No. 20-5801

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 District Court of Appeal of Florida, Fourth District

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Respondent's central argument—that the Florida Supreme Court understood that *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*), was an AEDPA decision and not a decision on the merits of the Eighth Amendment claim—is dispelled by the words on the page. But before getting to them, it will be helpful to understand the context in which they were written.

To determine the constitutionality of a parole-eligible sentence, the realities of the parole system must be examined. *See Solem v. Helm*, 463 U.S. 277, 301 (1983) (stating that in *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court "did not rely simply on the existence of some system of parole" but "looked to the provisions of the system presented…."). In 2016, juvenile offender Angelo Atwell argued that Florida's parole system provided only a remote, clemency-like opportunity to obtain release, not a meaningful opportunity based on demonstrated maturity and rehabilitation. Presented with such a claim, the Florida Supreme Court did the heavy lifting that it required. The court conducted an in-depth analysis of Florida's parole system and held that "Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional." *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016).

That this holding was correct was borne out by the fact that at least 66 parole-eligible juvenile offenders were resentenced and released pursuant to *Atwell*. A82-A83. It was also borne out by the experience of juvenile offender Robert

Howard. In 2015 Judge Altenbernd of Florida's Second District Court of Appeal pointed out that Mr. Howard had been repeatedly denied parole despite an extraordinary record of achievement and performance in prison. *Howard v. State*, 180 So. 3d 1135 (Fla. 2d DCA 2015) (Altenbernd, J., concurring) ("Mr. Howard's story is extraordinary and is worth telling."), *quashed and remanded for resentencing*, 41 Fla. L. Weekly S578 (Fla. Oct. 28, 2016). Judge Altenbernd said—correctly, as it turns out—that it was unlikely that Mr. Howard was the only juvenile offender treated this way: "Although Mr. Howard may stand out for his exceptional record in prison, he is likely to be one of a number of prisoners who have been denied parole while serving sentences of life with the possibility of parole under guidelines that did not take into consideration their youthfulness at the time of the offense." *Howard*, 180 So. 3d at 1138 (Altenbernd, J., concurring).

But two years later, the Florida Supreme Court overruled *Atwell* in *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018). What changed? Did Respondent argue that *Atwell* should be overruled because Florida's parole system was much improved and now provided juvenile offenders with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation? Did Respondent argue that the court in *Atwell* had overlooked some important feature of Florida's parole system and so juvenile offenders serving parole-eligible sentences actually do have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation?

Respondent did neither. In fact, Respondent did not ask the Florida Supreme

Court to overrule *Atwell*.[1] Instead, the court *sua sponte* treated *Virginia v. LeBlanc* as a decision on the merits of the Eighth Amendment issue and reversed *Atwell* on the authority of it.

That the court treated *LeBlanc* as a merits decision leaps from the page; indeed, Respondent essentially conceded as much in its response to the order show cause filed in the district court of appeal. A94-A95. The court began in *Michel*, 257 So. 3d at 4, by lumping *LeBlanc* together with the merits decisions of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), and stating that those three cases "delineated" the Eighth Amendment's requirements.[2] "[W]e hold that juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct.

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[1] The narrow issue in *Michel* and *Franklin* was whether the relief in *Atwell* was limited to juvenile offenders who have a presumptive parole release date that exceeds their life expectancy. The briefs and other pleadings can be viewed at the court's docket here: https://bit.ly/3cX8EKQ (*Franklin*); https://bit.ly/2GDcv3w (*Michel*). The briefs in *Michel* are also available on Westlaw: *Florida, Petitioner, v. Michel, Respondent*, 2017 WL 10439278 (State's Initial Brief); *Florida, Petitioner, v. Michel, Respondent*, 2017 WL 10439279 (Michel's Answer Brief); *Florida, Petitioner, v. Michel, Respondent*, 2017 WL 10439281 (State's Reply Brief).

[2] *State v. Michel* was a plurality opinion, but Petitioner will refer to the pronouncements made in it as being made by "the court." He does so for two reasons. First, the Florida Supreme Court (4-3) adopted *Michel* in *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), and treated the plurality opinion as one made by the court. Second, Respondent follows that usage as well.

1726, 198 L.Ed.2d 186 (2017)." *Michel*, 257 So. at 4. But *LeBlanc*, unlike *Graham* and *Miller*, did not delineate the Eighth Amendment: *LeBlanc* delineated the deference federal courts owe state court decisions under AEDPA.

The court stated: "In *Atwell*, when attempting to apply the United States Supreme Court's decisions in *Graham* and *Miller*, a majority of this Court took issue with extended presumptive parole release dates that may occur under Florida's parole statute and held that parole is … inconsistent with the legislative intent as to how to comply with *Graham* and *Miller*." *Michel*, 257 So. 3d at 6 (brackets, quotation marks, and citations omitted; ellipsis added). But now, the court said, there was a new sheriff in town—*LeBlanc*:

> However, the more recent decision of *LeBlanc*, 137 S.Ct. 1726, has clarified that the majority's holding does not properly apply United States Supreme Court precedent. We reject the dissent's assertion that we must adhere to our prior error in *Atwell* and willfully ignore the United States Supreme Court's clarification in *LeBlanc*. *See Rotemi Realty, Inc. v. Act Realty Co.*, 911 So. 2d 1181, 1188 (Fla. 2005) ("[S]tare decisis counsels us to follow our precedents *unless* there has been 'a significant change in circumstances after the adoption of the legal rule, or ... an error in legal analysis.'" (emphasis added) (quoting *Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003)).

Michel, 257 So. 3d at 6.

This sentence is worth repeating: "We reject the dissent's assertion that we must adhere to our prior error in *Atwell* and willfully ignore the United States Supreme Court's clarification in *LeBlanc*." *Id.* Again, what this Court clarified in *LeBlanc* was the deference federal courts owe to state court decisions, not the scope of the Eighth Amendment. And the Florida Supreme Court's citation to *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So. 2d 1181 (Fla. 2005), shows that it treated

LeBlanc as a "significant change in circumstance" that warranted overruling *Atwell* a mere two years after it was decided.

Respondent emphasizes a single line in *Michel*: "In *LeBlanc*, 137 S.Ct. at 1729, the United States Supreme Court reversed the Fourth Circuit Court of Appeals and held that a Virginia court's decision affirming a juvenile offender's sentence of life for a nonhomicide crime subject to the possibility of conditional geriatric release was not an unreasonable application of the Supreme Court's case law." *Id*. What the court said about *LeBlanc* is true, but the court did not understand—it didn't say it did—that this does not settle the Eighth Amendment claim. And a state court's duty upon being presented with an Eighth Amendment claim is to decide that claim; it is not merely to decide whether upholding some punishment would be an unreasonable application of this Court's case law—to decide, in effect, that a federal court might be required under AEDPA to uphold the punishment. For example, if a state prisoner were sentenced to be whipped, and he or she claimed that that punishment is cruel and unusual, the state court would be required to decide that issue "straight-up." The state court would violate the Supremacy Clause if it held that whipping is constitutional merely because, while this Court has precedent involving prison beatings, *see Hudson v. McMillian*, 503 U.S. 1 (1992), it has no clearly established precedent declaring the practice of whipping unconstitutional. Whipping may be an unconstitutional punishment under the Eighth Amendment, just as Virginia's geriatric release program may be an unconstitutional punishment under the Eighth Amendment, and a state court

judge presented with those issues would be required to decide them because "the Judges in every State shall be bound [by the Federal Constitution]." U. S. Const., Art. VI, cl. 2.

After the Florida Supreme Court compared some of Florida's parole provisions to Virginia's geriatric release program—a program that this Court said may be unconstitutional—it stated: "[I]f a Virginia juvenile life sentence subject to possible conditional geriatric release after four decades of incarceration based upon the individualized considerations quoted above conforms to current case law from the United States Supreme Court, a Florida juvenile life sentence with the possibility of parole after 25 years does too." *Michel*, 257 So. 3d at 7 (citations omitted). The Florida Supreme Court was not properly reviewing the constitutional claim with this statement; all it was saying, whether it knows it or not, is that AEDPA would likely require a federal court to toss out a claim that Florida's parole system is unconstitutional as applied to juvenile offenders.

At the end of the opinion, Sheriff *LeBlanc* returned: "We hold that juvenile offenders' 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.' *LeBlanc*, 137 S.Ct. at 1729." *Michel*, 257 So. 3d at 8.

LeBlanc's policing continued in *Franklin*: "[I]nstructed by a more recent United States Supreme Court decision, *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017), we have since determined that the majority's

analysis in *Atwell* improperly applied *Graham* and *Miller*." *Franklin*, 258 So. 3d at 1241 (citing *Michel* and *LeBlanc*). The rest of the short opinion echoed *Michel's* analysis of *LeBlanc*. Nothing in this opinion grappled with the reasoning of *Atwell* or the underlying constitutional question.

Moreover, *LeBlanc* was decided after the briefs were filed in *Michel* and *Franklin*, and no party filed it as supplemental authority.[3] The Florida Supreme Court did not ask the parties to address the case. That the court *sua sponte* overruled *Atwell* on the authority of *LeBlanc* is further evidence that it considered *LeBlanc* a merits decision: it is unlikely the court would have done that unless it believed *LeBlanc* made overruling *Atwell* a fait accompli under the state constitution's conformity clause. (If this Court holds that a punishment does not violate the Eighth Amendment, then the Florida Constitution mandates that Florida courts rule the same way. Art. I, § 17, Fla. Const.)

Respondent argues that "this case is unworthy of review because, though Petitioner contests the manner in which the Florida Supreme Court resolved the Eighth Amendment challenge, he does not contend that the court ultimately answered the question incorrectly." *BIO at 8*. To the contrary, Petitioner argued that the Florida Supreme Court correctly resolved the issue—in *Atwell*. *Petition at 15-16*. That decision has not been overturned by rigorous constitutional analysis, Petitioner argued, but by a misapplication of *LeBlanc*; therefore, the last true pronouncement about Florida's parole process as applied to juveniles was that it

[3] *See* footnote 1 on page 3.

was unconstitutional. If this Court grants certiorari, vacates, and remands, Petitioner is quite prepared to argue in state court that *Atwell* was correctly decided and that Florida's parole system still provides only a remote clemency-like opportunity to obtain release, not a meaningful opportunity based on demonstrated maturity and rehabilitation. *See* A67-A81.

Respondent states that "[a]t most … this case presents the narrow question of whether the Florida Supreme Court properly understood the limited nature of" *LeBlanc's* holding, an issue that "involves no legal question about which lower courts might legitimately disagree." *BIO at 9*. Loosely translated, Respondent argues that this case is not certworthy because it is unlikely that another state court would make a similar blunder. But it would be a perverse incentive indeed to give Florida a pass because it made a mistake so big that other courts are unlikely to follow it. *See* Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 603-05 (2016) (describing category of this Court's summary reversals as "out to lunch" errors).

Respondent states: "Granting, vacating, and remanding would … serve no useful purpose apart from giving Petitioner a second bite at establishing in state court that his sentence is unconstitutional." *BIO at 10*. But Petitioner hasn't had the first bite: the Florida Supreme Court's erroneous reliance on *LeBlanc* has thrown him out of court. Giving Petitioner an opportunity to establish that his life sentence is a cruel and unusual punishment is a useful purpose guaranteed by the Supremacy Clause.

Petitioner's reliance on *California v. Rooney*, 483 U.S. 307 (1987), is misplaced. *BIO at 10-11.* In that case, the petitioner prevailed in the lower court but wanted to prevail in a different way. In the case at bar, Petitioner lost in the lower court and he is not asking this Court to remand so he can lose in a different way. Petitioner seeks a remand so he can be given the opportunity to persuade a court that his sentence is unconstitutional.[4] Of course, it may not be fair that the arguments that prevailed in *Atwell* must be made all over again, and there is no guarantee that they will prevail again, but Petitioner should be given the opportunity to make those arguments in a court free of the misconception that *LeBlanc* settled the Eighth Amendment issue. And it is not uncommon for this Court to grant certiorari, vacate, and remand with instructions that the lower court make its decision with a proper understanding of the law. *E.g.*, *Youngblood v. W. Virginia*, 547 U.S. 867 (2006) (*per curiam*) (remanding to West Virginia Supreme Court of Appeals to properly address the *Brady* issue before this Court reached the merits); *Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*) (remanding to the Florida Supreme Court to evaluate the claim with a proper understanding of *Fiore v. White*, 531 U.S. 225 (2001) (*per curiam*)).

Respondent argues that the Florida Supreme Court "cited *LeBlanc* for the

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[4] Rogers asked the district court of appeal to certify this question to the Florida Supreme Court (*see* Art. V, § 3(b)(4), Fla. Const.): "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*?" A66.

proposition that *Graham* and *Miller* did not resolve the question before it." *BIO at 12*. This is not what Respondent argued in the district court of appeal. A94-A95. Moreover, the Florida Supreme Court didn't need *LeBlanc* to tell it that "*Graham* and *Miller* did not resolve the question before it." And that was not what the court meant when it wrote: "We reject the dissent's assertion that we must adhere to our prior error in *Atwell* and willfully ignore the United States Supreme Court's clarification in *LeBlanc*" (*Michel*, 257 So. 3d at 6), and, "[W]e hold that juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017)." *Michel*, 257 So. 3d at 4.

CONCLUSION

"Under AEDPA, state courts play the leading role in assessing challenges to state sentences based on federal law." *Shinn v. Kayer*, 592 U.S. ____, ____ (2020) (slip op., at 12). Florida's state courts are not playing that role. Rogers respectfully requests that this Court grant the petition and summarily reverse the decision of the District Court of Appeal.

Respectfully submitted,

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