

No.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ROGERS, 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

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, Florida 33401
(561)355-7600; (561) 624-6560
ppetillo@pd15.state.fl.us
appeals@pd15.state.fl.us

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JAMES ROGERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D19-3955

[June 25, 2020]

Appeal of order denying rule 3.800 motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Timothy L. Bailey, Judge; L.T. Case No. 94-000144CF10B.

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

Ashley Moody, Attorney General, Tallahassee, and Paul Patti, III, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

LEVINE, C.J., DAMOORGIAN and FORST, 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,

JUDGE: HAIMES

vs.

CASE NO.: 94-144CF10B

JAMES ROGERS
Defendant.

/

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

The Defendant, James Rogers, by and through undersigned counsel, and pursuant to Florida Rules of Criminal Procedure 3.850 and 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 sentence imposed in this case and granting a resentencing hearing. As grounds in support of this motion, the Defendant alleges the following:

1. Mr. Rogers was convicted of one count of first-degree murder, one count of attempted first-degree murder, one count of attempted second-degree murder and attempted robbery/weapon, in the Circuit Court for the 17th Judicial Circuit, in and for Broward County, Florida, on October 4, 1995. The conviction was the result of a trial.

¹ 132 S. Ct. 2455 (2012)

² 162 So. 3d 954 (Fla. 2015)

2. On March 8, 1996, the trial court imposed consecutive life sentences on the murder charge and both attempted murder charges, and a concurrent 15 years in prison on the robbery charge. The sentences on the attempted murder charges were amended on January 23, 1998, to a consecutive 25 years in prison on the attempted first-degree murder charge, and a consecutive 15 years in prison on the attempted second-degree murder charge.
3. There is no appeal/post-conviction history relevant to the issue raised in this motion.
4. The Defendant's date of birth is June 29, 1976. The offense was committed on December 15, 1993, before Mr. Rogers 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 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*, --- So. 3d. ---, 2016 WL 3010795 (May 26, 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.* at *8.
9. The life sentence imposed upon Mr. Rogers is in violation of the U.S. Constitution.

10. Mr. Rogers seeks an Order from this Court vacating and setting aside the sentence on the murder charge and attempted first-degree murder charge 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 sentence imposed in this case and granting a resentencing hearing.

HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

Tamara Curtis

TAMARA CURTIS
Florida Bar No. 712167
Assistant Public Defender
Attorney for the Defendant
discovery@browarddefender.org
tsiegel@browarddefender.org
(954) 831-8645

ATTESTATION

I, James M. Rogers, under penalty of perjury, pursuant to Fla. Stat. 92.525, attest that I am the Defendant in the above styled cause, that I have read the foregoing, all that all of the facts stated in it are true.

James M. Rogers
James M. Rogers

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 19th day of September, 2016.

HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

HZ

TAMARA CURTIS
Florida Bar No. 712167
Assistant Public Defender
Attorney for the Defendant
discovery@browarddefender.org
tsiegel@browarddefender.org
(954) 831-8645

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

STATE OF FLORIDA)	CASE NO: 94-144 CF10B
)	
)	JUDGE: HAIMES
)	
v.)	
)	
JAMES M. ROGERS)	
)	
<u>Defendant</u>)	

**RESPONSE TO DEFENDANT'S MOTION TO
CORRECT ILLEGAL SENTENCE**

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and responds to the Defendant's Motion to Correct Illegal Sentence, pursuant to Fla.R.Crim.P. 3.800(a), and the Order of this Honorable Court, as follows:

1. The defendant in this matter was convicted at trial of murder in the first degree two counts of attempted murder in the first degree, and attempted armed robbery. He was sentenced to life imprisonment, with a mandatory minimum sentence of 25 years, for murder in the first degree, 25 years in prison for attempted murder in the first degree, 17 years in prison for attempted murder in the

second degree, and 15 years in prison for armed robbery¹.

2. The allegation of the defendant that he is entitled to relief under pursuant to *Miller v. Alabama*, 132 S.Ct 2344 (2012) is without merit. Initially, the defendant was not sentenced to a mandatory life sentence, because he had the possibility for release on parole after 25 years. Although the Florida Supreme Court recently revised its interpretation of a mandatory life sentence in *Atwell v. State*, 197 So.3d 1040 (Fla. 2016), this interpretation does not affect this defendant, because he has not shown that he is not eligible for any type of conditional release. See *Williams v. State*, 197 So.3d 569 (Fla. 5th DCA 2016); *Stallings v. State*, 198 So.3d 1081 (Fla. 5th DCA 2016). See also *Davis v. State*, 199 So.3d 546 (Fla. 4th DCA 2016). Furthermore, there is a question as to whether the new sentencing scheme in F.S. § 921.1401 and 921.1402 can be applied to the defendant, since his case became final before July 1, 2014. *Davis, supra*. Consequently, this claim should be denied without prejudice for the Defendant to demonstrate that he is eligible for resentencing under *Atwell*.

3. Similarly, any allegation that the sentence of 25 years in prison for armed robbery is illegal is also without merit. Prior to

¹The first degree murder and armed robbery charges were affirmed on appeal, but the two attempted first degree murder charges were reversed for a new trial. *Rogers v. State*, 688 So.2d 6 (Fla. 4th DCA 1997). The defendant was found guilty of attempted murder in the first degree and the lesser included offense of murder in the second degree upon retrial (Exhibit I).

the *Miller* decision, the United States Supreme Court held in *Graham v. Florida*, 130 S.Ct. 2011 (2010) that mandatory life sentences for non-homicide crimes, where the defendant committed the crime under the age of 18, was unconstitutional, unless there was a meaningful opportunity for the defendant to be released. As previously noted, the crimes in this matter were committed prior to the enactment of sentencing guidelines. Although the defendant was under the age of 18 at the time of the crime, the concurrent sentence of 25 year in prison is not the functional equivalent of life imprisonment. *St. Val v. State*, 174 So.3d 447 (Fla. 4th DCA 2015); *Abrakata v. State*, 168 So.3d 251 (Fla. 1st DCA 2015) *petition for discretionary review pending*, SC15-1325 (Fla. 2015). See also *Davis, supra*. Since the 25 year concurrent sentence is not the functional equivalent of life imprisonment, relief as to the armed robbery count must be summarily denied.

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 Tamara L. Curtis (discovery@browarddefender.org) and (tsiegel@browarddefender.org), Attorney for the Defendant, this 4th day of November, 2016.

MICHAEL J. SATZ
State Attorney

By: 

JOEL SILVERSHEIN
Assistant State Attorney
Florida Bar #608092
Room 660
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
Telephone (954) 831-7913
courtdocs@sao17.state.fl.us
jsilvershein@sao17.state.fl.us

17th Judicial Circuit in and for ~~Broward County~~

CLOCK IN

DIVISION:
CRIMINAL

JUDGEMENT

DIV: *jk*

98-127276 T#018
03-04-98 09:47AM

THE STATE OF FLORIDA VS:

*James Maurice Rogers aka James Brian
H. Woods aka Steve Detrich Cartell*

PLAINTIFF *Hudson aka* DEFENDANT

CASE NUMBER

94-NYCPS

PROBATION VIOLATOR
(Check if Applicable)

STATE ATTORNEY
COURT REPORTER

D Zimet

M Palma

The Defendant, James Maurice Rogers etc. being personally before this Court represented by: Loyd del Nodar, his attorney of record, and having:

(Check Applicable Provision)

Been tried and found guilty of the following crime(s).

Entered a plea of guilty to the following crime(s).

Entered a plea of nolo contendere to the following crime(s).

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	ADD'L MONIES IMPOSED
<u>II</u>	<u>Attempted murder</u>	<u>117.04(1)(4)</u>	<u>LF</u>	
<u>III</u>	<u>Attempted</u> <u>murder do with firearms</u>	<u>117.04(1)(4)</u>	<u>1F</u>	

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s)

The Defendant is hereby ordered to pay the sum of Fifty Dollars (\$50.00) pursuant to F.S. 960.20 (Crimes Comp. Trust Fund). The defendant is further ordered to pay the sum of Five Dollars (\$5.00) as court costs pursuant to F.S. 943.25(4).

(Check if Applicable) The Defendant is further ordered to pay a fine in the sum of \$ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s).)

The Court hereby imposed additional court costs in the sum of \$ _____

Imposition of Sentence
Stayed and Withheld The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred
Until Later Date
(Check if Applicable) The Court hereby defers imposition of sentence until _____ (Date)

Pay \$200.00 Trust Fund pursuant to F.S.27.3455

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

COUNT(S) _____ : DAYS BROWARD COUNTY

JAIL W/CREDIT FOR _____ DAYS TIMES SERVED

8K27805 PG 0574

DIVISION
CRIMINAL

ADJUDICATION WITHHELD
 ADJUDICATED GUILTY

CASE NUMBER

94-144-CB

FINGERPRINTS OF DEFENDANT

8K21805PC0575

COUNTY ADMINISTRATOR

D. Rogers #4,75 Court Deputy
Name and Title

DONE AND ORDERED in Open Court at Broward County, Florida this 24 day of Nov
A.D., 1997 I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the
Defendant James M. Rogers, and that they were placed thereon by said Defendant in
my presence in Open Court this date. James Maurice Rogers

aka James Brian H Woods
aka Steve Detrick Carter II
Hudson aka Boo

JUDGE

Gold

DIVISION:
Criminal

as to Court

Re- SENTENCE Per Mandate
II

THE STATE OF FLORIDA VS.

James Maurice Rogers

CASE NUMBER

PLAINTIFF

DEFENDANT

94-144 CFS

The Defendant, being personally before this Court, accompanied by his attorney, A. Coffey, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One) and the Court having on _____ deferred imposition of sentence until this date.
 and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
 and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____, pursuant to F.S. 775.063, plus \$ _____ at the 5% surcharge required by F.S. 960.25

The Defendant is hereby committed to the custody of the Department of Corrections.
 The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.
 The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

For a term of Natural Life.
 For a term of 25 years
 Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence,
complete either
paragraph.

Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

DIVISION: CRIMINAL	Re-SENTENCE Per mandate (AS TO COUNT <u>11</u>)	CASE NUMBER 94-144 CF 6
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In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS

(As to Count 11)

By appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

**CONTROLLED
SUBSTANCE WITHIN
1000 FEET OF SCHOOL** It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

**HABITUAL FELONY
OFFENDER** The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**HABITUAL VIOLENT
OFFENDER** The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in this sentence in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**LAW ENFORCEMENT
PROTECTION ACT** It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

CAPITOL OFFENSE It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

**VIOLENT CAREER
CRIMINAL** The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**PRISON RELEASEE
REOFFENDER** The defendant is sentenced as a prison releasee reoffender and must serve a term of imprisonment of _____ years in accordance with the provisions of Florida Statute 775.082(8)(a)2.

DIVISION: CRIMINAL	Re - SENTENCE <i>Per Mandate</i> (AS TO COUNT <u>II</u>)	CASE NUMBER 94-144 CF6
OTHER PROVISIONS		
SHORT-BARRELED RIFLE, SHOTGUN, MACHINE GUN	<input type="checkbox"/> It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.	
CONTINUING CRIMINAL ENTERPRISE	<input type="checkbox"/> It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.	
RETENTION OF JURISDICTION	<input type="checkbox"/> The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).	
JAIL CREDIT	<input type="checkbox"/> It is further ordered that the defendant shall be allowed a total of _____ days as credit for time incarcerated prior to imposition of this sentence.	
PRISON CREDIT	<input type="checkbox"/> It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.	
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	<input checked="" type="checkbox"/> It is further ordered that the sentence imposed by this court shall run consecutive to _____ concurrent with (check one) the sentence set forth in count <u>I</u> of this case.	

17th Judicial Circuit in and for Broward County

CLOCK IN

DIVISION:
Criminal

as to Count

Re-SENTENCE per Mandate
III

THE STATE OF FLORIDA VS.

PLAINTIFF

James Maurice Rogers

DEFENDANT

CASE NUMBER

94-144 CFS

The Defendant, being personally before this Court, accompanied by his attorney, A. Coffey, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown.

(Check One) and the Court having on _____ deferred imposition of sentence until this date.
 and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
 and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____, pursuant to F.S. 775.063, plus \$ _____ at the 5% surcharge required by F.S. 960.25

The Defendant is hereby committed to the custody of the Department of Corrections.
 The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.
 The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

For a term of Natural Life.
 For a term of 15 years
 Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence,
complete either
paragraph.

Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

However, after serving a period of _____ imprisonment in the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

DIVISION: CRIMINAL	Re- SENTENCE per Mandate (AS TO COUNT <u>III</u>)	CASE NUMBER <u>94-144 CF 6</u>
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In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS

(As to Count III)

By appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

**CONTROLLED
SUBSTANCE WITHIN
1000 FEET OF SCHOOL** It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

**HABITUAL FELONY
OFFENDER** The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**HABITUAL VIOLENT
OFFENDER** The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in this sentence in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**LAW ENFORCEMENT
PROTECTION ACT** It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

CAPITOL OFFENSE It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

**VIOLENT CAREER
CRIMINAL** The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

**PRISON RELEASEE
REOFFENDER** The defendant is sentenced as a prison releasee reoffender and must serve a term of imprisonment of _____ years in accordance with the provisions of Florida Statute 775.082(8)(a)2.

DIVISION: CRIMINAL	Re - SENTENCE <u>Per Mandate</u> (AS TO COUNT <u>III</u>)	CASE NUMBER <u>94-144 CF 6</u>
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OTHER PROVISIONS

SHORT-BARRELED RIFLE,
SHOTGUN, MACHINE GUN

It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL
ENTERPRISE

It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF
JURISDICTION

The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT

It is further ordered that the defendant shall be allowed a total of 3 yrs + 361 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT

It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/
CONCURRENT AS
TO OTHER COUNTS

It is further ordered that the sentence imposed by this court shall run consecutive to _____ concurrent with (check one) the sentence set forth in count II of this case.

CONSECUTIVE/
CONCURRENT AS
TO OTHER
CONVICTIONS

It is further ordered that the composite term of all sentences imposed for the courts specified in this order shall run
 _____ consecutive to _____ concurrent with (check one) the following:
 _____ Any active sentence being served.
 _____ Specific sentences:

PSI ORDERED

YES [] NO []

In the event the above the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Broward County, Florida, this 13 day of May, 19 99.

nunc pro tunc 1-23-980

JUDGE

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

STATE OF FLORIDA,
Plaintiff,
v.
JAMES ROGERS
Defendant.

Case No.: 94-144CF10B
Judge: HAIMES

**REPLY TO STATE'S RESPONSE ON DEFENDANT'S
MOTION TO VACATE SET ASIDE OR CORRECT SENTENCE**

The Defendant, James Rogers, by and through undersigned counsel, and pursuant to Florida Rules of Criminal Procedure 3.850, hereby files this reply to the State's response filed November 4, 2016:

1. On September 20, 2016, Mr. Rogers filed a Motion to Vacate, Set Aside or Correct Sentence. The basis of the motion is that his life sentence is unconstitutional based on recent opinions from the U.S. and Florida Supreme Courts. *See Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Atwell v. State*, 2016 WL 3010795 (May 26, 2016).
2. On November 4, 2016, the State filed a response. In its response, the State argued that the Motion filed by Mr. Rogers should be denied without prejudice because it does not alleged that his Presumptive Parole Release Date (PPRD) is so far into the future that his sentence the equivalent of a life sentence. For that, the State cites *Williams v. State*,

2016 WL 4431478 (Fla. 5th DCA 2016) and *Stallings v. State*, 2016 WL 4416997 (Fla. 5th DCA 2016) to support its argument.

3. Regardless of his PPRD, Mr. Rogers is entitled to resentencing under the new Florida sentencing statutes for juvenile offenders. The State's argument misapprehends *Atwell*. In *Atwell*, the Florida Supreme Court discussed the inadequacy of the parole system for juvenile offenders.

Although the pre-1994 first-degree murder statute ... provided for parole eligibility, it remained a mandatory sentence that treated juveniles exactly like adults and precluded any individualized sentencing consideration. The current parole process similarly 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*.

Atwell, 2016 WL 3010795 at p. 2.

4. In addition to the fact that the Florida Supreme Court considers the parole system inadequate for juvenile offenders, the Court noted in its decision in *Atwell* that the Florida Legislature enacted new legislation to remedy the problem of juveniles serving life sentences.

Moreover, as we observed in *Horsley*, the Florida Legislature did not choose a parole-based approach to remedy sentences that are unconstitutional under *Graham* and *Miller*. 160 So.3d at 407. Instead, the Legislature chose to enact chapter 2014-220, Laws of Florida, and to use substantively different criteria for evaluation, specifically tailored to juveniles and based on the *Miller* factors. *Id.* Also, at the judicial sentence review hearing under chapter 2014-220, Laws of Florida, the trial court is required to

consider the enumerated *Miller* factors of section 921.1402(6), Florida Statutes, along with any other factor it deems appropriate to review the juvenile's sentence. *See* § 921.1402(6), Fla. Stat. (2015). Parole is, simply put, "patently inconsistent with the legislative intent" as to how to comply with *Graham* and *Miller*. *Horsley*, 160 So.3d at 395.

Atwell, 2016 WL 3010795 at p. 9.

5. The clear intent of Florida's Legislature and Supreme Court is that juvenile offenders serving life sentences, for both homicide and non-homicide offenses, must be resentenced pursuant to § 921.1401 and § 921.1402, Fla. Stat., which mandate sentencing courts to consider "[t]he distinctive attributes of youth," which "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S. Ct. at 2465.
6. Additionally, the State argues that Mr. Rogers's claims regarding his terms of years sentences should be denied because "the concurrent sentence of 25 year (sic) in prison is not the functional equivalent of life imprisonment. The State's own exhibits, however, demonstrate that Mr. Roger's sentences on each of his offenses were ordered to run **consecutively**, not **concurrently** with each other. Accordingly, those sentences will need to be revisited as well, to ensure that his term of years sentence is not the functional equivalent of a life sentence.

WHEREFORE, the Mr. Rogers respectfully requests that this Honorable Court enter an ORDER vacating and setting aside the sentences imposed in this case and granting a resentencing hearing in conformity with § 775.082, § 921.1401 and § 921.1402, Fla. Stat.

Respectfully submitted,

HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

/s/ Tamara Curtis
Tamara L. Curtis
Florida Bar No. 712167
Assistant Public Defender
Attorney for the Defendant
discovery@browarddefender.org
tsiegel@browarddefender.org
(954) 831-8689

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 13th day of October, 2016.

HOWARD FINKELSTEIN
Public Defender
17th Judicial Circuit

/s/ Tamara Curtis
Tamara L. Curtis
Florida Bar No. 712167
Assistant Public Defender
Attorney for the Defendant
discovery@browarddefender.org
tsiegel@browarddefender.org
(954) 831-8689

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

STATE OF FLORIDA
Plaintiff,
vs.
JAMES MAURICE ROGERS.
Defendant

CASE NUMBER: 94-144CF10B
DIVISION: FH
JUDGE: TIM BAILEY

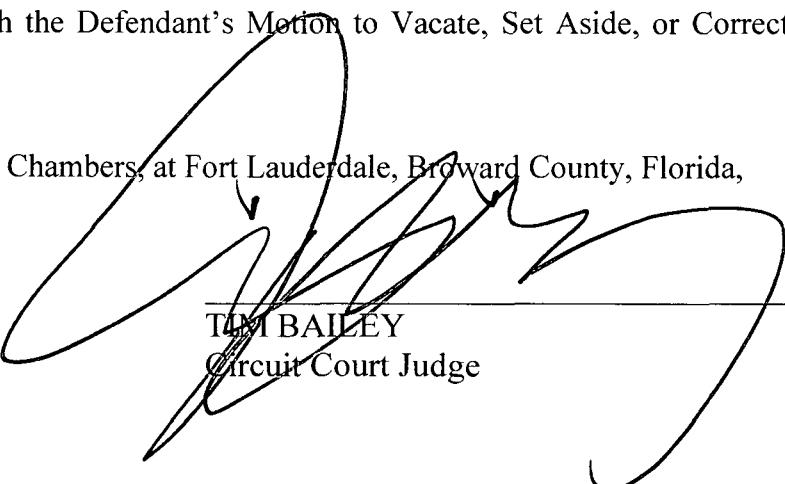
**ORDER STAYING DEFENDANT'S MOTION TO VACATE,
SET ASIDE, OR CORRECT SENTENCE**

THIS CAUSE having come before the Court upon the State's January 19, 2017 Motion to Stay Defendant, Marcus Blackmon's, Motion to Vacate, Set Aside, or Correct Sentence, filed on September 20, 2016, filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.800, and this Court having considered same, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the State's Motion to Stay is granted pending the Florida Supreme Court's resolution of conflict cited herein. The issue of whether or not parole dates are relevant in Atwell resentencing cases, (Atwell v. State, 197 So. 3rd 1040 (FL 2016)) will be resolved by the Florida Supreme Court in the resolution of conflict between the 4th DCA in Michel v. State, 204 So. 3rd 101 (FL 4th DCA 2016) and the 5th DCA in Williams v. State, 197 So. 3rd 569 (FL 5th DCA 2016). Williams holds that relief under Atwell v. State, 197 So. 3rd 1040 (FL 2016) depends upon the Defendant's presumptive parole release date, a piece of information missing from the Defendant's September 20, 2016 Motion to Vacate, Set Aside, or Correct Sentence. Michel holds that Florida's parole system does not address the issues raised in Atwell and therefore the Defendant's presumptive parole release date is not relevant to his right to be resentenced. Once the conflict described herein has been resolved, this stay will terminate and the Court will proceed accordingly with the Defendant's Motion to Vacate, Set Aside, or Correct Sentence.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 27th day of January, 2017.

cc: Joel Silvershein, Esq.
Tamara Curtis, Esq.


TIM BAILEY
Circuit Court Judge

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

STATE OF FLORIDA)	CASE NO: 94-144 CF10B
)	
)	JUDGE: T. BAILEY
)	
V.)	
)	
JAMES M. ROGERS)	
)	
<u>Defendant</u>)	

**MOTION TO LIFT STAY AND AMENDED 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 convicted at trial of murder in the first degree two counts of attempted murder in the first degree, and attempted armed robbery. He was sentenced to life imprisonment, with a mandatory minimum sentence of 25 years, for murder in the first degree, 25 years in prison for attempted murder in the first degree, 17 years in prison for attempted murder in the

second degree, and 15 years in prison for armed robbery¹.

2. The defendant, through counsel, filed a post-conviction motion based on *Miller v. Alabama*, 132 S.Ct 2344 (2012). That motion was stayed at the request of the State on January 30, 2017 due to the conflict between the Fourth DCA in *Michel v. State*, 204 So.3d 101 (Fla. 4th DCA 2016), and the Fifth DCA cases of *Williams v. State*, 197 So.3d 569 (Fla. 5th DCA 2016) and *Stallings v. State*, 198 So.3d 1081 (Fla. 5th DCA 2016), which was certified in *Michel* (Exhibit II).

3. The conflict between the Fourth DCA and Fifth DCA was resolved in the Florida Supreme Court decisions in *Franklin v. State*, 258 So.3d 1239 (Fla. 2018) and *Michel v. State*, 257 So.3d 3 (Fla. 2018). In those decisions, the Florida Supreme Court found that if a defendant was parole eligible, then the *Miller/Graham* criteria is met, and the sentence is legal. *Id.*

4. The stay in this matter has not been lifted at this point in time. Based on the fact that the Florida Supreme Court has now definitively addressed the issue, the stay in this matter should be lifted, and the post-conviction motion filed on September 20, 2016 should be summarily denied based on *Franklin* since the defendant is

¹The first degree murder and armed robbery charges were affirmed on appeal, but the two attempted first degree murder charges were reversed for a new trial. *Rogers v. State*, 688 So.2d 6 (Fla. 4th DCA 1997). The defendant was found guilty of attempted murder in the first degree and the lesser included offense of murder in the second degree upon retrial (Exhibit I).

parole eligible in this matter. Similarly, the concurrent sentence of 25 year in prison is not the functional equivalent of life imprisonment, and the motion to correct illegal sentence must be denied. *Hart v. State*, 246 So.3d 417 (Fla. 4th DCA 2018); *Pedroza v. State*, 244 So.3d 1128 (Fla. 4th DCA 2018) rev. granted SC18-964 (Fla. December 6, 2018). See also *St. Val v. State*, 174 So.3d 447 (Fla. 4th DCA 2015).

WHEREFORE, the State of Florida respectfully requests this Honorable Court to:

1. Lift the stay issued by this Honorable Court dated January 30, 2017.
2. Deny the Defendant's Motion for Post-Conviction Relief based on *Franklin v. State*, 258 So.3d 1239 (Fla. 2018) and *Michel v. State*, 257 So.3d 3 (Fla. 2018).

I HEREBY CERTIFY that a copy of the foregoing was furnished by e-mail to Christine Sharmae Robinson (discovery@browarddefender.org), Attorney for the Defendant, this 27th day of November, 2019.

MICHAEL J. SATZ
State Attorney

By: 

JOEL SILVERSHEIN
Assistant State Attorney
Florida Bar No. 608092
Room 07130
Broward County Courthouse
West Building
201 S.E. 6th Street
Fort Lauderdale, Florida 33301
Telephone: (954)831-7913
courtdocs@saol7.state.fl.us

DIVISION
CRIMINAL

ADJUDICATION WITHHELD
 ADJUDICATED GUILTY

CASE NUMBER

94-744 CFB

FINGERPRINTS OF DEFENDANT

8K27806 PG 0575

COUNTY ADMINISTRATOR

D. Neugent #4,75 Court Deputy

Name and Title

DONE AND ORDERED in Open Court at Broward County, Florida this 24 day of Nov
A.D., 1997 I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the
Defendant James Maurice Rogers, and that they were placed thereon by said Defendant in
my presence in Open Court this date. James Maurice Rogers

aka James Bryant Woods
aka Steve Detrick Carter II
Hudson aka Boo

JUDGE

Gold

17th Judicial Circuit in and for Broward County

CLOCK IN

DIVISION:
Criminal

Re - SENTENCE Per Mandate
as to Count II

THE STATE OF FLORIDA VS.

James Maurice Rogers

CASE NUMBER

PLAINTIFF

DEFENDANT

94-144 CRB

The Defendant, being personally before this Court, accompanied by his attorney, A. Coffey, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One) and the Court having on _____ deferred imposition of sentence until this date.
 and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
 and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____, pursuant to F.S. 775.063, plus \$ _____ at the 5% surcharge required by F.S. 960.25

The Defendant is hereby committed to the custody of the Department of Corrections.
 The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.
 The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

For a term of Natural Life.
 For a term of 25 years
 Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence,
complete either
paragraph.

Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

DIVISION: CRIMINAL	Re-SENTENCE Per mandate (AS TO COUNT <u>11</u>)	CASE NUMBER 94- 144 CFB
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In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS

(As to Count 11)

By appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM

It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING

It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this court.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL

It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this court.

HABITUAL FELONY OFFENDER

The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER

The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in this sentence in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

LAW ENFORCEMENT PROTECTION ACT

It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

CAPITOL OFFENSE

It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL

The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

PRISON RELEASEE REOFFENDER

The defendant is sentenced as a prison releasee reoffender and must serve a term of imprisonment of _____ years in accordance with the provisions of Florida Statute 775.082(8)(a)2.

DIVISION: CRIMINAL	Re - SENTENCE <i>Per Mandate</i> (AS TO COUNT <u>II</u>)	CASE NUMBER 94-144 CFB
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OTHER PROVISIONS

**SHORT-BARRELED RIFLE,
SHOTGUN, MACHINE GUN**

It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

**CONTINUING CRIMINAL
ENTERPRISE**

It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

**RETENTION OF
JURISDICTION**

The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT

It is further ordered that the defendant shall be allowed a total of _____ days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT

It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

**CONSECUTIVE/
CONCURRENT AS
TO OTHER COUNTS**

It is further ordered that the sentence imposed by this court shall run consecutive to _____ concurrent with (check one) the sentence set forth in count I of this case.

17th Judicial Circuit in ~~and~~ for Broward County

CLOCK IN

DIVISION:
Criminal

Re-**SENTENCE** per Mandate
III

THE STATE OF FLORIDA VS.

PLAINTIFF

DEFENDANT

James Maurice Rogers

CASE NUMBER

94-144CFD

The Defendant, being personally before this Court, accompanied by his attorney, A. Coffey, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he sentenced as provided by law, and cause shown,

(Check One) and the Court having on _____ deferred imposition of sentence until this date.
 and the Court having previously entered a judgment in this case on the defendant now re sentences the defendant.
 and the Court having placed the Defendant on Probation/Community Control and having subsequently revoked the Defendant's Probation/Community Control.

IT IS THE SENTENCE OF THE COURT that:

The Defendant pay a fine of \$ _____, pursuant to F.S. 775.063, plus \$ _____ at the 5% surcharge required by F.S. 960.25

The Defendant is hereby committed to the custody of the Department of Corrections.
 The Defendant is hereby committed to the custody of the Sheriff of Broward County, Florida.
 The Defendant is hereby sentenced as a youthful offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one: unmarked sections are inapplicable)

For a term of Natural Life.

For a term of 15 years

Said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

If "split" sentence,
complete either
paragraph.

Followed by a period of _____ on Probation/Community Control under the supervision of the Department of Correction according to the terms and conditions of supervision set forth in separate order entered herein.

However, after serving a period of _____ imprisonment in the balance of such sentence shall be suspended and the defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

DIVISION: CRIMINAL	<i>Re - SENTENCE per Mandate (AS TO COUNT <u>III</u>)</i>	CASE NUMBER 94-144 CF 6
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In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS

(As to Count III)

By appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM

It is further ordered that the three year minimum imprisonment provision of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING

It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this count.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL

It is further ordered that the three year minimum imprisonment provision of Florida Statute 893.13(1)(e) 1, are hereby imposed for the sentence specified in this count.

HABITUAL FELONY OFFENDER

The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in this sentence in accordance to the provisions of Florida Statute 775.084(4). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

HABITUAL VIOLENT OFFENDER

The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in this sentence in accordance with the provision of Florida Statute 775.084(4). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

LAW ENFORCEMENT PROTECTION ACT

It is further ordered that the Defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

CAPITOL OFFENSE

It is further ordered that the Defendant shall serve no less than 25 years in accordance with the provisions of Florida Statute 775.082(1).

VIOLENT CAREER CRIMINAL

The defendant is adjudicated a violent career criminal offender and has been sentenced to an term in accordance with the provision of Florida Statute 775.084(4)(c). A minimum term of _____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

PRISON RELEASEE REOFFENDER

The defendant is sentenced as a prison releasee reoffender and must serve a term of imprisonment of _____ years in accordance with the provisions of Florida Statute 775.082(8)(a)2.

DIVISION: CRIMINAL	Re - SENTENCE <u>Per Mandate</u> (AS TO COUNT <u>III</u>)	CASE NUMBER <u>94-144 CF 6</u>
-----------------------	--	-----------------------------------

OTHER PROVISIONS

SHORT-BARRELED RIFLE,
SHOTGUN, MACHINE GUN

It is further ordered that the five-year minimum provisions of Florida Statute 790.221(2) are hereby imposed for the sentence specified in this court.

CONTINUING CRIMINAL
ENTERPRISE

It is further ordered that the 25 year mandatory minimum sentence provisions of Florida Statute 893.20 are hereby imposed for the sentence specified in this count.

RETENTION OF
JURISDICTION

The court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).

JAIL CREDIT

It is further ordered that the defendant shall be allowed a total of 3 years + 361 days as credit for time incarcerated prior to imposition of this sentence.

PRISON CREDIT

It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

CONSECUTIVE/
CONCURRENT AS
TO OTHER COUNTS

It is further ordered that the sentence imposed by this court shall run consecutive to _____ concurrent with (check one) the sentence set forth in count II of this case.

CONSECUTIVE/
CONCURRENT AS
TO OTHER
CONVICTIONS

It is further ordered that the composite term of all sentences imposed for the courts specified in this order shall run
consecutive to _____ concurrent with (check one) the following:
Any active sentence being served.
Specific sentences:

PSI ORDERED

YES [] NO []

In the event the above the above sentence is to the Department of Corrections, the Sheriff of Broward County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends _____

DONE AND ORDERED in Open Court at Broward County, Florida, this 13 day of May, 1999.
June Pro 1-23-980

JUDGE

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

STATE OF FLORIDA
Plaintiff,
vs.
JAMES MAURICE ROGERS.
Defendant

CASE NUMBER: 94-144CF10B
DIVISION: FH
JUDGE: TIM BAILEY

**ORDER STAYING DEFENDANT'S MOTION TO VACATE,
SET ASIDE, OR CORRECT SENTENCE**

THIS CAUSE having come before the Court upon the State's January 19, 2017 Motion to Stay Defendant, Marcus Blackmon's, Motion to Vacate, Set Aside, or Correct Sentence, filed on September 20, 2016, filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.800, and this Court having considered same, and being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that the State's Motion to Stay is granted pending the Florida Supreme Court's resolution of conflict cited herein. The issue of whether or not parole dates are relevant in Atwell resentencing cases, (Atwell v. State, 197 So. 3rd 1040 (FL 2016)) will be resolved by the Florida Supreme Court in the resolution of conflict between the 4th DCA in Michel v. State, 204 So. 3rd 101 (FL 4th DCA 2016) and the 5th DCA in Williams v. State, 197 So. 3rd 569 (FL 5th DCA 2016). Williams holds that relief under Atwell v. State, 197 So. 3rd 1040 (FL 2016) depends upon the Defendant's presumptive parole release date, a piece of information missing from the Defendant's September 20, 2016 Motion to Vacate, Set Aside, or Correct Sentence. Michel holds that Florida's parole system does not address the issues raised in Atwell and therefore the Defendant's presumptive parole release date is not relevant to his right to be resentenced. Once the conflict described herein has been resolved, this stay will terminate and the Court will proceed accordingly with the Defendant's Motion to Vacate, Set Aside, or Correct Sentence.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida,
this 27th day of January, 2017.

cc: Joel Silvershein, Esq.
Tamara Curtis, Esq.

TIM BAILEY
Circuit Court Judge

EXHIBIT II

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

STATE OF FLORIDA,

CASE NO.: 94-000144CF10B

Plaintiff,

JUDGE: TIM BAILEY

v.

JAMES M. ROGERS,

Defendant.

**ORDER LIFTING STAY; ORDER DENYING DEFENDANT'S MOTION TO
VACATE, SET ASIDE, OR CORRECT SENTENCE; AND ORDER DISMISSING
DEFENDANT'S MOTION FOR SENTENCE REVIEW**

THIS CAUSE comes before the Court upon the Defendant's September 19, 2016, Motion to Vacate, Set Aside, or Correct Sentence, and Notice of Supplemental Authority, brought pursuant to both Rule 3.850 and 3.800, Florida Rules of Criminal Procedure, and *Miller v. Alabama* (132 S.Ct. 2455 (2012)). On November 4, 2016, the State filed a Response. On November 7, 2016, the Defendant filed a Reply to the State's Response. On January 19, 2017, the State filed a Motion to Stay the Defendant's Motion. On January 25, 2017, the Defendant filed an Objection to State's Request for Stay. On January 30, 2017, this Court granted the Motion to Stay, based on the Florida Supreme Court's forthcoming ruling on the certified conflict between *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016) and *Williams v. State*, 197 So.2d 569 (Fla. 5th DCA 2016). The Florida Supreme Court resolved the conflict in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018) and *Michel v. State*, 257 So. 3d 3 (Fla. 2018). Therefore, this Court's stay of the Defendant's Motion is now lifted.

The Court, having examined all motions, responses, the court file, applicable law, and being otherwise fully advised in the premises hereby finds as follows:

The Defendant was found guilty after trial by jury of one count of murder in the first degree, two counts of attempted murder in the first degree, and one count of attempted armed robbery. The Defendant was sentenced to life imprisonment with a mandatory minimum of 25 years for murder in the first degree; 25 years for attempted murder in the first degree, 17 years for attempted murder in the second degree, and 15 years for attempted armed robbery. The Defendant was under the age of 18 at the time he committed the offenses.

On appeal to the Fourth District Court of Appeal, the sentences for the first degree murder and attempted armed robbery charges were affirmed, but the two attempted first degree murder charges were reversed and remanded for a new trial. *Rogers v. State*, 688 So. 2d 6 (Fla. 4th DCA 1997). Upon retrial, the Defendant was found guilty of attempted murder in the first degree and the lesser-included offense of murder in the second degree.

The Defendant's 2016 Motion to Vacate, Set Aside, or Correct Sentence was based on *Miller v. Alabama*, 132 S.Ct 2344 (2012), wherein the United States Supreme Court extended the Eighth Amendment rule prohibiting the imposition of a mandatory life sentence without the possibility of parole for juvenile homicide offenders.

However, after certified conflict, in *State v. Michel*, 257 So. 3d 3 (2018), the Florida Supreme court held that "juvenile offender's sentences of life with the possibility of parole after 25 years under Florida's parole system do not violate 'Graham's requirement that juveniles...have a meaningful opportunity to receive parole.' Therefore,

such juvenile offenders are not entitled to resentencing under section 921.1402, Florida Statutes." *Id.* at 8 (internal citations omitted). Further, *Franklin v. State*, 258 So. 2d 1239 (2018) also held that a sentence including the eligibility for parole does not violate the Eighth Amendment. *Id.* at 1241.

As the Defendant is parole eligible in the instant case, his Motion is denied. This Court further finds that the Defendant's Motion for Sentence Review is moot based upon the controlling case law.

Based on the foregoing, it is

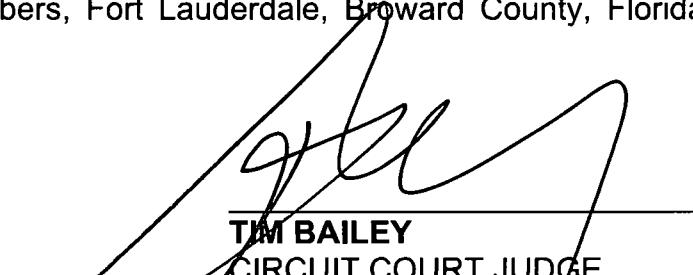
ORDERED AND ADJUDGED that the Order Staying the Defendant's Motion to Vacate, Set Aside or Correct Sentence is **LIFTED**. It is further

ORDERED AND ADJUDGED that the Defendant's Motion to Vacate, Set Aside, or Correct Sentence is **DENIED**. It is further

ORDERED AND ADJUDGED that the Defendant's Motion for Sentence Review is **DISMISSED AS MOOT**.

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

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida, this 13 day of December, 2019.



TIM BAILEY
CIRCUIT COURT JUDGE

Copies furnished:

Joel Silvershein, Esq.
Assistant State Attorney

Pro Se Defendant:
James Rogers, DC# 195723
Florida State Prison- M/U
P.O. Box 800
Raiford, FL 32083

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

CASE NO. 4D19-3955

JAMES ROGERS,
Appellant

v.

STATE OF FLORIDA,
Appellee

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

CAREY HAUGHWOUT
Public Defender
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Paul Edward Petillo
Assistant Public Defender
Florida Bar No. 508438
ppetillo@pd15.state.fl.us
appeals@pd15.state.fl.us

Attorney for Appellant

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STATEMENT OF THE CASE AND FACTS

In 1993, appellant committed first-degree murder, attempted robbery, attempted first-degree degree murder, and attempted second-degree murder. R 1. He was 17 years old. R 2. Appellant was sentenced to life imprisonment with parole eligibility after 25 years for the first-degree murder, a consecutive sentence of 25 years in prison for the attempted first-degree murder, and a consecutive sentences of 15 years in prison for the attempted second-degree murder. R 2, 19-24. He was sentenced to 15 years in prison for the attempted robbery. R 2. (Appellant's motion states that he was sentenced to "a concurrent 15 years in prison on the robbery charge" (R 2), but he doesn't say with which count.) In short, if appellant were paroled immediately after serving 25 years for the murder conviction, he would then have to serve 40 more years (25 followed by 15) on the attempted murder convictions.

In September 2016, appellant moved to correct his sentences pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). The State agreed that appellant was under 18 when the crimes were committed, but it 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 14-15. The State, mistakenly believing that appellant's tem-of-year sentences were to be served concurrently instead of consecutively, argued that they were not the functional equivalent of life and so should not be disturbed. R 15.

Appellant filed a reply and argued that *Atwell* did not require that a PPRD be equivalent to life imprisonment. R 25-27. As for the sentences on his non-homicide offenses, he argued:

Additionally, the State argues that Mr. Rogers's claims regarding his terms of years sentences should be denied because "the concurrent sentence of 25 year (sic) in prison is not the functional equivalent of life imprisonment. The State's own exhibits, however, demonstrate that Mr. Roger's sentences on each of his offenses were ordered to run **consecutively**, not **concurrently** With each other. Accordingly, those sentences will need to be revisited as well, to ensure that his term of years sentence is not the functional equivalent of a life sentence.

R 27 (emphasis in original).

Two days after appellant filed his reply, this Court issued *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016), which held that it is unnecessary to allege the PPRD is functional equivalent of life imprisonment. Appellant filed *Michel* as supplemental authority (R 30-32), and the trial court asked the State to respond to it. R 35.

The State responded by moving to stay the proceedings pending review of *Michel*. R 36. Over appellant's objection (R 50-52), the trial court granted the State's motion and stayed proceedings. R 55. This occurred in January 2017.

In November 2019, the State filed a motion to lift the stay and an amended response to appellant's motion for postconviction relief. R 115. The State argued that *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), overruled *Atwell* and precluded relief on the first-degree murder count. R 116. It repeated its error that appellant's sentences on the non-homicide offenses were ordered to be served concurrently and so were not the functional equivalent of life imprisonment. R 116.

The trial court denied appellant's postconviction motion on the authority of *Franklin*. R 128-30. The Court did not address the legality of appellant's consecutive sentences.

Appellant filed a timely notice of appeal. R 131. 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

Appellant's consecutive sentences totaling 65 years in prison for crimes he committed as a juvenile violate the Eighth Amendment. The trial court erred in failing to address this issue in its order. This Court can either remand for the trial court to rule on appellant's claim or order resentencing.

POINT II

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 III

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 IV

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

APPELLANT'S CONSECUTIVE SENTENCES TOTALING AT LEAST 65 YEARS IN PRISON FOR CRIMES HE COMMITTED AS A JUVENILE VIOLATE THE EIGHTH AMENDMENT

Appellant was sentenced to life imprisonment with parole eligibility after 25 years (on the first-degree murder count), followed by 25 years in prison (on the attempted first-degree murder count), followed by 15 years in prison (on the attempted second-degree murder count). R 2, 19-24. This means if appellant were paroled immediately after serving 25 years for the murder conviction, he would have to serve an additional 40 years (25 followed by 15) before any hope of release—a total of 65 years. This *de facto* life sentence violates the Eighth Amendment.

It is well established that the “specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated.” *Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015) (applying *Graham v. Florida*, 560 U.S. 48 (2010), to “term-of-years prison sentences”). It is not a juvenile’s sentence, but rather his “juvenile status that implicates the Eighth Amendment to the United States Constitution.” *Id.* at 677.

Consequently, “*Graham* applies to ensure that juvenile nonhomicide offenders will not be sentenced to terms of imprisonment without affording them a

meaningful opportunity for early release based on a demonstration of maturity and rehabilitation.” *Id.* at 680. *Henry* stressed that “the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.” *Id.*; *Johnson v. State*, 215 So. 3d 1237, 1240 (Fla. 2017) (“*Graham* prohibits juvenile nonhomicide offenders from serving lengthy terms of incarceration without any form of judicial review mechanism.”).

Appellant’s consecutive 25-year and 15-year sentences are not parole eligible. *See* § 921.001(4)(b), Fla. Stat. (1993); *Washington v. State*, 103 So. 3d 917, 921 (Fla. 1st DCA 2012) (noting that parole was abolished for non-capital felonies in the mid-eighties) (Wolf, J., concurring). Unless appellant lives until he is 82 (17 plus 65), the structure of his sentences guarantees that he will not have an opportunity for release based on demonstrated maturity and rehabilitation “during his ... natural life.” *Henry*, 175 So. 3d at 679. As such, this aggregate sentence violates *Henry* and must be vacated. *See Morris v. State*, 198 So. 3d 31 (Fla. 2d DCA 2015) (vacating sixty-five-year sentence pursuant to *Henry*); *Brooks v. State*, 186 So. 3d 564 (Fla. 5th DCA 2015) (same); *Barnes v. State*, 175 So. 3d 380 (Fla. 5th DCA 2015) (aggregate sixty-year sentence falls within scope of *Henry*).

The fact that appellant's sentence arises from multiple counts is not an impediment to relief. In determining whether a sentence violates *Graham*, a court must consider the aggregate sentencing scheme. *See Henry*, 175 So. 3d at 676 (vacating consecutive sentences aggregating to ninety years); *See Hernandez v. State*, 43 Fla. L. Weekly D1079 (Fla. 3d DCA 2018) (holding that a thirty-year sentence for a non-homicide offense, consecutive to a life sentence with judicial review, "violates *Graham* and *Henry*.").

The issue in the case at bar was raised in *Ingraham v. State*, 277 So. 3d 243 (Fla. 3d DCA 2019). Ingraham was sentenced to life with parole eligibility after 25 years for first degree murder and to two consecutive 30-year sentences for two counts of two attempted second-degree murder. "[T]he trial court issued no ruling on Ingraham's claim that the aggregate sixty-year sentence, to be served at the conclusion of his life-with-parole sentence on Count I, is unconstitutional and contrary to *Henry* and *Kelsey*." *Id* at 244. The third district remanded for further proceedings: "Although we have the discretion to address this matter in the first instance, we decline to do so, and instead remand this cause for the trial court to conduct any further proceedings as may be appropriate, to make a determination on Ingraham's second claim, and to render an order accordingly."

Likewise, the trial court here did not issue a ruling on appellant's claim that his consecutive sentences are unconstitutional. At a minimum, this Court should

remand for the trial court to conduct further proceedings and rule on appellant's claim. But that is unnecessary. This Court has already held that 65-year sentences for a juvenile are unconstitutional, *Perry v. State*, 263 So. 3d 86, 87 (Fla. 4th DCA 2019), and appellant's mandatory minimums equal 65 years (25-25-15). This Court should reverse and remand for resentencing.

POINT II

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).

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. 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).

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 III

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

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 re integrate 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 to both the offender and the offense.” *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotation marks omitted)). Certain punishments are disproportionate when applied to children because children are different. They lack maturity; they are more vulnerable and easy to influence; and their traits are less fixed, so they are more likely to become responsible, law-abiding adults. *Miller*, 567 U.S. at 471. In short, “because juveniles have lessened culpability they are less deserving of the

most severe punishments.” *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citing *Roper*, 543 U.S. at 569).

“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). But Florida’s parole process does not recognize this. The commission is not required to consider either the mitigating attributes of youth or the juvenile offender’s maturity and rehabilitation.

Instead of maturity, rehabilitation, and the diminished culpability of youth, Florida’s parole process focuses on the “seriousness of the offender’s present offense and the offender’s past criminal record.” § 947.002(2), Fla. Stat. (2018). These are static factors that the offender cannot change. Whether a juvenile offender has reformed should be “weighed more heavily than the circumstances of the crime itself.” Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller and California’s Youth Offender Parole Hearings*, 40 N.Y.U. Rev. L. & Soc. Change 245, 294 (2016). Florida’s parole process fails to weigh it at all. Rehabilitation is not enough. Even clearly exceptional program achievement will normally not be considered in establishing a presumptive parole release date.

Further, parole is less likely to be granted to juvenile offenders than adult offenders. To be released, inmates must have gainful employment and suitable

housing. Adult offenders are more likely to have the resources—education, job skills, and family support—to obtain those things. Juvenile offenders, on the other hand, often have been imprisoned since they were children, and imprisoned in an environment that focuses on punishment rather than rehabilitation. *See* § 921.002(1)(b), Fla. Stat. (2018) (“The primary purpose of sentencing is to punish the offender.”); *State v. Chestnut*, 718 So. 2d 312, 313 (Fla. 5th DCA 1998) (“[T]he first purpose of sentencing is to punish, not rehabilitate.”). It is unlikely they obtained job skills before they were incarcerated, and it is more likely they have lost contact with friends and family. “[J]uvenile offenders who have been detained for many years are typically isolated, and many will lack connections and support from the community. This isolation makes it more difficult for them to present a solid release plan to the decision maker, and it means that they are less likely to have individuals in the community advocate for their release.” Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 421 (2014). This is one example of a parole standard that is “systematically biased against juvenile offenders.” Caldwell, 40 N.Y.U. Rev. L. & Soc. Change at 292.

The harm of the substantive deficiencies in the 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 IV

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 and either remand for the trial court to rule on appellant's claim that his consecutive sentences are unconstitutional or 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 20th day of February, 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

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

JAMES ROGERS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

Case No. 4D19-3955

RESPONSE TO ORDER TO SHOW CAUSE

Appellee, the State of Florida, by and through undersigned counsel, files this response to this Court's order directing the State to "show cause why the trial court's order denying appellant's Florida Rule of Criminal Procedure 3.800(a) motion should not be reversed and remanded for further proceedings."

Graham and Miller

Miller [v. Alabama, 567 U.S. 460 (2012)] was the progeny of *Graham v. Florida, 560 U.S. 48, 74 (2010)*, in which the Supreme Court had held that a sentence of life imprisonment without the possibility of parole is cruel and unusual punishment and therefore a violation of the Eighth Amendment when imposed on a juvenile for a nonhomicide offense. The *Graham* Court explained that, although states are "not required to guarantee eventual freedom" to juvenile nonhomicide offenders, they may not sentence these offenders to life imprisonment without affording them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. The *Graham* holding was

extended in *Miller* to invalidate sentencing schemes that mandated life without parole for juveniles convicted of homicide offenses. 567 U.S. at 465.

Unlike the *Graham* decision with respect to juvenile nonhomicide offenders, the *Miller* decision did not “foreclose a sentencer’s ability” to sentence a juvenile homicide offender to life without parole. *Id.* at 479-80. However, it instructed that before doing so the sentencer must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480. Although the sentencing scheme at issue in *Miller* was one that mandated life without parole for the first-degree murder at issue, the Supreme Court later explained that *Miller* did more than invalidate such mandatory schemes: it “rendered life without parole an unconstitutional penalty for ‘a class of offenders because of their status’--that is, juvenile offenders whose crimes reflect the transient immaturity of youth,” as distinguished from “the rare juvenile offender whose crime reflects irreparable corruption.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), and then *Miller*, 567 U.S. at 479-80). The Supreme Court instructed that, for juvenile homicide offenders not found irreparably corrupt, sentencing must leave them with “hope for some years of life outside prison walls.” *Id.* at 737.

Pedroza v. State, 45 Fla. L. Weekly S93a * 2-3 (Fla. March 12, 2020).

The Florida Supreme Court also determined that Graham was “not limited to sentences denominated ‘life’ but also extends to term-of-years sentences that ensure imprisonment throughout a juvenile offender’s natural life.” Id. at 4 (citing Henry v. State, 175 So. 3d 675, 679-80 (Fla. 2015)). In clarifying precedent, and receding from an erroneous rule set out in Johnson v. State, 215 So. 3d 1237 (Fla. 2017), the

court held “that a juvenile offender’s sentence does not implicate *Graham*, and therefore *Miller*, unless it meets the threshold requirement of being a life sentence or the functional equivalent of a life sentence.” Id. at 13.

Appellant’s Sentence is Constitutional

Appellant argues his sentence “to life imprisonment with parole eligibility after 25 years . . . , followed by 25 years in prison . . . , followed by 15 years in prison” is a “de facto life sentence violat[ing] the Eighth Amendment.” (IB 6-9; PDF 14-17).

First, despite his assertions, Appellant never raised this claim below in his motion to vacate, set aside, or correct sentence. (R 1-4). The specific claim raised below was strictly based on the overturned Atwell¹ opinion finding Florida’s parole system non-compliant with Miller for mandatory life sentences imposed on juveniles. (R 1-4, 7-10).

While the State below appeared to believe an argument regarding the legality of his 25-year sentence for armed robbery was made, (R 14-15), a review of the motion plainly reveals Appellant made no such argument. (R 1-4, 7-10). Appellant addressed the State’s contention on reply, (R 27), but Appellant’s argument was wholly insufficient to state any claim and was essentially limited to the comment: “those sentences will need to be revisited as well, to ensure that his term of years

¹ Atwell v. State, 197 So. 3d 1040 (Fla. 2016).

sentence is not the functional equivalent of a life sentence.” (R 27). Further, there is no provision of the Florida Rules of Criminal Procedure which entitles a postconviction defendant to file a reply to a State’s response. See Fla. R. Crim. P. 3.850; Fla. R. Crim. P. 3.800. While replies are often filed, and sometimes considered by a trial court, there is no entitlement to a reply. See Evans v. State, 764 So. 2d 822, 823 (Fla. 4th DCA 2000). Assuming Appellant made an argument at all, a reply is **not** a proper vehicle for his first attempt to present the claim to the trial court or to preserve the claim for appeal. Appellant’s reliance on Ingraham is therefore inapposite. Ingraham v. State, 277 So. 3d 243 (Fla. 3d DCA 2019) (remand for ruling on claim actually raised). Thus, the trial court did not “fail[] to address this issue in its order;” Appellant failed to sufficiently raise the claim.

Second, Appellant’s entire argument is based on conjecture that he will receive parole relief after 25 years on his life sentence for his first-degree murder count. (IB 6-9; PDF 14-17). As the record indicates Appellant has yet to have any parole proceedings, (R 51), such argument is not ripe for consideration in this appeal. See Messina v. State, 563 So. 2d 194, 195 (Fla. 1st DCA 1990) (“Appellant’s second issue, involving the sentence which might be imposed if appellant were to violate the conditions of his probation, is not ripe for adjudication, and is therefore disregarded.”). Such conjecture also cannot form the basis for reversal of

Appellant's sentence. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) ("Reversible error cannot be predicated on such conjecture.").

Third, Appellant's heavy reliance on Henry and Hernandez are unavailing. See Henry v. State, 175 So. 3d 675, 677 (Fla. 2015) (Henry's aggregate sentence under Graham was unconstitutional); Hernandez v. State, 43 Fla. L. Weekly D1079 (Fla. 3d DCA May 16, 2018) (30 year consecutive sentence on attempted murder count, without review after 25 years, unconstitutional under Graham; "but only insofar as it omits a separate 25-year right of review on the Count II sentence") pend'g Hernandez v. State, SC18-879 (show cause order on jurisdiction pending regarding, relevantly, State v. Purdy, 252 So. 3d 723 (Fla. 2018)).

Henry and its progeny were recently addressed in Pedroza. In that case, the Florida Supreme Court clarified that the threshold question whether Graham or Miller applies is whether a defendant "had demonstrated that his sentence did not offer an opportunity for release before the end of his natural life." Pedroza, 45 Fla. L. Weekly S93a * 7. Given this clarification, Appellant has failed to prove his consecutive sentences--presuming he were released on parole for his homicide offense--would be the functional equivalent of a life sentence. In fact, Appellant's own argument is self-defeating: "Unless appellant lives until he is 82 (17 plus 65), the structure of his sentences guarantees that he will not have an opportunity for release . . ." (IB 7; PDF 15) (emphasis added). Appellant concedes he could be

released before the end of his natural life; were he to live to 82. Thus, Appellant has failed to meet his threshold burden. See Pedroza, 45 Fla. L. Weekly S93a * 7.

Finally, fourth, Appellant's argument has already been rejected by this Court. See Warthen v. State, 265 So. 3d 695, 697 (Fla. 4th DCA 2019) ("We reject his position that the consecutive prison terms for the unrelated homicide and non-homicide offenses is an 'aggregate' sentence implicating the Eighth Amendment. Indeed, **our supreme court decided in a plurality decision that a defendant's aggregate sentence arising from the same case did not implicate *Graham* and *Miller*.**") (emboldened emphasis added) (citing State v. Purdy, 252 So. 3d 723, 729 (Fla. 2018)); pend'g Warthen v. State, SC19-482 (discretionary jurisdiction determination stayed pending Pedroza). This Court explicitly affirmed "because the defendant has failed to show that **his sixty five year consecutive terms** for separate homicide and non-homicide offenses violates either *Graham* or *Miller*." Warthen, 265 So. 3d at 697 (emphasis added).

Thus, Appellant's cited cases are inapplicable. (IB 7; PDF 15) (citing Morris v. State, 198 So. 3d 31 (Fla. 2d DCA 2015); Brooks v. State, 186 So. 3d 564 (Fla. 5th DCA 2015); and Barnes v. State, 175 So. 3d 380 (Fla. 5th DCA 2015)).

No Question of Great Public Importance

Appellant next argues that his sentence of life with the possibility of parole after twenty-five years violates the Eighth and Fourteenth Amendments of the

United States Constitution. He argues that while this Court is bound by Michel and Franklin, a recent case from the Supreme Court of the United States - Madison v. Alabama, 139 S. Ct. 718 (2019), undermines those decisions and calls into question whether Michel and Franklin were correctly decided.

In LeBlanc the Supreme Court held that the Virginia Supreme Court did not unreasonably apply the rule announced in Graham. Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017). While the Court made it clear that it expressed no view on the underlying merits of the claim, see id. at 1729, it nonetheless found that a state court ruling that geriatric release - which in Virginia constituted release when the offender reached the age of sixty or sixty-five in certain circumstances - was not a reading of Graham that “diverge[d] so far from Graham’s dictates as to make it ‘so obvious that . . . there could be no ‘fairminded disagreement’ about whether the state court’s ruling conflicts with this Court’s case law.’” Id. (quoting White v. Woodall, 572 U.S. 415 (2014)).

A plurality of the Florida Supreme Court in Michel found that because Virginia’s system did not violate Graham’s mandate, it gave defendants “a meaningful opportunity to receive parole[,]” Michel’s sentence “did not violate Graham or Miller because Michel was not sentenced to life without the possibility of parole.” Michel, 257 So. 3d at 7. Because he was eligible for parole after serving twenty-five years of his sentence, Florida’s parole system complied with Graham’s

mandate. Id. But Michel was not a true majority opinion as Justice Polston’s written opinion was joined only by now-Chief Justice Canady and Justice Lawson. Justice Lewis concurred in result, leaving the plurality opinion arguably non-binding on similarly situated defendants in other cases and the question remained open whether Atwell was truly overruled.

Any embers of doubt regarding Atwell’s viability that lingered after Michel were extinguished in Franklin v. State, 258 So. 3d 1239 (Fla. 2018). There, a clear, four justice majority of the Florida Supreme Court, citing to Michel found that “instructed by a more recent United States Supreme Court decision, Virginia v. LeBlanc, 137 S. Ct. 1726 (Fla. 2017), we have since determined that the majority’s analysis in Atwell improperly applied Graham and Miller.” Id. at 1241. Based on its treatment of a life-with-parole sentence in Michel, the Florida Supreme Court found that a sentence of “three 1000-year concurrent sentences with parole[]” did not violate “the categorical rule announced in Graham.” Id. at 1241.

While Appellant now argues that these decisions improperly ignored binding precedent of the Supreme Court of the United States in Miller, this Court simply lacks the ability to ignore the Florida Supreme Court precedents outlined above. Just as Florida courts lack the authority to “reconsider and reject” decisions of the Supreme Court of the United States on Eighth Amendment issues, see Delancy v. State, 256 So. 3d 940, 947 (Fla. 4th DCA 2018), a district court of appeal cannot

ignore binding Florida Supreme Court precedent. Hall v. State, 282 So. 2d 190, 191 (Fla. 2d DCA 1973).

Appellant also asks that this Court certify a question of great public importance with regard to its treatment of LeBlanc given the Court's later decision in Madison v. Alabama, 139 S. Ct. 718 (2019), which granted relief on the merits of a claim previously denied when presented for review as a claim under AEDPA. These issues, however, have already been presented to the Florida Supreme Court in Michel's motion for rehearing, which argued that LeBlanc did not consider the merits of the underlying claim, and which the Florida Supreme Court denied. See Mot. for Rehearing, State v. Michel, No. SC16-2187 (July 27, 2018). Thus, it is the State's position that it should decline to certify a question that the Florida Supreme Court has implicitly answered.

Appellant's argument that this issue should be considered because it has not been fully briefed, citing Colon v. State, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019) (C.J. Canady, concurring), is erroneous. See (IB 17-18; PDF 25-26). Chief Justice Canady's position was predicated on that issue being "properly presented to the Court." Colon, 44 Fla. L. Weekly S251 *1. Because the same argument here, that the Florida Supreme Court misapprehended the law in Michel, was submitted to the Michel court on rehearing, this claim has already been "properly presented to the

Court” and rejected. See id.; see also Order Deny’g Mot. for Rehearing, State v. Michel, No. SC16-2187 (October 24, 2018). Accordingly, this Court should affirm.

Appellant’s Parole-Eligible Sentence is Constitutional

Appellant again concedes that this Court is bound by Franklin but argues that Florida’s parole system violates the Eighth and Fourteenth Amendments because it “will not afford appellant any meaningful opportunity for relief.” (IB 19-33; PDF 27-41). Appellant asserts that granting of parole is rare in Florida and he details the applicable procedures for parole eligibility. (IB 20-29; PDF 28-37).

First, again, this claim is not ripe for review because Appellant has not sought or been denied parole. See ripeness argument supra pp 4-5.

Second, Appellant’s argument concerns “[j]uvenile offenders like appellant,” which is an “as applied” challenge to Florida’s parole system. Lamore v. State, 983 So. 2d 665, 668 (Fla. 5th DCA 2008) (“although Lamore attempts to label his argument as a ‘facial’ challenge to the statute, his real argument is that the statute is unconstitutional as applied to a person, like Lamore”). Such a claim must be raised at the trial level to be preserved. Id. Here, as this specific constitutional claim was never raised below it is unpreserved for consideration by this Court. See id.

Third, Appellant relies heavily on the United States Supreme Court's opinion in Solem² and its distinction of Rummel³ to argue Florida's parole system is constitutionally inadequate. See (IB 29-31; PDF 37-39). While the court in Solem was generally effusive of the Texas parole system at issue in Rummel, the analysis in Solem did not detail the expansive discretion of that system. See Solem, 463 U.S. at 301-02.

In Rummel, (Rummel II) the Supreme Court acknowledged Rummel's argument that he was unable to "enforce" any right to Texas' allegedly liberal parole policies and could not treat "his life sentence as if it were equivalent to a sentence of 12 years." Rummel, 445 U.S. at 280. As such, the court stated:

[B]ecause parole is "an established variation on imprisonment of convicted criminals," *Morrissey v. Brewer*, 408 U.S. 471, 477[] (1972), 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. If nothing else, the possibility of parole, **however slim**, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony.

Id. at 280-81 (emphasis added).

² Solem v. Helm, 463 U.S. 277 (1983).

³ Rummel v. Estelle, 445 U.S. 263 (1980).

The dissent in the Fifth Circuit's Rummel (Rummel I) detailed this slimness as:

It is almost certain to the state that if Rummel does serve the rest of his natural life in jail, it will not be for the crimes for which his sentence was imposed, but rather for other reasons. These reasons the world may never know. No public record need show which of an infinite number of reasons caused Rummel to fall into disfavor with the parole board. He may by laziness or insolence make enemies of prison authorities. His personality may cause trouble with other prisoners. Many forms of behavior which bring discipline in prison are not criminal in the outside world. Rummel has no recourse if the **parole board in its virtually unfettered discretion is never moved to release him or tell him why it did not.**

Parole, **if it does come**, is in no way equivalent to the freedom of an ordinary citizen. The conditions imposed on the parolee are wide-ranging, and any violation may result in a return to prison.

...

A person who receives a twelve-year sentence for a crime in Texas and is totally recalcitrant in his behavior while in prison can do no worse than serve his whole twelve years. The parole board may choose not to let him out early, but it cannot make him stay longer than the term of his sentence. What that person may do after his term is served, so long as it is not criminal, is his own business. If Rummel's offenses, standing alone, only justify a maximum sentence to a term of years, then he should be able to serve those years and be done with them, no matter what the parole board thinks of him. But that is not Rummel's condition. Texas has deprived Rummel of any legally enforceable right to his freedom for his entire life and the **chances for grace are perilous** and without protection of law.

Rummel v. Estelle, 587 F.2d 651, 668-69 (5th Cir. 1978) (J. Clark, dissenting) (internal citations omitted & emphasis added), aff'd, 445 U.S. 263 (1980).

Appellant's arguments are not dissimilar to the dissent's concerns over the Texas parole system in Rummel I; for which the court in Solem spoke of with acclaim. Compare (IB 19-33; PDF 27-41) with Rummel, 587 F.2d at 668-69 and Solem, 463 U.S. at 301-02. The Rummel I dissent believed the Texas parole system was so onerous it impliedly advocated for its end. See Rummel I, 587 F.2d at 669.⁴

Despite these criticisms, the Supreme Court in Rummel II found "the possibility of parole, **however slim**," to be a sufficient distinction for Eighth Amendment purposes in that case. Rummel II, 445 U.S. at 281 (emphasis added). As Justice Scalia observed, generally, of the parole system on review of an *ex post facto* claim:

Under the traditional system of minimum-maximum sentences (20 years to life, for example), it would be absurd to argue that a defendant would have an *ex post facto* claim if the compassionate judge who presided over the district where he committed his crime were replaced, prior to the defendant's trial, by a so-called "hanging judge." Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes.

⁴ As Appellant acknowledged, (IB 7; PDF 15), Florida did as the dissent in Rummel I preferred by abolishing parole in favor of the Criminal Punishment Code. See § 921.002(1)(e), Fla. Stat. (1998).

At the margins, to be sure, it may be difficult to distinguish between justice and mercy. A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement--a reduction of the prescribed penalty--rather than a discretionary grant of leniency. But that is immeasurably far removed from the present case. In Georgia parole, like pardon (which is granted or denied by the same Board), is--and was at the time respondent committed his offense--a matter of grace. It may be denied for any reason (except, of course, an unlawful one such as race), or for no reason. And where, as here, the length of the reconsideration period is entrusted to *the discretion of the same body that has discretion over the ultimate parole determination*, any risk engendered by changes to the length of that period is merely part of the uncertainty which was inherent in the discretionary parole system, and to which respondent subjected himself when he committed his crime.

Garner v. Jones, 529 U.S. 244, 258-59 (2000) (emphasis in original) (J. Scalia, concurring in part in the judgment); see also United States v. Wetherald, 636 F.3d 1315, 1323 n. 1 (11th Cir. 2011) (quoting Garner).

Appellant fails to show how either Graham or Miller fundamentally changed such parole discretion. In fact, Graham explicitly precludes such argument:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. **It is for the State, in the first instance, to explore the means and mechanisms for compliance.** It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide

offender, **it does not require the State to release that offender during his natural life.** Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. **The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life.** It does prohibit States from making the judgment **at the outset** that those offenders never will be fit to reenter society.

Graham, 560 U.S. at 75 (emphasis added).

Accordingly, Appellant's arguments are erroneous. This Court should affirm.

No Manifest Injustice

Appellant argues that failure to resentence him will result in manifest injustice because it will result in a different sentence those received by juvenile offenders who were resentenced after Atwell but prior to Michel and Franklin. But the cases relied upon by Appellant invoked the manifest injustice exception to excuse an otherwise procedurally barred postconviction motion to consider a claim based upon a development in the law. See Johnson v. State, 9 So. 3d 640 (Fla. 4th DCA 2009) (involving a case where the defendant raised an issue three times with each being denied prior to his fourth motion being granted based on a relatively new case from a sister court); Prince v. State, 98 So. 3d 768, 770 (Fla. 4th DCA 2012) (same); McMillan v. State, 254 So. 3d 1002, 1003 (Fla. 4th DCA 2018) (same); Haager v. State, 36 So. 3d 883 (Fla. 2d DCA 2010) (involving a claim that was raised twice

and preventing a procedural bar from denying the defendant relief because to do so would constitute a manifest injustice where the claim had merit).

Stephens is also inapposite because Stephens' relief was predicated on his co-defendant's relief in "virtually identical circumstances" where his co-defendant "was sentenced by the same judge to life in prison as a HFO [habitual felony offender] on the very same day that Mr. Stephens was sentenced." Stephens v. State, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). Other than being a "parole-eligible juvenile offender" during the erroneous Atwell years, Appellant has wholly failed to detail that he is in a "virtually identical circumstance[]," similar to in Stephens, to any of the defendants listed in his "Atwell Releasees" chart. Compare (IB 34-38; PDF 42-46) with Stephens, 974 So. 2d at 457.

Despite Appellant's assertions, none of these cases compel a trial court to impose a now-illegal sentence by resentencing Appellant in disregard of Michel and Franklin. Accordingly, this Court should affirm.

CONCLUSION

Based on the foregoing arguments and authorities, the State requests that this Court AFFIRM the trial court proceedings.

ASHLEY MOODY
ATTORNEY GENERAL
Tallahassee, Florida

/s/ Paul Patti, III
PAUL PATTI, III

Assistant Attorney General
Florida Bar No. 0111691
1515 North Flagler Drive, Ste. 900
West Palm Beach, FL 33401
(561) 837-5016
CrimAppWPB@MyFloridaLegal.com

Counsel for Appellee

CERTIFICATE OF SERVICE

I CERTIFY that on March 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using the Florida Courts e-filing Portal and it is being served on all counsel of record or *pro se* parties identified in the attached Service List either via the Florida Courts e-filing Portal or in another authorized manner for counsel or parties not authorized to receive Notices of Electronic Filing.

/s/ Paul Patti, III
PAUL PATTI, III
Assistant Attorney General

SERVICE LIST

Paul Edward Petillo
421 Third Street
West Palm Beach, Florida 33401
ppetillo@pd15.state.fl.us
appeals@pd15.state.fl.us

/s/ Paul Patti, III
PAUL PATTI, III
Assistant Attorney General

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

CASE NO. 4D19-3955

JAMES ROGERS,
Appellant

v.

STATE OF FLORIDA,
Appellee

REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

CAREY HAUGHWOUT
Public Defender
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Paul Edward Petillo
Assistant Public Defender
Florida Bar No. 508438
ppetillo@pd15.state.fl.us
appeals@pd15.state.fl.us

Attorney for Appellant

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ARGUMENT

POINT I

APPELLANT'S CONSECUTIVE SENTENCES TOTALING AT LEAST 65 YEARS IN PRISON FOR CRIMES HE COMMITTED AS A JUVENILE VIOLATE THE EIGHTH AMENDMENT

The State argues this issue wasn't preserved for appellate review, though it admits the prosecutor below thought it was. *Response at page 3*. This issue was preserved because the trial court had notice of the error and an opportunity to correct it. *Daniels v. State*, 121 So. 3d 409, 417 (Fla. 2013) ("The salient purpose of the rule of contemporaneous objection is to place the trial judge on notice that error may have been committed and provide the court with an opportunity to correct the error at that time.").

The State argues, "Appellant's entire argument is based on conjecture that he will receive parole relief after 25 years on his life sentence for his first-degree murder count" (*Response at page 4*) when the record shows he has not yet had any parole proceedings. That is hardly an argument in favor of the constitutionality of appellant's sentences. If appellant is paroled, say, 20 years from now, when he is 63, he will then embark on the 40 years remaining on his sentence for counts two and three. That is a de facto life sentence.

The State argues that it is conceivable that appellant could be released when he is 82 years old (assuming he is paroled at 25 years) and therefore his sentence is constitutional *Response at pages 5-6*. First, a 65-year sentence is a de facto life

sentence, even for a juvenile offender. *Perry v. State*, 263 So. 3d 86, 87 (Fla. 4th DCA 2019). Second, *Pedroza v. State*, SC18-964, 2020 WL 1173747 (Fla. Mar. 12, 2020), did not overrule *Henry v. State*, 175 So. 3d 675 (Fla. 2015), either explicitly or sub silentio—something the Florida Supreme Court says it doesn’t do. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) (“We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio.”). So de facto life sentences are unconstitutional as applied to juveniles. Third, if there is any question whether appellant’s 65-year sentence (which, again, assumes he is paroled at 25 years) is a de facto life sentence, an evidentiary hearing on that issue should be held. (Pause to consider the cruelty of such a hearing: “Mr. Rogers, we want to figure out how long you are going to live because if your sentence ends right before you die, you will not be entitled to a new sentencing hearing.”)

POINT II

THIS COURT SHOULD CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE

The State argues that this Court should not certify a question because Michel made similar arguments on rehearing in *State v. Michel*, 257 So. 3d 3 (Fla. 2018). First, that is an argument in favor of certifying a question because a motion for rehearing is no substitute for briefing. *See Colon v. State*, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019) (Canady, C.J., concurring) (inviting reconsideration of an issue because it was not the subject of full briefing). Second, and more importantly, the supreme court did not have the benefit of *Madison v. Alabama*, 139 S. Ct. 718 (2019), which makes it clear that AEDPA decisions are not rulings on the merits.

POINT III

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

Appellant will rely on his initial brief for argument under this point.

POINT IV

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

Appellant will rely on his initial brief for argument under this point.

CONCLUSION

This Court should certify a question of great public importance and either remand for the trial court to rule on appellant's claim that his consecutive sentences are unconstitutional or remand for resentencing.

CERTIFICATE OF SERVICE

I certify that this brief was served to Assistant Attorney General Paul Patti III, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 4th day of April, 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