IN THE
SUPREME COURT OF FLORIDA

JERMAINE C. JACKSON,
Petitioner,

Case No. SC14–842

vs.

L.T. Case Nos. 4D11–3174
562010CF001229A

STATE OF FLORIDA,
The State.

On Discretionary Review from a Decision of the
Fourth District Court Of Appeal

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

The following references are used:

AB	Answer Brief.
IB	Initial Brief.
T	Trial and Sentencing Transcript.
Age-at-Sentencing	The classification on review limiting eligibility for youthful offender sentencing to offenders "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (Oct. 1, 2008 to present).
Age-at-Offense	The pre-amendment classification limiting youthful offender sentencing to crimes "committed before the defendant's 21st birthday." § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008).
Chapter 958	The Florida Youthful Offender Act.
FYCA	Federal Youth Corrections Act.
Juvenile	A person younger than 18 years of age.
Youthful Offender	A person younger than 21 years of age at the time sentence is imposed, including a juvenile prosecuted as an adult, who has committed a felony other than a capital offense or life felony. § 958.04(1)(a), (c), Fla. Stat. (Oct. 1, 2008 to present).

I. Section 958.04(1)(b) of the Florida Youthful Offender Act violates equal protection and due process guarantees where age-eligibility for alternative sentencing is determined by the defendant's age at the time sentence is imposed.

The State argues that defendant lacks standing, that there is no fundamental right to youthful-offender status, and that statutes are presumptively valid under the rational-basis standard. AB8–20. It then answers defendant's claims. AB20–25.

To maintain the structure of the initial brief, defendant replies to the argument he lacks standing in section E ("This case reinforces that the classification is unconstitutional."). He replies to the argument that youth-based classifications are subject to rational-basis review in section A-2 ("Rehabilitative sentencing disfavors the classification.") and section C ("The age-at-sentencing classification triggers heightened review because it encroaches upon the rights of the accused."). He replies to the argument that the statute is presumptively valid in section F ("The predecessor statute should be revived.").

Defendant also clarifies the "age-at-sentencing" label used in his briefs. The label is actually broader than the classification on review. Section 958.04(1)(b) restricts eligibility to offenders "*younger than* 21 years of age *at the time sentence* is imposed." § 958.04(1)(b), Fla. Stat. (Oct. 1, 2008 to present) (italics added). As explained in section C below, the "younger than" language creates a sentencing deadline that is not present in all "age at sentencing" classifications.

A. The age-at-sentencing classification violates equal protection.

1. Florida disfavors the classification.

The State has not pointed to any other Florida statute that distinguishes defendants based solely on their age at sentencing. AB20. Therefore, defendant's claim is not "without merit." AB20.

Defendant cites two more Florida statutes that link youth to the offense date. Serious sexual offenses are punished less severely if committed by a person who is younger than 18 years of age. §§ 794.011(2)(b), (4)(c), (5)(c), 800.04(5)(c)1., (5)(d), (6)(c), (7)(c), Fla. Stats. (2015). Florida also provides specialized sentencing procedures for capital offenses, life felonies, and first-degree felonies punishable by life and "committed before" a juvenile offender has "attained 18 years of age." §§ 921.1401, 921.1402, Fla. Stats. (2015). *See also Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) ("mandatory life without parole for those under the age of 18 *at the time of their crimes* violates the Eighth Amendment[]....") (italics supplied).

2. Rehabilitative sentencing laws disfavor the classification.

The State broadly argues that the classification here should be upheld where the Federal Youth Corrections Act's age-at-conviction classification survived constitutional challenges. AB 17–20. This argument fails in its particulars.

As the State acknowledges, the FYCA was challenged on different grounds. IB15–16, AB18–19.[1] Moreover, courts found a meaningful distinction between conviction and sentencing. IB16, citing *Holloway v. United States*, 951 A.2d 59 (D.C. 2008), *United States v. Carter*, 225 F. Supp. 566, 568 (D.D.C.1964). *See also United States v. Kleinzahler*, 306 F. Supp. 311, 313–14 (E.D.N.Y.1969) ("It would be unfair to both court and defendant if sentencing procedures designed to protect created the necessity of a harsher sentence because a critical birthday was celebrated during the court's rumination.").

The State tangentially references a Wisconsin statute that classifies juveniles based on age when charges are filed. AB14, citing *Bendler v. Percy*, 481 F. Supp. 813 (E.D. Wis. 1979). *See also* § 938.02(10m), Wis. Stat. (2015). Excluded juveniles have a due process right to a hearing at which the State must show it did not purposefully evade juvenile court. *State v. Becker*, 247 N.W. 2d 495 (Wis. 1976); *State v. Bergwin*, 793 N.W. 2d 72 (Wis. Ct. App. 2010). A similar hearing requirement cannot be engrafted unto Florida's Youthful Offender Act. Eligibility is determined at the end of the proceedings, not the beginning. Disparate treatment occurs even when all parties act in good faith.

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[1]*See* Annot., *Validity, Construction, and Application of Provisions of Federal Youth Corrections Act (18 U.S.C. s 5010)*, 11 A.L.R. Fed. 499 (1972) (early challenges); Nancy Fox Kaden, *Sentencing*, 73 Geo. L.J. 671, 689-697 (1984) (later challenges until FYCA's 1984 repeal).

3. The classification creates arbitrary and irrational distinctions between otherwise eligible defendants.

The State did not directly answer this claim. AB20. Thus, defendant relies on the initial brief. IB17–19.

B. The age-at-sentencing classification violates due process.

1. Eligibility implicates liberty interests.

The State discounts defendant's cases because they involve different statutes. AB20–21. Defendant's cases involve habitual offenders (*State v. Johnson*, 616 So. 2d 1 (Fla. 1993)), prisoners (*Wilkinson v. Austin*, 545 U.S. 209 (2005)), and probationers (*Morrissey v. Brewer*, 408 U.S. 471 (1972)). IB20–21. Like youthful offenders, they have lost the presumption of innocence. Although this diminishes their liberty, it does not eliminate it. *Del Valle v. State*, 80 So. 3d 999, 1013 (Fla. 2011). Moreover, *Johnson* and *Morrissey* involve discretionary sentencing statutes. *See* §§ 775.084(3)(a)6. (habitual offender), 948.06(2)(a), (e) (probation revocation), Fla. Stats. (2015).

2. Eligibility is automatically denied.

3. There is no safety valve.

The State asserts without elaboration that the cases in support of points B-2 and B-3 involve different statutes or do not support defendant's conclusion. AB21. Defendant stands by the initial brief. IB21–23.

C. The age-at-sentencing classification triggers heightened review because it encroaches upon the rights of the accused.

The State answers that heightened review should be denied because age is not a suspect class and there is no fundamental right to be treated as a juvenile or youthful offender. AB12–15, 17, 21–22. The defendant never claimed heightened review based on age. IB13, 31, 44. *See also* 4D11-3174, IB39–41.

Section 958.04(1)(b) triggers heightened review because its sentencing deadline encroaches on the rights of the accused. By way of comparison, consider a nearly identical, but less burdensome, age-based classification. Suppose Florida enacted an "elderly-offender" statute that authorized reduced penalties for offenders "*older* than x years of age at the time sentence is imposed." Eligibility would not expire once attained. Defendants could fully litigate their cases, before and after sentencing, without forfeiting either eligibility or constitutional rights. Trial courts could remedy arbitrary or unreasonable deprivations. Time would act as a safety valve, not a boiler.

Eligibility under Florida's Youthful Offender Act, by contrast, expires automatically on the offender's 21st birthday. § 958.04(1)(b), Fla. Stat. The date-certain deadline interferes with the trial process and thus constitutional rights. IB24–30. This interference, not age or youth, triggers heightened review.

Because defendant has not claimed special status as a youthful offender, this Court should avoid obiter dicta statements regarding children's rights. Juveniles

prosecuted as adults are a subset of "youthful offenders." § 958.04(1)(a), Fla. Stat. (2015). The cases relied on by the Fourth District, and those cited by the State (AB12–15) predate *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *Graham v. Florid*a, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). The Supreme Court has made clear that "children are *constitutionally* different from adults for sentencing purposes." *Miller*, 132 S. Ct. at 2458 (emphasis supplied).

Roper, *Graham*, and *Miller* cast a shadow on cases like *Brazill v. State,* 845 So. 2d 282 (Fla. 4th DCA 2003). AB11–12. There, the court upheld a statute that allowed the State to indict children for capital and life felonies, thus triggering mandatory adult penalties. *Brazill* rests on the questionable premise that "[t]he legislature could reasonably have determined that for some crimes the rehabilitative aspect of juvenile court must give way to punishment." 845 So. 2d at 288. The continued validity of these older cases cannot be assumed.

D. The age-at-sentencing classification is not narrowly tailored, or even rationally related, to its purported purpose.

Rational Basis Test.

The State argues the rational-basis test requires the challenging party "to show there is no conceivable factual predicate which would rationally support the classification under attack." AB23. It mistakenly quotes the dissenting opinion in *Estate of McCall v. United States*, 134 So. 3d 894, 927 (Fla. 2014) (Polston, C.J. dissenting). AB22–23. Defendant stands on the initial brief. IB31–32.

Heightened Review.

The State denies it must meet heightened review because defendant "has not shown the Fourth District improperly applied the rational basis test." AB23. Based on this conclusion, the State foregoes any attempt to demonstrate a compelling state interest effectuated by the least restrictive means. If this Court determines that section 958.04(1)(b) encroaches on the rights of the accused, it should also rule the statute fails heightened review. *Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001).

1. The classification was not amended to ensure that the DOC's youthful offender population remains youthful.

2. The classification was meant to align the age-restriction for judicial dispositions with the DOC's age-restriction.

The State offers "plausible" reasons for the 2008 amendment. AB7, 24. For example, it suggests the amended classification remediates a continuing lack of available DOC facilities. AB7. It cites section 958.04(4), originally enacted in 1987, where the Legislature declared that "severe prison overcrowding" necessitated a basic training program facility "to aid in alleviating an emergency situation." Ch. 87–58, § 1, enacting § 958.04(5), Fla. Stat. (subsequently renumbered). The State overlooks that restricting eligibility for shorter youthful-offender prison terms does not alleviate "severe prison overcrowding."

Moreover, the State does not support its claim of a continuing crisis apart from the fact section 958.04(4) has not been repealed. AB7. As this Court has

recognized, changing conditions can transform once reasonable classifications into unconstitutional ones. *McCall*, 134 So. 3d at 913 (plurality opinion), and 134 So. 3d at 920 (Pariente, J. concurring).

The State also defends the Fourth District's reliance on the Florida Youthful Offender Act's legislative intent. AB16, 24; *Jackson v. State,* 137 So. 3d 470, 475 (Fla. 4th DCA 2014), citing § 958.021, last revised by ch. 94–209, Laws of Fla. The statement of intent oddly assumes all youthful offenders will be imprisoned, at least initially. Oddly because chapter 958 has never required imprisonment. § 958.05(1), Fla. Stat. (1979–1985); § 958.04(2)(a)–(c), Fla. Stat. (1985–2015).

The State considers the 1987 and 1994 statements relevant to show a "conceivable state of facts or plausible reason to justify [the statute], regardless of whether the Legislature actually relied on such facts or reason." *Jackson,* 137 So. at 474–75, AB7, 24. But legislative statements of policy and fact "are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry." *McCall,* 134 So. 3d at 919 (Pariente, J. concurring), *citing Seagram–Distillers Corp. v. Ben Greene, Inc*., 54 So. 2d 235, 236 (Fla. 1951). *See also City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 451–52 (1985) (declining to find rational basis "simply because there is a speculative benefit to the public").

3. The classification fails to promote its purpose.

The State emphasizes the legislative prerogative to limit sentencing classifications. AB7–8, 24–25. It observes that "some degree of imprecision or inequality is permitted" under equal-protection rationality review. AB25. These generalizations fail to justify (a) the inequality wreaked by a sentencing classification wholly unrelated to culpability or the nature of the offense or (b) the arbitrary denial of eligibility for rehabilitative sentencing.

E. This case reinforces that the classification is unconstitutional.

Defendant has standing because he lost eligibility for youthful offender sentencing solely by operation of section 958.04(1)(b), Florida Statute (2010).

He was eligible for youthful offender sentencing when at the age of twenty, he committed a first-degree felony punishable by life imprisonment. §§ 812.13(2)(a), 958.04(1)(c), Fla. Stats. (2010); *Simpkins v. State*, 784 So. 2d 1203 (Fla. 2d DCA 2001) (armed robbery is subject to youthful offender sentencing). Defendant automatically lost eligibility when he turned twenty-one before sentencing. § 958.04(1)(b). If this Court revives the predecessor statute, he will regain eligibility. § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979–Sept. 30, 2008).

Two careless sentences in the initial brief overstated defendant's claim. At page 40, he wrote: "Defendant was arbitrarily and unreasonably excluded from youthful offender sentencing." He was excluded from eligibility. At page 49, he

asked this Court to remand for resentencing under the predecessor statute. He should have asked for a resentencing at which the trial court has discretion to sentence him as a youthful offender under the predecessor statute. *See Gallimore v. State,* 100 So. 3d 1264, 1266 (Fla. 4th DCA 2012) (where trial court mistakenly believed defendant did not qualify for youthful offender sentencing, remedy was fully-informed resentencing).

The State points to defendant's failure to request a youthful offender sentence. AB9. Defendant asked for the minimum lawful sentence of 10-years imprisonment under the 10/20/Life statute. T521–22. § 775.087(2)(a)1., Fla. Stat. (2010). As argued in the initial brief, he was not required to challenge section's 958.04(1)(b) facial constitutionality in the trial court. IB10, citing *Brannon v. State*, 850 So. 2d 452 (Fla. 2003), *Harvey v. State*, 848 So. 2d 1060 (Fla. 2003).

The State's cases on standing do not control. AB8–9, citing *Ferreiro v. Phila. Indem. Ins. Co.*, 928 So. 2d 374 (Fla. 3d DCA 2006) (class action certification); *Alachua County v. Scharps*, 855 So. 2d 195 (Fla. 1st DCA 2003) (taxpayer and First Amendment standing); *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002) (election supervisors' standing). A more apt case is *Reyna v. State*, 866 So. 2d 214, 215 n.2 (Fla. 3d DCA 2004), where a defendant lacked standing to challenge a direct-file statute applicable to younger teens, but had standing to challenge the statute removing him from juvenile court.

F. The predecessor statute should be revived.

The State relies on section 958.04(1)(b)'s presumptive validity. AB11, 12, 23–24, 26. Defendant has overcome a presumption that the classification on review bears a rational relationship to a legitimate state purpose. IB31–43.

To overcome the separate presumption of facial validity, this Court generally requires a showing that "no set of circumstances exists in which the statute can be constitutionally applied." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (declining to extend First Amendment's overbreadth doctrine to invalidate statute under Fifth Amendment's Due Process Clause).[2]

On its face, section 958.04(1)(b) distinguishes offenders based on whether they are "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (eff. Oct. 1, 2008). This Court might posit a set of circumstances involving a middle-aged defendant sentenced for a crime committed before his or her 21st birthday. Even there, the denial of *eligibility* violates equal protection and due process. The middle-aged person, like a person "younger than 21 years of age at the time sentence is imposed," committed a youthful offense.

[2]The Supreme Court is presently determining whether a law can be facially invalidated as violating the Fourth Amendment independent of a particular search or seizure. *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014), *reviewing Patel v. City of Los Angeles*, 738 F. 3d 1058 (9th Cir. 2013) (en banc).

Although a trial court may consider the crime's youthful aspect to determine a sentence within the statutory range, it may not rely on youth to depart below the Criminal Punishment Code's minimum sanction or avoid a mandatory-minimum term attached to a specific offense. IB22–23, §§ 921.0024(2), 921.0026(2), 921.00265(1), Fla. Stats. (2015); *Rochester v. State*, 140 So. 3d 973 (Fla. 2014).

Departure or avoidance requires eligibility for youthful offender sentencing. §§ 921.0026(2)(l), 958.04(2), Fla. Stats. (2015). *See* Richard Sanders, *Imposing Mandatory Sex Offender Probation Conditions on Youthful Offenders*, 88 Fla. B. J. 20 (April 2014) (discussing penalties, fines, and adjudications avoided by youthful offender sentencing). Mandatory imprisonment under the general sentencing laws—when required by section 958.04(1)(b)—places additional and illogical burdens on excluded offenders. Despite any reformation gained with maturity, they are automatically denied eligibility for alternative sentencing.

On the other hand, the amended classification is not necessary to avoid circumstances whereby a hardened criminal is sanctioned as a misguided youth. Youthful offender sentencing is discretionary. Courts retain authority to punish offenders to the full extent of the law. § 958.04(1)(a), Fla. Stat. And, an inmate older than 25 cannot be housed in a youthful-offender facility, regardless of the sentence imposed. § 958.11(1), (3)(f)–(h), (4), Fla. Stat. (2015).

Thus, section 958.04(1)(b) fails under a lex ipsa loquitur standard.

Defendant further argues the constitutional infirmities so permeate section 958.04(1)(b) that it cannot be upheld.[3] In *Del Valle v. State*, 80 So. 3d 999 (Fla. 2011), for example, this Court ruled due process prohibited a statutory burden of proof requiring probationers to prove their inability to pay restitution with clear and convincing evidence. The statute violated fundamental fairness under the Fourteenth Amendment because it "create[d] an impermissible risk that a person will be imprisoned simply because, through no fault of his or her own, he or she cannot pay the monetary obligation." 80 So. 3d at 1011.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court invalidated a spousal notification clause as unduly burdensome under the Due Process Clause even though it affected only one percent of women seeking abortions. Justice O'Connor, joined by Justices Kennedy and Souter, explained, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894.

In vagueness cases, courts resolve "any doubt as to a statute's validity ... in favor of the citizen" to "avoid arbitrary and discriminatory enforcement" and ensure notice of prohibited conduct. *DuFresne v. State*, 826 So. 2d 272, 274–5

[3] *See* Scott A. Keller and Misha Tseytlin, *Applying Constitutional Decision Rules versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301 (2012) (summarizing leading decisions and scholarship on facial challenges before arguing for clearer distinction between constitutional inquiry and remedy ordered).

(Fla. 2002); *Sult v. State*, 906 So. 2d 1013, 1022–23 (Fla. 2005); *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("when vagueness permeates the text of such a law, it is subject to facial attack") (Stevens, J., joined by Souter and Ginsburg, JJ.).

Mandatory statutory presumptions are subject to a three-pronged due process inquiry. In addition to conducting a modified rational-basis test, this Court asks "whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption." *Bass v. General Development Corp.*, 374 So. 2d 479, 484 (Fla. 1979).[4] *But see State v. Adkins*, 96 So. 3d 412 (Fla. 2012) (permissive presumption of scienter could be constitutionally applied).

In this case, the Equal Protection and Due Process Clauses of the state and federal Constitutions prohibit the denial of eligibility for significantly reduced prison terms solely because, as the face of the statute provides, an offender is no longer "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. The classification cannot be severed from chapter 985 because it sets the age limit for youthful offender sentencing. IB44. Individual determinations cannot reverse an offender's age; to do so by legal fiction would only result in further arbitrary applications. Affected offenders are unlikely to

[4]The facial constitutionality of presumptive attorney-fees under the workers' compensation statute are at issue in *Castellanos v. Next Door Co.*, 145 So. 3d 822 (Fla. 2014), *Diaz v. Palmetto General Hosp*., 2014 WL 6390298, SC14–1916 (Fla. Nov. 7, 2014), and *Pfeffer v. Labor Ready Southeast, Inc.*, 2014 WL 6390289, No. SC14–1325 (Fla. Nov. 7, 2014).

challenge the classification since many enter guilty pleas. They retain eligibility but lose the opportunity for an acquittal or lesser offense. *Cf. Hamil v. State*, 106 So. 3d 495 (Fla. 4th DCA 2013) (affirming denial of motion to withdraw plea entered on eve of 21st birthday). Thus, section 958.04(1)(b), as amended by chapter 2008-250, should be invalidated and the predecessor statute revived.

II. Defendant must be resentenced before another judge where his sentence is based on arbitrary considerations.

The State has not addressed the merits of the issue. AB25. Defendant relies on the initial brief. IB46–48.

CONCLUSION

Defendant respectfully asks this Court to reverse *Jackson v. State*, 137 So. 3d 470 (Fla. 4th DCA 2014), declare section 958.04(1)(b) invalid, and remand for a resentencing at which the court may consider youthful offender sentencing under section 958.04(1)(b), Florida Statute (Jan. 1, 1979–Sept. 30, 2008). Whether or not the statute is invalidated, he asks the Court to reverse the sentence and order resentencing before another judge.

Respectfully submitted,

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/s/ Nan Ellen Foley
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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on February 24, 2015 this document was electronically filed through the Florida Court's E-Filing Portal and emailed to ALLEN R. GEESEY, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401–3432, at CrimAppWPB@myfloridalegal.com.

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CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2).

/s/ Nan Ellen Foley
NAN ELLEN FOLEY
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