CASE NO: SC18-964

In the Supreme Court of Florida

LINDA PEDROZA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA No.: 4D17-2151

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This appeal concerns whether a juvenile defendant's forty-year prison sentence for a homicide offense violates the Eighth Amendment. In denying relief, the Fourth District Court of Appeal held that Petitioner failed to "show[] that her sentence . . . violates the Eighth Amendment as construed by any decision of [this Court or] the Supreme Court of the United States." (Op. 1). Recognizing there was disagreement, the Fourth District certified conflict with numerous Second and Fifth District Court of Appeal decisions, which have interpreted *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016); and *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017), as mandating a resentencing for all juvenile offenders whose sentences meet the standard for judicial review defined by Chapter 2014-220, Laws of Florida, but who have not received the benefit of the statute.

Because this Court's precedent holds that "all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220 . . . are entitled to judicial review," *Kelsey*, 206 So. 3d at 8 (discussing *Henry*'s holding), Petitioner requests that this Court disapprove of the Fourth District's decision below and remand her case for resentencing. This result flows from the principle that the constitutionality of a juvenile offender's sentence depends not on its length, but whether the sentence was individualized and provides a meaningful opportunity for early release based upon demonstrated maturity and rehabilitation.

STATEMENT OF THE CASE AND FACTS

This case began in 2000 when Petitioner Linda Pedroza and her boyfriend, Antoine Wright, were charged as codefendants with the first-degree murder of Petitioner's mother. (R. 21).[1] In the same indictment, the State charged Petitioner with (Count II) conspiracy and (Count IV) false report of a crime. (R. 21-22). Petitioner committed the offenses when she was seventeen years old. (R. 3, 124).

On December 20, 2002, Petitioner entered into a negotiated plea. For Count I, Petitioner pled guilty to the lesser offense of second-degree murder and was sentenced to forty years' imprisonment. (R. 24-26, 28). For Counts II and IV, Petitioner pled guilty as charged and received concurrent sentences of thirty years imprisonment and five years imprisonment, respectively.[2] (R. 28-33). Petitioner's codefendant, who was an adult when he committed the murder, was sentenced pursuant to a plea to twenty years imprisonment. (R. 50).

Petitioner's Motion to Correct an Illegal Sentence

On January 6, 2017, Petitioner filed a *pro se* postconviction motion pursuant to Florida Rule of Criminal Procedure 3.800(a). Within the motion, Petitioner

[1] Although the record on appeal does not contain page numbers, the citations used in this Brief will refer to the PDF citation number. References to the Fourth District's opinion—which is included as an appendix—will be referenced by the term "Op" and an appropriate page number.

[2] Petitioner only challenged the second-degree murder conviction in her Florida Rule of Criminal Procedure 3.800(a) motion.

argued that her forty-year sentence for second-degree murder violated *Miller v. Alabama*, 567 U.S. 460, 469 (2012), because it did not provide her a meaningful opportunity for early release based upon her demonstrated maturity and rehabilitation. (R. 3-7). As relief, Petitioner requested a resentencing hearing where mitigating evidence of her youth could be considered. (R. 6).

Petitioner's motion asserted that through *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), this Court extended *Miller* to second-degree murder cases. (R. 5). Furthermore, Petitioner argued that two cases—this Court's decision in *Thomas v. State*, 177 So. 3d 1275 (Fla. 2015), and the Fifth District Court of Appeal's decision in *Tarrand v. State*, 199 So. 3d 507 (Fla. 5th DCA 2016)—mandated that lengthy term-of-years sentences for juvenile homicide offenders can be unconstitutional. (R. 5).

In addition, Petitioner explained that she "entered [the] plea of guilty to avoid both the death penalty or a natural life sentence." (R. 5). Through resentencing and review proceedings, Petitioner sought to "provide mitigating factors" not fully appreciated when she entered her initial plea, such as "her age and the fact that she was not the individual who actually committed the murder." (R. 5). Petitioner wrote that her codefendant Wright—who was twenty-three years old at the time of the murder and qualified as a Prison Releasee Reoffender—"was the actual perpetrator in this case." (R. 5). Nonetheless, Petitioner explained that

she "was only offered a forty (40) year plea because the victim was her mother." (R. 5). Wright, by contrast, received a twenty-year sentence and has since been released from prison. (R. 5).

The State's Response

In a written response, the State argued that Petitioner's forty-year sentence for second-degree murder was not unconstitutional. (R. 11-19). The State urged the trial court to deny relief based upon the First District's decision in *Davis v. State*, 214 So. 3d 799 (Fla. 1st DCA 2017), and the Second District's decision in *Waiters v. State*, 210 So. 3d 209 (Fla. 2d DCA 2016). (R. 14-16). In those cases, the district courts denied defendants relief on their thirty-five and forty year sentences, respectively, on the basis that their sentences for homicide offenses were neither mandatory life, natural life, nor de facto life. (PDF. 15). Relying upon the Fourth District's decision in *Davis v. State*, 199 So. 3d 546 (Fla. 4th DCA 2016), the State also argued Petitioner was not entitled to relief because she is scheduled to be released from prison at age fifty-five.[3] (PDF. 16).

[3] After the State filed its written response, this Court quashed the Second District's decision in *Waiters* as well as the Fourth District's decision in *Davis*. *See Waiters v. State*, 42 Fla. L. Weekly S751 (Fla. June 23, 2017); *Davis v. State*, SC16-1905, 2018 WL 480516 (Fla. Jan. 19, 2018). The defendant from the First District's *Davis* decision—who had proceeded pro se on appeal—did not invoke this Court's discretionary jurisdiction.

The Trial Court's Order

On June 12, 2017, the trial court entered a written order summarily denying Petitioner's 3.800(a) motion, incorporating the State's response and its exhibits. (R. 186-87). Thereafter, Petitioner timely appealed to the Fourth District.

Hart v. State

While Petitioner's appeal was pending, the Fourth District issued an en banc decision in *Hart v. State*, 246 So. 3d 417 (Fla. 4th DCA 2018), *review granted*, SC18-967, 2018 WL 4614150 (Fla. Sept. 7, 2018), *and case dismissed*, SC18-967, 2018 WL 6181698 (Fla. Nov. 27, 2018). In *Hart,* the juvenile defendant appealed from the summary denial of his Florida Rule of Criminal Procedure 3.800(a) postconviction motion, which asserted his thirty-year sentence for a nonhomicide offense violated the Eighth Amendment. *Id.* at 418.

The Fourth District affirmed the denial of the Rule 3.800(a) motion. In the majority opinion—joined by eight judges—the Fourth District distinguished this Court's opinions in *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016); *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017); and *Lee v. State*, 234 So. 3d 562 (Fla. 2018), on the following basis:

> We distinguish *Henry*, *Kelsey*, *Johnson*, and *Lee*, as those cases all involve juvenile non-homicide offenders who were resentenced following *Graham* and whose sentences imposed on resentencing still were unconstitutional. In those cases, the violation of the dictates of *Graham* resulted in resentencing, which was mandated by the Florida Supreme Court to be in accordance with chapter 2014–220. In

> contrast, the instant case involves an original sentence, and there is no clear authority stating that a 30–year sentence violates *Graham* so as to trigger resentencing under chapter 2014–220. The dissent overlooks this distinction and, in doing so, conflates *Graham* and chapter 2014–220.

Hart, 246 So. 3d at 419. Thus, the majority concluded that "[t]he Florida Supreme Court has not yet applied *Graham* to a 30–year or shorter sentence." *Id.* at 420.

Recognizing there was disagreement from other district courts, the Fourth District certified conflict with the following decisions from the Second and Fifth District Courts of Appeal: *Cuevas v. State*, 241 So. 3d 947 (Fla. 2d DCA 2018); *Blount v. State*, 238 So. 3d 913 (Fla. 2d DCA 2018); *Mosier v. State*, 235 So. 3d 957 (Fla. 2d DCA 2017); *Alfaro v. State*, 233 So. 3d 515 (Fla. 2d DCA 2017); *Burrows v. State*, 219 So. 3d 910 (Fla. 5th DCA 2017).

The dissenting opinion—authored by Judge Warner—explained that "the Florida Supreme Court ha[d] already addressed the issue presented in the majority opinion." *Hart*, 246 So. 3d at 421 (Warner, J., dissenting). Analyzing this Court's precedent, Judge Warner wrote that "[a] lengthy sentence . . . violates the precepts of *Graham* when it does not provide a means of early release based on maturity." *Id.* at 422. Because the sentence was sufficiently lengthy to trigger judicial review, Judge Warner asserted the case should be "reverse[ed] and remand[ed] for resentencing of Hart consistent with" *Lee*, *Johnson*, and *Kelsey*. *Id.* at 419.

The defendant in *Hart* timely invoked this Court's jurisdiction and this

Court accepted review. *See Hart v. State*, SC18-967, 2018 WL 4614150 (Fla. Sept. 7, 2018). However, the defendant subsequently obtained collateral relief and was released from prison, rendering his cause moot. Accordingly, this Court dismissed the case. *See Hart v. State*, SC18-967, 2018 WL 6181698 (Fla. Nov. 27, 2018).

Petitioner's Appeal Before the Fourth District

The Fourth District later affirmed the denial of Petitioner's rule 3.800(a) motion based upon the reasoning of *Hart*. The court explained as follows, (Op. 1):

> [Petitioner] has not shown that her sentence, imposed when she was a juvenile for the murder of her mother, violates the Eighth Amendment as construed by any decision of the Supreme Court of the United States. Nor has she identified any clear, binding Florida Supreme Court decision that requires resentencing. We note the Florida Supreme Court's recent decisions in both *Morris v. State*, ––– So.3d––, 43 Fla. L. Weekly S223a, 2018 WL 2146786 (Fla. May 10, 2018) and *Williams v. State*, ––– So.3d ––––, 43 Fla. L. Weekly S183, 2018 WL 1870518 (Fla. Apr. 19, 2018), involved concessions of error by the state.

Finding that no authority from this Court or the United States Supreme Court mandated a resentencing, the Fourth District affirmed based upon the reasoning in *Hart*. As was done in *Hart*, the Fourth District certified conflict with the Second and Fifth District decisions in *Cuevas*, *Blount*, *Mosier*, *Alfaro*, and *Burrows*. Furthermore, because Petitioner—unlike the defendant in *Hart*—committed a homicide offense, the Fourth District certified conflict with the Fifth District's decisions in *Katwaroo v. State*, 237 So. 3d 446 (Fla. 5th DCA 2018), and *Tarrand v. State*, 199 So. 3d 507 (Fla. 5th DCA 2016). (Op. 2).

SUMMARY OF THE ARGUMENT

In denying Petitioner relief, the Fourth District misread *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016); *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017); and *Lee v. State*, 234 So. 3d 562, 564 (Fla. 2018). These decisions collectively hold that the constitutionality of a juvenile offender's sentence is predicated not on the term of the sentence but rather on the status of, and the opportunity afforded, the offender. To ensure juvenile offenders are afforded such opportunity, this Court mandated "that all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220 . . . are entitled to judicial review." *Kelsey*, 206 So. 3d at 8; *Henry*, 175 So. 3d at 680.

Because Petitioner's forty-year prison sentence was not individualized and does not contain judicial review pursuant Chapter 2014-220, her sentence violates the Eighth Amendment and resentencing is required. Such result is consistent with this Court's treatment of similarly situated juvenile defendants. *See, e.g.*, *Thomas v. State*, 177 So. 3d 1275 (Fla. 2015); *Waiters v. State*, 42 Fla. L. Weekly S751 (Fla. June 23, 2017); *Williams v. State*, 44 Fla. L. Weekly S98 (Fla. Jan. 4, 2019); *Morris v. State*, 246 So. 3d 244 (Fla. 2018). Furthermore, denying relief to juvenile offenders like Petitioner would frustrate the Legislature's intent in creating judicial review as a remedy and disproportionately punish juvenile offenders serving lengthy term-of-year sentences on lesser offenses not warranting a life sentence.

ARGUMENT

PETITIONER'S FORTY-YEAR PRISON SENTENCE VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, BECAUSE THE SENTENCE WAS NOT INDIVIDUALIZED AND DOES NOT PROVIDE FOR JUDICIAL REVIEW PURSUANT TO CHAPTER 2014-220, LAWS OF FLORIDA

By denying Petitioner a resentencing and foreclosing her eligibility for judicial review, the Fourth District's decision contravenes the precepts of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), which were predicated on the notion that children are different than adults in ways that affect the appropriateness of their punishment. *See Johnson v. State*, 215 So. 3d 1237, 1239-40 (Fla. 2017) ("[A]ny term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.").

Because of these differences, this Court has articulated its "intent[ion] for juvenile offenders, who are otherwise treated like adults for purposes of sentencing, to retain their status as juveniles in some sense." *Kelsey v. State*, 206 So. 3d 5, 10 (Fla. 2016). And this Court implemented this intention by mandating that all "juveniles who are serving lengthy sentences are entitled to periodic judicial review to determine whether they can demonstrate maturation and rehabilitation." *Id.*; *see also Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015) ("[T]he Eighth Amendment will not tolerate prison sentences that lack a review

mechanism for evaluating this special class of offenders for demonstratable maturity and reform in the future . . . . "); *Johnson*, 215 So. 3d at 1240 ("*Graham* prohibits juvenile nonhomicide offenders from serving lengthy terms of incarceration without any form of judicial review mechanism.").

At present, Petitioner is serving a forty-year prison sentence with no periodic review to demonstrate her maturation and rehabilitation. Without periodic review, Petitioner has been deprived the opportunity to show that the criminal act she committed as a child does not forever define her. Without periodic review, Petitioner has been denied the ability to "demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). And without periodic review, Petitioner retains no status as a juvenile in any sense—as she remains in the same position as any adult prisoner serving the totality of a lengthy term-of-year sentence with no hope of early release.

Consistent with the holdings of *Henry*, *Kelsey*, and *Johnson*, this Court should disapprove of the Fourth District's decision below and remand Petitioner's case for resentencing. As presently structured, Petitioner's sentence is unconstitutional because it was not individualized to account for her youth and it does not provide a meaningful opportunity for early release based upon Petitioner's demonstration of her maturity and rehabilitation.

I. Standard of Review

"[R]eview of a decision of a district court of appeal construing a provision of the state or federal constitution concerns a pure question of law and is, thus, de novo." *Tracey v. State*, 152 So. 3d 504, 511 n.7 (Fla. 2014); *see also State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (questions of law are reviewed de novo).

II. United States Supreme Court's Jurisprudence

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller*, 567 U.S. at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). This right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id*. (quotation marks omitted); *see also Graham*, 560 U.S. at 59 ("The concept of proportionality is central to the Eighth Amendment."); *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–33 (2016) ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment . . . . ").

In determining the constitutionality of a punishment, courts must look to the "evolving standards of decency that mark the progress of a maturing society," recognizing the "essential principle" that "the State must respect the human attributes even of those who have committed serious crimes." *Graham,* 560 U.S. at 58 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). In so doing, courts must

exercise their independent judgment to consider the culpability of the offender and the severity of the punishment. *Id.* at 67. A "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71.

In the context of juveniles, the United States Supreme Court has consistently recognized that "children are constitutionally different from adults for purposes of sentencing," *Montgomery*, 136 S. Ct. at 733, and "cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011). This recognition derives in part from what parents have always known—that children "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). But it also stems from developments in psychology and brain science, which have shown that there are fundamental differences between juvenile and adult minds. *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 471-72.

Graham v. Florida

Rooted in these principles, the United States Supreme Court in *Graham* held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." 560 U.S. at 74. The *Graham* opinion echoed the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005)—which invalidated the death penalty for children—in recognizing that three essential characteristics distinguish juveniles from adults for culpability purposes:

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders."

ld. at 68 (quoting *Roper*, 543 U.S. at 569-70, 573). These distinctive features—including a child's inherent capacity for change—require a different approach under the Eighth Amendment when imposing a sentence upon a child.

In deciding *Graham*, the Court reviewed the well-established penological rationales for punishment—retribution, incapacitation, and rehabilitation—and concluded that each carries less force in the case of juvenile offenders. Because "[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult." *Graham*, 540 U.S. at 71 (quotations omitted). Likewise, deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible," despite that "incorrigibility is inconsistent with youth." *Id.* at 72-73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)). Finally, rehabilitation cannot justify such a sentence because life without parole "forswears altogether the rehabilitative ideal." *Id.* at 74.

The core principle from *Graham* was that, within our criminal justice system, the severity of punishment must be proportional to moral culpability. Given the incongruity of imposing an irrevocable penalty on adolescents who have the capacity to change and grow, the Court mandated that "[w]hat the State must do . . . is give defendants like Graham some **meaningful** opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75 (e.a.).

Miller v. Alabama

Turning to the homicide context, the Supreme Court held in *Miller* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. *Miller* dictates that before life without parole becomes a proportionate sentence, sentencing courts must consider "youth and its attendant characteristics," i.e. "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 465, 480.

"The 'foundation stone' for *Miller*'s analysis was the line of precedent holding certain punishments disproportionate when applied to juveniles." *Montgomery*, 136 S. Ct. at 732. The Court explained that "none of what it said about children" in *Graham*—"about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime specific." *Miller*, 567 U.S. at 473.

"Most fundamentally, *Graham* insist[ed] that youth matters in determining the appropriateness of a" juvenile offender's sentence. *Id.*

Subsequently, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Supreme Court recognized that *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* at 734 (quoting *Miller*, 567 U.S. at 472). "Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, a juvenile whose crimes reflect the transient immaturity of youth." *Id.* (internal quotations omitted).

III. The Florida Legislature's Response to Miller *and* Graham

In issuing *Graham*, the Supreme Court left to the states, "in the first instance," the responsibility for determining "the means and mechanisms for compliance." 560 U.S. at 75. In response, the Florida Legislature passed Chapter 2014-220, Laws of Florida, which enacted sentencing provisions for juveniles. These statutes, by their wording, apply to offenses committed after July 1, 2014. Their purpose was to "bring Florida's juvenile sentencing statutes into compliance

with the United States Supreme Court's . . . Eighth Amendment juvenile sentencing jurisprudence." *Horsley v. State*, 160 So. 3d 393, 394 (Fla. 2015).

Section 921.1401, Florida Statutes, enumerated a list of sentencing factors a trial court must consider when determining a qualifying juvenile offender's sentence. These factors codify the individualized sentencing requirement of *Miller*. *See Landrum v. State*, 192 So. 3d 459, 465 (Fla. 2016).

The juvenile sentencing provisions also allow juvenile offenders to obtain judicial review of their sentences after either 15, 20, or 25 years, depending on the circumstances of the offense. *See* §§ 775.082(1)(b), 775.082(3)(a)5, 775.082(3)(b)2, 775.082(3)(c), Fla. Stat. The sentencing review provision satisfies the requirement that juvenile offenders be provided a meaningful opportunity for early release based upon maturation and rehabilitation by requiring the trial court to modify the defendant's sentence if "the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society." § 921.1402(7), Fla. Stat.

IV. This Court's Jurisprudence

Although *Miller* and *Graham* focused on life-without-parole, this Court has held that the Supreme Court's juvenile sentencing jurisprudence applies to juvenile offenders that receive lengthy term-of-year sentences. In so concluding, this Court has embraced the principle that children are different than adults in ways that affect the appropriateness and proportionality of their punishment. *See Johnson*, 215 So.

3d at 1239-40 ("[A]ny term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult.").

Furthermore, this Court has construed *Graham* and *Miller* as being part of a single body of jurisprudence with congruent constitutional considerations. *See Horsley*, 160 So. 3d at 398 ("While this case involves a homicide rather than a nonhomicide offense, *Graham* is instructive because, as the Supreme Court acknowledged two years later in *Miller*, *Graham* stands for the proposition that the Eighth Amendment prohibits certain punishments without 'considering a juvenile's lessened culpability and great capacity for change.'"); *Falcon v. State*, 162 So. 3d 954, 959 (Fla. 2015) ("A discussion of *Miller* appropriately begins with the Supreme Court's prior decision in *Graham*, which laid the jurisprudential foundation upon which the subsequent *Miller* decision was based.").

Henry v. State

In *Henry v. State*, 175 So. 3d 675 (Fla. 2015), this Court rejected the State's position that *Graham* was limited to cases in which the juvenile received a sentence of life imprisonment. *Id.* at 680. This Court explained that "the United States Supreme Court's long-held and consistent view that juveniles are different" than adults supported the view that "the specific sentence that a juvenile nonhomicide offender receives for committing a given offense is not dispositive as to whether the prohibition against cruel and unusual punishment is implicated." *Id.*

Instead, the constitutional focus had to be placed not on the length of the sentence, but on the "special class of citizens, to wit: juvenile nonhomicide offenders." *Johnson*, 215 So. 3d at 1239; *see also Gridine v. State*, 175 So. 3d 672, 674–75 (Fla. 2015) (finding a seventy year sentence unconstitutional because it failed to provide the defendant with a meaningful opportunity for "early release").

Applying this focus, this Court held that "the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of [juvenile] offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult." *Henry*, 175 So. 3d at 680. This Court has since clarified that its holding in "*Henry* was not predicated on the term of the sentence but rather on the status of, and the opportunity afforded, the offender." *Kelsey*, 206 So. 3d at 9. To ensure juvenile offenders are afforded such opportunity, *Henry* mandated "that all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220 . . . are entitled to judicial review." *Kelsey*, 206 So. 3d at 8 (discussing *Henry*'s holding).

Thomas v. State and *Kelsey v. State*

In *Thomas v. State*, 177 So. 3d 1275 (Fla. 2015), this Court quashed a First District opinion that had affirmed a juvenile offender's sentences for homicide and nonhomicide offenses. The defendant initially received a life sentence for first-

degree murder, but was resentenced following *Miller* to concurrent sentences of forty years imprisonment for murder and thirty years imprisonment for robbery. *Thomas v. State*, 135 So. 3d 590, 590-91 (Fla. 1st DCA 2014). The sentences did not include judicial review. Without elaboration, this Court accepted review and remanded the case for resentencing under Chapter 2014-220, Laws of Florida.

Any ambiguity as to this Court's reasoning in *Thomas* was subsequently ameliorated in *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016). There, the juvenile defendant was originally sentenced to life imprisonment for nonhomicide offenses but was resentenced following *Graham* to forty-five years in prison. Because the defendant was sentenced prior to the effective date of Chapter 2014-220, his sentence did not include judicial review. The First District affirmed the sentence, reasoning that forty-five years in prison did not constitute a "de facto" life sentence. *Kelsey v. State*, 183 So. 3d 439, 442 (Fla. 1st DCA 2015).

Disagreeing with the First District that relief is reserved for juvenile offenders serving de facto life sentences, this Court held that "all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014–220, a sentence longer than twenty years, are entitled to judicial review." *Kelsey*, 206 So. 3d at 8. This Court reiterated that its "focus has not been on the length of the sentence imposed but on the status of the offender and the possibility that he or she will be able to grow into a contributing member of society." *Id*. at 9.

"After . . . ma[king] clear that *Graham* does indeed apply to term-of-years sentences," this Court wrote that it "declined to require that such sentences must be 'de facto life' sentences for *Graham* to apply." *Id*. at 10 (citation omitted).

In tandem, this Court held that the defendant did not have a reasonable expectation of finality in his sentence—and, so, jeopardy did not attach—because his 45-year sentence was *independently* illegal. That sentence was illegal not because of its length, "but because it did not provide [the defendant] a meaningful opportunity for early release based on maturation and rehabilitation." *Id*. at 11.

Johnson v. State

One year later, this Court applied the same principles to decide *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017). There, the defendant was resentenced following *Graham* to 100 years in prison, but he was eligible for substantial gain time by virtue of committing the offense in 1990. *Id.* at 1239. In reversing the defendant's sentence, this Court interpreted three cases—*Graham*, *Henry*, and *Kelsey*—as standing for the proposition that "juvenile nonhomicide offenders are entitled to sentences that provide a meaningful opportunity for early release based on demonstrated maturity and rehabilitation during their natural lifetimes and that gain time fails to meet those requirements." 215 So. 3d at 1239.

For a lengthy term-of-years sentence to be constitutional, this Court held the juvenile offender must be provided an opportunity for <u>early</u> release that is: (1)

meaningful, (2) based on a demonstration of maturity and rehabilitation, and (3) during his or her natural life. *Id.* at 1242. The exclusion of any prong would render the sentence unconstitutional. As this Court explained in detail, (*id.* at 1243):

> Post–Henry,[4] we must ensure that a juvenile nonhomicide offender does not receive a sentence that provides for release only at the end of a sentence (e.g. a 45–year sentence with no provision for obtaining early release based on a demonstration of maturity and rehabilitation before the expiration of the imposed term, such as in Kelsey). Secondly, we must ensure that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence which includes early release that is not based on a demonstration of rehabilitation and maturity (i.e. gain time or other programs designed to relieve prison overpopulation). Last, we must ensure that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence that provides for early release at a time beyond his or her natural life (e.g. a 1,000–year sentence that provides parole-eligibility after the offender serves 100 years). To qualify as a "meaningful opportunity for early release," a juvenile nonhomicide offender's sentence must meet each of the three parameters described in Henry.

Because the defendant in *Johnson* would not be eligible for release until long after his life expectancy, even with gain time, the third prong—that release occur during the defendant's natural life—was not met and his sentence was unconstitutional. However, as the above language indicates, the defendant's sentence would have been unconstitutional, regardless of when he was set to be released, had the sentence been 45 years imprisonment without judicial review.

[4] Although using the term "post-Henry," the defendant in *Johnson* was sentenced on February 12, 2012, three years before *Henry* was decided.

This Court later held so in *Lee v. State*, 234 So. 3d 562, 564 (Fla. 2018) (applying the factors described in *Johnson* to reverse a juvenile's 40-year sentence, which was imposed after the defendant's initial life sentence was invalidated).

V. The Second and Fifth District Apply the Correct Interpretation of this Court's Precedent

Consistent with Petitioner's argument, the Second and Fifth District Courts of Appeal have interpreted *Henry*, *Kelsey*, and *Johnson* as mandating that resentencing is required for all juvenile offenders whose sentences meet the standard for judicial review defined by Chapter 2014-220 but who have not received the benefit of the statutory scheme. *See Cuevas v. State*, 241 So. 3d 947 (Fla. 2d DCA 2018); *Blount v. State*, 238 So. 3d 913 (Fla. 2d DCA 2018); *Mosier v. State*, 235 So. 3d 957 (Fla. 2d DCA 2017); *Alfaro v. State*, 233 So. 3d 515 (Fla. 2d DCA 2017); *Burrows v. State*, 219 So. 3d 910 (Fla. 5th DCA 2017). In several instances, the State on appeal has conceded this to be the correct interpretation. [5]

[5] For example, in *Peterson v. State*, 193 So. 3d 1034 (Fla. 5th DCA 2016), the Fifth District affirmed a defendant's original fifty-six-year prison sentence and held that, regardless of life expectancy or whether a sentence is de facto life, *Henry* applies to lengthy-term-year sentences that do not provide a review mechanism and opportunity for early release. The State appealed to this Court and the case was stayed pending *Kelsey*. *See* Docket for *State v. Peterson*, SC16-1211. In response to a show case order, the State conceded that *Kelsey* controlled and that the Fifth District's decision was correct. *See* State's Response, available at: https://efactssc-public.flcourts.org/casedocuments/2016/1211/2016-1211_response_47707.pdf. Thereafter, this Court entered an order that declined jurisdiction and cited to *Kelsey*. *See State v. Peterson*, SC16-1211, 2017 WL 2705649 (Fla. June 23, 2017).

In *Mosier*, the State conceded that a trial judge erred in summarily denying a defendant's Rule 3.800(a) motion, where the defendant had been sentenced to thirty years imprisonment followed by ten years' of probation for offenses he committed as a juvenile. 223 So. 3d at 516. The trial judge denied the motion because the defendant "would be released at age forty-six at the latest" and "had the opportunity for earlier release through the accrual of gain time." *Id.* Accepting the State's concession of error, the Second District reversed because the defendant's sentence did not satisfy the three prongs outlined in *Johnson*. *Id.*; *see also Burrows*, 219 So. 3d 910 (accepting the State's concession of error and citing *Kelsey* where the defendant filed 3.800 motion challenging concurrent twenty-five-year sentences that lacked judicial review).

In *Montgomery v. State*, 230 So. 3d 1256 (Fla. 5th DCA 2017), the Fifth District reversed for resentencing where a juvenile defendant had been sentenced to thirty years' imprisonment with a twenty-five-year mandatory minimum for nonhomicide offenses. After engaging in a thorough analysis of *Graham*, *Henry*, *Kelsey*, and *Horsley*, the Fifth District reaffirmed "that [this Court's] admonition that a constitutional sentence is one that provides a meaningful opportunity for early release is not satisfied because the juvenile may be released from prison at some point before the conclusion of his or her life expectancy." *Id.* at 1259 (quoting *Peterson v. State*, 193 So. 3d 1034, 1038 (Fla. 5th DCA 2016)). Since the

defendant's thirty-year sentence without judicial review did not provide a meaningful opportunity for early release, the sentence was unconstitutional.[6]

The Fifth District—relying upon *Thomas*—has applied the same analysis to reverse lengthy term-of-year sentences imposed upon juvenile offenders convicted of homicide offenses. *See Tarrand v. State*, 199 So. 3d 507, 509 (Fla. 5th DCA 2016) (reversing fifty-one-year sentence for homicide offense on the basis that through *Thomas* the "supreme court intends to apply the holdings of *Henry* and *Gridine* to juvenile homicide offenders who receive lengthy term-of-years sentences"); *Katwaroo v. State*, 237 So. 3d 446, 447 (Fla. 5th DCA 2018) (reversing denial of 3.800(a) motion where defendant received a 30-year sentence for murder that lacked judicial review); *Ostane v. State*, 245 So. 3d 1022 (Fla. 5th DCA 2018) (same); *Santiago v. State*, 254 So. 3d 1125 (Fla. 5th DCA 2018)

[6] There are numerous other decisions from the Second and Fifth Districts that apply the same reasoning. *See Cuevas*, 241 So. 3d 947 (concluding that a juvenile nonhomicide offender's sentences of twenty-six years in prison were unconstitutional under *Graham* as construed by *Henry* and *Johnson*); *Blount*, 238 So. 3d 913 (reversing the denial of a rule 3.800(a) motion to correct juvenile nonhomicide sentences of 40 years in prison and remanding for resentencing pursuant to *Johnson*); *Alfaro*, 233 So. 3d at 516 (reversing 30–year sentences for nonhomicide offenses and rejecting trial court's conclusion that "*Kelsey* only applied to juvenile offenders like Kelsey who initially received life sentences but had been resentenced to a term of years under *Graham*"); *Gorman v. State*, 253 So. 3d 740 (Fla. 2d DCA 2018) (defendant was entitled to resentencing on forty-five year sentences for nonhomicide offenses); *Tyson v. State*, 199 So. 3d 1087, 1088 (Fla. 5th DCA 2016) (defendant to be resentenced on forty-five year sentence).

(reversing 35-year sentence for second-degree murder).

As Judge Warner recognized in her dissent in *Hart*, the Second and Fifth Districts apply the correct interpretation of this Court's precedent. 246 So. 3d at 421 (Warner, J., dissenting). To secure "a meaningful review based on rehabilitation and maturity," as *Graham* and *Miller* require, a sentence must include a mechanism that provides periodic review of defendants who committed their crimes as juveniles to determine whether they have matured and been rehabilitated. This is the only way to embrace the accepted scientific principle that children are different than adults. Juvenile offenders' lack of developmental accountability must correlate to their legal accountability and mandate a process that meaningfully considers their future prospects for rehabilitation. Lengthy term-of-years sentences without judicial review deny juvenile offenders an opportunity for early release that is meaningful.

VI. The Second and Fifth District's Interpretation is Consistent With This Court's Treatment of Similarly-Situated Defendants

By contrast, the Fourth District—in both this case and *Hart*—has read this Court's precedent as creating two classes of juvenile offenders serving term-of-year sentences: (1) those who originally received life sentences that were then rendered unconstitutional by *Graham* or *Miller*, and (2) those who received only term-of-years sentences short of their life expectancies, with no previous life sentence in violation of the Eighth Amendment. The first group must, according to

the Fourth District, be resentenced under Chapter 2014-220, which includes judicial review of their sentence. The second group is not entitled to resentencing. The First District has interpreted this Court's precedent similarly. *See Kadeem Hart v. State*, 255 So. 3d 921 (Fla. 1st DCA 2018), *reh'g denied* (July 2, 2018).

Aside from being contrary to the express language of *Henry*, *Kelsey*, and *Johnson*, this interpretation cannot be reconciled with this Court's treatment of defendants similarly situated to Petitioner. *See, e.g., Trejo v. State*, 41 Fla. L. Weekly S454 (Fla. Oct. 11, 2016) (quashing fifty-year sentence); *Michel v. State*, 41 Fla. L. Weekly S454 (Fla. Oct. 11, 2016) (quashing fifty-nine-year aggregate sentence); *Smith v. State*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016) (forty-year sentence); *Collins v. State*, 43 Fla. L. Weekly S507 (Fla. Aug. 24, 2018) (aggregate fifty-five-year sentence). This Brief will address three such cases in depth.

Waiters v. State

In *Waiters v. State*, 210 So. 3d 209 (Fla. 2d DCA 2016), the defendant was sentenced to forty years imprisonment without judicial review for a second-degree murder he committed as a juvenile. *Id.* at 210. While his direct appeal was pending, the defendant filed a motion to correct sentencing error, which was denied, arguing that he was entitled to be resentenced under section 921.1402, Florida Statutes, even though his crime was committed before the effective date of the statute. *Id.* "Because [the defendant] did not receive a mandatory life sentence

without parole," the Second District held "his sentence [wa]s not unconstitutional under *Miller* and he was not entitled to be sentenced under section 921.1402." *Id.* Furthermore, the court found that a "forty-year sentence is not a de facto life sentence without parole . . . qualifying him for relief under *Landrum* . . . . " *Id.*

Upon further appeal, this Court entered a disposition order[7] that "accept[ed] jurisdiction in th[e] case consistent with *Kelsey* . . . . " *Waiters v. State*, 42 Fla. L. Weekly S751 (Fla. June 23, 2017). The disposition order noted that the State "concede[d] that *Kelsey* mandates resentencing in conformance" with Chapter 2014-220. Therefore, the Court quashed the Second District's decision and remanded the case "for further proceedings consistent with *Kelsey*." *Id.*

This Court's treatment of *Waiters* sheds light on two important aspects of Petitioner's appeal. First, the *Waiters* decision confirms—as shown through

[7] A disposition order that accepts jurisdiction over a case and quashes a district court of appeal decision constitutes precedent because it demonstrates this Court's affirmative directive that the underlying decision was wrongly decided. The situation is different from an order that declines jurisdiction of a case, which is of no precedential value because the decision to accept or deny jurisdiction is entirely discretionary. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 220 (2016) ("Although the one-line orders embodied in summary affirmances [from the United States Supreme Court] bind lower courts, the same isn't true of another type of one-line order: denials of writs of certiorari. This action—in truth a kind of inaction—'imports no expression of opinion upon the merits of the case, as the bar has been told many times.' Unlike a summary disposition, a refusal to hear a case says nothing about the merits. It says only that, for any number of possible reasons, the Court didn't want to review the lower-court ruling . . . . ").

Thomas—that the analysis of *Kelsey* applies equally to juveniles convicted of homicide offenses as it does to juveniles convicted of non-homicide offenses. Second, the *Waiters* decision shows that a defendant originally sentenced to forty years imprisonment without judicial review is entitled to resentencing. Because the defendant in *Waiters* had never received a life or de facto life sentence, this Court's decision to remand for resentencing "consistent with *Kelsey*" cannot be reconciled with the Fourth District's interpretation of *Henry*, *Kelsey*, and *Johnson*.

Williams v. State

This Court reached a similar result in *Williams v. State*, 44 Fla. L. Weekly S98 (Fla. Jan. 4, 2019). There, the trial court sentenced the defendant for first-degree murder to thirty-five years' imprisonment, with a twenty-five-year mandatory minimum. *Williams v. State*, 203 So. 3d 1020, 1021 (Fla. 2d DCA 2016). The defendant was also sentenced on a nonhomicide offense to a twenty-five-year minimum mandatory sentence followed by probation. *Id.*

On direct appeal, the defendant argued he was entitled to be resentenced under Chapter 2014-220, even though he committed his offenses prior to the July 1, 2014, effective date of the legislation. *Id.* The Second District disagreed for two reasons. First, the court held that the defendant's thirty-five-year sentence for first-degree murder was not unconstitutional under *Miller*, since he did not receive a mandatory life-without-parole sentence. *Id.* Second, the court held that the

defendant's twenty-five-year sentence for attempted murder was not unconstitutional because it did not amount to de facto life. *Id.*

Before this Court, the State conceded the defendant was entitled to be resentenced pursuant to Chapter 2014-220. *Williams*, 44 Fla. L. Weekly S98. Accepting the concession[8] and relying upon *Thomas*, a plurality of this Court quashed the Second District's decision and remanded for resentencing. *Id.*

Morris v. State

Most recently, in *Morris v. State*, 246 So. 3d 244 (Fla. 2018), the trial court sentenced the defendant—who was fifteen years old at the time of his offenses—to concurrent sentences of thirty years' imprisonment and fifteen years' imprisonment for the crimes of attempted felony murder and attempted armed robbery, respectively. *Id.* at 244. The defendant committed the offenses in 2012, prior to the enactment of Chapter 2014-220, but was sentenced in 2014. *Id*. "[B]y its own terms, chapter 2014-220 d[id] not apply" to the defendant and so his sentence did

[8] In *Hart*, the Fourth District distinguished *Williams* on the basis that it "involv[ed] a plurality opinion which, based entirely on the state's concession, ended inquiry and remanded for resentencing of a 35–year sentence pursuant to chapter 2014–220." 246 So. 3d at 420. However, Florida courts are not bound to accept improper State concessions of error. *See, e.g.*, *Gomez v. State*, 684 So. 2d 879 (Fla. 4th DCA 1996); *Fichera v. State*, 688 So. 2d 453 (Fla. 1st DCA 1997). On prior occasion, this Court has recognized that an inappropriate acceptance of a State's concession of error can lead to an announcement of an erroneous statement of the law. *See Strickland v. State*, 437 So. 2d 150, 151-52 (Fla. 1983).

not include judicial review. *Id*. at 244-45.

During the appeal's pendency, the defendant filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), arguing he was entitled to resentencing under Chapter 2014-220. *Id.* at 245. The Second District Court of Appeal affirmed the motion's denial because the defendant's sentence did not amount to de facto life. *See Morris v. State*, 206 So. 3d 154 (Fla. 2d DCA 2016).

In a plurality opinion,[9] this Court quashed the Second District's decision and remanded for resentencing. The opinion explained that "[b]ecause the sentencing court did not make the required findings at [the defendant's] sentencing hearing to comport with chapter 2014-220, Laws of Florida, and [the defendant's] sentence lacks any review mechanism," the defendant was entitled to a resentencing "based upon this Court's precedent." *Morris*, 246 So. 3d at 245. The "precedent" referenced by the preceding quotation was *Lee* and *Johnson.*

Application to this Case

In the above cases, the defendants received original sentences that were either the same length or shorter than Petitioner's sentence. In two of the cases—

[9] Justice Lewis concurred in result only. The three remaining justices—Lawson, Canady, and Polston—dissented in a written opinion. However, the author of the dissent, Justice Lawson, explained that *Kelsey* "seems to have held that *Graham* requires resentencing for **all** 'juvenile offenders who are sentenced to terms longer than twenty years.'" *Id.* at 245-46 (Lawson, J., dissenting). However, Justice Lawson wanted to recede from this holding. This indicates that even the dissent agreed with Petitioner's interpretation of *Kelsey* and *Johnson*.

Waiters and *Williams*—the defendants' sentences were for homicide offenses. The issue in the cases was that Chapter 2014-220 expressly states that its statutory scheme applies prospectively to offenses committed after July 1, 2014. It was only through *Horsley*[10] that these statutes became retroactively applicable to juveniles whose sentences have been invalidated under *Graham* or *Miller*.

If these defendants' term-of-years sentences were not unconstitutional then Chapter 2014-220—by its express wording—would not apply to them since their offenses were committed before July 1, 2014. By remanding the cases for resentencing, this Court confirmed, as it has previously held, that "all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220 . . . are entitled to judicial review." *Kelsey*, 206 So. 3d at 8. Accordingly, these cases show that this Court's mandate applies even if a juvenile defendant's original sentence for a homicide or nonhomicide offense does not amount to a "de facto" life sentence.

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[10] Prior to *Horsley*, this Court held that *Miller* applied retroactively and invalidated the mandatory life sentences of all juvenile offenders. The problem, however, was that there was no statutory basis to resentence these defendants because Chapter 2014-220—which codified sections 775.082(3)(c) and 921.1402(2)(d), among others—expressly provides that it applies prospectively to crimes committed on or after July 1, 2014. With no statutory scheme to apply at resentencings, this Court held that, "even though the effective date is prospective, . . . the appropriate remedy is to apply chapter 2014–220, Laws of Florida, to all juvenile offenders whose sentences are unconstitutional under *Miller*." *Horsley*, 160 So. 3d at 405.

VII. The Fourth District's Interpretation Should be Rejected

The Fourth District's interpretation of this Court's precedent should be rejected, as it creates an unworkable framework that disproportionately punishes juvenile offenders based upon arbitrary distinctions. Accepting the Fourth District's interpretation would result in the unconstitutional incarceration of rehabilitated juvenile offenders, whose sentences no longer serve a legitimate penological purpose. *See Graham*, 560 U.S. at 71 (holding that a "sentence lacking any legitimate penological justification is by its nature disproportionate to the offense"). Moreover, it would deny defendants an individualized sentencing that accounts for their youth as well as a ***meaningful*** opportunity for early release based upon their demonstration of maturity and rehabilitation.

A. Lack of a Constitutional Framework

On multiple occasions, this Court has "declined to require that [juvenile offenders'] sentences must be 'de facto life' sentences for *Graham* to apply." *Kelsey*, 206 So. 3d at 10; *Johnson*, 215 So. 3d at 1240. The Fourth District's decision in this case begs the question—if relief for juvenile offenders depends on sentence length, then at what length does *Graham* apply? Forty-five years? Fifty years? Would that number be randomly selected? The Fourth District's analysis provides no guidance for answering this critical question, other than to say that a forty-year sentence is not sufficiently lengthy to violate *Graham* or *Miller*.

The most workable framework is to look to Chapter 2014-220 for guidance. What constitutes a "lengthy" sentence was answered by the Legislature when it enacted Chapter 2014-220. For juvenile nonhomicide offenders, that bar is set at twenty years imprisonment. *See Horsley*, 160 So. 3d at 404 ("Those juvenile offenders sentenced to a term of imprisonment of more than twenty years for a nonhomicide offense are entitled to subsequent judicial review of their sentences." (citations omitted)). For juvenile homicide offenders, review is set at fifteen or twenty-five years, depending upon the circumstances of the offense.

Using the parameters of Chapter 2014-220 to determine the constitutionality of juvenile offenders' sentences embraces the spirit of the *Graham* and *Miller* decisions, which were grounded on the principle that juveniles are capable of change and can outgrow antisocial behavior. In *Roper*, the Court recognized that, "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as an individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty By Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Judicial review allows a court, after the defendant has served a substantial amount of time in prison, to determine whether the defendant has become rehabilitated and is fit to reenter society. "After the juvenile's transient impetuosity ebbs and the juvenile matures and reforms," prolonged incarceration "becomes 'nothing more than the purposeless and needless imposition of pain and suffering.'" *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). Requiring rehabilitated and matured juvenile offenders to remain in prison long beyond their rehabilitation to a time slightly before their life expectancy is not a "meaningful" opportunity for early release. Furthermore, those defendants' sentences no longer serve a penological purpose.

B. The Proportionality Principles of the Eighth Amendment Require Judicial Review for all Juveniles Whose Sentences Exceed the Review Period

Applying the Fourth District's reasoning and denying Petitioner relief would also violate the Eighth Amendment's principles of proportionality, creating a situation where Petitioner would have fared better by entering a plea to first-degree murder instead of a lesser offense. *Cf. Landrum*, 192 So. 3d at 468 ("[P]ermitting a life-without-parole sentence for a juvenile offender convicted of second-degree murder that was imposed without the sentencer considering the 'distinctive attributes of youth' would be grossly disproportionate when juvenile offenders convicted of the more serious charge of first-degree murder and sentenced to life imprisonment will receive the benefit of chapter 2014–220 . . . . ").

Within the context of sentencing, this Court has explained that the Eighth Amendment's protections are typically applied "relative to the mode and method of punishment, not the length of incarceration." *Hall v. State,* 823 So. 2d 757, 760 (Fla. 2002), *abrogation on other grounds recognized in State v. Johnson,* 122 So. 3d 856, 862 (Fla. 2013). "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem v. Helm,* 463 U.S. 277, 291 (1983).

For example, in *Peters v. State*, 128 So. 3d 832, 854 (Fla. 4th DCA 2013), a juvenile defendant was resentenced following *Graham* to multiple concurrent 99 year prison terms for first-degree felonies punishable by life. Because *Graham* invalidated the possibility of a life sentence, an anomaly arose for the statutory scheme in place at the time the defendant committed his offenses—an anomaly where the most the defendant could receive for a life felony (a more serious offense) was forty years imprisonment but he could be sentenced to well beyond forty years for a first-degree felony punishable by life (a lesser crime).

The Fourth District held that the defendant's sentence—which exceeded forty years imprisonment for first-degree felonies punishable by life—violated the Eighth Amendment. The district court explained that "[b]y creating a system of graduated penalty classes, the legislature established that certain crimes were more worthy of punishment than others." *Id.* at 855. Because the defendant "would have

been better situated had he committed a life felony, a more serious crime under the legislative framework, than the crimes he committed," this was "an affront to the Constitution that [could not] stand." *Id.*

Through Petitioner's case, this Court is presented with a similar anomaly. Had Petitioner pled to or been convicted of first-degree murder, she would have received a mandatory life-without-parole sentence, making her eligible for *Miller* relief and periodic judicial review of her sentence after twenty-five years. Instead, because Petitioner entered a plea to second-degree murder (a lesser offense) she remains ineligible for release until her fifties at the earliest. Such a result not only defies logic and the precepts of *Graham* and *Miller*, but offends notions of fairness.

Juvenile offenders—who this Court has called a "special class of offenders"[11]—cannot be treated so disparately and in such an arbitrary fashion. The Legislature has determined that a prison sentence exceeding twenty-five years for a homicide offense is sufficiently lengthy to trigger judicial review. The Eighth Amendment principles of proportionality, which drove *Graham* and *Miller*, compel that similarly situated juveniles facing lengthy sentences for lesser crimes be provided the same opportunity to demonstrate their maturity and rehabilitation.

[11] *Henry*, 175 So. 3d at 680.

C. Lack of Individualized Sentencings

In addition, Petitioner's prison sentence—which was imposed prior to the Supreme Court issuance of *Roper*, *Graham,* and *Miller*—was not individualized to account for her youth, its attendant circumstances, or her reduced culpability. It is the immaturity and vulnerability of children that lessens their moral culpability and leads to the individualized sentencing requirement announced in *Miller*. A sentencer must consider youth and its attendant characteristics "before imposing a particular penalty." *Miller*, 567 U.S. at 483. If the sentencer does not do this, then there is "too great a risk of disproportionate punishment." *Id*. at 479.

In *Landrum v. State*, 192 So. 3d 459, 464 (Fla. 2016), this Court interpreted *Miller* as "requir[ing] that a sentencer consider the juvenile offender's 'chronological age and its hallmark features' before imposing sentence." In *Landrum*, this Court had to decide "whether a life sentence without parole imposed upon a juvenile for second-degree murder is unconstitutional under the Eighth Amendment . . . where the trial court had the discretion to impose a term-of-years sentence but was not required to consider . . . the individualized attributes of the juvenile offender's youth when exercising this discretion." *Id.* at 463. "Because the trial court was not required to, and did not take into account, the *Miller* factors," this Court reversed and remanded for resentencing. *Id.* at 460.

In reaching this result, this Court explained that the constitutional violation in *Miller* did "not emanate from the mandatory nature of the sentence imposed" but from the precept that "because children are constitutionally different . . . the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects 'irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'" *Id.* at 466 (citations omitted). Therefore, "even discretionary sentences must be guided by consideration of age-relevant factors." *Id.* (quoting *McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016)).

This Court believed the "*Miller* Court had no intention of limiting its rule of requiring individualized sentencing for juvenile offenders only to mandatorily-imposed sentence of life without parole, when a sentencing court's exercise of discretion was not informed by *Miller*'s considerations." *Id.* at 467. Rather, "at the heart of *Miller* . . . [wa]s the Eighth Amendment's prohibition of imposing certain punishments on juvenile offenders that fail to consider a juvenile's lessened culpability and greater capacity for change." *Id.* (quotation omitted).

Accordingly, this Court held that "the exercise of a sentencing court's discretion when sentencing juvenile offenders **must be informed** by consideration of the juvenile offender's 'youth and its attendant circumstances' as articulated in *Miller* and now provided for in section 921.1401." *Id.* (emphasis added). "Without

this individualized sentencing consideration," this Court explained, "a sentencer is unable to distinguished between juvenile offenders whose crimes 'reflect transient immaturity' and those whose crimes reflect 'irreparable corruption.'" *Id.*

In the instant case, the factual basis of Petitioner's plea established that both Petitioner and her codefendant boyfriend were active participants in her mother's murder. (R. 13-14). By the time of sentencing, the Supreme Court had not yet decided *Roper*, *Graham*, or *Miller*—in fact, the State sought the death penalty. Despite that the codefendant was an adult at the time of the murder, he received a twenty-year prison sentence—half of Petitioner's sentence. Like the defendant in *Landrum*, the trial court and the prosecution in this case were not required to, and did not take into account, the *Miller* factors, as those factors did not yet exist. That Petitioner, a juvenile, received twice as long a sentence as her adult codefendant who was an active participant in the murder further demonstrates the incongruity of Petitioner's lengthy term-of-year sentence and the need for resentencing.

D. A Life Expectancy Analysis Would Render Meaningless the Fundamental Rehabilitation and Reform Principles Underling Graham *and* Miller

Although the Fourth District decision in this case provides no framework for determining when a juvenile offender's sentence violates the Eighth Amendment, other courts have previously applied a life expectancy analysis to determine whether a juvenile's sentence constitutes a "de facto" life sentence. *See, e.g.*, *Williams v. State*, 197 So. 3d 569 (Fla. 2d DCA 2016); *Collins v. State*, 189 So. 3d

342, 343 (Fla. 1st DCA 2016), *decision quashed*, 43 Fla. L. Weekly S507 (Fla. Aug. 24, 2018). To the degree the Fourth District's opinion can be construed as an attempt to resuscitate a life expectancy analysis, such an approach should be rejected, as it draws lines for relief arbitrarily and denies juveniles a ***meaningful*** opportunity for early release. *See* Kelly Scavone, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 Fordham L. Rev. 3439, 3469 (2014).

The first problem with a life expectancy analysis is determining what sentence constitutes "de facto" life. As the Fifth District explained in *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012), *decision quashed*, 175 So. 3d 675 (Fla. 2015):

> If . . . under the notion that a term-of-years sentence can be a *de facto* life sentence that violates the limitations of the Eighth Amendment, *Graham* offers no direction whatsoever. At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria?

Most likely, courts would need to rely upon "life expectancy" tables, which calculate "[t]he average number of additional years a person could expect to live if current mortality trends were to continue for the rest of that person's life." *See* Life Expectancy, Glossary of Demographic Terms, Population Reference Bureau, (last visited February 1, 2019), available at https://www.prb.org/glossary/. However,

because life expectancy tables derive from the average or mean of the population, half of people should die before their life expectancy is reached. *See* Adele Cummings & Stacie Nelson Colling, *There Is No Meaningful Opportunity in Meaningless Data: Why It Is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences*, 18 U.C. Davis J. Juv. L. & Pol'y 267, 283 (2014). Obviously, the opportunity for release will not be meaningful for the numerous juveniles who—despite being rehabilitated—never reach their life expectancy.

The second problem derives from the factors required to determine life expectancy. "[A] myriad of diverse factors, such as race, gender, or socioeconomic status arguably can affect an individual's life expectancy." *Peterson*, 193 So. 3d at 1038 n.8. "Thus, the courts would need to consider the sex and race of a defendant when calculating a particular defendant's life expectancy." Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 Nova L. Rev. 793, 816 (1995). "Courts would also necessarily have to consider age in prescribing a punishment because a person's life expectancy changes with each passing birthday." *Id.*

Florida law dictates that "[s]entencing is neutral with respect to race, gender, and social and economic status." *See* § 921.002(1)(a), Fla. Stat;. But under a "de facto" life analysis, courts would be compelled to always consider a defendant's race and gender when calculating life expectancies, and to uphold sentences

differently based on their immutable characteristics. For example, statistics show that "women live longer than men, and whites live longer than blacks."[12] Cummings & Colling, *supra* at 280. This would lead to an intolerable analysis wherein a lengthy sentence imposed upon a Caucasian woman is deemed constitutional but the same sentence imposed on an African American man is not. That result alone would arguably violate an individual defendant's constitutional right to equal protection. But it would also raise practical questions about how life expectancy would be determined—and whether trial courts would need to conduct mini-trials with expert evaluations to account for individual defendants.

The third problem is that life expectancy estimates for the general population fail to take into account the lower life expectancies of persons incarcerated in prison. "Life expectancy within . . . prison is considerably shortened." *United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006), *aff'd in part, vacated in part sub nom. United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); *see also* Nick Straley, *Miller's Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 Wash. L. Rev. 963, 986 n.142 (2014) ("A person suffers a two-year

[12] For example, Table 107 the National Vital Statistics Report for 2008, published in 2012, shows that Caucasian women have a life expectancy at birth of 80.8 years, whereas African American men have a life expectancy at birth of 70.9 years. *See* U.S. Census Bureau, *Births, Deaths, Marriages, and Divorces, in Statistical Abstract of the United States: 2012* (2012), *available at* https://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/vitstat.pdf (last visited February 1, 2019).

decline in life expectancy for every year locked away in prison."). The decrease in live expectancy for prisoners derives, in large part, from high levels of violence and diseases in prison, as well as poor diets and health care. *See People v. Buffer*, 75 N.E.3d 470, 481 (Ill. App. Ct. 2017); *Tavares*, 436 F. Supp. 2d at 500.

"Unless incarceration either increases life expectancy or has no effect," a de facto life analysis "unfairly diminish[es] the possibility that juvenile offenders will be released from prison before they die, violating both the Eighth Amendment and the Supreme Court's holding in *Graham*." Cummings & Colling, *supra* at 272. This will mean that a substantial number of juvenile defendants will never reach their life expectancy in prison despite becoming matured and rehabilitated.

The fourth problem is that, even if a juvenile defendant is released from prison shortly before his or her life expectancy, it cannot be said that this opportunity for release is "meaningful." As one commentator has explained:

> The greatest, and fatal, deficiency of the life expectancy approach is that it fails to comply with *Graham*'s mandate. In *Graham*, the Court's disdain for the life without parole sentence stemmed from its findings that the sentence denies any hope of release, "forswears altogether the rehabilitative ideal," and "improperly denies the juvenile offender a chance to demonstrate growth and maturity. Accordingly, the Court held that states are constitutionally required to provide juvenile nonhomicide offenders with some "realistic," "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The life expectancy approach deprives juvenile offenders of this requisite meaningful opportunity because it affords no possibility of release until a specified time, regardless of reform. To demonstrate the disconnect between the life expectancy approach and *Graham*'s mandate, consider the following: A term-of-

> years sentence that provides an opportunity for release just before the juvenile offender's expected death, either pursuant to gaintime or upon the expiration of the sentence, satisfies the life expectancy approach because technically the offender is not required to spend his "entire" life in prison. Yet it fails *Graham*'s mandate because it deprives the offender of a meaningful opportunity to demonstrate he has been reformed and thus should be released early.

Krisztina Schlessel, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide A "Meaningful Opportunity" for Release*, 40 Fla. St. U.L. Rev. 1027, 1055 (2013) (footnotes omitted).

In *Graham*, the Court wrote that "[f]rom 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." 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* at 79. Given their capacity for change, juvenile offenders cannot be required to wait until the very end of their life for the first opportunity to demonstrate that reform.

VIII. Stare Decisis

Finally, this Court should not depart from stare decisis to recede from the holdings of *Henry*, *Kelsey*, and *Johnson*. *See Puryear v. State*, 810 So. 2d 901, 904 (Fla. 2002) ("This Court adheres to the doctrine of stare decisis."). The doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual

and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It has been a fundamental tenet of Anglo-American jurisprudence for centuries. *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003) (quoting 1 William Blackstone, *Commentaries* *69).

"[A] decision to depart from the principles of stare decisis cannot be taken lightly." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014). "The presumption in favor of *stare decisis* is strong, and where the decision in issue was a watershed judgment resolving a deeply divisive societal controversy, the presumption in favor of *stare decisis* is at its zenith." *N. Florida Women's Health & Counseling Services, Inc.*, 866 So. 2d at 637–38. "As an institution cloaked with public legitimacy, this Court cannot recede from its own controlling precedent when the only change has been the membership of the Court." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government.").

"Stare decisis does not yield based on a conclusion that a precedent is merely erroneous." *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012). Rather, before overruling a prior decision, this Court must ask three questions:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the

> decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Strand v. Escambia Cty., 992 So. 2d 150, 159 (Fla. 2008) (citation omitted).

For the instant case, the answers to these questions do not overcome the heavy presumption in favor of stare decisis. The rule of law announced by *Henry*, *Kelsey*, and *Johnson* creates a constitutional framework that is straightforward to apply and consistent with core principles of *Graham* and *Miller*. To recede from *Henry*, *Kelsey*, and *Johnson* at this juncture would create a serious injustice to juvenile defendants serving lengthy term-of-years sentences who otherwise would receive a resentencing and judicial review of their sentences—in particular, it would be patently unfair to Petitioner who has correctly interpreted this Court's precedent only to have her opportunity to mitigate her sentence snatched from her grasp. Furthermore, receding from this precedent would create turmoil in an area of law that is already highly litigious and, at times, convoluted.

Franklin v. State *and* State v. Michel

The Supreme Court's decision in *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017), does not compel a departure from stare decisis. Factually, *LeBlanc* is distinguishable because the defendant in that case was eligible to be released on geriatric release. Petitioner's sentence, by contrast, does not include a provision for

early release. While this Court found *Leblanc* to be instructive in *State v. Michel*, 257 So. 3d 3 (Fla. 2018), and *Franklin v. State*, 43 Fla. L. Weekly S556 (Fla. Nov. 8, 2018), both cases involved defendants who committed offenses decades ago and received sentences that included parole. Furthermore, after *LeBlanc* issued on June 12, 2017, this Court remanded juveniles' cases for resentencing in *Lee*, *Waiters*, *Williams*, and *Morris*, adhering to the precedent of *Henry*, *Kelsey*, and *Johnson*. The only change since these decisions has been the composition of this Court.

On the merits, the holding of *Leblanc* is curtailed by its procedural context. *Leblanc* involved a Virginia juvenile offender who sought federal habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, to invalidate his life sentence. Under Virginia law, the defendant would be eligible for "geriatric release" on parole once he was over the age of sixty. A federal district court granted the defendant relief and the Fourth Circuit Court of Appeal affirmed, finding that the Virginia Supreme Court's decision to uphold the sentence was unreasonable in light of *Graham*. *Leblanc*, 137 S. Ct. at 1728.

Because the defendant raised his claim through AEDPA rather than on direct review, "[t]he question [wa]s not whether [the] federal court believe[d] the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). This standard means a federal habeas court may not issue a

writ of habeas corpus "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). Rather, federal courts must consider whether the state court's "determination can[] be reconciled with *any* reasonable application of the controlling standard [.]" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (emphasis added).

When the United States Supreme Court holds that a federal court has overstepped its bounds under AEDPA, the Court often states that it is not ruling on, or even expressing a view of, the underlying constitutional claim.[13] And that is exactly what the Court did in *LeBlanc*. After observing the defendant had made a

[13] *See, e.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 n.3 (2018) ("Because our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue.") (citations omitted); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) ("We express no view on the merits of the underlying question outside of the AEDPA context."); *Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) ("We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy."); *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) ("Without ruling on the merits of the court's holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse."); *White v. Woodall*, 572 U.S. 415 (2014) ("We need not decide here, and express no view on, whether the conclusion that a no-adverse-inference instruction was required would be correct in a case not reviewed through the lens of § 2254(d)(1)."); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) ("The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial.").

reasonable argument that Virginia's geriatric release program violated the Eighth Amendment as applied to juveniles, and that "[p]erhaps the logical next step from *Graham* would be to hold that a geriatric release program does not satisfy the Eighth Amendment, but perhaps not," the Court declined to pass on the merits:

> These arguments cannot be resolved on federal habeas review. Because this case arises "only in th[at] narrow context," the Court "express[es] no view on the merits of the underlying" Eighth Amendment claim. *Woods*, *supra*, at ——, 135 S.Ct., at 1378 (internal quotation marks omitted). Nor does the Court "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Marshall v. Rodgers*, 569 U.S. ——, ——, 133 S.Ct. 1446, 1451, 185 L.Ed.2d 540 (2013) (per curiam); *accord*, *Woodall*, *supra*, at ——, 134 S.Ct., at 1703. The Court today holds only that the Virginia trial court's ruling, resting on the Virginia Supreme Court's earlier ruling in *Angel*, was not objectively unreasonable in light of this Court's current case law.

LeBlanc, 137 S. Ct. at 1729. Accordingly, far from concluding that the Virginia Supreme Court correctly resolved that geriatric release satisfied *Graham*, the Court merely held that the state court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." [14] *Id*. at 1728.

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[14] Several courts have written that *LeBlanc* speaks only to the limitations of habeas review under AEDPA, not to the Court's conclusion on the merits. *People v. Contreras*, 411 P.3d 445, 460-61 (Cal. 2018) (noting that Supreme Court recognized there was reasonable argument in favor of Leblanc's Eighth Amendment claim, but that relief was foreclosed due to deferential AEDPA standard of review); *Brown v. Preythe*, 2017 WL 4980872 (W.D. Mo. Oct. 31, 2017) ("Supreme Court expressly stated that it was not deciding" merits of claim); *Carter v. State*, 192 A.3d 695, 706 (Md. 2018) ("While such a geriatric release

Against this backdrop, it is plain that the significance of *LeBlanc*–particularly in a case like the present where the defendant is ineligible for parole—is minimal. The Supreme Court in no way held that the geriatric relief afforded a Virginia state prisoner is good, right, or what is required by the Eighth Amendment. The Court only held that the "state court . . . did not diverge so far from *Graham's* dictates as to make it 'so obvious that . . . there could be no 'fairminded disagreement' about whether the state court's ruling conflicts with this Court's case law." 137 S. Ct. at 1729 (citation omitted).

If a Virginia defendant makes the same argument on direct review, rather than through AEDPA, he or she may obtain relief. Or not. We do not know, because the United States Supreme Court has not decided the merits of such a claim. Because the Supreme Court did not address the claim's merits, *LeBlanc*'s application of AEDPA's very deferential standing in no way impacted the holdings or factual backgrounds buttressing *Henry*, *Kelsey*, and *Johnson*. Therefore, the strong presumption in favor of stare decisis has not been overcome.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner requests that this Court disapprove of the Fourth District Court of Appeal's decision and remand her case for resentencing pursuant to Chapter 2014-220, Laws of Florida.

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program might satisfy *Graham*, the Court has not reached such a holding.").

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this brief was electronically filed with the Court and a copy of it was served to Matthew Ocksrider, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com this 4th day of February, 2019.

/s/ BENJAMIN EISENBERG
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CERTIFICATE OF FONT

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

/s/ BENJAMIN EISENBERG
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