NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

LEWIS TAYLOR, JR.,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In 1976, the state of Florida sentenced Petitioner to a 129-year term of imprisonment for a non-homicide offense committed when he was 16 years of age. Although Petitioner is eligible for parole under a system Florida abolished in 1983, each year Florida grants parole only to one-half of one percent of parole-eligible inmates.

The question presented is:

Whether, given the rarity of the grant of parole in Florida and Florida's failure to take a juvenile offender's maturity and rehabilitation adequately into account in its parole decisions, it is unreasonable to conclude that Petitioner has been afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" in violation of the Eighth Amendment under *Graham v. Florida*, 560 U.S. 48, 75 (2010), and its progeny.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States Supreme Court:

Lewis Taylor, Jr. v. Florida,
No. 19-8042 (May 18, 2020)

United States Court of Appeals (11th Cir.):

Lewis Taylor, Jr. v. Florida Dep't of Corr.,
No. 21-12587 (Nov. 4, 2021)

In re Lewis Taylor, Jr.,
No. 16-11942 (April 22, 2016)

United States District Court (S.D. Fla.):

Lewis Taylor, Jr. v. Florida Dep't of Corr.,
No. 16-60905-Civ-Smith (July 1, 2021)

Florida Fourth District Court of Appeal:

Lewis Taylor, Jr. v. State of Florida,
No. 4D19-1200 (Dec. 16, 2019)

Seventeenth Judicial Circuit, Broward County, Florida:

State of Florida v. Lewis Taylor, Jr.,
No. 76-2188CF10B (Jan. 22, 2019)

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Lewis Taylor, Jr. respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit denying him a certificate of appealability, rendered and entered in case number 21-12587 in that court.

OPINIONS BELOW

The Eleventh Circuit's order denying Petitioner a certificate of appealability is unreported (App. A-1), as is the district court's order denying Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus (App. A-2), and the Eleventh

Circuit's order granting Petitioner leave to file a second or successive § 2254 petition (App. A-3).

This Court's order denying Petitioner's petition for writ of certiorari from the decision of the Florida Fourth District Court of Appeal affirming the state trial court's denial of Petitioner's Eighth Amendment claim is reported at 140 S. Ct. 2782 (App. A-4). The decision of the Florida Fourth District Court of appeal is reported at 288 So.3d 663 (App. A-5). The trial court's order denying Petitioner's Eighth Amendment claim is unreported (App. A-6).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On November 4, 2021, the court of appeals affirmed the district court's grant of Petitioner's habeas corpus petition. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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 Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, U.S.C. § 2254(d) provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

STATEMENT OF THE CASE

1. On March 24, 1976, Gerald Ford was president. *One Flew Over the Cuckoo's Nest*, starring Jack Nicholson, was in movie theaters. Patty Hearst had just been found guilty of the armed robbery of a San Francisco bank. And Lewis Taylor, Jr., a 16-year old African American teenager, was charged as an adult in Broward County, Florida, with armed robbery. A jury convicted Mr. Taylor as charged, and on September 17, 1976, the trial judge sentenced him to a term of imprisonment of 129 years. He is now 62 years old.

2. Although Mr. Taylor is eligible for parole under a system Florida abolished in 1983, *see* Fla. Stat. §§ 947.16, 921.001(4)(a) (1983); Ch. 83-87, § 2, Laws of Fla. (establishing sentencing guidelines effective October 1, 1983 and abolishing parole), he has remained incarcerated for the past 46 years. This is not surprising. Parole is so rarely granted in Florida that he has little chance of ever being released

The following summary of release decisions of the Florida Commission on Offender Review (formerly the Florida Parole Commission) from 2014 until 2019 demonstrates the miniscule chance Mr. Taylor has of ever being released on parole:

Fiscal Year	Parole Eligible	Parole Release Decisions	Parole Granted	Percentage Release Decisions Granted	Percentage Eligible Granted
2018-19[1]	4,117	1,454	28	1.93%	0.68%
2017-18[2]	4,275	1,499	14	0.93%	0.33%
2016-17[3]	4,438	1,242	21	1.69%	0.47%
2015-16[4]	4,545	1,237	24	1.94%	0.53%
2014-15[5]	4,561	1,300	25	1.92%	0.55%

Over the five-year period from 2014 to 2019, only 112 Florida inmates were released on parole – an average of approximately 22 each year, or only one-half of one percent of parole-eligible inmates (0.51%), and less than two percent of inmates receiving a parole release decision (1.68%). By comparison, the parole approval rates in other states is astronomically higher. For example, for fiscal year 2019 the

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1 Fla. Comm'n on Offender Review 2019 Ann. Report 8, available at https://www.fcor.state.fl.us/docs/reports/AnnualReport2019.pdf.

2 Fla. Comm'n on Offender Review 2018 Ann. Report 8, available at https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202018%20WEB.pdf.

3 Fla. Comm'n on Offender Review 2017 Ann. Report 8, available at https://www.fcor.state.fl.us/docs/reports/Annual%20Report%202017%20for%20web.pdf.

4 Fla. Comm'n on Offender Review 2016 Ann. Report 8, available at https://www.fcor.state.fl.us/docs/reports/FCORannualreport201516.pdf.

5 Fla. Comm'n on Offender Review 2015 Ann. Report 8, available at https://www.fcor.state.fl.us/docs/reports/FCORannualreport201415.pdf.

parole approval rate in Texas was 35.55 percent.[6] And of the approximately 17,000 cases considered by the Virginia Parole Board from 2014 through October 2019, the parole approval rate was about 6 percent[7] – or more than three times that of Florida. A 2018 survey of thirty states found that from 2009 to 2016, an average of 42% of parole hearings resulted in parole being granted.[8]

The rarity with which parole is granted in Florida should not be surprising. Parole in Florida is "an act of grace of the state and shall not be considered a right." Fla. Stat. § 947.002(5) (2018); Fla. Admin. Code R. 23-21.002(32). Relevant here, 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." Fla. Stat. § 947.18 (2021). Rather, "[p]rimary weight" must be given to the "seriousness of the offender's present criminal offense and the offender's past criminal record." Fla. Stat. § 947.002(2) (2021).

The parole process begins with the calculation of a presumptive parole release date. The first step involved in this calculation is the determination of the matrix

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6 Texas Bd. of Pardons & Paroles, Annual Stat. Report 5, available at https://www.tdcj.texas.gov/bpp/publications/FY_2019_Annual_Statistical_Report.pdf.

7 Emma Gauthier & Anna Madigan, *Virginia Denies Vast Majority of Parole Requests, Data Shows*, Virginia Capital News Service (Dec. 18, 2019), available at https://patch.com/virginia/richmond/amp/28474201/virginia-denies-vast-majority-of-parole-requests-data-shows.

8 Renaud, Jorge, *Eight Keys to Mercy*, Prison Policy Service, Figure 3 Parole Grant Rates by State (Nov. 2018), available at: https://www.prisonpolicy.org/reports/longsentences.html.

time range. Fla. Admin. Code R. 23-21.009 (2021). The matrix time range is the intersection of the "salient factor score" – 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) (2021). 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) (2021).

The commission, however, may set a presumptive parole date outside the matrix time range based on aggravating factors. *See* Fla. Admin. Code R. 23-21.010 (2021). 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. Rather, the aggravating factors listed are "only examples." Fla. Admin. Code R. 23-21.010(5)(a) (2021). Nonetheless, the vast majority relate to the circumstances of the crime and the inmate's criminal history. *See id*.

The commission may also 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) (2021). In keeping with the statutory directive that rehabilitation is not enough, however, the commission will not consider even "clearly exceptional program achievement" until "after a substantial period of incarceration." Fla. Admin. Code R.

23-21.010(5)(b)2.j. (2021). It is unclear how long a period of incarceration must be before it is considered "substantial."

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 Dist Ct. App. 1982) (emphasis in original). It is "only an estimated release date." *Meola v. Department of Corrections*, 732 So. 2d 1029, 1034 (Fla. 1998); Fla. Stat. § 947.002(8) (2021) (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 (2021); Fla. Stat. § 947.174(1)(c) (2021). 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) (2021).

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." Fla. Stat. §§ 947.005(5), 947.1745 (2021). The inmate is again interviewed by the commission investigator. Fla. Admin. Code R. 23-21.015(2) (2021). The investigator discusses the inmate's institutional conduct and release plan[9] 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) (2021).

Even 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) (2021).

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[9] No Florida inmate will be released on parole without a "satisfactory release plan." Fla. Admin. Code R. 23-21.002(44) (2021). 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." Fla. Stat. § 947.18 (2021); *see* Fla. Admin. Code R. 23-21.002(44)(b) (2021). 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) (2021).

If the effective parole release date is postponed, the commission investigator may conduct a rescission hearing to withdraw it. Fla. Admin. Code R. 23-21.002(41) (2021). Rescission can be based on "infraction(s), new information, acts or unsatisfactory release plan." Fla. Admin. Code R. 23-21.019(1)(a), (b) (2021). 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) (2021).

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 "until such time that the inmate is found to be a good candidate for parole release." Fla. Admin. Code R. 23-21.0155(1) (2021). In her dissent in *State v. Michel*, 257 So.3d 3 (Fla. 2018), Justice Pariente pointed out that the defendant in *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016), was still incarcerated in 2016 "[d]espite having a presumptive parole release date of 1999," because the release date had remained suspended throughout that time. *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.

Given the tortoise-like pace of parole grants in Florida, it would take 187 years to parole the 4,117 parole-eligible inmates who remained incarcerated in 2019. There can be no doubt the vast majority of them will instead die in prison. Indeed,

given the age of this population, all of whom were sentenced before 1983, few parole-eligible inmates will be alive within 20 years. This is very likely true of Mr. Taylor, who is now 62 years of age. The average life expectancy of an African American male at 65 years of age it is 81.4 years.[10] The Florida Department of Corrections indicates that Mr. Taylor has a current release date of November 18, 2042[11] when he will be 82 years old. But even his release by that date is uncertain in light of the utter lack of standards governing the setting and suspension of parole release dates in Florida.

3. The treatment of juvenile offenders subject to Florida's parole system stands in sharp contrast to the juvenile sentencing statutes Florida enacted in response to this Court's decisions in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012). Juvenile *homicide* offenders sentenced after 2014 to life imprisonment or a term of years equal to life imprisonment have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Sentencing judges cannot consider only the nature and circumstances of the offense, but must take into account a number of factors "relevant to . . . the defendant's youth and attendant circumstances." Fla. Stat. § 921.1401(2) (2021). If a lengthy sentence is imposed, the juvenile offender will be

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[10] Fred Dews, *Charts of the Week: Black men's life expectancy; student debt and Black households; struggling families*, Brookings Now (Feb. 26, 2021), available at https://www.brookings.edu/blog/brookings-now/2021/02/26/charts-of-the-week-black-mens-life-expectancy-student-debt-and-black-households-struggling-families/.

[11] *See* http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=055708&TypeSearch=AI.

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." Fla. Stat. § 921.1402(6) (2021). Depending on the seriousness of the offense committed, the offender is eligible for a sentence-review hearing after serving 15, 20, or 25 years (unless the offender was previously convicted of certain felonies). Fla. Stat. § 921.1402(2)(b)–(d) (2021). 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. Fla. Stat. § 921.1402(5) (2021); Fla. R. Crim. P. 3.781 (2021); Fla. R. Crim. P. 3.802(g) (2021).

Although Mr. Taylor was convicted as a juvenile of a *non*-homicide offense committed when he was but 16 years of age, and he was sentenced to a *de facto* life sentence, there are no similar substantive and procedural protections for him because he is subject to Florida's parole system. As discussed above, the circumstances of the crime are the central focus of the parole decision; maturity and rehabilitation are considered inconsequential. Moreover, there is no right to appointed counsel in Florida parole proceedings. *Floyd v. Parole and Probation Comm'n*, 509 So. 2d 919 (Fla. 1987); *Graham v. State*, 372 So. 2d 1363 (Fla. 1979). "Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful [parole] hearing for juvenile offenders." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the*

Eighth Amendment, 89 Ind. L.J. 373, 425 (2014). 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. Nor does the Florida Commission on Offender Review ever see or hear from the inmate, as inmates are prohibited from attending Commission meetings. Fla. Admin. Code R. 23-21.004(13) (2021). "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. Yet none of these substantive and procedural protections enacted by Florida to remedy the Eighth Amendment concerns that motivated the decisions in *Graham* and *Miller* help juvenile offenders caught in the web of Florida's parole system.

4. In 2016, Mr. Taylor filed in the United States Court of Appeals for the Eleventh Circuit a *pro se* application for leave to file a second or successive 28 U.S.C. § 2254 habeas corpus petition. In the application, he alleged that his 129-year sentence for a non-homicide offense, imposed when he was a juvenile, violated the Eighth Amendment's prohibition against cruel and unusual punishments under *Graham* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). The Eleventh Circuit granted Mr. Taylor's application. App. A-3.

Thereafter, Mr. Taylor filed a counseled § 2254 petition asserting his Eighth Amendment claim. The district court ordered the State to show cause why the

petition should not be granted, and the State's response asserted that Mr. Taylor had not exhausted his claim in the state courts. The district court stayed federal proceedings to allow Mr. Taylor to exhaust his Eighth Amendment claim, which he then did.

5. Mr. Taylor presented his Eighth Amendment claim to the state courts by filing a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.800. The motion was stayed pending resolution by the Florida Supreme Court of several cases addressing Eighth Amendment claims raised by juvenile offenders in the wake of *Graham* and *Miller*. Ultimately, after the Florida Supreme Court decided those cases, the trial court held as follows:

> The Defendant's 129 year prison sentence with *the possibility of parole* did not violate the categorical rule of *Graham v. Florida*, 560 U.S. 48 (2010), that any life sentence for a juvenile non-homicide offender be accompanied by some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation before the end of the sentence and during the offender's natural life. *Franklin v. State*, [258 So.3d 1239 (Fla. 2018)]; *Michel v. State*, 204 So.3d 101 (Fla. 4th DCA 2016); *State v. Wesby*, 2019 WL 140813, 4D16-4246 (Fla. 4th DCA January 9, 2019); *State v. West*, 2019 WL 140816, 4D16-4252 (Fla. 4th DCA January 9, 2019). Florida's statutory parole process fulfills *Graham*'s requirement because it includes initial and subsequent parole reviews based upon individualized considerations before the Florida Parole Commission that are subject to judicial review. *Id*.

App. A-6.

On December 16, 2019, the Florida Fourth District Court of Appeal affirmed the denial of the Rule 3.800 motion in an unexplained *per curiam* decision. *Taylor v. State*, 288 So.3d 663 (Fla. 4th Dist. Ct. App. 2019) (*per curiam*); App. A-5. Mr.

Taylor petitioned this Court for a writ of certiorari to review the Fourth District's decision, but the Court denied the petition. *Taylor v. Florida*, 140 S. Ct. 2782 (2020); App. A-4.

6. Following this Court's denial of *certiorari*, the district court reopened Mr. Taylor's federal proceedings, and denied the petition. App. A-2. The district court held that in light of this Court's decision in *Virginia v. LeBlanc*, ___ U.S. ___, 137 S. Ct. 1726 (2017) (*per curiam*), it "must give deference under AEDPA to the state court's finding that because Petitioner is parole eligible his sentence did not violate the Eighth Amendment. This finding, as in *LeBlanc*, is not contrary to or an unreasonable application of controlling Supreme Court precedent." *Id.* at 6. In the same order, the district court also denied a certificate of appealability "[b]ecause the claims raised are clearly without merit." *Id*. at 7-8.

7. Mr. Taylor timely appealed and moved the Eleventh Circuit for a certificate of appealability. The Eleventh Circuit denied a certificate in a summary order. App. A-1.

REASONS FOR GRANTING THE WRIT

I. Given the rarity of the grant of parole in Florida and Florida's failure accord adequate weight to a juvenile offender's maturity and rehabilitation in its parole decisions, the state court's conclusion that Petitioner has been afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under *Graham v. Florida*, 560 U.S. 48, 75 (2010), and its progeny was unreasonable.

The touchstone of this Court's juvenile-sentencing jurisprudence is the "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotation marks omitted). Certain punishments are disproportionate when applied to children because children are different. They lack maturity; they are more vulnerable and easy to influence; and their traits are less fixed, so they are more likely to become responsible, law-abiding adults. *Id*. at 471. "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). In short, "because juveniles have lessened culpability they are less deserving of the most severe punishments." *Id*. (citing *Roper*, 543 U.S. at 569).

But Florida's parole process does not recognize this. The Florida Parole Commission is not required to consider either the mitigating attributes of youth or the juvenile offender's possibility of 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." Fla. Stat. § 947.002(2) (2021). 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). But in Florida, rehabilitation alone is not enough to be granted parole. Even clearly exceptional program achievement by an inmate incarcerated for a crime committed while a juvenile will normally not be considered when establishing a presumptive parole release date.

Further, parole is less likely to be granted to Florida's juvenile offenders than adult offenders even though a juvenile's lack of maturity and potential for rehabilitation should require the opposite. Inmates cannot be released on parole unless they have an adequate release plan, which requires them to 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* Fla. Stat. § 921.002(1)(b) (2021) ("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." Russell, 89 Ind. L.J. at 421. 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 Florida parole process is compounded by its procedural deficiencies. There is no right to present mitigation because rehabilitation is not a significant consideration. There is no right to counsel. Indeed, there is not even a right for the inmate to be present at any hearing that decides whether he will be released or likely die in custody. This stands in sharp contrast to the juvenile sentencing statutes Florida enacted in response to *Graham* and *Miller*, which provide juvenile *homicide* offenders sentenced after 2014 sentenced to life imprisonment or a term of years equal to life

imprisonment a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. And those statutes also afford juvenile offenders procedural protections such as the right to counsel, the right to present mitigation and the right to be present at any hearing. Yet there are no similar substantive and procedural protections for Petitioner, despite the fact he is incarcerated for a *non*-homicide offense, because he is subject to Florida's parole system.

In light of all of these barriers to a grant of parole in Florida, it is not surprising that only 1.68% of all inmates who make it to the point of receiving a parole decision actually have their parole applications granted, and only one-half of one percent of all parole-eligible inmates are released.

The rarity with which parole is granted in Florida makes it more like clemency rather than a true parole system. However, this Court has held that the "remote possibility" of clemency "does not mitigate the harshness of [a life] sentence" in a manner that satisfies the Eighth Amendment. *Graham*, 560 U.S. at 70; *see Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, the defendant argued that his sentence of life imprisonment without parole for a nonviolent offense under a South Dakota recidivist statute 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, finding South Dakota clemency – where only 22 life sentences had been commuted in the previous 19 years – was not at all comparable

to the Texas parole system it reviewed in *Rummel*. *Solem*, 463 U.S. at 300-03 & n.29.

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)). Indeed, the "possibility" of release on parole in Texas is not a mirage. As Mr. Taylor explained above, more than one-third of Texas inmates eligible for parole are released on parole each year. *See supra*, at 6 & n.6.

In affirming Rummel's sentence, this Court "did not rely simply on the existence of some system of parole;" but 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," as well as "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 Texas 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, the clemency procedure in South Dakota was "an *ad hoc* exercise" that made it impossible to predict when it might be granted. *Id*. at 301.

In Florida, unlike Texas, parole is no longer a "regular part of the rehabilitative process." *Solem*, 463 U.S. at 300. And because it is granted in only in a handful of cases each year, and in light of its lack of substantive and procedural protections for juveniles, it is almost impossible "to predict . . . when parole might be granted." *Id*. at 301. Parole 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, the parole process in Florida is exactly like the commutation process found violative of the Eighth Amendment in *Solem*: "an *ad hoc* exercise," *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," 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 only 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. Mr.

Taylor's 129-year sentence violates the Eighth Amendment despite the possibility of parole, because parole is so rarely granted for juveniles in his position that that possibility is not meaningful.

Of course, this a federal habeas corpus proceeding, and therefore Mr. Taylor's Eighth Amendment claim must overcome the hurdle erected by 28 U.S.C. § 2254(d). Under § 2254(d), if a state court has adjudicated a federal claim, habeas corpus relief cannot be granted on that claim unless the state court's adjudication was contrary to or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts. *See* § 2254(d). Here, because the Florida Fourth District Court of Appeal affirmed the denial of Mr. Taylor's Eighth Amendment claim in an unexplained *per curiam* decision, *see* App. A-5, a federal habeas court must "look through" that decision to the reasoned decision of the state postconviction court. *See Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188, 1192 (2018).

The state postconviction court concluded that because Florida provided Mr. Taylor the *possibility* of parole, his 129-year sentence did not violate the categorical rule of *Graham v. Florida*, 560 U.S. 48 (2010). But *Graham* makes clear that a mere *possibility* of parole is not enough; the possibility cannot be "remote," but must instead be "meaningful." *See Graham*, 560 U.S. at 71, 75. Although "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," *id.* at 75, it must provide "defendants some meaningful

opportunity to obtain release based on maturity and rehabilitation," *id*. Given the rarity of the grant of parole in Florida, Mr. Taylor has been not been afforded a "meaningful opportunity to obtain release" under *Graham*, *Solem,* and their progeny.

When it denied habeas corpus relief, the district court relied on *Virginia v. LeBlanc*, ___ U.S. ___, 137 S. Ct. 1726 (2017), to hold that the state court's adjudication of Mr. Taylor's Eighth Amendment claim was not unreasonable. *See* App. A-2 at 6. But *LeBlanc* does not require that conclusion.

In *LeBlanc*, a Virginia court held that the state's geriatric release program, which replaced its earlier parole system, satisfied *Graham*'s requirement of parole for juvenile non-homicide offenders. This Court held that state-court decision was not an unreasonable application of *Graham,* and therefore habeas corpus relief was barred by § 2254(d). 137 S. Ct. at 1728-29. The Court stated, "it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of nonhomicide crime have a meaningful opportunity to receive parole." *Id*. at 1729. The Court reached this conclusion even though LeBlanc argued that there was no "meaningful opportunity" for parole under the Virginia system based on statistics showing, on average, that 5.8% of the inmates who applied for conditional release received it. *See* Cert. Petition, *Virginia v. LeBlanc*, 2017 WL 1192139, at *12 (U.S. Mar. 28, 2017).

The district court denied Mr. Taylor's petition because his "[a]s in *LeBlanc*, this Court must give deference under the AEDPA to the state court's finding that because Petitioner is parole eligible his sentence did not violate the Eighth Amendment." App. A-2 at 6. But, unlike *LeBlanc*, where the parties agreed that Virginia grants almost 6% of parole requests, in Florida only a paltry 1.68% of all parole decisions result in the grant of parole. In light of the dearth of parole grants in Florida, and *Graham*'s requirement that a state parole system provide a "meaningful opportunity for release," the state court's conclusion that Florida's parole system satisfies *Graham* was an unreasonable application of this Court's Eighth Amendment jurisprudence.

II. The decision below conflicts with that of the Ninth Circuit in *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013).

In *Moore v. Biter*, 725 F. 3d 1184 (9th Cir. 2013), the Ninth Circuit granted § 2254 relief to a California inmate sentenced to a lengthy term of years as a juvenile for a non-homicide offense who "would not be eligible for parole in his lifetime." *Id.* at 1191. The Ninth Circuit found his "sentence is irreconcilable with *Graham*'s mandate that a juvenile nonhomicide offender must be provided 'some meaningful opportunity' to reenter society,'" and the decision of the state appellate court to the contrary an unreasonable application of *Graham* under § 2254(d). *Id.* at 1192, 1194 (quoting *Graham*, 130 S. Ct. 2030). The same is true here. The paucity of parole grants in Florida makes clear that Mr. Taylor will die in prison before he obtains a

favorable parole decision. Were Mr. Taylor housed in the Ninth Circuit, the state court decisions rejecting Mr. Taylor's Eighth Amendment claim would be deemed an unreasonable application of *Graham*, and § 2254 relief granted. The Court should grant the petition to resolve this irreconcilable conflict.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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