No.

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR BRANCACCIO, 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

VICTOR BRANCACCIO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D19-889

[August 6, 2020]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Gary L. Sweet, Judge; L.T. Case No. 1993CF001592A.

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

Ashley Moody, Attorney General, Tallahassee, and Anesha Worthy, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed.

GROSS, ARTAU, JJ., and SCHOSBERG FEUER, SAMANTHA, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Filed Date: 11/13/2012

IN THE CIRCUIT COURT OF NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY STATE OF FLORIDA

STATE OF FLORIDA, **CASE NO.: 93-1592-CF A**

DIVISION: CRIMINAL

Plaintiff,

vs

VICTOR BRANCACCIO

Defendant/Petitioner

_____/

MOTION FOR POST CONVICTION RELIEF

The Defendant/Petitioner, VICTOR BRANCACCIO, respectfully moves this Court for postconviction relief pursuant to Rule 3.850 of Florida Rules of Criminal Procedure. In support of his Motion for Postconviction Relief, Mr. Brancaccio states as follows:

1. The judgment of conviction under attack was entered in the Circuit Court of the Nineteenth Judicial Circuit and for St. Lucie County, Florida located in Fort Pierce, Florida.

2. The date of the judgment of conviction is February 19, 1999.

3. The Indictment charged Victor Brancaccio with the crimes of first degree murder in violation of §782.04(1), Fla. Stat. (Count One) and kidnapping

Filed Date: 11/13/2012

with a weapon in violation of §§ 775.087(1) and 787.01, Fla. Stat. (Count Two). Victor Brancaccio was convicted on Counts One and Two.

4. The length of sentence is life imprisonment on Count One with a 25 year mandatory minimum and life imprisonment on Count Two with the sentence on Count Two to run concurrent with the sentence on Count One.

5. Victor Brancaccio pled not guilty to all of the charges.

6. Victor Brancaccio had a jury trial.

7. Victor Brancaccio did not testify at the trial or at any pretrial hearing.

8. Victor Brancaccio timely filed a notice of appeal from the judgment of conviction.

[1] Victor Brancaccio was first tried in 1995. The jury found him guilty of first-degree murder, indicating that the conviction was based on a felony murder theory, **not** premeditation. The jury also found Victor Brancaccio guilty of kidnapping. The State sought the death penalty. After the penalty phase of the trial, the jury returned an advisory verdict of life imprisonment without parole for 25 years. However, Victor Brancaccio's conviction was reversed on appeal by the Fourth District Court of Appeal because the jury was not instructed on Victor's theory of the defense – that he was suffering from involuntary intoxication caused by his prescription anti-depressant medication, Zoloft. *Brancaccio v. State*, 698 So.2d 597 (Fla. 4th DCA 1997). The judgment of conviction under attack is the product of the retrial.

Filed Date: 11/13/2012

9. Victor Brancaccio appealed to the Fourth District Court of Appeal of Florida in *Victor Brancaccio v. State of Florida*, Case No. 4D99-1100. On November 22, 2000, the Fourth District affirmed the judgment of conviction and sentence. See *Brancaccio v. State*, 773 So.2d 582 (Fla. 4th DCA 2000).

10. Other than the direct appeal form the judgment of conviction and sentence, Victor Brancaccio has previously filed petitions, applications, motions, etc., with respect to this judgment in this Court.

11. Other than Victor Brancaccio's direct appeal from the judgment of conviction and sentence, Victor Brancaccio has previously filed a petition, application, motion, etc. with respect to this judgment in another court, namely Victor Brancaccio filed a petition for review in the Florida Supreme Court with respect to this judgment. The grounds raised in this petition for review were that the Florida Supreme Court had discretionary jurisdiction because the Fourth District's decision in *Brancaccio v. State*, 791 So.2d 1095 (Fla. 2001). Thereafter, Victor Brancaccio filed a petition for a wit of certiorari in the United States Supreme Court with respect to this judgment. The ground raised in that petition for a writ of certiorari was whether a severely mentally and emotionally compromised minor can knowingly and voluntarily waive his *Miranda* rights where the police isolate him from his parents, leave him handcuffed to a chair in a small interrogation room, refuse to tell him why he is in custody before he signs

Filed Date: 11/13/2012

the waiver form and used trickery and deceit to obtain a confession. An evidentiary hearing was not held on this petition. On November 13, 2001, the United States Supreme Court denied Victor Brancaccio's petition for a writ of certiorari. See *Brancaccio v. Florida*, 534 U.S. 1022 (2001).

12. Victor Brancaccio also filed claims that the judgment and sentence were unlawful is that newly discovered evidence exited that was not known by the trial court, by Victor Brancaccio, or by his trial counsel at the time of trial, that could not have been discovered by Victor Brancaccio or his trial counsel at the time of trial by the exercise of due diligence **and** that is material, relevant, admissible evidence that goes to the merits of the case and will probably produce an acquittal on retrial.

13. The claims in this successive petition are based upon Fla. R. Crim. P. 3.850 b (2) because Victor Brancaccio asserts that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity.

14. The fundamental constitutional rights asserted are based upon United States Supreme Court authority in *Graham vs. Florida* and *Miller v. Alabama.* These cases are cited in the accompanying memorandum of law. Mr. Brancaccio's instant claim requires this court to consider the following factual history to

Filed Date: 11/13/2012

properly apply *Graham* and *Miller* a review of Mr. Brancaccio's facts are therefore necessary:

A. Trial Proceedings:

At Victor Brancaccio's 1999 trial, the following evidence was adduced:

Victor's trial, which resulted in the judgment of conviction at issue herein began and ended in January 1999.

Mollie Frazier was killed in 1993. Victor Brancaccio confessed to killing her. At the time of this incident, Victor [2] was a mentally compromised sixteen-year-old boy. (T. 1681). [3] Victor has borderline intelligence, just above the level of mental retardation. (T. 1896). He has learning disabilities and functions as if he is mentally retarded. (T.1952-53).

Victor's problems began early. It is undisputed that twice during infancy his brain was deprived of oxygen. *See* (T. 1888, 1892-93, 1899). The first incident occurred at the time of his birth. He immediately developed cyanosis with grunting and tachypnea. (T. 1889). His condition deteriorated and he suffered from anoxia – his brain was deprived of oxygen. (T. 1890). Events that deprive

---

[2] Victor Brancaccio is also referred to herein as "Victor".

[3] "T" refers to the 199 Trial Transcript; "ST" refers to the Supplemental Transcript which will be cited by volume number and page number.

Filed Date: 11/13/2012

the brain of oxygen permanently poison the system so that it never works the same again. (T. 1916).

Just before Victor's second birthday, he suffered another incident of anoxia. Victor fell into a pond, was underwater for approximately five minutes, and had to be revived using CPR and transported to a hospital in an ambulance for treatment. (T. 1891). According to forensic psychologist Antoinette R. Appel, a defense witness, the second incident of oxygen deprivation, added to the earlier event, caused additional brain damage in Victor Brancaccio resulting in further developmental and learning problems. (T. 1891-92).

Even the State's expert at Brancaccio's trial, Dr. Daniel Martell, agreed that brain damage can contribute to or increase the likelihood of violent behavior. (T. 2574). However, it is undisputed that Victor had no history of violence of this magnitude. (T. 2080). He was in a few fights, had some discipline issues at school, and had some difficulty handling rage, but that was primarily directed inward and was not a major problem. (T. 1901, 2080, 2494).

Victor's Hospitalization. In the spring of 1993, Victor was involuntarily committed to mental hospitals twice. Two months before Mollie Frazier was killed, the police had Victor committed to New Horizons Mental Health Center under the Baker Act. (T. 1905-06). He was taken into custody after he went into a store, refused to leave, ran off in clear view with beer, and then threatened himself

Filed Date: 11/13/2012

and his parents. (T. 1905). He was then admitted to Savannas Hospital, another mental health institution. (T. 1906).

The staff at Savannas diagnosed Victor as suffering from major depression, oppositional defiance disorder, attention deficit disorder, a learning disability, and alcoholism. (T. 1906, 1908). While at Savannas Hospital, Victor was placed on an anti-depressant medication, Zoloft. (T. 1910).

According to hospital records, Victor began to show negative behavioral changes beginning a week or so after he was placed on Zoloft. (T. 1910-11). Victor's hands began to tremble, and he transformed from a quiet, introverted boy to one who began seriously acting out. (T. 1911). He came confrontational, irritable, "out of control" and loud. (T. 1911, 1917). He challenged authority and was given to angry outbursts. (T. 2081-2083). While the State's expert did not find these post-Zoloft symptoms significant, these are all typical signs of an adverse reaction to medications such as Zoloft. (T. 1917).

Hospital records show that Victor warned his interviewers that he did not feel right, did not want to be released, and that he felt like something bad was going to happen. (T. 1911). Just before his release, Victor told the hospital that he was not in control, and was very fearful of going home because he was afraid of "messing up". (T. 1911). However, no one listened.

Filed Date: 11/13/2012

Notwithstanding the negative changes in Victor's personality and behavior, and despite the fact that Victor had met almost none of his treatment goals, Savannas Hospital released Victor just 23 days after his admission – the day his insurance ran out. (T. 1911-12). On the advice of his doctors, Victor continued to take Zoloft after his release up to and including the date of Mollie Frazier's death. (T. 2005-06). One month after being released from Savannas Hospital, Victor killed Mollie Frazier. (3ST 15), *see* (T. 1208).

The death of Mollie Frazier: On June 13, 1993. Mollie Mae Frazier, an elderly woman, was found dead behind a berm in the vacant lot in a subdivision of St. Lucie West. (T. 900, 921). The medical examiner gave the cause of death as blunt trauma. (T. 1483). He believed there had been a minimum of six blows to her head, any on of which could have caused her death. (T. 1496, 1525-26). She also had a crushing injury to the chest and some injuries to her arms. (T. 1505-06, 1509). Most of her injuries could have been inflicted in a very short time, possibly in less than a minute. (T. 1594, 2030). The first blow may have killed her. (T. 1526). She probably survived only a few minutes after receiving these injuries. (T. 1510, 1517).

The assault was so out of character for Victor that no one believed him when he tried to tell his friends what had happened. (T. 1118, 1124, 1173, 1182, 1238). He seemed to tell everyone he saw, except his parents, about the incident – even

Filed Date: 11/13/2012

people he did not know very well. (T. 1124, 1153, 1181, 1208, 1346). Many of these people testified for the State at Victor's trial. He went back to the scene the next day. Even though forensic experts agree she must have been dead at that time (T.1158, 2037), Victor believed she as breathing (T. 1235, 2564). He returned again and first tried to burn her body with a newspaper then spray painted her body red. (T. 1244). However, Victor made no attempt to hide his blood spattered clothes or the spray paint can, all of which were found out in the open at the Brancaccio home. (T. 1063, 1066).

Victor's arrest and interrogation. On the morning of June 14, 1993, the police arrested Victor Brancaccio. (T. 1001, 1003). Victor was handcuffed and transported to the police station by Officer Theede. (2ST 8; T. 1814). At the police station, officers took Victor to a small interrogation room and handcuffed him to a chair. (T. 1684).

Prior to questioning, Victor asked the police if his parents had been called. (2ST. 11; T. 1818). Detective Ruether replied "that it was being taken care of." (2ST11, 33; T. 1818) Neither Officer Theede nor Detective Ruether contacted Victor's parents. (2ST 10-12, 18; T. 1817-18).

Detective Scott Beck interrogated Victor with Detective Ruether and an assistant state attorney present. (2ST 26-27; T. 1701-02). Victor had no one. During the interrogation Beck used various tactics to coax a confession from

Filed Date: 11/13/2012

Victor. Victor ultimately confessed to killing Mollie Frazier. (2ST 16). It was only after Victor confessed to murder that Detective Beck arranged for Victor's parents to be notified that Victor was in custody. (2ST 30; T. 1701, 1719, 1806).

The expert testimony at Victor's trial concerning Zoloft. Since Victor confessed to the killing, the only issues for the jury to determine was whether he had the mental capacity to form the intent necessary to commit the crimes. It was Victor's theory of defense that, at the time that Mollie Frazier was killed, Victor was voluntarily intoxicated by the prescribed medication Zoloft. This was a valid and complete defense to the charges against him and the jury was so instructed. (T. 2777-79).

For the defense, Dr. Appel, the forensic psychologist, testified that, at the time of the incident, Victor was suffering negative side effects from Zoloft. (T 1917). She gave her expert opinion that, at the time that Mollie Frazier was killed, Victor did not know the difference between right and wrong and was not able to appreciate the nature and consequences of his actions. (T. 1924). She further testified that Victor's mental state at that time was the result of the negative effects of Zoloft on his brain, which was already compromised by the facts of his brain damage, his mental illness, and his drinking. (T.1975). She described an escalating pattern of behavior while Victor was on the Zoloft. She further that, after the

Filed Date: 11/13/2012

Zoloft washed from his system, he was no longer violent. (T. 1978). She explained that Zoloft was what pushed him over the edge. (T. 1977-78).

However, during the cross-examination of Dr. Appel, the prosecutor elicited testimony from her that, at the time of Victor's trial, there was only a "small" amount of literature concerning studies of people who were aggressive or violent while on Zoloft, Prozac or some other selective serotonin reuptake inhibitor ("SSRI") and that, at that time, Zoloft was approved for use in adolescents. (T. 1978, 1983-84).[4]

Pharmacologist Dr. James O'Brien also testified for the defense that in his opinion, based on hospital records, Victor was suffering adverse side effects from the Zoloft-including agitation, anger, aggression and hyperactivity. (T. 2079-81). Dr. O'Brien specifically pointed to places in the hospital records showing a marked difference in Victor's behavior before and after treatment with Zoloft. (T. 2082-83).

According to Dr. O'Brien, Victor's background and history made it more likely that he would have an adverse reaction to a drug like Zoloft. (T. 2081). Dr. O'Brien testified that the Zoloft made Victor more and more explosive,

[4] At the trial, it was established that Zoloft is a potent member of the group of antidepressants classified as SSRIs.

Filed Date: 11/13/2012

aggressive, and made it more difficult for him to control his behavior. (T. 2081, 2084).

However, on cross-examination, the prosecutor elicited from Dr. O'Brien that, at the time of the trial, the FDA had approved Zoloft for use in adolescents and this was significant because it was rare for the FDA to authorize the use of any drug by adolescents. (T.2100-01).

Psychiatrist Dr. Ronald Schlensky testified for the defense that the Zoloft affected Victor's brain chemistry so that it reduced his already compromised brain function. (T.2129-30). According to Dr. Schlensky, Zoloft would affect a damaged brain like Victor's differently from that of other people. (T. 2168). Dr. Schlensky testified that, as a result of the Zoloft, at the time incident, Victor was reduced to a psychotic state and was unable to understand what happening. (T. 2128-29).

At the trial, Victor was seriously handicapped in the presentation of his involuntary intoxication defense because of the existing state of scientific evidence on the adverse effects of Zoloft, especially on children. As Dr. Appel, noted at the trial, there was very little literature at the time on aggression and violence as negative effects of Zoloft. (T. 1983-84). Futhermore, Dr. O'Brien acknowledged during cross-examination that, although Zoloft was approved for

Filed Date: 11/13/2012

adolescents, there was not a lot of data on the effects on pediatric patients. (T. 2100-02).

The State rebutted Victor's experts with the testimony of its own expert who opined that Victor was not involuntarily intoxication because of the Zoloft. On behalf of the State, Dr. Darryl Matthews testified that the great majority of the psychiatric community was of the opinion that Zoloft is an effective and safe drug. (T. 2208). He further testified that the fact that the FDA approved Zoloft was significant because it means that it is "safe and effective for human beings." (T. 2210). He went in detail through the package insert regarding Zoloft that listed the FDA warnings in use at the time of the trial. (T. 2209-25). He noted that the package insert for Zoloft listed "aggressive reaction" among other things as an "infrequent" symptom of Zoloft but he emphasized that the possible side effects listed in the insert were reported during treatment with Zoloft, but ***were not necessarily caused by it*** and ***did not "amount to actual side effects" caused by Zoloft***. (T. 2224-25). Dr. Matthews also testified that the FDA concluded that drugs like Zoloft do not cause suicidal ideation. (T. 2298-99). While he admitted that a small number of studies suggested a relationship between drugs like Zoloft and violent behavior, he testified unequivocally that "the review of the literature supports the idea that there is **no known causal relationship** between Zoloft and

Filed Date: 11/13/2012

violence." (T. 2230)(emphasis added). Nor did he find any evidence in the literature to suggest Zoloft would enhance violent behavior. (T. 2233).

At the close of his testimony, Dr. Matthews reiterated that "there is no scientific evidence that these substances [such as Zoloft] cause ill violence," and the scientific evidence is "based on literally millions and millions and millions of prescriptions of these medications over many years. [These] are terribly widely commonly used drugs that have a very, very well know side effect profile." (T. 2353). During closing argument, the prosecutor argued that Victor's theory of defense that he was involuntarily intoxicated on Zoloft was an "excuse" made up after Victor killed Mollie Frazier and reminded the jury of the trial testimony of Dr. O'Brien that, as of the date of the trial, Zoloft was "a good drug approved for adolescents." (T. 2662).

B. Newly Discovered Evidence.

Since the time of Victor's second trial in January 1999. a vast amount of scientific evidence has accumulated on the effects of Zoloft and other similar antidepressant medications. As previously explained, Zoloft (generic name sertraline) is a member of a group of closely related medications known as SSRIs (selective serotonin reuptake inhibitors). Other members of this group include

Filed Date: 11/13/2012

Prozac (fuoxetine), Paxil (paraxetine), Celexa (citalopram), and Luvox (fluvoxamine).

Beginning on March 22, 2004, as a result of this new scientific evidence, the FDA, as well as British and Canadian drug control agencies have issued new warnings for each of the SSRIs. Since that time, these agencies have also concluded that Zoloft is not effective for treating depression in children and that it can cause extremely abnormal behavior. More specifically, the United States and Canadian drug control agencies have specifically warned that Zoloft and other SSRIs can cause suicide and violence. The Canadian label for Zoloft now includes a warning about Zoloft causing harm against self and others. Great Britain has taken it one step further, banning Zoloft in treatment of children of Victor's age at the time he was in Savannas Hospital.

At the time of the trial in 1999, the syndromes associated with Zoloft-induced violence had not been fully articulated. (Exhibit 1 at 9). [5] Moreover,

[5] Dr. Breggin is a psychiatrist with a subspecialty in clinical psychopharmacology and specifically antidepressant adverse effects. He has been in practice since 1968, has published multiple books and peer-reviewed articles on issues relevant to this case, has presented to many professional organizations and the FDA on these subjects, and sees patients who suffer from similar conditions as Victor Brancaccio. He participated actively in two recent GDA hearings that resulted in a change of label for Zoloft and related drugs and the language in the label changes closely parallels his publications.

Filed Date: 11/13/2012

even as of 1999, the experts who testified for both the defense and the State had relatively little information available to them on the effects of Zoloft. (Exhibit 1 at 10). Until recently, the drug companies and the FDA were actively denying that Zoloft and similar SSRIs could cause suicide, hostility, and aggression. (Exhibit 1 at 10). In fact, the manufactures of the SSRIs were actively hiding data. (Exhibit 1 at 10). The FDA suppressed the conclusions of its own in-house review and was so remiss in this and other similar matters that the director of the FDA later resigned under pressure from Congress. (Exhibit 1 at 10). During this time, Pfizer, the manufacturer of Zoloft, also suppressed the results of its own pediatric trials of Zoloft. (Exhibit 1 at 10). Now, however, this evidence has come to light.

FDA Warnings. On March 22, 2004, after holding public hearings, the FDA for the first time issued the following public health advisory on the use if **all** SSRIs, including Zoloft, by adults and children: "The agency is also advising that these patients be observed for certain behaviors that **are known to be** associated

---

The Federal Aviation Agency (FAA) hired him as a consultant to evaluate the effect of Zoloft on pilots. In addition, in 1998, he was asked by the National Institutes of Health (NIH) to be the scientific expert on adverse drug effects in children at the NIH Consensus Development Conference on the Diagnosis and Treatment of ADHD. Attached hereto as Exhibit 1 is a report of Dr. Breggin prepared to explain potential reasons for granting Victor Brancaccio clemency which discusses recently available data and conclusions from regulatory agencies, including the FDA, that SSRI antidepressants, including Zoloft, possess similar effects, including a syndrome that can cause murderous, violent behavior.

Filed Date: 11/13/2012

with these drugs, such as anxiety, agitation, panic attacks, insomnia, **irritability, hostility**, impulsivity, **akathisia** (severe restlessness), **hypomania and mania**." (emphasis added). *See* (Exhibit 1 at 11). [6] In addition to "hostility", the terms "irritability", "akathisia", and "mania" are also closely related to violent behavior. (Exhibit 1 at 12).

The fact that the FDA describes these adverse reactions as "known" is significant – it means that, on March 22, 2004, the FDA recognized them as scientifically demonstrated or established. (Exhibit 1 at 11). Under these circumstances, it simply would not be possible today for the State's expert, Dr. Matthews, to truthfully testify, has he did at Victor's trial in 1999, that "there is no know causal relationship between Zoloft and violence." (T. 2230).

On October 15, 2004, the FDA ordered a label change for all SSRIs, including Zoloft, that unequivocally recognized a causal connection between antidepressants and suicide in children and adolescents. The FDA did this via its highest level of warning, a black box. (Exhibit 1 at 13). On October 15, 2004, beneath the black box, the FDA also required more lengthy and detailed information and warnings, including warnings never previously given that pediatric patients treated with SSRIs should be closely observed for "unusual

[6] Attached hereto as Exhibit 2 are FDA talk papers regarding this March 22, 2004 FDA advisory.

Filed Date: 11/13/2012

changes in behavior, especially during the initial few months of a course of drug treatment". Further, the FDA's October 15, 2004 order required that the new label for all SSRIs, including Zoloft, must include warning statements about "*irritability, hostility (aggression), impulsivity, akathisia (psychomotor restlessness), hypomania and mania*" as reported symptoms in adults and pediatric patients.

On November 3, 2004, the FDA published its "FDA Proposed Medication Guide: About Using Antidepressants in Children and Adult." In a section of that publication entitled "What to Watch Out For in Children or Teens Talking Antidepressants," the FDA listed twelve items including "feelings very agitated or restless," "new or worse irritability," "**acting aggressive, being angry or violent,**" and "**acting on dangerous impulses.**"

This kind of scientific regulatory data was simply not available at the time of Victor Brancaccio's 1999 trial. Whereas, at the time of Victor's 1999 trial, the evidence that SSRIs, including Zoloft, can cause aggression and hostile behavior was primarily anecdotal and opinion, it is now recognized fact. Moreover, this new data emphasizes these adverse effects, it is now recognized among children, like Victor Brancaccio, and occur in the initial few months of treatment.

Canadian Regulatory Action. On June 3, 2004, even before the FDA issued its formal label changes and warnings, Health Canada (the Canadian drug

Filed Date: 11/13/2012

regulatory agency) issued its own advisory requiring broader warnings on SSRIs, including Zoloft. The June 3, 2004 Canadian warnings "indicate that patients of all ages taking these drugs may experience behavioral and/or emotional changes that may put them at increased risk of self-harm or harm to others." In addition, the June3, 2004 advisory describes as examples: "unusual feelings of agitation, ***hostility*** or anxiety," or "impulsive or disturbing thoughts that could involve self-harm or ***harm to others***."

On May 26, 2004, shortly before this advisory came out, Pfizer, the maker of Zoloft, had already upgraded its Canadian warning labels after consultation with Health Canada. In their black boxed warning, **Pfizer admitted** that "there are clinical trials and post marketing reports with SSRIs and other newer antidepressants, in both pediatrics and adults, of severe agitation-type adverse events coupled with self-harm or **harm to others**. The agitation-type events included: akathisia, agitation, de-inhibition, emotional liability, hostility, aggression, depersonalization. In some cases, the events occurred within several weeks of starting treatment." This admission by the drug manufacturer that Zoloft did indeed cause these adverse reactions is key evidence not available to either the experts or the jury in Victor's 1999 trial which occurred at a time when Pfizer was still denying hiding such effects.

Filed Date: 11/13/2012

British Regulatory Action. Sometime after December 6, 2004, the MHRA, the British drug regulatory agency, concluded that all SSRIs except Prozac are ineffective in children and that all SSRIs (including Prozac) pose some risk of suicide. The MHRA banned the use of all SSRIs except Prozac in children under eighteen.

The Impact of This New Evidence:

In closing argument at Victor Brancaccio's trial, the State strongly suggested that the latest scientific would show that there is no connection between SSRIs and violent behavior because it is used to treat violent behavior. (T. 2662), 2746). We now know, acknowledged by the manufacturer, the FDA, and other regulatory agencies, that this is not the case.

The newly discovered evidence mandates post-conviction relief. The previously explained advisories, warnings and publications of the FDA, other governmental drug regulatory agencies and Pfizer beginning on March 22, 2004 were not known by the trial court, Victor Brancaccio or his counsel at the time of his 1999 trial and could not have been discovered by Victor Brancaccio or his counsel by the exercise of due diligence for the obvious reason that they did not occur until over five years later. Furthermore, this evidence would have been admissible at Victor's trial if it had existed at that time. Indeed, as previously

Filed Date: 11/13/2012

explained at Victor's 1999 trial, the jury heard evidence of the FDA's conclusions, advisories and warnings regarding Zoloft that were in effect at the time. The previously described newly discovered advisories, warnings and publications of the FDA, other governmental drug regulatory agencies and Pfizer plainly would have been admissible at Victor's 1999 trial if such evidence had existed at that time and experts would have been permitted to rely on this evidence in forming their opinions.

Furthermore, this newly discovered evidence was material, relevant, substantive evidence that was not cumulative to any evidence adduced at the 1999 trial. In order for Victor to succeed on his affirmative defense of involuntary intoxication, he had to convince the jury that Zoloft could have caused his behavior. This meant both that aggressive, violent, and dangerous impulsive behavior was a side effect of this drug, and that Victor was suffering from those side effects at the time of the incident, which caused him to act the way he did. Therefore, this newly discovered evidence which affirmatively shows that aggressive, hostile, violent and impulsive behavior that threatens harm to self or others are now recognized as know side effects of Zoloft and other SSRI drugs is highly relevant as direct, substantive evidence of Victor's affirmative defense. If these advisories, black box warnings and publications of the FDA and other governmental drug control agencies had been available at the time of the Victor

Filed Date: 11/13/2012

Brancaccio's 1999 trial, the prosecutor's cross-examination of defense experts, Dr. Appel and Dr. O'Brien, establishing that it was significant that the FDA had approved Zoloft for use in adolescents could have been powerfully rebutted by defense counsel in his redirect examination of these experts.

The State at the 1999 trial emphasized the lack of controlled studies, journal articles or other evidence to support expert opinions that Zoloft caused violent or aggressive behavior. (T. 2090-95, 2164). Dr. Darryl Matthews, the State's expert, testified at that trial that the great majority of the psychiatric community was of the opinion that Zoloft is an effective and safe drug. (T. 2208). He went in detail through the package insert with the FDA warnings in use at the time. (T. 2209-25). He emphasized that the possible side effects listed in the package insert were reported during treatment with Zoloft, but were not necessarily caused by it. (T. 2224-25). Dr. Matthews also testified that the FDA concluded that drugs like Zoloft do not cause suicidal ideation. (T. 2298-99). While he admitted that a small number of studies suggested a relationship between drugs like Zoloft and violent behavior, he testified unequivocally that "the review of the literature supports the idea that there is no known causal relationship between Zoloft and violence." (T. 2230). Nor did he find any evidence in the scientific literature to suggest Zoloft would enhance violent behavior. (T. 2233). At the close of his testimony, Dr. Matthews reiterated that "there is no scientific evidence that these

Filed Date: 11/13/2012

substances [such as Zoloft] cause ill violence," and the scientific evidence is "based on literally millions and millions and millions and millions of prescriptions of these medications over many years. [These] are terribly widely commonly used drugs that have a very, very well known side effect profile." (T. 2353). Therefore, for all the foregoing reasons, Mr. Brancaccio asserted that if the newly discovered evidence had been available at Victor's 1999 trial, it would probably have produced an acquittal on both counts.

14. Victor Brancaccio does not have any petition, application, appeal, motion, etc, now pending in any court, either state or federal, as to the judgment under attack.

15. In *Miller vs. Alabama*, 132 S. Ct. 2455 (2012) the United States Supreme Court recently held:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf. *Graham*, 560 U.S., at ___, 130 S.Ct., at 2030 ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Filed Date: 11/13/2012

Miller on its face is the clear progeny of *Graham v. Florida*, 130 S. Ct. 2011 (2010). Graham has been held to apply retroactively to post conviction proceedings.

15. Based upon the above pled history and for the reasons stated above the life sentence imposed on the Kidnapping charge is unconstitutional on its face. Moreover, for the reasons stated above the mandatory life sentence is unconstitutional on its face or as applied.

15. The name and address of the attorneys who have represented or are representing Victor Brancaccio in the following stages of the judgment attacked herein are:

a) At preliminary hearing: Not Applicable

b) At trial and sentencing: Roy Black

c) On appeal: Roy Black

d) In this post conviction proceeding pursuant to Fla. R. Crim. P. 3.850: David M. Lamos, 805 Delaware Ave, Fort Pierce, Florida 34950.

WHEREFORE, Defendant/Petitioner/ Victor Brancaccio requests that the Court grant all relief to which he may be entitled in this proceeding, including but not limited to vacating and setting aside the sentences in his case and further relief as the Court deems just and proper.

Filed Date: 11/13/2012

OATH

Under penalties of perjury, I declare that I have read the foregoing motion and the facts stated in it are true.

Victor Brancaccio DC# 306050
Columbia Correctional Institution
216 S.E. Corrections Way
Lake City, Florida 32025-2013

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that a copy hereof has been furnished to the **State Attorney's Office 411 2nd Street Ft. Pierce, FL 34950** on 11/5/12, 2012.

Respectfully submitted,

Law Offices of David M. Lamos

David M. Lamos, Esq.
Florida Bar Number: 747386
805 Delaware Avenue
Fort Pierce, Florida 34950-8557
(772) 464-4054
(772) 468-2072 Facsimile

St. Lucie County File Date: 03/04/2013

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

VICTOR BRANCACCIO,

Defendant.
_____/

FELONY DIVISION
CASE NO.: 561993CF1592A

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CASE came before the Court in chambers on the Defendant's motion filed by and through counsel on November 13, 2012, pursuant to Florida Rule of Criminal Procedure 3.850, and amended motion filed on January 17, 2013, requesting alternative relief under Rule 3.800(a). The Court finds and orders as follows.

Following his retrial, on February 19, 1999, the Defendant was convicted of first degree murder and kidnapping with a weapon. The Defendant was sentenced to life in prison with a 25 year mandatory minimum for the murder and life in prison for the kidnapping. The judgment and sentence were affirmed on appeal. *Brancaccio v. State,* 773 So. 2d 582 (Fla. 4th DCA 2000). His convictions became final on November 13, 2001, when the United States Supreme Court declined to accept his petition for certiorari. Thereafter, on March 21, 2006, the Defendant filed a Rule 3.850 motion. On May 7, 2008, the court denied the motion following a hearing and the appellate court affirmed. *Brancaccio v. State,* 27 So. 3d 739 (Fla. 4th DCA 2010). Thus, the present motion is successive.

The Defendant alleges that this sentence is illegal under *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The Defendant claims

that he was a juvenile at the time that he committed the crimes. Further, the Defendant asserts that, based on *Graham* and *Miller*, he could not have been sentenced to life without the possibility of parole. The Court adopts and incorporates the State's response inclusive of all attached exhibits in finding that the Defendant is not entitled to relief. *See* Exhibit A attached.

Miller Issue

The Defendant's case was final before the Supreme Court's decision in *Miller*. At this time, the only two Florida appellate cases to address the retroactivity of *Miller* have found that the case is not retroactive for cases that were final at the time *Miller* was decided. *See Geter v. State*, 37 Fla. L. Weekly D2283 (Fla. 3d DCA Sept. 27, 2012) and *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st DCA 2012), reh'g denied (Dec. 13, 2012). This Court agrees that *Miller* is not applicable to the Defendant as it is not retroactive. Consequently, the Defendant has not demonstrated that his sentence is illegal on based on *Miller*.

Graham Issue

The Court in *Graham* held that "[t]he constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham,* 130 S.Ct. at 2034. The Court unequivocally limited its holding to those cases where a juvenile defendant was "sentenced to life without parole solely for a nonhomicide offense." *Id.* at 2023. However, there is conflict between the appellate courts as to whether the holding in *Graham* applies to a defendant who has been convicted of both a homicide and nonhomicide offense arising from a single criminal transaction. *See Washington v. State*, 37 Fla. L. Weekly D154 (Fla. 2d DCA January 18, 2012) and *Akins v. State*, 37 Fla. L. Weekly D2757 (Fla. 1st DCA November 30, 2012).

The Second District in *Washington* held that *Graham* did not apply to cases where a defendant is simultaneously convicted of both a homicide and a nonhomicide and receives life sentences on both. *Washington* at 2. The court found that the "homicide offense can be an aggravating factor in the sentencing of the nonhomicide offense." *Id.*

Disagreeing, the First District in *Akins* held that *Graham* would apply. *Akins* at 2. That court took the narrower view that a defendant could not receive a sentence of life without the possibility of parole on a nonhomicide conviction. However, a dissent in *Akins* agreed with the reasoning and outcome of *Washington. See Akins* at 2-3.

This Court concludes that the proper application of *Graham* is found within *Washington*. Thus, as *Graham* is inapplicable to the Defendant's case, the Defendant has failed to demonstrate that his sentence is illegal and he is not entitled to relief.

The Defendant is placed on notice that, under Florida law, all or any part of the gain-time earned by a prisoner is subject to forfeiture if such prisoner is found by a court to have brought a frivolous suit, action, claim, proceeding, or appeal in any court. Fla. Stat. §§ 944.279(1) and 944.28(2)(a); *Wimberly v. State*, 50 So. 3d 785, 788 (Fla. 4th DCA 2010); *Marc v. State*, 46 So. 3d 1045, 1046 (Fla. 4th DCA 2010); and Fla. R. Crim. P. 3.850. Postconviction movants should also remain aware that penalties for direct contempt of court or perjury may be imposed when movants are untruthful in postconviction proceedings. *See Oquendo v. State,* 2 So. 3d 1001, 1006 (Fla. 4th DCA 2008). "[G]iven the possibility of sanctions, prisoners should "*stop and think*" before filing frivolous collateral criminal challenges or appeals." *Marc v. State,* 46 So. 3d 1045 (Fla. 4th DCA 2010) (emphasis added) (citing *Spencer v. Fla. Dep't of Corr.,* 823 So. 2d 752, 756 (Fla. 2002). It is hereby

ORDERED that the Defendant's motion is DENIED.

The Defendant has 30 days to seek appellate review.

DONE AND ORDERED in chambers in Fort Pierce, St. Lucie County, Florida on

1 March, 2013.

ROBERT E. BELANGER
CIRCUIT COURT JUDGE

Certificate of Service

I hereby certify that a true copy of the foregoing order and any attachments have been provided by U.S. Mail or courthouse mail to the following addresses on March 4, 2013.

David M. Lamos, Esquire
805 Delaware Avenue
Fort Pierce, Florida 34950-8557
Fla. Bar No.: 747386

Thomas F. Burns, Esquire
3072 Treasure Island Road
Port St. Lucie, Florida 34952
Fla. Bar No.: 48275

Ryan R. Butler, ASA
Office of the State Attorney
via Courthouse mail

CLERK OF THE CIRCUIT COURT ST. LUCIE COUNTY

JOSEPH E. SMITH
CLERK OF THE COURT

By: Deputy Clerk

Filing # 32429997 E-Filed 09/24/2015 10:24:10 AM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY STATE OF FLORIDA

STATE OF FLORIDA, **Case No. 56-1993-CF-001592**

Plaintiff,

vs.

VICTOR BRANCACCIO,

Defendant/Petitioner.
_____/

MOTION FOR POST-CONVICTION RELIEF

The Defendant/Petitioner, **VICTOR BRANCACCIO,** *pro se*, respectfully moves this Honorable Court for Post-Conviction Relief pursuant to Rule 3.850 and 3.800 of the Florida Rules of Criminal Procedure. In support of his motion for Post-Conviction Relief, Mr. Brancaccio states as follows:

1. The Defendant/Petitioner is presently confined in the Florida Department of Corrections serving two life sentences.

2. The Judgment of conviction under attack was entered in the Circuit Court of the Nineteenth Judicial Circuit in and for St. Lucie County Florida located in Ft. Pierce, Florida.

3. The date of the Judgment of conviction from which the Defendant/Petitioner seeks relief is February 19, 1999.

4. The Defendant/Petitioner's conviction grew from an Indictment which charged him with the crimes of: Ct. 1) First Degree Murder and Ct. 2) Kidnapping with a weapon.

5. This Defendant/Petitioner pled not guilty to both charges in the indictment.

6. The Defendant/Petitioner had a jury trial on both charges in the indictment whereafter he was found guilty as charged on both counts.

7. This Defendant/Petitioner did not testify at trial.

8. Upon his conviction the trial court sentenced him as follows:

   a.) 1st Degree Murder: Life imprisonment with a 25 year minimum mandatory.

   b.) Kidnapping with a weapon: Life in prison.

   c.) Both sentences were to run concurrent with each other.

9. The Defendant/Petitioner timely filed a Notice of Appeal from this sentence.

10. The appeal of the conviction in this case was unsuccessful with the Fourth District Court of Appeals affirming both the Judgment of conviction and the sentences (Brancaccio v. State, 773 So.2d 582 (4th DCA 2000).

11. Other than Defendant/Petitioner's direct appeal from this judgment of conviction and sentence, he has also filed previous to this motion, petitions/motions/applications with respect to this judgment in another court, namely the Florida Supreme Court, (attempting to invoke the Court's discretionary jurisdiction). That motion was denied, (Brancaccio v. State, 791 So.2d 1095 (Fla. 2001).

Thereafter, the Defendant/Petitioner also filed his Petition for Writ of Certiorari with the United States Supreme Court with respect to this judgment attacking the trial court's ruling on a Motion to Suppress his confession. That petition was denied (Brancaccio v. Florida, 534 U.S. 1022 (2001)).

12. This Defendant/Petitioner has previously filed motions/petitions with this court with respect to the judgment of conviction and sentence dealing with:

a.) Newly discovered evidence; and,

b.) That his fundamental constitutional rights were violated through the imposition of a life sentence on a juvenile offender.

c.) Motion to disqualify judge.

These post conviction motions were denied.

13. This instant motion for post conviction relief is based up on the Defendant/Petitioner's position that the two life sentences he received in 1999 violated his basic and fundamental constitutional rights to a fair sentencing hearing. See Miller v. Alabama, 132 S. Ct. 2455 (2012).

14. The fundamental constitutional rights which were violated by the Defendant/Petitioner's sentence, and the proper remedy (resentencing), were not recognized by the Florida Supreme Court until March 19, 2015 in the case of Horsley v. State, SC13-1938 (Fla. 2015). Wherein the Florida Supreme Court ruled for the first time that the U.S. Supreme Court's ruling in Miller v. Alabama,

("the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders") should be applied ***retroactively to all prisoners*** in Florida whom were juveniles at the time of their crime and received a life sentence for it.

15. Pursuant to this 2015 holding of the Florida Supreme Court in *Horsley*, the Defendant/Petitioner is entitled to post conviction relief.

16. The post conviction relief the Supreme Court of Florida has set forth for defendants such as Victor Brancaccio is to vacate his sentences of life in prison and to grant to this Defendant/Petitioner an individualized sentencing hearing pursuant to the procedures and criteria set forth in Florida Statute 921.1401 and 921.1402 for both crimes he was convicted of.

17. The claims set forth in this successive petition/motion for post conviction relief are made within two years of the date of the Florida Supreme Court's mandate in *Horsley* (2015) which set forth the retroactive application of a new sentencing scheme for juvenile offenders such as Victor Brancaccio.

18. Victor Brancaccio does not have any petition, application, appeal or motion pending before any court, State of Federal, as to the judgment under attack.

19. Based upon the case history of this Defendant/Petitioner and the rulings by the U.S. Supreme Court and Florida Supreme Court, the life sentence imposed upon this Defendant/Petitioner for kidnapping is unconstitutional on its face. Similarly, the mandatory life sentence imposed as to the first-degree murder conviction is unconstitutional on its face or as applied.

20. The names and addresses of the attorneys who have or are representing Defendant/Petitioner Victor Brancaccio in the following statuses are as follows:

a.) At preliminary hearing: Not Applicable

b.) At trial and sentencing: Roy Black, Black Srebnick Kornspan & Stumpf, P A 201 S. Biscayne Blvd. Ste. 1300 Miami, FL 33131-4311.

c.) On appeal: Roy Black, Black Srebnick Kornspan & Stumpf, P A 201 S. Biscayne Blvd. Ste. 1300 Miami, FL 33131-4311.

d.) Previous post conviction proceedings:

1.) David Lamos, 805 Delaware Avenue, Ft. Pierce, FL 34950.

2.) Thomas Burns, Office of Regional Counsel, 111 North 2nd Street, Ft. Pierce, FL 34950.

e.) Motion to disqualify: Thomas Burns, Office of Regional Counsel, 111 North 2nd Street, Ft. Pierce, FL 34950.

WHEREFORE, Defendant/Petitioner respectfully requests that this court grant all relief he may be entitled to pursuant to this action, including but not limited to, setting aside and vacating the sentences he received in this case and imposing new sentences in accordance with Florida Law after first conducting an individualize sentencing hearing as set forth in Horsley.

THIS PLEADING was prepared with the assistance of Counsel: RICHARD D. KIBBEY, ESQ., Kibbey | Wagner, Attorneys at Law, 416 SW Camden Avenue, Stuart, Florida, 34994.

OATH

I have read the foregoing Motion for Post-Conviction Relief and the statements in this affidavit. I have personal knowledge of the facts set forth and state that all facts are true and correct.

VICTOR BRANCACCIO
INMATE # 306050
Florida State Prison (Male)
7819 N.W. 228th Street
Raiford, Florida 32026-1000

STATE OF FLORIDA

COUNTY OF ~~UNION~~ Bradford

Before me, the undersigned authority, this day personally appeared VICTOR BRANCACCIO, who first being duly sworn, says that he is the Defendant in the above-styled cause, that he has read the foregoing Motion for Post-Conviction Relief, and has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

Victor Brancaccio

VICTOR BRANCACCIO

SWORN AND SUBSCRIBED TO before me on September 17, 2015.

Brian J Paul

NOTARY PUBLIC, State of Florida
Printed Name:
My commission expires:

BRIAN J. PAUL
MY COMMISSION # FF 129579
EXPIRES: June 4, 2018
Bonded Thru Budget Notary Services

Notary Seal

CERTIFICATE OF MAILING

I, VICTOR BRANCACCIO, pursuant to the "mailbox rule" do hereby verify that the Motion for Post-Conviction Relief was signed by me and given to prison officials for mailing to: the Clerk of Court, St. Lucie County, 201 South Indian River Drive, Ft. Pierce, FL 34950; The Office of the State Attorney, 411 South Second Street, Ft. Pierce, FL 34990; and Honorable Judge Belanger, St. Lucie County Courthouse, 218 South 2nd Street, Ft. Pierce, FL 34950 on **September** 17 **, 2015.**

VICTOR BRANCACCIO
INMATE # 306050
Florida State Prison (Male)
7819 N.W. 228th Street
Raiford, Florida 32026-1000

CERTIFICATE OF SERVICE

I, VICTOR BRANCACCIO, certify that a true and correct copy of the foregoing was mailed to the Clerk of Court, St. Lucie County, 201 South Indian River Drive, Ft. Pierce, FL 34950; The Office of the State Attorney, 411 South Second Street, Ft. Pierce, FL 34990; and Honorable Judge Belanger, St. Lucie County Courthouse, 218 South 2nd Street, Ft. Pierce, FL 34950 on **September** 17 **, 2015.**

VICTOR BRANCACCIO
INMATE # 306050
Florida State Prison (Male)
7819 N.W. 228th Street
Raiford, Florida 32026-1000

Filing # 38666564 E-Filed 03/07/2016 10:28:49 AM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA	)	Case No. 561993CF0001592A
	)	
-VS-	)	
	)	
Victor Brancaccio	)	
Defendant(s)	)	

UNOPPOSED MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONER'S SECOND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this unopposed motion for extension of time to respond to the petitioner's second successive Motion for Post-Conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 and 3.800.

I. The Petitioner's Motion for Relief

The petitioner was convicted on February 19, 1999, of First Degree Murder and Kidnapping With a Weapon. He was sixteen years old at the time he committed the crimes. The court sentenced him to life in prison with a possibility of parole after twenty-five year years for the murder and life in prison without parole for the kidnapping with a weapon. Brancaccio v. State, 698 So.2d 597 (Fla. 4th Dist. Ct. App. 1997). His convictions became final on November 13, 2001, when the United States Supreme Court declined to accept his petition for certiorari. He filed his initial Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850 on March 21, 2006. The trial court denied that motion and the Fourth District Court of Appeal affirmed its decision on February 10, 2010. Brancaccio v. State, 27 So.3d 739 (Fla. 4th Dist. Ct. App. 2010).

The petitioner filed a successive motion for post-conviction relief on November 13, 2012, and amended that motion on January 17, 2013. In his successive motion the petitioner alleged that his sentence of life with the possibility of parole after twenty-five years for the first degree murder of Mollie Frazier, and his sentence of life without the possibility of parole for her kidnapping, violated the Eighth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in Miller v. Alabama, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48 (2010). The court denied the successive motion on March 4, 2013. The petitioner did not appeal the decision.

The petitioner asserts in his second successive motion that his petition is timely and that the United States Supreme Court opinions in Graham v. Florida, 130 S.Ct. 2011 (2010), and Miller v. Alabama, 132 S.Ct. 2455 (2012) entitle him to re-sentencing on his convictions for kidnapping with a weapon and first degree murder.

II. The Petitioner's Kidnapping Sentence

The State agrees with the petitioner that his life without parole sentence violates Graham v. Miller, and he is entitled to resentencing. Lawton v. State, 181 So.3d 452 (Fla. 2015).

III. The Petitioner's Murder Sentence

The Fourth District Court of Appeal held that Miller does not apply to defendants who were sentenced to life with the possibility of parole after twenty-five years. Atwell v. State, 128 So.3d 167 (Fla. 4th Dist. Ct. App. 2013). Atwell was sentenced to life without the possibility of parole for twenty-five years for a first degree murder he committed in 1992, when he was sixteen years old. Id. at 168. In 2013 he filed a motion for post-conviction relief, arguing that Miller was retroactive and applied to his case. Id. at 168-169. The trial court denied the motion. Id. The

Fourth District Court of Appeal found it was unnecessary to reach the issue of retroactivity because on its face Miller did not apply to his sentence:

> Without deciding the issue of whether *Miller* applies retroactively, we conclude that *Miller* is inapplicable because *Miller* applies only to a mandatory sentence of life *without the possibility of parole.* The holding of *Miller* could not be more clear: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S.Ct. at 2469. In reaching this holding, the Court relied on its prior decision in *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), where it held that a sentence of life without the possibility of parole is unconstitutional when imposed on a juvenile for a non-homicide offense. In announcing the holding in *Miller,* the Court quoted portions of *Graham* which state: " 'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller,* 132 S.Ct. at 2469 (quoting *Graham,* 130 S.Ct. at 2030). It is clear that the underpinning of the holding of both *Miller* and *Graham* was the ineligibility for release on parole.
>
> Appellant was not sentenced to life *without the possibility of parole* for his murder conviction. The sentencing scheme in place at the time of appellant's offense did not require a mandatory sentence of life without parole for the murder. *Miller* is inapplicable, and appellant would not be entitled to relief even if *Miller* applies retroactively.

Atwell v. State, 128 So. 3d 167, 169 (Fla. Dist. Ct. App. 2013), review granted, 160 So. 3d 892

(Fla. 2014). The Fourth District reaffirmed Atwell in a memorandum opinion issued in Graham v. State, 143 So.3d 953 (Fla. 4th Dist. Ct. App. 2013). See also McPherson v. State, 138 So.3d 1201 (Fla. 2nd Dist. Ct. App. 2014).

The petitioner in the instant case was sentenced for a homicide he committed in 1993. Florida Statute 775.082(1) in effect at that time specified that persons "convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole …" Fla. Stat. 775.082(1), Fla. Stat. (1993). The defendant therefore was not sentenced to a life without parole sentence, and his sentence falls within the rule announced in Atwell. The Florida Supreme Court has accepted review in Atwell, however, and may decide the issue favorably to the petitioner.

IV. Request for Extension of Time

The petitioner is entitled to resentencing for his kidnapping conviction in accordance with Florida Statute 921.1401. Depending upon the Florida Supreme Court's decision in Atwell, he may be entitled to resentencing on his murder conviction as well. Rather than consume judicial resources on two potential sentencing proceedings, the State respectfully requests that the court grant this request for an extension of time to respond to the petitioner's motion until 15 days after the Florida Supreme Court issues a decision in Atwell. The undersigned has spoken to Richard Kibbey, counsel for the petitioner, and he has no objection to this request for an extension of time.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Richard Kibbey, Esq., attorney for petitioner, 416 Camden Avenue, Stuart, FL 34994 through electronic service at kibbey@kibbeylaw.com.

Respectfully submitted,
BRUCE H. COLTON, State Attorney

BY: /s/ Ryan L. Butler
Ryan L. Butler
Assistant State Attorney
Florida Bar No: 0018287
411 South Second Street
Ft. Pierce, FL 34950
(772) 462-1300
rbutler@sao19.org

Filing # 41954075 E-Filed 05/25/2016 12:34:30 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY STATE OF FLORIDA

STATE OF FLORIDA, Case No. 561993CF0001592A

Plaintiff,

vs.

VICTOR BRANCACCIO,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE came on to be heard in open court, and the Court, being fully advised of the facts and law of this issue and aware of stipulation between the State of Florida and the Defendant that this Court grant the relief ordered herein, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Post-Conviction Relief is hereby **GRANTED** to the extent that:

1. Defendant Victor Brancaccio is entitled to be resentenced on the charge of Kidnapping with a Weapon. The Court reserves jurisdiction to decide whether the Defendant's request for resentencing on his conviction for 1st Degree Murder is required by law.

2. This resentencing hearing shall be scheduled once the Florida Supreme Court renders its decision in the case of Atwell v. State, 160 So.3d 892 (Fla. 2014).

DONE AND ORDERED at Fort Pierce, Florida this 25 day of May 2016.

Honorable Robert Belanger
Circuit Judge

Copies furnished to:
Richard D. Kibbey, Esq. – kibbey@kibbeylaw.com
Counsel for Defendant Victor Brancaccio

Ryan Butler – sa19eService@sao19.org
Office of the State Attorney
The Justice Administrative Commission – pleadings@justiceadmin.org

Served via E-Portal/lmv

Filing # 46948386 E-Filed 09/27/2016 10:04:42 AM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	Case No. 561993CF0001592A
-VS-	)	
	)	
Victor Brancaccio	)	
Defendant(s)	)	

STATE'S RESPONSE TO PETITIONER'S SECOND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, who files this response to the petitioner's second successive Motion for Post-Conviction relief pursuant to Florida Rules of Criminal Procedure 3.850 and 3.800.

I. The Petitioner's Motion for Relief

The petitioner was convicted on February 19, 1999, of First Degree Murder and Kidnapping With a Weapon. He was sixteen years old at the time he committed the crimes. The court sentenced him to life in prison with a possibility of parole after twenty-five year years for the murder and life in prison without parole for the kidnapping with a weapon. Brancaccio v. State, 698 So.2d 597 (Fla. 4th Dist. Ct. App. 1997). His convictions became final on November 13, 2001, when the United States Supreme Court declined to accept his petition for certiorari. He filed his initial Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850 on March 21, 2006. The trial court denied that motion and the Fourth District Court of Appeal affirmed its decision on February 10, 2010. Brancaccio v. State, 27 So.3d 739 (Fla. 4th Dist. Ct. App. 2010).

The petitioner filed a successive motion for post-conviction relief on November 13, 2012,

and amended that motion on January 17, 2013. In his successive motion the petitioner alleged that his sentence of life with the possibility of parole after twenty-five years for the first degree murder of Mollie Frazier, and his sentence of life without the possibility of parole for her kidnapping, violated the Eighth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in Miller v. Alabama, 132 S.Ct. 2455 (2012), and Graham v. Florida, 560 U.S. 48 (2010). The court denied the successive motion on March 4, 2013. The petitioner did not appeal the decision.

The petitioner asserts in his second successive motion that his petition is timely and that the United States Supreme Court opinions in Graham v. Florida, 130 S.Ct. 2011 (2010), and Miller v. Alabama, 132 S.Ct. 2455 (2012), entitle him to re-sentencing on his convictions for kidnapping with a weapon and first degree murder. On March 7, 2016, the State conceded that the petitioner was entitled to resentencing on his conviction for kidnapping. The Court permitted the State to file this response when the Florida Supreme Court's opinion in Atwell v. State, 2016WL 3010795 (Fla. May 26, 2016) became final. The Court issued its mandate in Atwell on August 23, 2016, and the Attorney General did not seek a petition for certiorari with the United States Supreme Court.

II. The Petitioner's Murder Sentence

In light of the decision in Atwell, the State agrees with the petitioner that he is entitled to resentencing pursuant to Florida Statute 921.1401. The State asks that this matter be set for a status conference so that a sentencing date may be set and this case may proceed expeditiously.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Richard Kibbey, Esq., attorney for petitioner, 416 Camden Avenue, Stuart, FL 34994 through electronic service at kibbey@kibbeylaw.com this 27th day of September, 2016.

Respectfully submitted,
BRUCE H. COLTON, State Attorney

BY: /s/ Ryan L. Butler

Ryan L. Butler
Assistant State Attorney
Florida Bar No: 0018287
411 South Second Street
Ft. Pierce, FL 34950
(772) 462-1300
rbutler@sao19.org

Filing # 75011917 E-Filed 07/16/2018 03:38:38 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR SAINT LUCIE COUNTY, FLORIDA

STATE OF FLORIDA	)	
	)	Case No. 93-1592 CF
-VS-	)	
	)	
Victor Brancaccio	)	
Defendant(s)	)	

STATE OF FLORIDA'S NOTICE OF SUPPLEMENTAL AUTHORITY AND OBJECTION TO RESENTENCING ON COUNT I

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and files this notice of supplemental authority and objection to resentencing on Count 1 of the indictment.

1. On July 12, 2018, the Florida Supreme Court held in *State v. Michel*, SC16-2187 (Fla. July 12, 2018), that juveniles sentenced to life in prison with the possibility of parole after twenty-five years are not entitled to resentencing pursuant to Florida Statute 921.1401:

> 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.

Op. at 9.

2. The Court in *Michel* overruled *Atwell v. State*, 197 So.3d 1040 (Fla. 2016).

3. In light of *Michel*, the defendant is not eligible for re-sentencing on count I of the

indictment (first degree murder), since he was sentenced to life with the possibility of parole after twenty-five years. The state therefore objects to resentencing on this count.[1]

Respectfully submitted,
BRUCE H. COLTON, State Attorney

BY:/s/ Ryan L. Butler
Ryan L. Butler
Assistant State Attorney
Florida Bar No: 0018287
411 South Second Street
Ft. Pierce, FL 34950
(772) 462-1300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Richard Kibbey, Esq., attorney for petitioner, 416 Camden Avenue, Stuart, FL 34994 through electronic service at kibbey@kibbeylaw.com.

/s/ Ryan L. Butler

[1] The State submits that it would be prudent to defer final action on count I until the mandate issues in *Michel* and any petitions to the United States Supreme Court are resolved.

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

STATE OF FLORIDA

vs.

VICTOR BRANCACCIO,

Defendant.
_____/

FELONY DIVISION
CASE NO.: 561993CF1592A

ORDER DENYING RESENTENCING AS TO COUNT I (MURDER) AND RESENTENCING ORDER AS TO COUNT II (KIDNAPPING)

THIS CASE came before the Court in chambers on the Defendant's motion filed February 16, 2017. The Court finds and orders as follows.

Following his retrial, on February 19, 1999, the Defendant was convicted of first degree murder (count 1) and kidnapping with a weapon (count 2). The Defendant was sentenced to life in prison with a possibility of parole after twenty-five years on count 1 and life in prison without the possibility of parole on count 2. The judgment and sentence were affirmed on appeal. *Brancaccio v. State*, 773 So.2d 582 (Fla. 4th DCA 2000).

On May 25, 2016, the Defendant was granted a resentencing on count 2 after filing a successful post-conviction motion. The Court reserved ruling on whether the Defendant was entitled to resentencing on count 1. On September 27, 2016, the State supplemented its response and conceded to resentencing on count 1. On January 16, 2018, this Court presided over a resentencing hearing on both counts and requested written final arguments.

On July 12, 2018, the Florida Supreme Court entered its decision in *State v. Michel*, SC16-2187, holding that juvenile offenders' sentences of life with the possibility of parole

after twenty-five years do not violate the Eighth Amendment and such juvenile offenders are not entitled to resentencing under §921.1402, Fla. Stat. On July 24, 2018, the State withdrew its concession to resentencing on count 1. Having denied rehearing on July 27, 2018, the *Michel* Court issued its mandate on November 15, 2018.

This Court has carefully considered the arguments of counsel concerning the non-binding *Michel* authority. This Court adopts the reasoning of the plurality opinion in *Michel* to find that this Defendant is not entitled to juvenile resentencing on count 1. *See also Franklin v. State*, SC14-1442 (Fla. November 8, 2018) (adopting the reasoning of the plurality opinion in *Michel* and finding that Florida's statutory parole process fulfills *Graham's* requirement that juveniles be given a meaningful opportunity for release during their natural life based upon normal parole factors that include individualized considerations before the Florida Parole Commission that are subject to judicial review). However, the Defendant is still entitled to be resentenced on count 2 for kidnapping with a weapon for which he was sentenced to life in prison without the possibility of parole.

It is hereby ORDERED as follows:

1. The Defendant's motion for post-conviction relief is DENIED to the extent that he is not entitled to be resentenced on count 1. Any order granting resentencing on count 1 is VACATED.

2. The Defendant's resentencing on count 2 is set forth below.

FACTS

On June 11, 1993, a mentally unstable teenager ended the life of Mollie Frazier, an elderly woman, in a moment of frenzied, uncontrolled rage. After an argument with his mother, the Defendant went for a walk, listening to and rapping along to a profane song.

Mrs. Frazier was standing outside her house when the Defendant walked by, repeating the offensive lyrics. She told the Defendant to stop because the words were obscene, and because it was a nice neighborhood. This angered the Defendant and he told her to shut up or he would hit her. Again, Mrs. Frazier told him not to curse or she would call the police. Unable to control his spontaneous rage, the Defendant hit her in the face. She began to bleed and offered the Defendant a tissue to wipe the blood from his own hands which he angrily rejected.

Fearing that a passing car had seen him, or that Mrs. Frazier would tell authorities about the attack and he would go to jail, he kidnapped her by dragging her over a berm where he continued to beat her until she was unconscious. He disregarded her pleas and prevented her from escaping. When he finished, he left her there and returned home to wash her blood off his hands. He changed his clothes and watched through his window for an ambulance. He then told a number of friends that he had killed an elderly woman and was going to flee the state. To hide his actions, he returned to the scene and spray-painted her body with red paint in a failed attempt to cover his fingerprints. He also then attempted to set her body on fire. He threw a toy gun used in the attack into a lake and retrieved his Walkman. He was eventually arrested, tried, and convicted of First Degree Murder and Kidnapping with a Weapon. On February 19, 1999, he was sentenced to life in prison with a mandatory minimum of twenty-five years for the murder of Mollie Frazier and life without the possibility of parole for her kidnapping. To date, he has spent 879 days in the county jail and approximately 19 years in prison.

Legal Background

Following the United States Supreme Court decisions, the Florida Legislature

created sentencing procedures which require the Court to consider certain factors in determining whether a life sentence is appropriate as to count 2. Florida Statute §921.1401 reads:

> (2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:
>
> (a) The nature and circumstances of the offense committed by the defendant.
>
> (b) The effect of the crime on the victim's family and on the community.
>
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
>
> (d) The defendant's background, including his or her family, home, and community environment.
>
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
>
> (f) The extent of the defendant's participation in the offense.
>
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
>
> (h) The nature and extent of the defendant's prior criminal history.
>
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
>
> (j) The possibility of rehabilitating the defendant.

Analysis

(a) The nature and circumstances of the offense committed by the defendant.

The offense was a savage and vicious attack. The Defendant had gone for a walk after arguing with his mother. As he walked down the street, he sang along to a profane rap song. When the victim told him to stop, he flew into a rage. He pulled her into a field and brutally murdered her by beating her with his fists and a toy gun. He continued to pummel her even after she tried to give him a tissue to wipe off the blood on his hands. Testimony revealed that the victim had so many broken ribs, she could not breathe, and actually died from asphyxiation. He left her body, and after telling a friend what he had

done, returned to the scene to check if she was still alive. He then defaced her body with spray paint in an attempt to hide his fingerprints. He also attempted to burn her corpse and her clothing. Testimony suggests he had been drinking alcohol prior to the initial attack.

At the time the Defendant was taking Zoloft, an antidepressant medication. The effects of this medication on juveniles was not known at the time. However, it has since been shown to sometimes cause agitation and violent behavior. Expert testimony suggests that Zoloft may have been a factor in causing the Defendant to commit this crime.

Furthermore, expert testimony and psychological evaluations conducted on the Defendant determine he had a low IQ and several behavioral disorders. These may have also played a factor in the Defendant's actions, in particular when combined with Zoloft and alcohol.

(b) The effect of the crime on the victim's family and on the community.

The crime shocked the community. Residents were outraged that such a crime could occur in St. Lucie West. One of the trials was broadcast on Court TV. The victim's family was devastated by the loss of a wife, mother and grandmother. Mrs. Frazier's daughter made statements to the court and wrote letters about this loss. The court fully appreciates the enormity of the loss suffered by Mrs. Frazier's family.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

At the time of the offense, the Defendant was 16 years old. Expert testimony,

personal history and psychological evaluations conducted on the Defendant revealed he had a brain injury as the result of being anoxic at birth (oxygen deprived) and nearly drowning at age two, also causing an anoxic event.

As a result, he has a below average IQ and a below average emotional intelligence. His IQ is just above "mental retardation." He had an eighth-grade education at the time of the offense and struggled academically. His school wanted to hold him back in kindergarten but allowed him to move on at the behest of his parents. However, he failed first grade. He was in special education programs by the time he was in second grade. Throughout his education he was only able to achieve C and D grades. He dropped out of school in the ninth grade due to behavior problems. Furthermore, his ability to think, reason, and conceptualize was characterized as in the "mentally retarded range."

He also suffered from depression and had previously attempted suicide. He has been Baker Acted for telling police officers he would harm himself and his family. He has had inpatient and outpatient treatment for depression and was being medicated for depression with Zoloft, which has been shown to cause agitation and violent behavior. He began medicating his depression with Zoloft while receiving treatment at Savannah's Hospital. There it was reported that before the Zoloft he felt hopeless, sad, and isolated, yet pleasant. After taking Zoloft, he exhibited signs of lethargy, disruptive and defiant behavior, an inability to concentrate, and frequent instances of hyperactive, angry and rude outbursts.

(d) The defendant's background, including his or her family, home, and community environment.

The Defendant grew up in a loving Italian-American family in the affluent suburb St. Lucie West in Port St. Lucie. He had an older brother who tended to pick on him and

bully him. Although he worked in his parents' restaurant after dropping out of school, he had a rocky relationship with them. He often fought with both his parents and with his brother. His parents were married but because they ran their own restaurant, his father was frequently unavailable due to work. The Defendant also began abusing alcohol at a young age and experimented with drugs including cocaine and hallucinogens. His drug of choice, however, was cannabis.

The Defendant experienced behavioral problems and dropped out in the ninth grade. He was purportedly frustrated with his special education classes and it played a factor in dropping out. His parents enrolled him in several different schools throughout his adolescence to find a school that could manage his academic and behavioral issues. They were unsuccessful. He also spent time in mental health institutions for depression and required medication to manage it.

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

The Defendant's low IQ and "retarded" ability to think, conceptualize, and reason influenced his participation in the offense. He likely did not fully think through what he was about to do and consider the predictable consequences. His exposure to Zoloft also may have clouded his judgment and compelled him to act out angrily and violently. That the Defendant told his friends about the offense suggests he did not appreciate the risks and consequences of what he had done. The attack was characterized as a frenzy, which suggests the Defendant did not contemplate or consider the risks and consequences of his actions.

His thought processes at the time of the attack were impaired to the point that they were described as "primary process thinking." That is, he was unable to appreciate the

risks and consequences and was not able to grasp what was taking place at the time. However, the Defendant's attempt to cover up his involvement in the crime shows a measure of calculated and rational thinking. Nonetheless, his methods were ineffective, unsophisticated, almost ridiculous.

(f) The extent of the defendant's participation in the offense.

The Defendant was the sole participant in the offense and he did actually kill the victim.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

The Defendant was alone when he committed the offense. There is no evidence that suggests the Defendant was being pressured or influenced by anyone to commit the offense.

(h) The nature and extent of the defendant's prior criminal history.

The Defendant has a short juvenile record. In 1992, he was involved in a fight with another juvenile in a park. Adjudication was withheld in that case. In 1993, he was arrested for Petit Theft/Shoplifting after stealing a case of beer from a convenience store. He received a non-judicial disposition in that case.

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

At the time of the offense, the Defendant was 16 years old. At this age, areas of the brain that control decision making, weighing risks and benefits, and anticipating consequences have been shown to be underdeveloped. Other areas of the brain that manage emotions and feelings are also not fully developed. Furthermore, a middle teenager would feel strong emotions with more intensity than at a younger or older age.

Even a normal teenager without mental illness or deficiencies can experience highly intense emotions that could lead to impulsive and poorly planned actions.

(j) The possibility of rehabilitating the defendant.

Testimony revealed that the Defendant is remorseful about what he did and becomes emotional when discussing the offense. The sincerity of his expressed remorse is impossible to determine. His family members report that the Defendant has said he hopes the victim is at peace.

While incarcerated, the Defendant has emotionally matured to a degree, but is still below his age level due to his cognitive impairment.

He has been unable to achieve his GED due to his learning disabilities and his ineligibility for GED programs because of his life sentence. He has also not been eligible for any other vocational programs through the Department of Corrections. His past preclusion from these programs should not prevent him from benefitting from them now if given the opportunity.

The structured prison environment and cessation of Zoloft, alcohol, and marijuana have allowed him to be a compliant prisoner. He has relatively few DRs, only one of which was issued in response to a violent incident. He is not involved with prison gangs or prison violence.

A psychological evaluation concludes he is at a moderate risk for future violence, but has an optimistic prognosis for rehabilitation. Rehabilitation would require anger management therapy, substance abuse counseling, and counseling to help him understand his future risk factors. He would also need an education program to complete his GED and vocational training. He seems to have good family support, a place to live

upon release, a job waiting for him at his parents' restaurant, and a desire to improve his life. However, he still has some maturing to do and still needs to work on understanding what triggers him to be violent. Moreover, the Defendant has emotional and intellectual deficiencies that will never get better because they are caused by brain injury. They will always impact his ability to make mature and responsible decisions. He has come a long way in rehabilitation, but it is not complete. Nonetheless, rehabilitation is not impossible for the Defendant.

Discussion

The Defendant was a mentally ill and emotionally unstable 16-year-old when he committed this brutally violent crime. By any rational evaluation, the attack was unprovoked. He did not live in a bad neighborhood where prevailing violent influences could have inspired him to commit this crime. Rather, it was a mixture of mental and emotional deficiencies caused by brain injury, alcohol, drug side effects, a recent argument with his mother, and being told what to do by an elderly woman that triggered him into the frenzied attack.

All of the experts agreed that the Defendant was not psychopathic. In fact, the evidence shows few other instances of violence in his life. The Defendant was a teenager when he committed the crime. Science shows that juveniles are less blameworthy than adults. They experience emotions much more intensely than do adults. In the Defendant's case, this natural juvenile experience was magnified by his reaction to Zoloft, alcohol, and the previously described mental deficiencies.

The Defendant did actually kill another human being, but the Court is constrained by clear controlling authority to punish for life only those juvenile offenders who are

hopelessly incorrigible and lack any prospect of rehabilitation. The Defendant has experienced some rehabilitation while in prison, but more is required before he can re-enter society. Unfortunately, he was not able to enter the necessary programs due to his sentence. Thus, the Defendant should be given an opportunity to continue and enhance his rehabilitation in prison.

Although the Defendant does not fit the definition of a juvenile deserving of life, he does still require the stringent structure of incarceration to further his rehabilitation. He is also in need of a lengthy term of probation to ensure his sobriety, his mental and emotional health and to more fully assimilate the coping mechanisms he has learned and will learn while incarcerated. The Defendant was 21 years old when he was sentenced. When released following this resentencing, he will have spent 2.41 years in county jail and many more in state prison.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendant's prior sentence, as to count 2, is vacated and set aside. It is further

ORDERED AND ADJUDGED that the conviction and adjudication as to count 2 remain valid and intact. It is further

ORDERED AND ADJUDGED that pursuant to Fla. Stat. 775.082(3)(a) on count 2, the Defendant is to be remanded into the custody of the Florida Department of Corrections for a period of 40 years, to run concurrently with the sentence imposed on count 1. It is further

ORDERED AND ADJUDGED that as to count 2, Defendant will be entitled to a judicial review of his sentence after 25 years as provided by Fla. Stat. 921.1402(2)(6). It

is further

ORDERED AND ADJUDGED that Defendant is entitled to 879 days jail credit in addition to all time served in state prison and unforfeited gain time as computed by the Florida Department of Corrections. All original fees, costs, and assessments will be reassessed and reduced to a civil judgment and lien.

ORDERED AND ADJUDGED that as to count 2, the Defendant's incarceration shall be followed by 2 years of GPS monitored community control, followed by 13 years of probation. All 15 years of supervision shall be subject to the following special conditions: mental health evaluation and compliance with recommended treatment, substance abuse evaluation and compliance with recommended treatment, abstinence from alcohol and any illegal drugs, and random urinalysis.

Defendant is hereby advised that he has thirty (30) days from today's date to file a notice of appeal, and if unable to retain counsel, a public defender will be appointed for him.

DONE AND ORDERED at Ft. Pierce, St. Lucie County, Florida, on the 14th day of March, 2019.

GARY L. SWEET
Circuit Judge

cc: ASA | Via E-Service
Counsel for Defendant | Via E-Service

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

CASE NO. 4D19-889

VICTOR BRANCACCIO,
Appellant

V.

STATE OF FLORIDA,
Appellee

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF THE CASE AND FACTS

In 1993, appellant committed first-degree murder and kidnapping with a weapon. R 29. He was 16 years old. R 29. He was sentenced in 1999 to life imprisonment on each offense (the sentence for first-degree murder has parole eligibility after 25 years).[1] R 26.

In 2012, appellant moved to correct his sentences pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010). R 25. The trial court denied the motion, however, because at that time the First and Third Districts had held that *Miller* was not retroactive,[2] and there was a split of authority

[1] This Court reversed appellant's first conviction on the ground that the trial court erred in refusing to instruct the jury on appellant's involuntary intoxication defense. *Brancaccio v. State*, 698 So. 597 (Fla. 4th DCA 1997). There was strong evidence that the killing in this case was the result of appellant's use of Zoloft, which was negligently prescribed to him when he was Baker acted. *See Brancaccio v. Mediplex Management of Port St. Lucie, Inc.*, 711 So. 2d 1206 (Fla. 4th DCA 1998). This Court affirmed appellant's second conviction. *Brancaccio v. State*, 773 So. 2d 582 (Fla. 4th DCA 2001). When further evidence was discovered concerning the dangerous side effects of Zoloft on minors, appellant filed a motion for postconviction relief. The trial court denied the motion and this Court affirmed. *Brancaccio v. State*, 27 So. 3d 739 (Fla. 4th DCA 2010).

[2] *Geter v. State*, 115 So. 3d 375 (Fla. 3d DCA 2012), *quashed*, 177 So. 3d 1266 (Fla. 2015), and abrogated by *Falcon v. State*, 162 So. 3d 954 (Fla. 2015); *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st DCA 2012), *quashed*, 177 So. 3d 1266 (Fla. 2015).

on whether *Graham* applied to juvenile offenders who commit both homicide and non-homicide offenses.[3] R 114-17.

Three years later, in 2015, appellant filed another motion for postconviction relief. R 218-23. By now, most of the dust had settled on juvenile resentencings. The State agreed that appellant was entitled to resentencing on his kidnapping offense, and it said that whether he was entitled to resentencing on the murder count depended on the disposition of *Atwell v. State*, 128 So. 3d 167 (Fla. 4th DCA 2013), *rev. granted* 160 So. 3d 892 (Fla. 2014). The trial court agreed with the State and entered an order that stated appellant was entitled to resentencing on his kidnapping offense and that the resentencing would be scheduled after the supreme court decided *Atwell*. R 304. A day after that order was filed, the Supreme Court decided *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), and ruled that juvenile offenders with parole-eligible sentences were entitled to resentencing under the new juvenile sentencing statutes.

In light of *Atwell*, the State filed a response to appellant's motion for postconviction relief and agreed that appellant was entitled to resentencing on both

[3] *Washington v. State*, 110 So. 3d 1 (Fla. 2d DCA 2012), *disapproved of by Lawton v. State*, 181 So. 3d 452 (Fla. 2015); *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012). This Court also held that *Graham* did not apply in that situation. *Orange v. State*, 149 So. 3d 74, 85 (Fla. 4th DCA 2014), *quashed*, 41 Fla. L. Weekly S81 (Fla. Feb. 9, 2016), *disapproved of by Lawton v. State*, 181 So. 3d 452 (Fla. 2015).

counts. R 313-15. Two months later, in November 2016, defense counsel filed a motion for appointment of a neuropsychologist to evaluate appellant "for purposes of [his] forthcoming sentencing hearing…." R 319-21. In January 2017, the trial court entered an order that stated, "Juvenile resentencing has been granted in this case." R 330. It noted, however, that the motion for neurological evaluation was legally insufficient and it required defense counsel to file a response addressing those deficiencies. R 331-32. (After defense counsel did so, the trial court granted the motion. R 538-39.)

For the next year (i.e., all of 2017), the parties prepared for resentencing, as evidenced by the motions and orders for expert and investigative fees. *See*, *e.g.*, R 548 (expert), 558 (mitigation support), 572 (psychological testing).

A resentencing hearing was held on both counts on January 16, 2018, and January 17, 2018. R 1108, 1365. The trial court heard from family members (appellant's and the victim's), experts, and appellant himself. At the conclusion of the sentencing hearing, the trial court asked for written closing arguments. R 1479.

Defense counsel filed a sentencing memorandum in February 2018, and the State filed one in March 2018. R 807, 828.

When the supreme court issued *State v. Michel*, 257 So. 3d 3 (Fla. 2018), *cert. denied*, 139 S. Ct. 1401 (2019), in July 2018 the State filed it as supplemental authority and objected to resentencing on count one on the authority of that case. R

954-55. Defense counsel filed a response and argued that the State had waived any objection to sentencing by 1) agreeing that appellant was entitled to resentencing, 2) not objecting to resentencing, and 3) not appealing the trial court's order granting resentencing. R 989. Defense counsel also argued that it would be a manifest injustice to deny appellant resentencing and that *State v. Michel*, a 3-1-3 decision, was of no precedential value. R 990-93.

The State filed a memorandum and argued that *State v. Michel* was binding precedent. R 995-1009. In November 2018, the State filed *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), as supplemental authority. R 1020. *Franklin* was a 4-3 decision, so that mooted the question of *Michel's* precedential value.

On March 14, 2019, appellant was before the court for sentencing. R 1481. Defense counsel argued, among other things, that the trial court lost jurisdiction to set aside its order granting post-conviction relief and that it would be a manifest injustice to do so. R 1483-44.

The trial court denied resentencing on count one on the authority of *Michel* and *Franklin*. R 1066, 1493. In a thoughtful order, the trial court sentenced appellant on count two to 40 years in prison with a review hearing after 20 years. R 1066-77, 1084, 1506; SR 1833.

Appellant filed a timely notice of appeal. R 1089. Fla. R. App. P. 9.140(b)(3). This Court has jurisdiction to review a criminal judgment and

sentence under article V, section 4(b)(1), Florida Constitution; Florida Rule of Appellate Procedure 9.140(b)(1)(A); and section 924.06(1), Florida Statutes. 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

The trial court lost jurisdiction to set aside its order granting appellant a resentencing hearing. This case is controlled by *Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019).

POINT II

Appellant was entitled to be resentenced on count one for over two years. But he wasn't resentenced. 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.

POINT III

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 IV

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.

ARGUMENT

POINT I

THE TRIAL COURT LOST JURISDICTION TO SET ASIDE ITS ORDER GRANTING APPELLANT'S MOTION FOR POSTCONVICTION RELIEF. THIS CASE IS CONTROLLED BY *JONES V. STATE*.

After appellant filed his motion for postconviction relief in 2015 (R 218-23), the State agreed that appellant was entitled to resentencing on his kidnapping offense, and it said that whether he was entitled to resentencing on the murder count depended on the disposition of *Atwell v. State*, 128 So. 3d 167 (Fla. 4th DCA 2013), *rev. granted* 160 So. 3d 892 (Fla. 2014). The trial court agreed with the State. It entered an order that stated appellant was entitled to resentencing on his kidnapping offense and that the resentencing hearing would be scheduled after the supreme court decided *Atwell*. R 304. A day after that order was filed, the Supreme Court decided *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), and ruled that juvenile offenders with parole-eligible sentences like appellant were entitled to resentencing under the new juvenile sentencing statutes.

In light of *Atwell*, the State agreed that appellant was entitled to resentencing on both counts. R 313-15. Two months later, in November 2016, defense counsel filed a motion for appointment of a neuropsychologist to evaluate appellant "for purposes of [his] forthcoming sentencing hearing…." R 319-21. On January 23,

2017, the trial court entered an order that stated, "Juvenile resentencing has been granted in this case." R 330.

The trial court lost jurisdiction to set aside that order, which it did over two years later. Although the order was titled, "Order Requiring Defense Response," labels do not control. *See Zabawa v. Penna*, 868 So. 2d 1292, 1293 (Fla. 5th DCA 2004); *Shephard v. State*, 854 So. 2d 251, 252 (Fla. 5th DCA 2003). An order is defined as a "decision, order, judgment, decree, or rule of a lower tribunal, excluding minutes and minute book entries." Fla. R. App. P. 9.020(f); *State v. Francis*, 954 So. 2d 755, 757 (Fla. 4th DCA 2007); *State v. Tremblay*, 642 So. 2d 64, 65 (Fla. 4th DCA 1994). Here the trial court's January 23, 2017, order was a written memorialization of what the parties understood and agreed to: appellant was entitled to be resentenced. The order did this "explicitly, on its face…." *Florida Agency for Health Care Admin. v. McClain*, 244 So. 3d 1147, 1148 (Fla. 1st DCA 2018). Moreover, this written memorialization was signed by the trial court and filed with the clerk of court. *See* Fla. R. App. P. 9.020(h) ("An order is rendered when a signed, written order is filed with the clerk of the lower tribunal."). Thus, unlike in *Davis v. State*, 44 Fla. L. Weekly D2348 (Fla. 4th DCA Sept. 18, 2019), in the case at bar the trial court *did* enter an order granting resentencing. Again, the court wrote in its order, "Juvenile resentencing has been granted in this case." R 330.

For that reason, this Court's decision in *Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019), and the First District's decision in *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DCA 2019), are on point and require reversal.[4] *See also White v. State*, 44 Fla. L. Weekly D2895 (Fla. 4th DCA Dec. 4, 2019); *Scott v. State*, 44 Fla. L. Weekly D2795 (Fla. 4th DCA Nov. 20, 2019); *German v. State*, 44 Fla. L. Weekly D2748 (Fla. 4th DCA Nov. 13, 2019).

In *Jones*, the trial court entered an order vacating the sentence pursuant to *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). More than a year later, the State objected to the resentencing on the authority of *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), and *State v. Michel*, 257 So. 3d 3 (Fla. 2018), *cert. denied*, 139 S. Ct. 1401 (2019). The trial court agreed with the State and vacated its initial resentencing order. Jones appealed and this Court reversed.

Relying on *Simmons*, this Court held that "[t]he order granting resentencing became final when neither party moved for rehearing or appealed that order." *Jones*, 279 So. 3d 174. Therefore, the trial court "lacked jurisdiction to rescind its first 'final' resentencing order." *Id*. (citing *Simmons*, 274 So. 3d at 470-72). *Id*. This Court reversed and remanded "with directions that the trial court reinstate the order granting resentencing" and resentence the defendant. *Id*.

[4] This issue concerns a trial court's jurisdiction to set aside its order. Jurisdictional issues are reviewed de novo. *See Terry v. State*, 263 So. 3d 799, 802 (Fla. 4th DCA 2019).

Likewise, in *Simmons*, the trial court rescinded its order granting a resentencing and denied Simmons's motion to correct sentence. Simmons appealed, arguing that the trial court lost jurisdiction to set aside its order and therefore he was entitled to resentencing. The First District agreed with Simmons and reversed. "Because the order granting resentencing became final when neither party moved for rehearing or appealed the order, the trial court had no authority to enter a second order rescinding the original order." *Simmons*, 274 So. 3d at 470. (It is worth mentioning that Mr. Simmons was resentenced and released on August 16, 2019—more than 50 years after his nonhomicide offense. http://www.dc.state.fl.us/OffenderSearch/Search.aspx; DOC# 019690.)

This Court's decision in *German v. State*, 204 So. 3d 90 (Fla. 4th DCA 2016), further supports appellant's argument. In that case, the trial court granted German's motion to correct sentence. Later, however, the trial court granted the State's motion to reconsider its ruling, and it denied the motion. *Id*. at 90. This Court reversed because the State's motion for reconsideration was not filed within 15 days of the order granting German's motion. *Id*. Therefore, the trial court lost jurisdiction to reconsider its order.

Similarly, in *Jordan v. State*, 81 So. 3d 595 (Fla. 1st DCA 2012), the judge granted Jordan's rule 3.800(a) motion to correct sentence. More than two months later, the judge passed away and the State asked the successor judge to reconsider

the order. This was beyond the 15-day time limit for filing a motion for rehearing under rule 3.800(b)(1)(B). *See also* Fla. R. Crim. P. 3.850(j) ("Any party may move for rehearing of any order addressing a motion under this rule within 15 days of the date of the service of the order.")

Over Jordan's objection, the successor judge reconsidered the order and set it aside. Jordan appealed and the State conceded the successor judge was without jurisdiction to set aside the order. Once the judge granted the motion that order was final. *Jordan*, 81 So. 3d at 596. "Accordingly, the order was subject to challenge only by way of a *timely* motion for rehearing or an appeal." *Id*. (emphasis in original). But "the motion seeking reconsideration of the first judge's order was not timely filed and, thus, the second judge lacked jurisdiction to consider the motion." *Id*.

As this Court did in *Jones*, *White*, *Scott*, and *German*, this Court should quash the order on appeal, and remand with directions that the trial court reinstate the order granting resentencing and resentence appellant on count one.

POINT II

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

In addition to his argument in Point I, 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.

POINT III

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 16 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), 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*,[5] 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 Commission that are subject to judicial review, *Michel*, 257 So. 3d at 6 (citing §§ 947.16-.174, Fla. Stat.).

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

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.

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 IV

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.[6] 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):

[6] Appellant's presumptive parole release date is year 2067, when he will be 90 years old. R 1490-91.

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.[7]

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

[7] TEX. BD OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT FY 2017, at 4, available at: https://www.tdcj.texas.gov/bpp/publications/FY%202017%20AnnualStatistical%20Report.pdf

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

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

The parole process begins with the calculation of a "presumptive parole release date." This date is established by selecting the number of months within a matrix time range and adding months for factors that aggravate the "severity of offense behavior." Fla. Admin. Code R. 23-21.010(5)(a)1. The commission's discretion to choose aggravating factors and the number of months to assign those factors is not limited by rule, standard, or guideline. (The aggravating factors listed

in rule 23-21.010(5)(a)1. are examples only.) And it should be self-evident that the commission knows the number of months that an inmate has served and that it assigns the number of months in view of that fact.

The commission may consider whether there are "[r]easons related to mitigation of severity of offense behavior" or "[r]easons related to likelihood of favorable parole outcome…." Fla. Admin. Code R. 23-21.010(5)(b). In keeping with the statutory directive that rehabilitation is not enough, the commission will not consider even "clearly exceptional program achievement" but it may "after a substantial period of incarceration." Fla. Admin. Code R. 23-21.010(5)(b)2.j.

The matrix time range is the intersection of the "salient factor score," which is a "numerical score based on the offender's present and prior criminal behavior and related factors found to be predictive in regard to parole outcome," *Atwell v. State*, 197 So. 3d at 1040, 1047 (Fla. 2016), and the "offender's severity of offense behavior." Fla. Admin. Code R. 23-21.002(27). The only concession that Florida's parole process makes to juvenile offenders is the use of a "Youthful Offender Matrix," which modestly reduces the matrix time ranges. Fla. Admin. Code R. 23-21.009(6). However, this meager reduction is easily nullified by assigning more months in aggravation.

The presumptive parole release date—even if it is within the inmate's lifetime—merely puts the inmate at the base of the mountain. It is not a release

date. "[A] presumptive parole release date is only presumptive. It is discretionary prologue to the Commission's final exercise of its discretion in setting an inmate's effective parole release date." *May v. Florida Parole and Probation Commission*, 424 So. 2d 122, 124 (Fla. 1st DCA 1982) (emphasis in original). It is "only an estimated release date." *Meola v. Department of Corrections*, 732 So. 2d 1029, 1034 (Fla. 1998); § 947.002(8), Fla. Stat. (2018) (stating it is only a "tentative parole release date as determined by objective parole guidelines."). "The Parole Commission reserves the right (and the duty) to make the final release decision when the [presumptive parole release date] arrives." *Meola*, 732 So. 2d at 1034. There are many more steps along the way that can derail an inmate's chance at release.

After the presumptive parole release date is established, a subsequent interview will be conducted to determine if there is new information that might affect that date. Fla. Admin. Code R. 23-21.013; § 947.174(1)(c), Fla. Stat. (2018). After the subsequent interview, the commission investigator will make another recommendation, which the commission is free to reject, and the commission may modify the presumptive parole release date "whether or not information has been gathered which affects the inmate's presumptive parole date." Fla. Admin. Code R. 23-21.013(6).

The next step requires the presumptive parole release date to become the "effective parole release date," which is the "actual parole release date as determined by the presumptive release date, satisfactory institutional conduct, and an acceptable parole plan." § 947.005(5), Fla. Stat. (2018); § 947.1745, Fla. Stat. (2018). The inmate is again interviewed by the commission investigator. Fla. Admin. Code R. 23-21.015(2). The investigator discusses the inmate's institutional conduct and release plan and makes a recommendation. *Id*. If the commission finds that the inmate's release plan is unsatisfactory, it may extend the presumptive parole release date up to a year. Fla. Admin. Code R. 23-21.015(8).

If the commission orders an effective parole release date, it can postpone that date based on an "unsatisfactory release plan, unsatisfactory institutional conduct, or any other new information previously not available to the Commission at the time of the effective parole release date interview that would impact the Commission's decision to grant parole…." Fla. Admin. Code R. 23-21.015(13).

If the effective parole release date is postponed, the commission investigator may conduct a rescission hearing to withdraw it. Fla. Admin. Code R. 23-002(41). Rescission can be based on "infraction(s), new information, acts or unsatisfactory release plan…." Fla. Admin. Code R. 23-019(1)(b).

Following a rescission hearing, the commission may: proceed with parole; vacate the effective parole release date and extend the presumptive parole release

date; or "vacate the prior effective parole release date, and decline to authorize parole…." Fla. Admin. Code R. 23-019(10)(a)-(c).

In addition to the hurdles outlined above, the commission is also authorized to suspend the presumptive parole release date on a finding that the inmate is a "poor candidate" for parole release. Fla. Admin. Code R. 23-0155(1); *Florida Parole Commission v. Chapman*, 919 So. 2d 689, 691 (Fla. 4th DCA 2006). In her dissent in *State v. Michel*, 257 So. 3d 3 (Fla. 2018), Justice Pariente pointed out that the inmate's presumptive parole release date in *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016), had been suspended since 1999. *Michel*, 257 So. 3d at 17-18 (Pariente, J., dissenting). There appear to be no standards governing how long the commission may suspend a parole date.

The touchstone of the United States Supreme Court's juvenile-sentencing jurisprudence is the "basic precept of justice that punishment for crime should be graduated and proportioned tboth the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotation marks omitted). Certain punishments are disproportionate when applied to children because children are different. They lack maturity; they are more vulnerable and easy to influence; and their traits are less fixed, so they are more likely to become responsible, law-abiding adults. *Miller*, 567 U.S. at 471. In short, "because juveniles have lessened culpabilityhey are less deserving of the

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

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

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

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

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

The harm of the substantive deficiencies in the parole process is compounded by its procedural deficiencies. Both deficiencies are made vivid by Florida's juvenile sentencing statutes, enacted in response to *Graham* and *Miller*.

Juvenile homicide offenders serving the more serious sentence of life without the possibility of parole have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Those offenders will be sentenced by judges who "seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society." *Graham*, 560 U.S. at 77. Those judges will be required to consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2), Fla. Stat. (2014). If a lengthy sentence is imposed, the juvenile offender will be entitled to a subsequent sentence-review hearing, at which the judge will determine whether the offender is "rehabilitated and is reasonably believed to be fit to reenter society…." § 921.1402(6), Fla. Stat. (2014). If the offender committed a crime other than first-degree murder, the offender is eligible for a sentence-review hearing after serving 20 years (unless the offender was previously convicted of certain felonies). §§ 775.082(3)(c), 921.1402(3)(d), Fla. Stat. (2014). If release is denied in the initial hearing, the offender is eligible for an additional sentence-review hearing after serving 30 years. § 921.1402(3)(d), Fla. Stat. (2014).

At sentencing, and at the sentence-review hearing, those offenders will be entitled to be present, to be represented by counsel, to present mitigating evidence on their own behalf, and, if the offender cannot afford counsel, to appointed counsel. § 921.1402(5), Fla. Stat. (2014); Fla. R. Crim. P. 3.781; Fla. R. Crim. P.

3.802(g). But there is no right to appointed counsel in parole proceedings. "Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." Russell, 89 Ind. L.J. at 425. Counsel can do what an inmate cannot: investigate, collect, and present "factual information so that the release decision is based on a full presentation of the relevant evidence." *Id*. at 426.

Further, the Florida Commission on Offender Review is not a "sentencing court." *Holston v. Fla. Parole & Probation Commission*, 394 So. 2d 1110, 1111 (Fla. 1st DCA 1981). The commission never sees or hears the inmate, as inmates are prohibited from attending the commission meeting. Fla. Admin. Code R. 23-21.004(13). "Certainly, it is important for the prisoner to speak directly to the decision maker. A decision maker needs to be persuaded by the prisoner that he or she is truly remorseful and reformed." Russell, 89 Ind. L.J. at 402.

The rarity with which parole is granted makes it more like clemency. In *Graham*, 560 U.S. at 71, the Court stated that the "remote possibility" of clemency "does not mitigate the harshness of [a life] sentence." The Court cited *Solem v. Helm*, 463 U.S. 277 (1983), where that argument had been rejected. *Id*.

In *Solem*, the defendant was sentenced to life imprisonment without parole for a nonviolent offense under a recidivist statute. *Solem* argued that his sentence violated the Eighth Amendment. The state argued that the availability of clemency

made the case similar to *Rummel v. Estelle*, 445 U.S. 263 (1980), in which the Court upheld a life sentence with the possibility of parole. The Court rejected that argument because clemency was not comparable to the Texas parole system it reviewed in *Rummel*. *Solem*, 463 U.S. at 300-03.

In *Rummel*, the Court agreed that even though Rummel was parole eligible after serving 12 years "his inability to enforce any 'right' to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years." Rummel, 445 U.S. at 280. However, "because parole is 'an established variation on imprisonment of convicted criminals,' . . . a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id*. at 280-81 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

The Court said in *Solem* that in affirming Rummel's sentence it "did not rely simply on the existence of some system of parole"; it looked "to the provisions of the system presented…." *Solem*, 463 U.S. at 301. Parole in Texas was a "regular part of the rehabilitative process"; it was "an established variation on imprisonment of convicted criminals"; and "assuming good behavior it is the normal expectation in the vast majority of cases." *Id*. at 300-01 (citation omitted). And because the law "generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time[,] . . . it is possible

to predict, at least to some extent, when parole might be granted." *Id*. By contrast, clemency was "an ad hoc exercise of executive clemency." *Id*. at 301.

In Florida, parole is no longer a "regular part of the rehabilitative process." *Solem*, 463 U.S. at 300. It is almost impossible "to predict . . . when parole might be granted." *Id*. at 301. It is not "the normal expectation in the vast majority of cases"; and it is not "an established variation on imprisonment of convicted criminals." *Id*. at 300-01. Instead, it is more like commutation: "an ad hoc exercise of executive clemency" (*id*. at 301) and a "remote possibility." *Graham*, 560 U.S. at 71.

In *Miller* the Court said it is the "rare juvenile offender whose crime reflects irreparable corruption", *id*. 567 U.S. at 479-80 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68), and that the "appropriate occasions for sentencing juveniles to [life imprisonment] will be uncommon." *Id*. at 479. This means the "sentence of life without parole is disproportionate for the vast majority of juvenile offenders" and "raises a grave risk that many are being held in violation of the Constitution." *Montgomery*, 136 S. Ct. at 736. But if parole is rarely granted, or if the parole procedures for sorting the rehabilitated from the irreparably corrupt are inadequate, then there is the "grave risk" that many juvenile offenders "are being held in violation of the constitution." *Id*. That grave risk is present in Florida. Accordingly, appellant's sentences 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.

CONCLUSION

This Court should reverse the order denying appellant's postconviction motion as it pertained to count one, and remand for resentencing on that count.

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 2nd day of January, 2020.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

CERTIFICATE OF FONT

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

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

VICTOR BRANCACCIO, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 4D19-889 L. T. No. 93-CF-1592

ANSWER BRIEF OF APPELLEE

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit,
In and For St. Lucie County, Florida
[Criminal Division – The Honorable Gary L. Sweet]

ASHLEY MOODY
Attorney General
Tallahassee, Florida

ANESHA WORTHY
Assistant Attorney General
Florida Bar No. 60113
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432
Telephone: (561) 837-5016
anesha.worthy@myfloridalegal.com
crimappwpb@myfloridalegal.com

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In the brief, Appellant will be referred to as "the Defendant" and Appellee will be referred to as "the State."

Citations to Appellant's Initial Brief are abbreviated as "IB," and citations to the record are abbreviated as follows:

"R.": Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections and/or clarifications noted within the argument section of this brief.

SUMMARY OF THE ARGUMENT

ISSUE I. The Defendant's claim that the trial court lost jurisdiction to rule on his motion for postconviction relief is without merit because it did not enter an order granting him resentencing on his first-degree murder conviction as he claims it did. The trial court entered an order reserving ruling on the issue; thus, it had jurisdiction to deny relief in the order it issued after holding an evidentiary hearing on the motion.

ISSUE II. The Defendant is not entitled to be resentenced merely because other juvenile offenders were erroneously resentenced in the interim between the Florida Supreme Court's decisions in Atwell and Franklin. It would not be a manifest injustice to deny him relief he is not legally entitled to receive.

ISSUE III. This Court should not certify a question of great public importance because the Florida Supreme Court properly relied on the United States Supreme Court's decision in LeBlanc to conclude that its decision in Atwell was erroneous.

ISSUE IV. The Defendant's life with the possibility of parole sentence does not violate the Eighth or Fourteenth Amendments. A juvenile offender's sentence must have a mechanism for providing an opportunity for release based upon the juvenile's individual circumstances and Florida's parole determination satisfies this requirement.

ARGUMENT

ISSUE I. THE TRIAL COURT DID NOT LOSE JURISDICTION TO DENY THE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF BECAUSE IT NEVER ENTERED AN ORDER GRANTING HIM RESENTENCING ON HIS FIRST-DEGREE MURDER CONVICTION.

The Defendant argues he is entitled to resentencing on his first-degree murder conviction because the trial court entered an order granting his motion for postconviction relief then improperly set it aside two years later. (IB. at 8-12). Relying on Jones v. State, 279 So. 3d 172 (Fla. 4th DCA 2019), and similar cases, he claims the trial court lost jurisdiction to vacate the order because the State did not appeal the order granting him resentencing. (IB. at 10); see also (IB. at 10-12) (citing Simmons v. State, 274 So. 3d 468 (Fla. 1st DCA 2019); White v. State, 284 So. 3d 1096 (Fla. 4th DCA 2019); Scott v. State, 283 So. 3d 1280 (Fla. 4th DCA 2019); German v. State, 284 So. 3d 572 (Fla. 4th DCA 2019); Jordan v. State, 81 So. 3d 595 (Fla. 1st DCA 2012)).

This argument is without merit because the trial court did not enter an order granting him postconviction relief on his first-degree murder conviction or vacate the order he claims it did. Because the trial court never entered an order on this issue, there is no basis to conclude the trial court lost jurisdiction to rule on the motion. A review of the record with an accurate account of what occurred is necessary to dispel the Defendant's claims on this matter because his assertions that

the trial court granted his motion for postconviction relief and entered an order granting resentencing on this count are not true.[1]

The record reveals that the Defendant filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 on September 24, 2015. (R. 218-23). In the motion, he argued that the two life sentences he received for his first-degree murder and kidnapping with a weapon convictions were unconstitutional pursuant to Miller v. Alabama, 567 U.S. 460 (2012), because he was a juvenile when he committed the offenses. The State agreed that he was entitled to resentencing on the kidnapping with a weapon conviction because the life without the possibility of parole sentence was unconstitutional under Graham v. Florida, 560 U.S. 48 (Fla. 2010). (R. 281, 283). However, it asked the court to delay addressing the constitutionality of the sentence for the first-degree murder conviction because the Florida Supreme Court's decision in Atwell v. State, 197 So. 3d 1040 (Fla. 2016), was pending and its outcome would determine whether he was entitled to resentencing. (R. 283). The trial court agreed and on May 25, 2016, issued an order ruling that he was entitled to resentencing on the charge of

[1]The State is referring to the Defendant's implicit and explicit assertions. For example, he has identified the issue on appeal as "The trial court lost jurisdiction to set aside its order granting appellant's motion for postconviction relief" which contains an implicit assertion that the trial court entered an order granting his motion for postconviction relief. (IB. at 8). Explicit assertions include his claim that "the trial court did enter an order granting resentencing." (IB. at 9).

kidnapping with a weapon and reserving ruling on whether he was entitled to resentencing on the first-degree murder conviction. (R. 304). The trial court issued no further rulings on the motion for postconviction relief until March 14, 2019, when it denied the motion as to the first-degree murder charge and resentenced him on the kidnapping with a weapon charge. (R. 1066-77).

Although the trial court never entered an order ruling on the motion after the May 2016 order, the trial court entered several orders addressing matters related to resolving the motion. The Defendant's argument that he is entitled to resentencing is based on one of these orders. (IB. at 8-9) (claiming that the trial court's "Order Requiring Defense Response" was an order granting him resentencing (R. 330)). The trial court entered the order at issue sua sponte in response to a motion the Defendant filed seeking the appointment of a neuropsychologist to evaluate him. (R. 319-27, 330-31). In the order, the trial court concluded that the Defendant's motion was legally insufficient and ordered him to file a response addressing the deficiencies. The pertinent parts of the order state:

ORDER REQUIRING DEFENSE RESPONSE

> THIS CASE came before the Court in chambers on the Defendant's Motion for Appointment of Neuropsychologist filed on November 21, 2016. This Court finds and orders as follows.
>
> Juvenile resentencing has been granted in this case. The Defendant is represented by retained counsel and has been declared indigent for costs. In preparation for resentencing, the Defendant seeks the appointment of a

> neuropsychologist to conduct a neuropsychological evaluation on the basis of material provided by the Defendant's family to the mitigation expert/specialist. . . .
>
> ***
>
> [T]he Court finds the Defendant's motion for neuropsychological evaluation legally insufficient[.]
>
> ***
>
> It is hereby ORDERED the Defense shall file a response addressing the deficiencies above no later than noon on February 10, 2017, so that the Court may be adequately informed to conduct the hearing.

(R. 330-31).

The face of the order establishes that the Defendant's claim that it granted his motion for postconviction relief and granted him resentencing is untrue because it expressly states that the trial court was ruling on his motion for appointment of a neuropsychologist. The language stating "THIS CASE came before the Court in chambers on the Defendant's Motion for Appointment of Neuropsychologist" affirmatively establishes this point. The conclusion of the order also makes it clear that the court was ruling on his motion for appointment of counsel—not his 3.850 motion—because it directed the Defendant to file a response addressing the deficiencies of the motion. There was no language in the order ruling that his motion for postconviction relief was granted or ordering him to be resentenced.

The Defendant quotes the portion of the order stating that "Juvenile resentencing has been granted in this case" to support his claim that it ordered him to be resentenced. However, in addition to the fact that the trial court was not ruling

on his 3.850 motion in the order, there are a couple of problems with this argument. First, the sentence is in the past tense and is, thus, referring to resentencing that had already been granted instead of ruling on the issue of whether he was entitled to resentencing. And second, it is too vague and unclear to establish that he was entitled to resentencing on the first-degree murder conviction. The Defendant's postconviction motion challenged two convictions and, without an express reference to the first-degree murder count, there is no way to establish that the trial court was referring to that conviction when it wrote the sentence. In fact, because the trial court had already entered an order that he was entitled to resentencing on the kidnapping with a weapon charge, it seems pretty clear that the trial court was referring to resentencing on that count when it noted that "Juvenile resentencing has been granted in this case." The Defendant's attempt to stretch the meaning of the words to argue that the court was ordering him to be resentenced on the first-degree murder charge is an unreasonable interpretation of the plain language of the order, and this Court should reject it as such.

This Court should also reject his claim that the trial court improperly set aside the order because it is untrue. There is no record evidence of the trial court vacating the "Order Requiring Defense Response" or otherwise addressing his motion for appointment of neuropsychologist except when it granted the motion after he filed a response in accordance with the order. (R. 538-39). Notably, the Defendant has not

cited to any order vacating it, and the final order on his motion for postconviction relief does not address it.

In short, the Defendant's claims on this issue are simply not supported by the record. The trial court entered two orders ruling on his 3.850 motion. The first order granted the motion in part and reserved ruling on whether he was entitled to resentencing on the first-degree murder conviction. The second, and final order, denied the motion as to his entitlement to resentencing on the charge and resentenced him on the kidnapping with a weapon conviction in accordance with the ruling in the first order that he was entitled to resentencing on that count. Because the order reserved jurisdiction on his entitlement to resentencing on the first-degree murder conviction, it never lost jurisdiction to rule on the issue. Thus, the Defendant cannot establish that the trial court's final order was erroneous.

This case is analogous to this Court's decision in Davis v. State, 287 So. 3d 586, 586 (Fla. 4th DCA 2019) (mem), wherein it rejected the appellant's argument that the postconviction court improperly denied his 3.850 motion because it never entered an order granting the motion and ordering him to be resentenced. The court determined that the facts in Davis were similar to its decision in Jones where it held that the trial court lacked the jurisdiction to vacate its resentencing order when neither party moved for rehearing or appealed the order, but concluded Davis was "distinguishable from Jones in a significant way." Id. According to court:

> [Unlike the circuit court in Jones, in] this case, the circuit court did not enter an order granting the motion for resentencing. Because it had not ordered resentencing, there was no final order for the State to appeal. And, because there was no final order granting resentencing, the court was not required to resentence the defendant.

Id.

Here, as in Davis, the trial court was not required to resentence the Defendant because it "did not enter an order granting the motion for resentencing." Further, like this Court did in Davis, it should reject the Defendant's claim that the State's failure to appeal precluded the trial court from denying his 3.850 motion. "Because it had not ordered resentencing, there was no final order for the State to appeal."

Because the trial court had not ordered resentencing, the Defendant's reliance on Jones, Simmons, White, Scott, German, and Jordan is misplaced and cannot support his argument. As such, there is no basis to remand for "the trial court to reinstate the order granting resentencing." (IB. at 12). This Court cannot remand for the trial court to reinstate an order that does not exist. Instead, this Court should affirm the denial of the motion for postconviction relief.

> ISSUE II. IT WOULD NOT BE A MANIFEST INJUSTICE TO DENY THE DEFENDANT'S REQUEST FOR RESENTENCING WHEN HE IS NOT ENTITLED TO RESENTENCING MERELY BECAUSE OTHER JUVENILE OFFENDERS WERE ERRONEOUSLY RESENTENCED.

The Defendant argues he should be resentenced because "[i]n the wake of Atwell v. State, [197] So. 3d 1040 (Fla. 2016), more than 65 parole-eligible juvenile

offenders were resentenced and released." (IB. at 13). He claims if he is not resentenced, it would be a manifest injustice. However, because he is not legally entitled to resentencing, this claim must fail.

In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that mandatory life without parole sentences for juvenile homicide offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. Pursuant to Miller, juvenile offenders sentenced to life without parole are entitled to resentencing. The Defendant does not fall within the class of juvenile offenders entitled to resentencing under Miller because he was not sentenced to life without the possibility of parole for the first-degree murder conviction. (R. 65-67). He is eligible for parole after twenty-five years.

In Atwell, 197 So. 3d at 1050, the Florida Supreme Court held that state juvenile offenders' life with the possibility of parole sentences run afoul of Miller because such sentences "effectively" resemble "a mandatorily imposed life without parole sentence" under statutory parole process and do not afford offenders with "the type of individualized sentencing consideration Miller requires."

Two years later, the Court concluded that "the majority analysis in Atwell improperly applied Graham and Miller." Franklin v. State, 258 So. 3d 1239, 1241 (Fla. 2018) (citing State v. Michel, 257 So. 3d 3, 6 (Fla. 2018)). It found that the life with the possibility of parole sentences in the state do not violate the Eighth

Amendment's prohibition against cruel and unusual punishment because the juvenile offenders have the opportunity for release during their natural lives, writing:

> [H]ere, [the juvenile offender's] sentence does not violate Graham or Miller because [he] was not sentenced to life without the possibility of parole. [He] is eligible for parole after serving 25 years of his sentence, which is certainly within his lifetime. The United States Supreme Court's precedent states that the "Eighth Amendment ... does not require the State to release [a juvenile] offender during his natural life." Graham, 560 U.S. at 75, 130 S.Ct. 2011. It only requires states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. And [he] will receive a "meaningful opportunity" under Florida's parole system after serving 25 years in prison and then (if applicable) every 7 years thereafter. See §§ 947.16-.174, Fla. Stat. Florida's statutorily required initial interview and subsequent reviews before the Florida Parole Commission include the type of individualized consideration discussed by the United States Supreme Court in Miller.

Michel, 257 So. 3d at 7.

The supreme court issued the opinions in Michel and Franklin before the trial court denied the Defendant's 3.850 motion. Both cases make it clear that his life with the possibility of parole after 25 years is not unconstitutional. Therefore, he is not entitled to resentencing. The mere fact that some juvenile offenders may have been resentenced pursuant to Atwell before the supreme court's decisions in Michel and Franklin made it clear that they were not entitled to resentencing if they were sentenced to life with the possibility of parole does not entitle the Defendant to resentencing as well. See, e.g., Pedroza v. State, SC18-964, 2020 WL 1173747, at

*1 (Fla. March 12, 2020)("[T]o the extent this Court has previously instructed that resentencing is required for all juvenile offenders serving sentences longer than twenty years without the opportunity for early release based on judicial review, it did so in error."). There is no basis to "adhere to [the supreme court's] prior error in Atwell and willfully ignore the United States Supreme Court's" decision clarifying that such sentences are not unconstitutional. Michel, 257 So. 3d at 6 (citing Virginia v. LeBlanc, 137 S.Ct. 1726 (2017) (holding that Virginia's conditional geriatric release program available to offenders sentenced to life in prison complied with the Eighth Amendment's requirement that juvenile offenders have a meaningful opportunity for release during their life time)).

Because he is not entitled to resentencing, the mere fact that some juvenile offenders may have been resentenced and released after Atwell even though their sentences did not violate Miller cannot be used to require him to be resentenced. Therefore, this Court should deny relief on this issue.

ISSUE III. THIS COURT SHOULD NOT CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE BECAUSE THE FLORIDA SUPREME COURT DID NOT ERR IN RELYING ON THE UNITED STATES SUPREME COURT'S DECISION IN LEBLANC TO OVERRULE ATWELL.

The Defendant argues that this court is bound by the Florida Supreme Court's decision in Franklin, 258 So. 3d at 1241,[2] which held that a life sentence that includes eligibility for parole does not violate the Eighth Amendment, but should certify a question of great public importance for the supreme court to reconsider whether it properly overruled Atwell "given that Virginia v. Leblanc was a federal habeas decision governed by the deferential AEDPA standard." (IB. at 26). He argues that a recent case from the Supreme Court—Madison v. Alabama, 139 S. Ct. 718 (2019)— calls into question whether Michel and Franklin were correctly decided. (IB. at18 26). In Madison, the Supreme Court granted relief on the merits of a claim previously denied when presented for review as a claim under AEDPA.

Notably, the juvenile offender in Michel has already presented this issue to the Florida Supreme Court in his motion for rehearing. In the motion, he argued the Court should not rely on LeBlanc to overrule its decision in Atwell because the Supreme Court in LeBlanc was not considering the merits of the underlying claim. The Florida Supreme Court denied the motion. See Mot. for Rehearing, 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.

[2]Franklin filed a petition for writ of certiorari in the Supreme Court of the United States on April 2, 2019, which the Court denied on May 28, 2019. See Franklin v. Florida, No. 18-8701.

The juvenile offender in Franklin also petitioned for a writ of certiorari from the United States Supreme Court arguing that the Florida Supreme Court improperly treated its decision in LeBlanc as a ruling on the merits despite the fact that it was before the Court on federal habeas review. The Supreme Court denied the petition. See Petition for Writ of Certiorari, Franklin v. Florida, USSC Case No. 18-8701 (May 28, 2019). Thus, it appears the Supreme Court has implicitly denied relief on this issue as well.

However, even if the Florida and United States Supreme Courts had not declined to review this issue in Michel and Franklin, there would still be no basis to certify a question of great public importance because Madison does not call into question whether the supreme court properly decided Franklin. The decision in Madison is clearly distinguishable from this case.

The issue in Madison, 139 S.Ct. at 722, involved the constitutionality of executing a mentally incompetent defendant. Although the Supreme Court granted the petition for writ of certiorari after denying habeas relief on the issue, it did not rule on the constitutionality of the petitioner's execution. Instead, it remanded for the state court to consider the petitioner's competency claim in light of its clarification of the law on the issue. Id. at 730-31. It remanded because it was "unsure" of whether the state court relied on an incorrect view of the law when it decided the petitioner's claim. Id. at 729. Equally significant is that the facts in the

case were not the same as the facts under review in the petitioner's habeas claim. As the Court noted, since the decision it reviewed in the habeas proceedings, the petitioner alleged "(1) he had suffered further cognitive decline and (2) a state board had suspended [the state expert witness]'s license to practice psychology, thus discrediting his prior testimony." Id. at 726.

Here, the issue involves a concrete, immutable characteristic of a criminal defendant—the offender's age when he or she committed the criminal offense—instead of an evaluation of an offender's current mental state. Thus, the constitutional issue in Madison is not sufficiently analogous to the issue before this court to provide precedential support for the Defendant's claim that it was erroneous for the Florida Supreme Court to rely on a habeas decision to address the merits of a constitutional claim. Further, because the Supreme Court did not rule on the constitutionality of Madison's execution, there is simply no basis to conclude that it supports the proposition that a decision from the Court under the deferential AEDPA standard cannot support a decision on the merits of the claim. As such, there is no need to certify a question of great public importance. The Florida Supreme Court properly applied LeBlanc when it decided Michel and Franklin. In Atwell, the court held that Florida's life with parole sentences violated the Eighth Amendment and the Supreme Court's decision in LeBlanc made it clear that the court's conclusion was incorrect.

ISSUE IV. THE DEFENDANT'S PAROLE ELIGIBLE LIFE SENTENCE DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Defendant argues that his sentence violates the Eighth Amendment because parole will not afford him any meaningful opportunity for release. (IB. at 27). There is no basis for relief on this claim because it is not preserved for appellate review and the Florida Supreme Court has already rejected this argument.

"In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985). Here, the Defendant did not preserve this issue for appellate review because he did not present this issue to the trial court and make the specific legal argument he makes on appeal in that court. Although he filed a motion for postconviction relief, the only ground he raised was that the "two life sentences he received in 1999 violated his basic and fundamental constitutional rights to a fair sentencing hearing." (R. 219). He never alleged that his sentence was unconstitutional because parole will not afford him a meaningful opportunity for release. Because this argument was not part of his presentation below, it is not preserved.

However, even if he had preserved this issue, he would still not be entitled to relief because his sentence does not violate the Eighth or Fourteenth Amendments.

"The United States Supreme Court's Eighth Amendment precedent regarding juvenile sentencing requires a mechanism for providing juveniles with an opportunity for release based upon their individual circumstances[.]" State v. Michel, 257 So. 3d 3, 5 (Fla. 2018). However, there is no requirement that juvenile offenders are guaranteed released. Id. (noting that the Eighth Amendment precedent "is not a standard aimed at guaranteeing an outcome of release for all juveniles regardless of individual circumstances that might weight against release"); see also Graham, 560 U.S. at 75.

Because there is no requirement that a juvenile be guaranteed release, the Defendant's claim that his sentence is unconstitutional must fail. His sentence includes the possibility of parole and this satisfies Miller. The supreme court's decision in Michel is instructive on this point. In Michel 257 So. 3d at 7-8, the court wrote:

> Michel's sentence does not violate Graham or Miller because Michel was not sentenced to life without the possibility of parole. Michel is eligible for parole after serving 25 years of his sentence, which is certainly within his lifetime. The United States Supreme Court's precedent states that the "Eighth Amendment . . . does not require the State to release [a juvenile] offender during his natural life." Graham, 560 U.S. at 75, 130 S.Ct. 2011. It only requires states to provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. And Michel will receive a "meaningful opportunity" under Florida's parole system after serving 25 years in prison and then (if applicable) every 7 years thereafter. See §§ 947.16-.174, Fla. Stat.

> Florida's statutorily required initial interview and subsequent reviews before the Florida Parole Commission include the type of individualized consideration discussed by the United States Supreme Court in Miller. For example, under section 947.174(3), Florida Statutes, the presumptive parole release date is reviewed every 7 years in light of information "including, but not limited to, current progress reports, psychological reports, and disciplinary reports." This information, including these individualized reports, would demonstrate maturity and rehabilitation as required by Miller and Graham. Moreover, there is no evidence in this record that Florida's preexisting statutory parole system (i) fails to provide Michel with a "meaningful opportunity to obtain release," Graham, 560 U.S. at 75, 130 S.Ct. 2011, or (ii) otherwise violates Miller and Graham when applied to juvenile offenders whose sentences include the possibility of parole after 25 years. And these parole decisions are subject to judicial review. See Johnson v. Fla. Parole Comm'n, 841 So. 2d 615, 617 (Fla. 1st DCA 2003) (recognizing that the Parole Commission's final orders are reviewable in circuit court through an extraordinary writ petition); see also Parole Comm'n v. Huckelbury, 903 So. 2d 977, 978 (Fla. 1st DCA 2005) (reviewing a circuit court's order on an inmate's petition challenging the suspension of a presumptive parole release date).

Although Michel was a plurality opinion, the supreme court subsequently made it clear that its holding in Michel has the support of a majority of the court when it wrote: "Florida's 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." See Franklin, 258 So. 3d at 1241 (citations and internal quotation marks omitted)); see also Day v. State, 266 So. 3d 870, 871 (Fla. 1st DCA 2019) ("[T]he original sentence was lawful if it afforded a meaningful

opportunity for release within Day's lifetime, which it did."); State v. Lawrence, 2D18-261, 44 Fla. L. Weekly D274 (Fla. 2d DCA Jan. 23, 2019)("As explained in Franklin, Lawrence's sentence of life with the possibility of parole for a murder he committed as a juvenile is constitutional under Miller and Graham.").

This Court cannot ignore the Florida Supreme Court precedent outlined above. See Hall v. State, 282 So. 2d 190, 191 (Fla. 2d DCA 1973). It also cannot ignore United States Supreme Court decisions on the Eighth Amendment. See, e.g., Delancy v. State, 256 So. 3d 940, 947 (Fla. 4th DCA 2018). Accordingly, there is no basis to conclude that the Defendant's sentence violates the Eighth or Fourteenth Amendments, and this court should affirm on this issue.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, the State respectfully requests that this Honorable Court affirm the denial of the Defendant's motion postconviction for relief.

Respectfully submitted,

ASHLEY MOODY
Attorney General
Tallahassee, Florida

/s/ *Anesha Worthy*
ANESHA WORTHY
Assistant Attorney General
Florida Bar No. 60113
1515 North Flagler Drive
Suite 900

West Palm Beach, FL 33401-3432
Telephone: (561) 837-5016
anesha.worthy@myfloridalegal.com
crimappwpb@myfloridalegal.com

CERTIFICATE OF SERVICE

I certify that the foregoing document has been electronically filed with this Court and furnished to Paul Edward Petillo, Assistant Public Defender, Office of the Public Defender, 15th Judicial Circuit, 421 Third Street, West Palm Beach, FL 33401, via email at appeals@pd15.state.fl.us on this 3rd day of April, 2020.

/s/ *Anesha Worthy*
ANESHA WORTHY

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that this brief was computer generated using 14-point Times New Roman font.

/s/ *Anesha Worthy*
ANESHA WORTHY

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

CASE NO. 4D19-889

VICTOR BRANCACCIO,
Appellant

V.

STATE OF FLORIDA,
Appellee

REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENT

POINT I

THE TRIAL COURT LOST JURISDICTION TO SET ASIDE ITS ORDER GRANTING APPELLANT'S MOTION FOR POSTCONVICTION RELIEF. THIS CASE IS CONTROLLED BY *JONES V. STATE*.

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

POINT II

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.

POINT III

THIS COURT SHOULD CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE

The State argues that this Court should not certify a question because this point was made on rehearing in *State v. Michel*, 257 So. 3d 3 (Fla. 2018). First, that is an argument in favor of certifying a question. A motion for rehearing is no substitute for briefing by the parties, and this issue wasn't briefed. *See Colon v. State*, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019) (Canady, C.J., concurring), discussed at pages 25-26 in the initial brief. Second, and more importantly, the supreme court in *Michel* and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), did not have the benefit of *Madison v. Alabama*, 139 S. Ct. 718 (2019). *Madison* makes it even clearer that AEDPA decisions are not rulings on the merits.

The State points out that the United States Supreme Court denied Franklin's petition for writ of certiorari, and it invites this Court to infer from that denial the High Court's approval of *Michel* and *Franklin*. But denial of certiorari "does not sprinkle holy water on any position argued below…." *Midwest Fence Corp. v. United States Dep't of Transp.*, 10 C 5627, 2018 WL 1535081, at *1 (N.D. Ill. Mar. 29, 2018). As the United States Supreme Court stated in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950):

> [T]his Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of

> a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Apparently, that admonition will need to be repeated—again.

Admittedly, it takes courage to say the emperor has no clothes, to say what we all know is true: that the Florida Supreme Court made a classic "deference mistake" in *Michel* and *Franklin*. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. Chi. L. Rev. 643, 662 (2015) ("[Court 2] makes a deference mistake when it misapplies [Court 1's] opinion by failing to account for the deference regime under which the case was decided.").

~ ~ ~

> "But the Emperor has nothing at all on!" said a little child.
>
> "Listen to the voice of innocence!" exclaimed his father; and what the child had said was whispered from one to another.
>
> "But he has nothing at all on!" at last cried out all the people. The Emperor was vexed, for he knew that the people were right; but he thought the procession must go on now! And the lords of the bedchamber took greater pains than ever, to appear holding up a train, although, in reality, there was no train to hold.

Hans Christian Anderson, The Emperor's New Clothes, The Literature Network, http://www.online-literature.com/hans_christian_anderson/967

This Court should certify a question of great public importance.

POINT IV

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.

CONCLUSION

This Court should reverse the order denying appellant's postconviction motion as it pertained to count one, and remand for resentencing on that count.

CERTIFICATE OF SERVICE

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

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	11/1/2019
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
67	NELMS, KEVIN	PALM BEACH	8400304	1/4/1984	097859	10/1/2020