No. 20-5486

IN THE

Supreme Court of the United States

SPENCER E. MILES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
**Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

Counsel for Respondent

QUESTION PRESENTED

In *Miller v. Alabama*, this Court held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders." 567 U.S. 471, 479 (2012). The Florida Supreme Court has since held that this holding should not be extended to juvenile sentences of life *with* the possibility of parole. *State v. Michel*, 257 So. 3d 3 (Fla. 2018) (plurality op.); *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018).

While *Michel* was pending, Petitioner, who is serving a life-with-parole sentence for a murder committed when he was a juvenile, moved to correct his sentence under *Miller*. The trial court declined to address that motion on the merits, concluding that the claim was unripe and that it should wait until the Florida Supreme Court decided *Michel*. It therefore denied Petitioner's motion without prejudice for him to re-file it later, which Petitioner declined to do. He instead appealed to the state intermediate court, which affirmed in an unelaborated per curiam order.

Petitioner does not ask this Court to address whether *Miller* bars a sentence, like his, that gives a juvenile homicide offender "initial and subsequent parole reviews based upon individualized considerations"; nor does he ask this Court to second-guess the Florida Supreme Court's conclusion that state law ensures such individualized consideration. *Franklin*, 258 So. 3d at 1241. He instead claims that the Florida Supreme Court erred in treating one of this Court's AEDPA cases, *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (per curiam), as a merits ruling. But

Michel and *Franklin* understood *LeBlanc* to "ma[k]e clear" only that a Virginia decision approving that state's geriatric release program "was not an unreasonable application" of federal law. *Franklin*, 258 So. 3d at 1241.

The question presented is: Whether the state intermediate appellate court properly affirmed the denial without prejudice of Petitioner's motion to correct his sentence.

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STATEMENT

1. "[C]hildren are constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Because juveniles have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." *Graham v. Florida*, 560 U.S. 48, 68 (2010). Thus, this Court held in *Graham* that the Eighth Amendment prevents States from sentencing juvenile non-homicide offenders to life in prison without the possibility of parole. *Id.* at 74–75. The Court stressed, however, that States are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." *Id.* at 75. What the Constitution requires is "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.*

Two years later, in *Miller v. Alabama*, this Court concluded that, while life-without-parole is a permissible penalty for juvenile homicide offenders, the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. Sentencing judges must therefore be afforded the discretion to impose a lesser sentence for those juvenile homicide offenders deemed to be capable of rehabilitation, or else the state sentencing scheme must allow juveniles serving mandatory life sentences to obtain release at a later date. *See id.* at 479–80. "A State may remedy a *Miller* violation," for example, "by permitting juvenile homicide offenders to be considered for parole." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

2. For several years after those decisions, the Florida Supreme Court grappled with *Graham* and *Miller*'s applicability to Florida sentencing law. As relevant here, though the court initially declared that the State violates the Eighth Amendment by sentencing juvenile homicide offenders to mandatory life-*with*-parole sentences, *see Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), it now recognizes that those sentences do not implicate *Graham* and *Miller* because, by definition, life with the possibility of parole affords juvenile homicide offenders a "meaningful opportunity to obtain release." *State v. Michel*, 257 So. 3d 3, 7 (Fla. 2018) (plurality op.); *see Franklin v. State*, 258 So. 3d 1239, 1241 (Fla. 2018).

The Florida Legislature abolished parole in 1994. *See* Ch. 94–228, § 1, Laws of Fla. (1994). But persons who committed their offenses prior to then remain eligible. *See id*. § 3. Under that statutory scheme, an offender receives an initial interview by the parole commission after a period predetermined by statute. *See* Fla. Stat. § 947.16(1). For persons serving life in prison, for example, that initial interview is conducted five years after the date of confinement, *id*. § 947.16(1)(d). Within ten days of the initial interview, the parole commission sets a presumptive parole date, *id*. § 947.172(2), which represents the "tentative parole release date as determined by objective parole guidelines." *Id*. § 947.005(8). Although presumptive parole dates may be set years into the future, sometimes outside an offender's natural life span, the parole commission re-interviews an offender no fewer than once every seven years to update his or her presumptive release date. *Id*. § 947.174(1)(a)-(b). An

offender's "young age" is relevant to the parole inquiry. Fla. Admin. Code R. 23–21.010(5)(b)1.b.

Evaluating that system, the Florida Supreme Court in *Atwell* found it inadequate to address the concerns identified in *Graham* and *Miller*. *Atwell*, 197 So. 3d at 1049–50. Namely, a majority of the court took issue with the extended presumptive parole release dates that can occur under Florida's parole statute and held that "[p]arole is, simply put, 'patently inconsistent with'" the Eighth Amendment. *Id*. at 1049 (quoting *Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015)).

This scheme failed to satisfy *Miller*, *Atwell* held, because it gave "primary weight" in the consideration of parole "to the seriousness of the offender's present offense," rather than to a juvenile offender's age. *Id*. at 1048. The parole statute therefore "fail[ed] to take into account the offender's juvenile status at the time of the offense." *Id*. at 1042. And so *Atwell* concluded that a life-with-parole sentence in Florida is "virtually guaranteed" to be as lengthy as a life-without-parole sentence. *Id*. at 1048.

Three justices dissented. In their view, Florida's parole system satisfied *Miller* because it "requires a subsequent interview to review [the presumptive parole] date within 7 years of the initial interview and once every 7 years after that." *Id*. at 1050 (Polston, J., dissenting). That date "is reviewed periodically in light of information 'including, but not limited to, current progress reports, psychological reports, and disciplinary reports.'" *Id*. at 1051 (quoting Fla. Stat. § 947.174(3)). Those periodic reviews allow for

"individualized consideration" of the offender's circumstances followed by "judicial review . . . of these parole decisions." *Id.* (citing *Johnson v. Fla. Parole Comm'n*, 841 So. 2d 615, 617 (Fla. Dist. Ct. App. 2003)). As the dissenting justices saw it, "the majority's unjustified perception and suspicion of the Parole Commission's periodic review" did not warrant invalidating the statutory scheme on its face, and an as-applied challenge was "not at issue in this case." *Id.*

In 2018, two years after deciding *Atwell*, the Florida Supreme Court overruled itself in *Michel*, 257 So. 3d at 5–8 (plurality op.). "Importantly," the plurality observed, the "Eighth Amendment . . . does not require the State to release [a juvenile] offender during his natural life." *Id.* at 5 (quoting *Graham*, 560 U.S. at 75). Rather, the plurality reasoned, the Constitution "only requires states to provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* (same). Because life with parole "leaves a route for juvenile offenders to prove that they have changed while also assessing a punishment that the Legislature has deemed appropriate," *id.* at 7 (citation omitted), the plurality adopted Justice Polston's dissenting view in *Atwell*. *See id.* at 8. A majority of the court formally adopted that approach a few months later in *Franklin*, 258 So. 3d at 1241 (holding that an opportunity for release based on "normal parole factors" satisfies *Graham*/*Miller*).

Aside from conducting its independent assessment of Florida's parole system in light of *Graham* and *Miller*, the plurality also considered this Court's decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017)

(per curiam). *See Michel*, 257 So. 3d at 6–7. That decision, the Florida Supreme Court wrote, "clarified" that *Graham* and *Miller* do not control whether parole-style schemes satisfy the Eighth Amendment. *Id.* at 6. In *LeBlanc*, the Fourth Circuit, applying the Anti-Terrorism and Effective Death Penalty Act's (AEDPA) deferential standard of review, concluded that Virginia's geriatric release program did not provide juvenile offenders a meaningful opportunity for release. *LeBlanc*, 137 S. Ct. at 1728. This Court reversed because the state court's decision upholding Virginia's geriatric release program was not "contrary to," and did not involve an "unreasonable application of," "clearly established Federal law." *Id.* at 1727–29 (quoting 28 U.S.C. § 2254(d)(1)). Though the defendant's Eighth Amendment arguments were not necessarily "insubstantial," "[t]hese arguments cannot be resolved on federal habeas review." *Id.* at 1729. This Court thus "'express[ed] no view on the merits of the underlying' Eighth Amendment claim." *Id.*

Quoting *LeBlanc* in *Michel*, the Florida Supreme Court observed that "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented." 257 So. 3d at 6 (quoting *LeBlanc*, 137 S. Ct. at 1728–29). "And it was not objectively unreasonable for the state court to conclude that, because the 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." *Id.* (quoting *LeBlanc*, 137 S. Ct. at 1729).

The Florida Supreme Court recognized that *LeBlanc* involved an application of AEDPA's deferential standard of review, explaining that *LeBlanc* found only that the Virginia state court's decision upholding its geriatric release program "was not an unreasonable application of the Supreme Court's case law." *Id.*

In both *Michel* and its follow-on decision in *Franklin*, the juvenile offender petitioned this Court for a writ of certiorari, arguing that the Florida Supreme Court misconstrued *LeBlanc* by treating it as a decision on the merits. *See* Pet. for Writ of Certiorari, *Michel v. Florida*, No. 18-8116, at *3–5 (Feb. 20, 2019); Pet. for Writ of Certiorari, *Franklin v. Florida*, No. 18-8701, at *3–5 (Apr. 2, 2019). The Court denied certiorari in both cases. *Michel v. Florida*, 139 S. Ct. 1401 (2019); *Franklin v. Florida*, 139 S. Ct. 2646 (2019).

3. In 1992, at the age of 16, Petitioner Spencer Miles committed first-degree felony murder and two attempted robberies. Pet. 4; *see* R. 52. For the murder, he was sentenced to life in prison with the possibility of parole after 25 years. R. 54–56. Since then, his requests for parole have consistently been denied.

After *Atwell*, Petitioner moved to correct his sentence under Florida Rule of Criminal Procedure 3.800(a). R. 1–5, 34–41. He alleged that his mandatory life-with-parole sentence for first-degree murder violated *Graham* and *Miller* because "many presumptive parole dates . . . are set beyond an inmate's expected lifespan." *See* R. 74–77. The trial court denied his motion without prejudice because

(1) Petitioner had not yet served the mandatory 25-year portion of his sentence, meaning his claim was unripe; and (2) *Michel* was then pending in the Florida Supreme Court and the trial court wished to have a definitive ruling from that court before addressing the issue. R. 122–24.

Without re-filing his motion to obtain a ruling on the merits,[1] Petitioner appealed to Florida's Fourth District Court of Appeal. In a per curiam order without written opinion, that court affirmed. Pet. App. 1a. The state intermediate appellate court did not specify the basis for its ruling. *See id.* Petitioner did not seek review in the Florida Supreme Court, which lacks jurisdiction over unelaborated per curiam affirmances, *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989–90 (Fla. 2004), and he did not move for a written opinion. *See* Fla. R. App. P. 9.330(a)(2)(D).

Petitioner now seeks a writ of certiorari. He does not assert that his sentence is unconstitutional under *Graham* and *Miller*, and instead contends—as the defendants did in *Michel* and *Franklin*—that the Florida Supreme Court's method of analyzing the constitutional question was flawed.[2] Accordingly, Petitioner asks this Court to "grant certiorari, vacate

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[1] Petitioner filed two subsequent pro se motions to correct his sentence but each was stricken because he was represented by counsel. R. 174–77, 206–08, 217; Pet. App. 13a.

[2] Pending petitions in *Cure v. Florida*, 20-5416, *Moss v. Florida*, 20-5485, and *Rogers v. Florida*, 20-5801 present the identical question.

the judgment, and remand this case for reconsideration with the understanding that *LeBlanc* was not a merits decision." Pet. 16.

REASONS FOR DENYING THE PETITION

I. The Narrow Question Presented Is Not Certworthy.

The issue in the state court was whether Florida's parole system, which allows persons convicted before 1994 the chance to establish that further incarceration is unwarranted, affords juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Miller v. Alabama*, 567 U.S. 471, 479 (2012), such that Petitioner's sentence was not an unconstitutional mandatory life-without-parole sentence. Petitioner presents no argument that the Florida Supreme Court has improperly answered that question. Rather, he challenges the *way* the Florida Supreme Court addressed the question because, he says, that court treated a recent AEDPA decision as binding on the merits. Pet. 7–12. But the limited question presented here does not warrant certiorari and, in any event, the premise of his argument is incorrect.

A. Petitioner does not ask the Court to review the underlying constitutional question and instead asks only that it reiterate the limited scope of its AEDPA rulings.

At the outset, this case is unworthy of review because, though Petitioner contests the manner in

which the Florida Supreme Court resolved the Eighth Amendment challenge, he does not contend that the court ultimately answered the question incorrectly. Having failed to present that question for review, Petitioner has waived the substantive question of whether Florida's parole system comports with *Graham* and *Miller*. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 n.3 (1976) (declining to address issue that "was not raised in the petition for certiorari").

At most, then, this case presents the narrow question of whether the Florida Supreme Court properly understood the limited nature of *Virginia v. LeBlanc*'s holding. 137 S. Ct. 1726 (2017) (per curiam). But that involves no legal question about which lower courts might legitimately disagree. Recently, for instance, this Court clarified what was already widely known: that its AEDPA precedents are not merits holdings. *See Madison v. Alabama*, 139 S. Ct. 718, 727 (2019). In *Madison*, the Court explained that a decision denying federal habeas relief under AEDPA's deferential standard of review establishes only that no "inarguable error" occurred. *Id.* Such a decision, the Court added, will not foreclose the Court's ability on plenary review in a future case to "address the issue straight-up, sans any deference to a state court." *Id*. Indeed, *LeBlanc* itself disavowed the notion that it upheld Virginia's geriatric release program on the merits. 137 S. Ct. at 1729 ("the Court 'express[es] no view on the merits of the underlying' Eighth Amendment claim"). Thus, there is little risk that future state courts will mistake *LeBlanc* for a binding

determination that a parole-style program satisfies the Eighth Amendment.

And the Florida Supreme Court and other state courts of last resort have already demonstrated their awareness that this Court's decisions applying AEDPA's deferential standard of review are *not* determinations on the merits. *See, e.g.*, *Rigterink v. State*, 2 So. 3d 221, 245 (Fla. 2009) (noting that "under the Antiterrorism and Effective Death Penalty Act of 1996," this Court "in a federal habeas case" is "bound by a deferential standard of review"), *overruled on other grounds*, *Florida v. Rigterink*, 559 U.S. 965 (2010); *People v. Contreras*, 411 P.3d 445, 461 (Cal. 2018) ("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*."); *Carter v. State*, 192 A.3d 696, 706 n.9 (Md. 2018) ("However, the procedural posture of [*LeBlanc*]—deferential collateral review of a state court decision under the federal Antiterrorism and Effective Death Penalty Act ('AEDPA')—means that the case provides limited guidance for our purposes."). Granting, vacating, and remanding would therefore serve no useful purpose apart from giving Petitioner a second bite at establishing in state court that his sentence is unconstitutional.

What is more, this Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (dismissing writ of certiorari as improvidently granted) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). That a lower

court "reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite [that] court's decision." *Id*. Yet that is effectively what Petitioner seeks here: by declining to challenge the state court's determination of the merits, he asks only that the Court rewrite the reasoning of the Florida Supreme Court's decision in *Michel*.

B. This case implicates no split of authority.

1. Nor does this case create or widen any split of authority. Petitioner asserts that the Florida Supreme Court's decision in *Michel* "conflicts with decisions of this Court" interpreting AEDPA. Pet. 6. But the premise of Petitioner's claim—that the Florida Supreme Court "view[ed] *LeBlanc* as settling the [merits] question," *id*.—is incorrect.

a. *Michel* properly understood that *LeBlanc* was an AEDPA case, not a decision on the merits. The best evidence of that is how the Florida Supreme Court itself characterized *LeBlanc*. It wrote: "In *LeBlanc*, the United States Supreme Court reversed the Fourth Circuit Court of Appeals and held that a Virginia court's decision affirming a juvenile offender's sentence of life for a nonhomicide crime subject to the possibility of conditional geriatric release *was not an unreasonable application of the Supreme Court's case law*." *Michel*, 257 So. 3d at 6 (plurality op.) (citation omitted; emphasis added). That is, the Florida Supreme Court referenced AEDPA's deferential standard of review and acknowledged that it was central to this Court's holding.

Rather than read *LeBlanc* as a determination on the merits, the Florida Supreme Court relied on that decision for two altogether permissible purposes.

First, the Florida Supreme Court cited *LeBlanc* for the proposition that *Graham* and *Miller* did not resolve the question before it. *Graham* and *Miller* did not require the court to invalidate Florida's own parole system because, as *LeBlanc* pointed out, "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment." *Id.* (quoting *LeBlanc*, 137 S. Ct. at 1728–29). Indeed, "that question was not presented" in those cases. *Id.* (quoting *LeBlanc*, 137 S. Ct. at 1729). Because *Graham* and *Miller* left open the question, the Florida Supreme Court was free to conduct its own independent assessment of the legal question in *Michel*. It was in this sense that the Florida Supreme Court deemed *LeBlanc* a "clarification" of the rule laid out in *Graham* and *Miller*. *See id.* at 6–7.

Second, the Florida Supreme Court relied on this Court's observation in *LeBlanc* that a state parole board's "[c]onsideration of [the parole] factors 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.* at 7 (quoting *LeBlanc*, 137 S. Ct. at 1729). That simple fact about the way parole systems operate was of course relevant to the question of whether, in the abstract, parole might cure any perceived defect in a life sentence imposed on a juvenile offender. On the other side of the ledger, *LeBlanc* identified as a potential counterargument 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." *LeBlanc*, 137 S. Ct. at 1729. That concern does not apply under Florida's scheme, however, because defendants like Petitioner, Michel, and Franklin enjoyed the possibility of parole after only 25 years, not 40, and because Florida's parole system does not give parole officials unfettered discretion to deny release. *See* Fla. Stat. § 947.165(1) (requiring parole commission to adopt "objective parole guidelines").

Nothing in this Court's AEDPA precedents implies that it is improper for state courts to rely on language in an AEDPA decision that, though not a holding, is nevertheless instructive. And *LeBlanc*'s observations about the competing considerations in a case of this nature were undoubtedly relevant to the Florida Supreme Court's eventual resolution of the question on the merits.

This reading of *Michel* is confirmed by the absence of any suggestion by the Florida Supreme Court that it felt bound by *LeBlanc*. And, in a later case discussing its holding in *Michel*, the Florida Supreme Court explained that it was "instructed"—not bound, controlled, or governed—by *LeBlanc*. *Franklin v. State*, 258 So. 3d 1239, 1241 (Fla. 2018).

b. Because *Graham* and *Miller* did not address whether a parole scheme similar to Florida's would comport with the Eighth Amendment, the Florida

Supreme Court applied its independent judgment to that inquiry in *Michel*.

To answer the question, the court first observed that "[t]he United States Supreme Court's precedent states that the 'Eighth Amendment . . . does not require the State to release [a juvenile] offender during his natural life.'" *Michel*, 257 So. 3d at 7 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). That precedent, the Florida court wrote, "only requires states to provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* (same). Turning to the facts of the defendant's life-with-parole sentence, the Florida Supreme Court then reasoned that "Michel's sentence does not violate *Graham* or *Miller* because . . . Michel is eligible for parole after serving 25 years of his sentence, which is certainly within his lifetime." *Id.*

Petitioner asserts that the Florida Supreme Court "did not engage in a reexamination of Florida's parole process," Pet. 5, and thus abdicated its duty to "adjudicate constitutional questions." Pet. 15. But the court's analysis refutes that claim. Indeed, the court expressly considered, and rejected, the notion that Florida's parole scheme failed to account for a juvenile's maturity and rehabilitation:

> Florida's statutorily required initial interview and subsequent reviews before the Florida Parole Commission include the type of individualized consideration discussed by the United States Supreme Court in *Miller*. For example, under section 947.174(3), Florida

> Statutes, the presumptive parole release date is reviewed every 7 years in light of information "including, but not limited to, current progress reports, psychological reports, and disciplinary reports." This information, including these individualized reports, would demonstrate maturity and rehabilitation as required by *Miller* and *Graham*. Moreover, there is no evidence in this record that Florida's preexisting statutory parole system (i) fails to provide Michel with a "meaningful opportunity to obtain release," or (ii) otherwise violates *Miller* and *Graham* when applied to juvenile offenders whose sentences include the possibility of parole after 25 years. And these parole decisions are subject to judicial review.

Michel, 257 So. 3d at 7 (citations omitted).

For those reasons, the Florida Supreme Court receded from *Atwell* and adopted the *Atwell* dissent's approach. *See id.* at 6–8.

It is therefore not true, as Petitioner would have it, that the Florida Supreme Court has "substituted rigorous Eighth Amendment analysis with reliance on an AEDPA decision." Pet. 15.

2. Moreover, Petitioner alleges no split of authority on the substantive question—which in any event is waived—of whether parole systems like Florida's comport with *Graham* and *Miller*. Courts across the nation instead hold that similar parole systems provide juvenile offenders a meaningful opportunity for release within their natural lifespans.

In *Friedlander v. United States*, the Ninth Circuit held that *Miller* did not apply to a juvenile offender's life sentence because "Friedlander was not sentenced to life without parole [as] Friedlander admits that he 'has seen the parole board approximately 8 time[s].'" 542 F. App'x 576, 577 (9th Cir. 2013) (unpublished). Similarly, the Texas Court of Criminal Appeals has held that a juvenile's mandatory sentence of life with the possibility of parole did not violate *Miller* because "[l]ife in prison with the possibility of parole leaves a route for juvenile offenders to prove that they have changed while also assessing a punishment that the Legislature has deemed appropriate." *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Ct. Crim. App. 2014). And in *James v. United States*, the D.C. Court of Appeals concluded that *Graham* and *Miller* did not apply to a juvenile offender's sentence of a mandatory minimum of 30 years to life with eligibility for parole after 30 years. 59 A.3d 1233, 1235–37 (D.C. 2013); *see also Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197–99 (4th Cir. 2019).

All of this explains why this Court has repeatedly declined to review the precise question presented in the Petition. *See Michel v. Florida*, 139 S. Ct. 1401 (2019); *Franklin v. Florida*, 139 S. Ct. 2646 (2019); *State v. Carter*, No. SC17-768, 2019 WL 102257 (Fla. Jan. 3, 2019), *cert. denied*, *Carter v. Florida*, 140 S. Ct. 52 (2019). The unelaborated decision of the intermediate state appellate court below adds nothing beyond the analysis of the Florida Supreme Court that this Court has already declined to take up.

II. This Case Is a Poor Vehicle.

Assuming this Court were interested in deciding whether the Florida Supreme Court either improperly construed *LeBlanc* or erred in its determination of the merits of the substantive Eighth Amendment question, this case is a poor vehicle. That is so for four reasons.

First, the trial court did not pass upon the merits of Petitioner's claim. *See* R. 122–24. It instead determined that his Eighth Amendment challenge was unripe and deferred ruling until the Florida Supreme Court resolved the then-pending *Michel* case. *Id.* That led to the denial of Petitioner's motion without prejudice, not a denial on the merits. *Id.* And Petitioner did not obtain a ruling on the merits because he chose to appeal, rather than re-file his motion at the appropriate time.

Second, the decision below is an unelaborated per curiam affirmance from a state intermediate appellate court. Because the court did not issue a written opinion, its ruling does not contribute to the jurisprudence in any way. *See Dep't of Legal Affairs v. District Court of Appeal*, 434 So. 2d 310, 311 (Fla. 1983) (explaining that unelaborated per curiam affirmances are non-precedential). What is more, Florida law dictates that the basis for a district court's decision cannot be discerned from an unelaborated per curiam affirmance. *Id.* ("We are of the view that such a decision does not establish any point of law; and there is no presumption that the affirmance was on the merits." (quoting *Schooley v. Judd*, 149 So. 2d 587, 590 (Fla. Dist. Ct. App. 1963)). Accordingly, it is

not even clear that the state intermediate appellate court reached the merits of Petitioner's claim—as opposed to affirming on a procedural basis. It is certainly not apparent, for example, that the state court relied on *Michel* and *Franklin*, making this case an unsuitable vehicle for reviewing those decisions.

Third, the State did not brief the issue in the state intermediate appellate court because that court did not order a response to Petitioner's opening brief raising his Eighth Amendment claim. This absence of adversarial briefing in the lower court means that the full range of arguments has not been examined.

Fourth, to the extent the Court is interested in the substantive Eighth Amendment question, this case is a poor vehicle because the record is undeveloped. Because Petitioner had not yet served 25 years in prison, he is not yet parole eligible and the parole commission has not considered whether he is suitable for release. As the trial court found, his Eighth Amendment claim is therefore unripe. R. 124.

III. The Florida Supreme Court's Decision in *Michel* Was Correct.

In any event, the Florida Supreme Court properly held that Florida's system of parole adequately affords juvenile offenders a meaningful opportunity for release. Thus, even if this Court were to grant, vacate, and remand, *see* Pet. 16, the outcome in state court would invariably remain the same.

Both *Graham* and *Miller* contemplated that States could satisfy the Eighth Amendment in juvenile cases

by making parole available. In *Graham*, this Court cautioned that "[a] State is not required to guarantee eventual freedom to a juvenile offender" because some juveniles will in fact be irredeemable. 560 U.S. at 75. What the States must do, the Court held, "is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. "It is for the State, in the first instance, to explore the means and mechanisms for compliance." *Id*.

Florida's parole system is just such a mechanism. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). By statute, the parole board periodically interviews an offender to update his or her presumptive release date. Fla. Stat. § 947.174(1)(a)-(b). In making that assessment, the parole board will consider new information "including, but not limited to, current progress reports, psychological reports, and disciplinary reports," Fla. Stat. § 947.174(3), and an offender's "young age" is relevant to the parole inquiry. Fla. Admin. Code R. 23–21.010(5)(b)1.b.[3]

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[3] In his lower court briefing, Petitioner cited statistics that he believes show that Florida's parole system does not offer juvenile offenders a "meaningful opportunity" for release. *See* Pet. App. 31–32a. Those statistics, however, were directed at the parole rate for the overall Florida prison population, not for juvenile offenders who sought parole after *Graham* and *Miller*. And, at any rate, the question in

As a result, and contrary to Petitioner's fleeting suggestion, this is not an instance in which "constitutional violations will inevitably result" from a state court's inappropriate "defer[ence] to this Court's AEDPA jurisprudence." Pet. 15.

Petitioner's as-applied Eighth Amendment challenge was whether *he*, not others, had been denied a meaningful opportunity for release. As noted above, he has not established that he is the sort of candidate for whom parole is appropriate or that the Florida parole board failed to take his youth and rehabilitative prospects into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
**Counsel of Record*

JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

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