Filing # 20557369 Electronically Filed 11/13/2014 06:21:47 PM

RECEIVED, 11/13/2014 18:23:37, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA,

ANGELO ATWELL, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. SC14-193

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Review from the
Fourth District Court of Appeal

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Paul Edward Petillo
Assistant Public Defender
Florida Bar No. 508438
ppetillo@pd15.state.fl.us
appeals@pd15.org

Attorney for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

United States Constitution

Florida Constitution

Other Authorities

Chapter Laws

STATEMENT OF THE CASE AND FACTS

In 1991, petitioner Angelo Atwell, was convicted of first degree murder and armed robbery. R 9-10. The offenses occurred August 30, 1990. R 18. For the murder, he received a mandatory life sentence without the possibility of parole for 25 years; for the robbery, he received a consecutive life sentence. R 11-17.

In February 2013, Atwell moved to correct his life sentences on the ground they constituted cruel and unusual punishment under *Miller v. Alabama*, 132 S.Ct. 2455 (2012). R 1-2.

The State filed a response and argued the motion should be denied for three reasons: first, the motion wasn't sworn; second, *Miller* does not apply retroactively; and, third, *Miller* does not apply because Atwell is eligible for parole after 25 years. R 4-7. The State agreed appellant was under 18 at the time of the offenses. R 6.

The trial court denied the motion for the reasons given by the State, and Atwell appealed to the Fourth District Court of Appeal. R 22-23, 26. He argued that his mandatory life sentence without the possibility of parole 25 years violated *Miller* and that his consecutive life sentence without the possibility of parole (for the armed robbery) violated *Graham v. Florida*, 560 U.S. 48 (2010).

The Fourth District affirmed, holding that *Miller* applied only to "a sentencing scheme that mandates life in prison without possibility of parole for

juvenile offenders." *Atwell v. State*, 128 So. 3d 167, 169 (Fla. 4th DCA 2013) (quoting *Miller*, 132 S.Ct. at 2469). The court rejected as unpreserved Atwell's *Graham* claim.

After the court denied rehearing, Atwell filed a notice to invoke the discretionary jurisdiction of this Court. He asserted that the district court expressly construed a provision of the federal constitution and therefore this Court had jurisdiction under article V, section 3(b)(3), of the Florida Constitution. This Court accepted jurisdiction on September 16, 2014.

SUMMARY OF THE ARGUMENT

POINT I

For a homicide he committed in 1990 when he was 16 years old, Atwell was sentenced to life imprisonment without the possibility of parole for 25 years. This sentence violates the Cruel and Unusual Punishments Clause for two reasons: first, the mandatory nature of the sentence treats juveniles like adults and all juveniles the same; second, the parole process does not provide a meaningful opportunity for release and is not an adequate substitute for the type of individualized hearing contemplated by *Miller v. Alabama*.

POINT II

For the armed robbery, Atwell was sentenced to life without the possibility of parole. This Court should hold, as the U.S. Supreme Court in *Graham v. Florida* held, that juvenile life sentences for non-homicide offenses are categorically banned.

ARGUMENT

POINT I

Miller v. Alabama applies to juveniles sentenced to mandatory life imprisonment without the possibility of parole for 25 years for two reasons: first, the mandatory nature of the sentence treats juveniles like adults and all juveniles the same; second, the parole process does not provide a meaningful opportunity for release and is not an adequate substitute for the type of individualized hearing contemplated by *Miller v. Alabama*.

A. *Background*

Atwell was charged by indictment with first-degree murder and armed robbery. The offense occurred on August 30, 1990, when he was 16 years old. At that time (and today) the State had the sole discretion to seek an indictment by grand jury and prosecute Atwell as an adult. § 39.02(c)1., Fla. Stat. (1989); § 985.56(1), Fla. Stat. (2014).

Atwell was found guilty as charged. For the murder, there were two possible penalties: death or life imprisonment without the possibility of parole for 25 years.[1] The jury recommended life. The judge followed that recommendation and sentenced him to life imprisonment without the possibility of parole for 25 years.

[1] *See* §§ 775.082(1), 921.141(1), Fla. Stats. (1989). In 1994, the Legislature amended section 775.082(1), Florida Statute, to eliminate parole for first-degree murder. Ch. 94–228, § 1, Laws of Fla. This became effective May 25, 1994. *Id*. In 1999, this Court held that a sentence of death imposed on a child under 17 violated the state constitution. *Brennan v. State*, 754 So. 2d 1 (Fla. 1999). In 2005, the U.S. Supreme Court held the death penalty unconstitutional for all juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005).

In February 2013, Atwell moved to correct this sentence on the ground it constituted cruel and unusual punishment under *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The trial court denied the motion, and Atwell appealed to the Fourth District Court of Appeal. The court affirmed, holding that *Miller* applied only to "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Atwell v. State*, 128 So. 3d 167, 169 (Fla. 4th DCA 2013) (quoting *Miller*, 132 S.Ct. at 2469).

Atwell argues that a mandatory life sentence even with the possibility of parole after 25 years violates *Miller* for two reasons: first, the sentence is disproportionate because it treats juveniles like adults and all juveniles the same; second, the parole process does not provide a meaningful opportunity for release and is not an adequate substitute for the type of individualized sentencing hearing contemplated by *Miller v. Alabama*.

B. *Standard of Review*

This Court reviews *de novo* a decision of a district court of appeal construing a provision of the state or federal constitution. *Tracey v. State*, 39 Fla. L. Weekly S617, S626 n.7 (Fla. Oct. 16, 2014).

C. *Miller v. Alabama applies retroactively*.

Whether *Miller* applies retroactively is the issue before this Court in *Falcon v. State*, No. SC13-865. Atwell will not repeat the arguments made there; nor will

he repeat at length the arguments he made in the district court except to note the following. First, the United States Supreme Court applied the rule in *Miller* to a case on collateral review (Kuntrell Jackson's case), implying the rule is retroactive. Second, both lines of precedent relied upon by the Court in *Miller* have been applied retroactively.[2] And third, *Miller* cannot be equated with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the holding of which this Court ruled is not retroactive. *Hughes v. State*, 901 So. 2d 837 (Fla. 2005). The holding of *Apprendi* was procedural, requiring that the jury, rather than the judge, find all the elements of the offense. *Miller*, on the other hand, is essentially substantive. As explained more fully below, juveniles are not the same as adults, and so treating them the same violates the "basic precept of justice" that sentencing be "graduated and proportioned to both the offender and offense." *Miller*, 132 S.Ct. at 2458 (citations and internal quotation marks omitted).

[2] The Court relied not only on *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Graham v. Florida*, 560 U.S. 48 (2010), but also cases "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2464. These cases include *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 483 U.S. 586 (1978); *Sumner v. Shuman*, 483 U.S. 66 (1987); and *Eddings v. Oklahoma*, 436 U.S. 921 (1978).

D. *The pre-1994 sentencing scheme for first-degree murder violates Miller v. Alabama because it treats juveniles like adults and all juveniles the same.*

It's worth repeating that Atwell was 16 at the time of his offenses. As the Court in *Miller* made so clear: juveniles are not the same as adults, and that difference makes them "less deserving of the most severe punishments." *Miller*, 132 S.Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). Juveniles have "diminished culpability and greater prospects for reform." *Id*. They have a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Id*. (citation and quotation marks omitted). They are "more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. (citation and alterations omitted). A juvenile's "character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Id*. (citation and alterations omitted).

The Court noted that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Id*. at 2464 (citation and alterations omitted). Further, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult

minds—for example, in parts of the brain involved in behavior control." *Id*. at 2464 (citation and alterations omitted). The Court said that "those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id*. at 2464-65 (citation and alterations omitted). The Court said

> youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage.

Id. at 2467 (citations, brackets, and quotation marks omitted).

Miller's premise—that children are not the same as adults and therefore shouldn't be treated the same—applies equally to juveniles sentenced to life imprisonment even with the possibility of parole after 25 years. Before May 25, 1994 (the effective date of ch. 94–228, § 1, Laws of Fla.), all defendants convicted of first degree murder and not sentenced to death—juvenile and adult offenders alike—were sentenced to life imprisonment with the possibility of parole after 25 years. But again, children are not equal to adults and so treating them the same (i.e., equally) violates a "basic precept of justice" that sentencing be "graduated and proportioned to both the offender and offense." *Miller*, 132 S.Ct. at 2458.

As the Court observed: "[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental

vulnerabilities—is crime-specific." *Id*. at 2465. Further, nothing that it said about children is *sentence*-specific either, a point the Chief Justice made in his dissent. *Miller*, 132 S.Ct. at 2482 (Roberts, C.J., dissenting) ("The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive." c.o.). As the Court said, "a sentencer misses too much if he treats every child as an adult." *Miller*, 132 S.Ct. at 2468.

Thus, Atwell's sentence is disproportionate vis-à-vis the more culpable adult offenders who received the same sentence. Stated another way, Atwell's sentence of life imprisonment with the possibility of parole is as disproportionate (again, vis-à-vis the more culpable adult offenders who received the same sentence) as a juvenile's post-1994 life sentence without the possibility of parole. This violates the "concept of proportionality [that] is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. Both sentences—mandatory life with parole and mandatory life without parole—violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel *or* Unusual Punishment Clause of article I, section 17, Florida Constitution.[3]

[3] Before 2002 amendment, article I, section 17, Florida Constitution, forbade cruel *or* unusual punishments. This version applies to crimes occurring before 2002. *See Adaway v. State*, 902 So. 2d 746, 747 n.2 (Fla. 2005).

Further, the pre-1994 mandatory-penalty scheme, just as much as the post-1994 mandatory-penalty scheme, requires the trial court to treat all children the same. This runs afoul of *Miller's* individualized-sentencing requirement. As the Court said, under mandatory sentencing schemes "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." And just as a "sentencer misses too much if he treats every child as an adult" (*Miller*, 132 S.Ct. at 2468), a sentencer misses too much if he or she treats every child the same.

Thus, the sentencer must be able to consider not only the "hallmark features" of youth, but also each child's "family and home environment … from which he cannot usually extricate himself"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; the child's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and, finally, the child's "possibility of rehabilitation." *Miller*, 132 S.Ct. at 2468.

Here, as in all mandatory life sentences—with or without parole—the trial court was precluded from considering how Atwell was different from adults and

how he was different from other children. And unless a court can consider these matters, the sentence will not be proportioned to the offender and offense.

E. *The parole process does not provide a meaningful opportunity for release and is not an adequate substitute for the type of individualized hearing contemplated by Miller v. Alabama*.

Florida's parole system is a creature of the Florida Constitution, statute, and administrative code. Art. IV, § 8, Fla. Const.; § 947.001, *et. seq.*, Fla. Stat.; Fla. Admin. Code R. 23-21.001, *et. seq*. Parole is administered by the Florida Commission on Offender Review (formerly the Parole Commission), an agency within the executive branch. § 20.32, Fla. Stat. (2014). The Commission is not a "sentencing court." *Holston v. Fla. Parole & Probation Commission*, 394 So. 2d 1110, 1111 (Fla. 1st DCA 1981).

Parole is "an act of grace of the state and shall not be considered a right." § 947.002(6), Fla. Stat. (1989); *see also* § 947.18, Fla. Stat. (1989) ("No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison."); Fla. Admin. Code R. 23-21.001 ("There is no right to parole or control release in the State of Florida.").

Atwell will be eligible for parole (on count I) after he serves 25 years in prison. The process begins with an initial interview, which is scheduled "within 18 months of the expiration of the mandatory portion of the term." Fla. Admin. Code R. 23-21.006(5)(b)5.c. The initial interview is conducted by a parole examiner

(essentially, a hearing examiner, *see* Fla. Admin. Code R. 23-21.001(34)). The interview has two parts. In Part I, the parole examiner determines whether the inmate is eligible for parole. Fla. Admin. Code R. 23-21.006(9). In Part II the parole examiner reviews, among other things, the matrix, which consists of a salient factor score on the y-axis and severity of offense behavior on the x-axis. Fla. Admin. Code R. 23-21.006(10). The matrix gives a range of appropriate Presumptive Parole Release Dates (PPRDs). Fla. Admin. Code R. 23-21.009.

But Part II of the initial interview does not end with the matrix. There are several aggravating and mitigating factors that the parole examiner may use to justify a PPRD outside the matrix. Fla. Admin. Code R. 23-21.010. After considering the matrix, the aggravators, and the mitigators, the parole examiner will recommend a PPRD, reduce the recommendation and considerations to writing, and submit it to the Commission on Offender Review (Commission) within 10 days. Fla. Admin. Code R. 23-21.006(10)&(11).

The Commission has 90 days from the date of the initial interview to agree or disagree with the parole examiner's recommendation. Fla. Admin. Code R. 23-21.006(14). The inmate must be informed of the Commission's decision in writing. *Id*. The Commission has authority to establish the inmate's PPRD. Fla. Admin. Code R. 23-21.010(4).

If the inmate wishes to contest his PPRD, he must do so in writing within 60 days of being notified of it. Fla. Admin. Code R. 23-21.012; § 947.173, Fla. Stat. (2014). The inmate must show cause with "individual particularities." Fla. Admin. Code R. 23-21.012(1).

If the Commission affirms the PPRD, the inmate can seek review by writ. *See Armour v. Florida Parole Commission*, 963 So. 2d 305, 307 (Fla. 1st DCA 2007) ("[J]udicial review is ... available through the common law writs of mandamus, for review of PPRD's, and habeas corpus, for review of effective parole release dates."). There is no right to appeal. *Johnson v. Florida Parole Commission*, 841 So. 2d 615, 617 (Fla. 1st DCA 2003) ("Because there is no right to appeal the revocation of parole, review by petition for writ of habeas corpus in the circuit court is proper.").

Although the Commission will accept a request to review the PPRD from an inmate's attorney (if he or she has one—*see* Fla. Admin. Code R. 23-21.012(1)), an indigent inmate does not have the right to the assistance of counsel to help him through this labyrinthine process. *Compare* § 921.1402(5), Fla. Stat. (2014) ("A juvenile offender who is eligible for a sentence review hearing under this section is entitled to be represented by counsel, and the court shall appoint a public defender to represent the juvenile offender if the juvenile offender cannot afford an attorney.").

Further, there are only two possible mitigating factors affecting the matrix that might be said to apply to juveniles: one, the inmate "was of such a young age as to diminish his capacity to fully understand the seriousness of his action and its direct consequences"; and, two, "the inmate had diminished mental capacity to contemplate the seriousness of the offense." Fla. Admin. Code R. 23-21.010(5)(b)1.b.&g. Compare these two factors with the list of factors the judge is to consider at the new *Miller* sentence-review hearing—factors that largely mirror those outlined in the *Miller* opinion:

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

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

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

(j) The possibility of rehabilitating the defendant.

§ 921.1401(2), Fla. Stat (2014).

Further, there are "[r]easons related to likelihood of favorable parole outcome" (Fla. Admin. Code R. 23-21.010(5)(b)2.) that generally will *not* apply to juveniles and will therefore put them at a distinct disadvantage in the parole process. For example, the Commission will consider whether the inmate has "led a law-abiding life for a substantial period before commission of the crime"; whether the inmate "has the availability of extremely strong community resources"; and whether the inmate "has education and skills which make him or her employable within the community." Fla. Admin. Code R. 23-21.010(5)(b)2.a.b.&d.

Of course, the Commission can change its parole guidelines to incorporate the holding of *Miller* and account for the disadvantages of inmates who committed their crimes as children. *See* § 947.165, Fla. Stat. (2014). Until it does so, however, Atwell's sentence of life without the possibility of parole for 25 years will violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel or Unusual Punishment Clause of article I, section 17, Florida Constitution.

POINT II

Atwell's life sentence for the non-homicide offense of armed robbery is a cruel and unusual punishment under *Graham v. Florida*.

For armed robbery, Atwell received a consecutive life sentence. This sentence is cruel and unusual punishment and violates *Graham v. Florida*, 560 U.S. 48 (2010).

The First and Fifth Districts have held that the Supreme Court created a bright-line rule concerning life without parole sentences for juveniles convicted of nonhomicide offenses: even if the same juvenile also committed a homicide offense during the same criminal incident, the trial court may not sentence the juvenile to life without parole for the nonhomicide offense. *Jackson v. State*, 117 So. 3d 70 (Fla. 1st DCA 2013); *Johnson v. State*, 38 Fla. L. Weekly D953 (Fla. 1st DCA Apr. 30, 2013); *Weiand v. State*, 129 So. 3d 434 (Fla. 5th DCA 2013); *Akins v. State*, 104 So. 3d 1173 (Fla. 1st DCA 2012).

The Second, Third, and Fourth Districts hold that *Graham* created an exception that would allow the imposition of a life without parole sentence on a juvenile for a nonhomicide offense when a homicide offense also occurred in a single criminal episode. *Orange v. State*, 39 Fla. L. Weekly D1887 (Fla. 4th DCA Sept. 3, 2014); *Starks v. State*, 128 So. 3d 91, 92 (Fla. 2d DCA 2013); *Washington v. State*, 110 So. 3d 1, 2–3 (Fla. 2d DCA 2012); *Lawton v. State*, 109 So. 3d 825 (Fla. 3d DCA 2013).

This issue is currently pending before this Court in *Lawton v. State*, No. SC13–685 (Fla. Jan. 14, 2014) (granting review). This Court should hold, as the Court in *Graham* itself did, that juvenile life sentences for non-homicide offenses are categorically banned.

That portion of the *Graham* opinion relied upon by *Lawton* (and the other courts) was dicta responding to a rhetorical point made by the State that the Annino study's tally of juveniles serving life failed to include "juvenile offenders who were convicted of both a homicide and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide." *Graham*, 560 U.S. at 63. The Court said (*id*):

> This distinction is unpersuasive. Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

As can be seen, the Court here wasn't carving out an exception to its categorical holding. Accordingly Atwell's life sentence on count II violates the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel or Unusual Punishment Clause of article I, section § 17, Florida Constitution.

CONCLUSION

As discussed in Point I, this Court should hold that until the Commission on Offender Review changes its parole guidelines to incorporate the holding of *Miller v. Alabama*, Atwell's sentence of life without the possibility of parole for 25 years will violate the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Cruel or Unusual Punishment Clause of article I, section § 17, Florida Constitution. As discussed in Point II, Atwell's life sentence without the possibility of parole on count II violates *Graham v. Florida*, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Cruel or Unusual Punishment Clause of article I, section 17, Florida Constitution.

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this brief has been electronically filed with the Court and a copy of it has been served to Heidi Bettendorf, 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 13th day of November, 2014.

/s/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO

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/ PAUL EDWARD PETILLO
PAUL EDWARD PETILLO