

STATE OF FLORIDA,
Appellee

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

In 1989, appellant was convicted of first-degree murder and two counts of attempted robbery. R 1. The offenses occurred in 1988, when appellant was 17 years old. R 1. Appellant was sentenced to life imprisonment with parole eligibility after 25 years for first-degree murder and to 66 months in prison on the remaining counts. R 1.

In January 2017, appellant moved to correct his sentence pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), among other cases. R 13. The State argued that relief under *Atwell* was dependent on the defendant having a presumptive parole release date (PPRD) equivalent to life imprisonment, citing *Williams v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016), and *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016). R 6. The State acknowledged that this Court had disagreed with those decisions in *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016), but asked the court to stay the proceedings until that issue was resolved by the supreme court. R 6-7.

On January 27, 2017, the trial court entered an order staying proceedings pending a decision in *Michel*. R 18.

Two years later, the State notified the Court that *Atwell* was overruled by *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). R 20. On February 1, 2019, the trial

court denied appellant's motion. R 29. This Court granted appellant a belated appeal. R 30.

This Court has jurisdiction to review an order denying postconviction relief under Florida Rule of Appellate Procedure 9.141(b)(2).

SUMMARY OF THE ARGUMENT

POINT I

This Court should certify a question of great public importance:

> 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, WAS *ATWELL V. STATE* CORRECTLY OVERRULED ON THE AUTHORITY OF *LEBLANC*?

POINT II

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 offender's maturity and rehabilitation. And 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 violates due process under the Fourteenth Amendment and article I, section 9, of the Florida Constitution.

POINT III

Appellant was entitled to be resentenced from November 2016 to November 2018, but he wasn't. Meanwhile, other juvenile offenders with parole-eligible sentences were being resentenced and released. It was a manifest injustice to deny

appellant resentencing when similarly-situated defendants were being resentenced and released. This Court should reverse the order denying appellant's motion to correct sentence and remand for resentencing.

ARGUMENT

POINT I

THIS COURT SHOULD CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE

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." The Eighth Amendment is made applicable to the States by the Fourteenth Amendment. *Timbs v. Indiana*, 139 S.Ct 682 (2019); *Robinson v. California*, 370 U.S. 660 (1962). Of course, the United States Constitution is the "supreme Law of the Land." Art. VI, cl. 2, U.S. Const. The standard of review of the constitutionality of a sentence is de novo. *Simmons v. State*, 273 So. 3d 116 (Fla. 3d DCA 2019).

Certain punishments are disproportionate and unconstitutional when applied to children because children are different in three ways relevant to punishment: first, they are immature and therefore have "an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; second, they are "more vulnerable to negative influences and outside pressures, including from their family and peers," and they have "limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings"; and, third, their characters are not "as well formed as an adult's," their traits "less fixed," and their "actions less likely to be evidence of

irretrievable depravity." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). In short, they are immature, vulnerable, reformable.

"[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham v. Florida*, 560 U.S. 48, 68 (2010) ((citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Thus, life sentences are categorically forbidden for juvenile nonhomicide offenders. *Graham*. And mandatory life sentences are forbidden for juvenile homicide offenders. *Miller*; *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

In *Miller* the Court said it is the "rare juvenile offender whose crime reflects irreparable corruption," *id*. at 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.

Appellant received a parole-eligible life sentence for a crime he committed when he was 17 years old. In *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), the 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*, *Miller*, and *Montgomery*. Two years later the court overruled *Atwell* on the authority of

Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) (per curiam). *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018).

This Court is bound by *Franklin*. (*State v. Michel*, 257 So. 3d 3 (Fla. 2018), *cert. denied*, 139 S. Ct. 1401 (2019), was a 3-1-3 decision.) However, a recent United States Supreme Court decision—*Madison v. Alabama*, 139 S.Ct. 718 (2019), discussed below—calls into question the basis of the supreme court's ruling in *Franklin*.

In overruling *Atwell*, the Florida Supreme Court did not engage in a rigorous reexamination of Florida's parole process. Instead, it used *LeBlanc* as a proxy for such an analysis:

> [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*." *See State v. Michel*, 257 So.3d 3, 6 (Fla. 2018) (explaining that *LeBlanc* made clear that it was not an unreasonable application of Graham "to conclude that, because the [state's] geriatric release program employed normal parole factors, it satisfied *Graham's* requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole") (quoting *LeBlanc*, 137 S.Ct. at 1729)). As we held in *Michel*,[1] involving a juvenile homicide offender sentenced to life with the possibility of parole after 25 years, Florida's statutory parole process fulfills Graham's requirement that juveniles be given a "meaningful opportunity" to be considered for release during their natural life based upon "normal parole factors," *LeBlanc*, 137 S.Ct. at 1729, as it includes initial and subsequent parole reviews based upon individualized considerations before the Florida Parole

[1] Again, the decision in *Michel* was 3-1-3, so this language is puzzling.

> Commission that are subject to judicial review, *Michel*, 257 So. 3d at 6 (citing §§ 947.16-.174, Fla. Stat.).

Franklin, 258 So. 3d at 1241.

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). In short, the court made a classic "deference mistake." *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. Chi. L. Rev. 643 (2015).

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 the Court granted it.

The 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*, 575 U.S. 312, 316 (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 prisoner's '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*.

The 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*. The 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, the 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 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., it granted Madison relief.

The United States Supreme Court said 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 than 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. "[A] good rule of thumb for reading [Supreme Court] 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).

And lower courts must pay attention to what they say. "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's] 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 *Franklin* and its reliance on *LeBlanc*.

Recently, Chief Justice Canady (joined by Justices Polston and Lawson), invited reconsideration of a decision (*Williams v. State*, 242 So. 3d 280 (Fla. 2018)) on the ground that the remedy in that case had not been the subject of full briefing. *Colon v. State*, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019) (Canady, C.J., concurring). Likewise, the court's erroneous reliance on *Virginia v. LeBlanc* was not the subject of full briefing (in fact, any briefing) in either *Franklin* or *Michel*. Instead, the supreme court acted as a "self-directed board[] of legal inquiry

and research," *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.), and applied *LeBlanc* itself.

Therefore, because this issue was not briefed, it too is "ripe for reconsideration," *Colon*, supra (Canady, C.J., concurring), and this Court should certify a question of great public importance so the court can consider it. Therefore, this Court should certify the following question as one of great public importance:

> 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, WAS *ATWELL V. STATE* CORRECTLY OVERRULED ON THE AUTHORITY OF *LEBLANC*?

POINT II

APPELLANT'S PAROLE-ELIGIBLE LIFE SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Again, this Court is bound by *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). But parole will not afford appellant any meaningful opportunity for relief and so his sentence violates the Eighth Amendment to the United States Constitution. Appellant makes that argument here in order to preserve his right to seek further review. *Sandoval v. State*, 884 So. 2d 214, 217 n.1 (Fla. 2d DCA 2004) ("Counsel has the responsibility to make such objections at sentencing as may be necessary to keep the defendant's case in an appellate 'pipeline.'").

Although appellant's sentence makes him parole eligible, parole is so rarely granted in Florida that appellant has little chance of being released. Here is a summary of the Florida Commission on Offender Review's release decisions for the last seven years (annual reports are available here https://www.fcor.state.fl.us/reports.shtml):

Fiscal Year	Parole Eligible	Release Decisions	Parole Granted	Percentage Release Decisions Granted	Percentage Eligible Granted
2018-19	4117	1454	27	1.86%	0.66%
2017-18	4275	1499	14	0.93%	0.33%
2016-17	4438	1242	21	1.69%	0.47%
2015-16	4545	1237	24	1.94%	0.53%
2014-15	4561	1300	25	1.92%	0.55%
2013-14	4626	1437	23	1.60%	0.50%
2012-13	5107	1782	22	1.23%	0.43%

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. At this rate, and with 4,117 parole eligible inmates remaining in 2019, it will take 187 years to parole these inmates. This means the vast majority of them will die in prison. By contrast, the overall parole approval rate in Texas for fiscal year 2017 was 34.94 percent.[2]

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

[2] 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

present criminal offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2018).

No inmate will be released without a "satisfactory release plan." Fla. Admin. Code R. 23-21.002(44). This has two components: gainful employment and suitable housing. *Id*. Thus, the inmate must show he "will be suitably employed in self-sustaining employment or that he will not become a public charge." § 947.18, Fla. Stat. (2018); Fla. Admin. Code R. 23-21.002(44)(b). And the inmate must show he has a "transitional housing program or residence confirmed by field investigation to be sufficient to meet the living needs of the individual seeking parole, or sufficient financial resources or assistance to secure adequate living accommodations." Fla. Admin. Code R. 23-21.002(44)(a). If the inmate shares housing, the commission must be satisfied that the other occupants will not "pose an undue risk to the inmate's ability to reintegrate into society." Fla. Admin. Code R. 23-21.002(44)(e).

The 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 time 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 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 at 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. 1998); § 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 the right (and the duty) to make the final release decision when the [presumptive parole release date] arrives.” *Meola*, 732 So. 2d at 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); § 947.1745, 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. 23-019(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; or "vacate the prior effective parole release date, and decline to authorize parole…." Fla. Admin. Code R. 23-019(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. 23-0155(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.

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 tboth 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 culpabilityhey 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 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). 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 in the initial hearing, the offender is eligible for an additional sentence-review hearing after serving 30 years. § 921.1402(3)(d), 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. § 921.1402(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 had 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, appellant's sentence violate the Eighth Amendment.

Juvenile offenders like appellant also have a liberty interest in a realistic opportunity for release based on demonstrated maturity and rehabilitation. Florida's parole system denies him this 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 and 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, 2017 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,

appellant's sentence violates not only the Cruel and Unusual Punishment Clauses, but also his right to due process pursuant under the Fourteenth Amendment and article I, section 9, of the Florida Constitution.

For these reasons, this Court should reverse the sentence and remand for resentencing.

POINT III

IT WOULD BE A MANIFEST INJUSTICE TO DENY APPPELLANT RELIEF WHEN SIMILARLY-SITUATED DEFENDANTS RECEIVED NEW SENTENCING HEARINGS AND WERE RELEASED

In the wake of *Atwell v. State*, 7 So. 3d 1040 (Fla. 2016), more than 65 parole-eligible juvenile offenders were resentenced and released, most after spending decades in prison:

	Atwell Releasees					
	Name	County	Case No.	Offense Date	DOC No.	Release Date
1	BARTH, CLIFFORD	ESCAMBIA	9100606	1/26/1991	216317	9/14/2017
2	GONZALEZ, ENRIQUE LIONEL	MIAMI-DADE	8840832B	11/21/1988	186274	4/19/2017
3	COATES, TYRONE	MIAMI-DADE	9130032A	7/18/1991	192711	8/25/2017
4	CLARINGTON, JERMAINE	MIAMI-DADE	9000354C	12/30/1989	192304	2/22/2018
5	HILTON, PERRY TEE	MIAMI-DADE	8421439	8/11/1984	096132	11/16/2017
6	MCMILLAN, WILLIE L	MIAMI-DADE	7610125	10/13/1976	059094	3/23/2018
7	REDDICK, ANGELO MAURICE	MIAMI-DADE	8712283	9/19/1986	184389	7/12/2017
8	COURTNEY, BRANDON PHILLIP	MIAMI-DADE	7604179B	9/1/1974	874784	10/26/2017
9	RIMPEL, ALLAN	MIAMI-DADE	9038716	9/6/1990	191195	11/1/2017
10	GRANT, ALAN RUDOLPH	MIAMI-DADE	8226401	9/23/1982	087912	4/11/2017
11	MILLER, RICARDO	MIAMI-DADE	7208754	4/16/1972	038649	4/11/2018
12	GONZALEZ, TITO	MIAMI-DADE	8411547	4/29/1984	099087	7/17/2017
13	MURRAY, HERBERT	MIAMI-DADE	7813136C	8/21/1978	067530	4/7/2017
14	TERRILL, CHRISTOPHER	MIAMI-DADE	9217844	5/3/1992	195060	12/22/2017
15	STIDHUM, JAMES RICKY	MIAMI-DADE	8222073D	9/6/1982	90384	4/20/2018
16	SHEPHERD, TINA KAY	MIAMI-DADE	8216103	6/29/1982	160407	11/7/2017
17	THOMAS, LESTER	MIAMI-DADE	8023444	10/7/1980	080877	12/22/2017
18	RIBAS, URBANO	MANATEE	8201196	10/8/1982	093472	5/11/2017
19	EVERETT, STEVEN L	MANATEE	7400468	7/11/1974	046717	4/12/2017
20	WORTHAM, DANIEL	MANATEE	9001844	7/3/1990	582950	10/20/2017
21	BRAXTON, CHARLES	MANATEE	8601920	11/28/1985	107687	7/7/2017
22	JOHNSON, ADRIAN LENARD	HILLSBOROUGH	8904764	3/17/1989	117404	6/14/2020
23	BEFORT, MARK R	HILLSBOROUGH	7905526	7/4/1979	072657	7/20/2017
24	IRVING, DEAN SWANSON	BAY	8201173	3/19/1981	092278	4/11/2018
25	CROOKS, DEMOND	BAY	9302523	12/15/1993	961761	1/22/2018
26	LEONARD, CARLOS	PALM BEACH	9204775	3/25/1992	896909	3/8/2017
27	THURMOND, KEVIN	PALM BEACH	8906616	5/5/1998	187400	2/6/2017

28	DOBARD, ANTHONY	PALM BEACH	8206935	1/7/1982	0953393	9/6/2017
29	BROWN, RUBEN	PALM BEACH	9204063	3/27/1992	780560	5/4/2017
30	LECROY, CLEO	PALM BEACH	104528	1/4/1981	104528	10/22/2018
31	STEPHENS, BARRY	BROWARD	8808481A	3/31/1988	186984	6/27/2018
32	CREAMER, DENNIS M	BREVARD	43686	5/30/1968	023801	6/27/2017
33	LAMB, WILBURN AARON	BREVARD	8600394	1/20/1986	106546	7/13/2018
34	ROBERSON, EUGENE	BREVARD	9100072A	12/10/1990	711333	12/12/2017
35	BISSONETTE, ROY I	BREVARD	7300440	5/12/1973	039295	7/3/2017
36	KENNEDY, BRIAN PATRICK	BREVARD	9100072	12/10/1990	704395	5/9/2017
37	ADAMS, RONNIE G	GLADES	7600025	7/6/1976	056056	2/16/2017
38	BRUNSON, THORNTON EMERY	DUVAL	9009095	5/19/1990	121312	6/18/2018
39	EDWARDS, EUGENE	DUVAL	9311766B	10/21/1993	123739	6/20/2018
40	THOMAS, CALVIN W	DUVAL	609501	6/9/1960	000984	4/24/2017
41	COOPER, ANTHONY JEROME.	DUVAL	7800349	2/2/1978	065615	2/21/2017
42	DIXON, ANTHONY A	DUVAL	7501613	6/4/1975	049671	5/9/2018
43	KELLY, CHRIS	PASCO	8902393	7/29/1989	118965	12/8/2019
44	HINKEL, SHAWN	PASCO	8300717	1/21/1983	089850	3/2/2018
45	SMITH, BENNY EUGENE	PINELLAS	8006738	8/2/1980	078908	11/14/2017
46	BELLOMY, TONY	PINELLAS	8510529	8/5/1985	100677	10/9/2017
47	CLARK, CHANTAY CELESTE	PINELLAS	9215418	8/15/1992	272025	11/3/2017
48	HARRIS, SYLVESTER A	PINELLAS	7505907	4/3/1975	054563	9/22/2017
49	DAVIS, HENRY M	PINELLAS	7223700	1/26/1972	033944	12/19/2017
50	STAPLES, BEAU	PINELLAS	265159	4/10/1989	265159	2/24/2019
51	FLEMMING, LIONEL	PINELLAS	842319	1/24/1984	095533	2/16/2018
52	ILLIG, LEON	PINELLAS	105411	1/1/1986	105411	10/24/2016
53	BLOCKER, TROY	PINELLAS	8714776	10/30/1987	115114	10/13/2016
54	BRYANT, DWIGHT	PINELLAS	15352	9/30/1964	015352	8/16/2018
55	DUNBAR, MICHAEL	PINELLAS	6415223	9/30/1965	015228	7/13/2018
56	JOHNSON, ROY L	ALACHUA	7109405	10/5/1970	029350	2/1/2018
57	DIXON, CHARLEY L.	BAKER	7000173	4/12/1970	027515	6/8/2018
58	LEISSA, RICHARD W	ORANGE	7502220	1/6/1975	049956	3/30/2017
59	SILVA, JAIME H	ORANGE	9212802	11/16/1992	371145	8/25/2016
60	WALLACE, GEORGE	PALM BEACH	8804700	3/11/1988	187487	1/3/2020
61	GLADON, TYRONE	BROWARD	796274	6/20/1979	072257	1/24/2018
62	SIMMONS, LESTER	ESCAMBIA	6700967	3/3/1951	019690	8/16/2019
63	STALLINGS, JACKSON	ORANGE	7201219	9/4/1955	038415	9/12/2019
64	COGDELL, JACKI	DUVAL	917406	11/2/1973	298848	9/12/2019
65	LEFLEUR, ROBERT	BROWARD	8803950	12/9/1988	184417	12/6/2019
66	LAWTON, TORRENCE	MIAMI-DADE	8708000	2/21/1987	182233	7/29/2016

Appellant argues that it would be a manifest injustice to deny him relief when so many others identically situated were afforded relief.

In *Stephens v. State*, 974 So. 2d 455 (Fla. 2d DCA 2008), the Second District granted postconviction relief on that basis. The trial court had sentenced Stephens to life imprisonment as a habitual felony offender for armed burglary on the mistaken assumption that it was required to do so. Stephens appealed and the Second District remanded for resentencing. But the district court made its own mistake: it assumed Stephens was sentenced under the unconstitutional 1995 guidelines, and it remanded for resentencing on the authority of *Heggs v. State*, 759 So. 2d 620 (Fla. 2000). *Stephens*, 974 So. 3d at 457. On remand, the trial court was puzzled by the district court's opinion and it left the sentence intact—life imprisonment. *Id*. "Thus, Mr. Stephens was deprived of a real opportunity to have his sentence reconsidered." *Id*.

Stephens filed a motion for postconviction relief; the trial court denied the motion; and Stephens appealed. The Second District reversed. The court highlighted, as had Stephens, the court's opinion in *Bristol v. State*, 710 So. 2d 761 (Fla. 2d DCA 1998). In that case, Bristol was mistakenly sentenced to life imprisonment as an habitual felony offender on the same day as Stephens and by the same judge. On appeal, the Second District reversed Bristol's life sentence and it remanded for the trial court to reconsider the sentence with the correct understanding that a life sentence was not mandatory.

The Second District granted Stephens relief: "To give Mr. Bristol relief but to deny Mr. Stephens the same relief for virtually identical circumstances is a manifest injustice that does not promote—in fact, it corrodes—uniformity in the decisions of this court." *Stephens*, 974 So. 2d at 457. The court granted Stephens relief "to avoid [this] incongruous and manifestly unfair result[]." *Id*.

This Court followed *Stephens* in *Johnson v. State*, 9 So. 3d 640 (Fla. 4th DCA 2009). In that case, Johnson, like Stephens and Bristol, was sentenced to life imprisonment as an habitual felony offender because the trial court was under the mistaken impression that the sentence was mandatory. Johnson raised that issue on appeal, but this Court affirmed without written opinion. Johnson subsequently raised the issue "at least three times" but this Court "denied such relief on procedural grounds." *Johnson*, 9 So. 3d at 642. Johnson eventually filed an All Writs petition in the Florida Supreme Court, citing *Stephens*. The supreme court transferred the petition to the trial court for consideration as a rule 3.800(a) motion to correct. The trial court denied the motion on the ground that Johnson's claim was barred by law of the case. Johnson appealed and this Court reversed.

Key to this Court's decision, as it was for the Second District's decision in *Stephens*, was that this Court had granted "relief to other defendants whose direct appeals were contemporary with Johnson's." *Johnson*, 9 So. 3d 642 (citations omitted). And there were factors "supporting a sentence significantly less than

Johnson's life sentence." *Id*. Johnson's jury had recommended leniency, for example; and under the current statute, Johnson would not qualify as a habitual felony offender. *Id*.

This Court agreed with Johnson that "it is a manifest injustice to deny him the same relief afforded other defendants identically situated." *Id*. This Court reversed and remanded for resentencing. *Id*.

This Court followed *Johnson* in *Prince v. State*, 98 So. 3d 768 (Fla. 4th DCA 2012), and *McMillan v. State*, 254 So. 3d 1002 (Fla. 4th DCA 2018). In both cases, the judges imposed life sentences under the mistaken belief the sentences were mandatory, and in both cases this Court reversed years later and remanded for resentencing. And the Second District followed *Stephens* in *Haager v. State*, 36 So. 3d 883, 884 (Fla. 2d DCA 2010), finding a manifest injustice and remanding for resentencing given that a codefendant and others obtained relief on the same claim.

As explained above, it is a manifest injustice to deny appellant the same relief afforded other defendants identically situated.

CONCLUSION

This Court should certify a question of great public importance or reverse the order denying appellant's motion to correct sentence and remand for resentencing.

CERTIFICATE OF SERVICE

I certify that this brief was served to Assistant Attorney General Celia Terenzio, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 29th day of January, 2020.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

CERTIFICATE OF FONT

I certify that this brief was prepared with Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO