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IN THE SUPREME COURT OF THE STATE OF FLORIDA,

ANGELO ATWELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-193

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly construes a provision of the state or federal constitution. Fla. R. App. P. 9.030(a)(2)(A)(ii).

STATEMENT OF THE CASE AND FACTS

In its written opinion in this case, the Fourth District Court of Appeal detailed the facts of this case. See *Atwell v. State*, 128 So.3d 167 (Fla. 4th DCA 2013), a copy of which is attached hereto for the convenience of this Court.

SUMMARY OF THE ARGUMENT

Petitioner has improperly invoked the discretionary jurisdiction of this Court. The decision of the Fourth District Court of Appeal does not explain or amplify a provision of the United States Constitution. The sentencing scheme in place at the time of appellant's offense did not require a mandatory sentence of life without parole for the murder. Accordingly, *Miller v. Alabama,* 132 S.Ct. 2455 (2012) is inapplicable.

Secondly, the sentence imposed in this case was not mandatory; the sentencing scheme in effect at the time of Petitioner's sentence clearly allowed a sentencing court to take certain mitigating factors into account when imposing a sentence. There is nothing in the record to support Petitioner's argument that the trial court imposed a mandatory sentence without considering factors which may have been unique to him.

Finally, Respondent submits that where, as here, a district court of appeal merely rules on an argument which is based on an opinion from the United States Supreme Court, it does not "expressly" construe a provision of the federal constitution as required by the Florida Rules of Appellate Procedure.

ARGUMENT

PETITIONER IMPROPERLY INVOKES THE JURISDICTION OF THIS COURT PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(ii); THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE FEDERAL CONSTITUTION.

Petitioner asks this Court to use its power of discretionary jurisdiction to review a decision of the Florida Fourth District Court of Appeal. He contends the Court's decision in *Atwell v. State,* 128 So.3d 167 (Fla. 4th DCA 2013) construes a provision of the federal constitution. In a word, he is wrong.

Briefly, Petitioner contends the Fourth District Court of Appeal "explained or amplified the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution when it held that *Miller v. Alabama*, 132 S.Ct. 2455 (2012) does not apply to a juvenile's mandatory life sentence without the possibility of parole for 25 years because *Miller* applied only to 'a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.'" (IB 2). He argues that, "the trial court did not take into account how juveniles are different before imposing a *mandatory* life sentence without the possibility of parole for 25 years," and concludes, "petitioner's sentence violates

the Cruel and Unusual Punishments Clause of the Eighth Amendment." (IB 4).

In the first place, the Fourth District Court of Appeal properly noted in its opinion that, "It is clear that the underpinning of the holding of both *Miller* and *Graham [v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)] was the ineligibility for release on parole. Addressing that issue, the Court said:

> Appellant was not sentenced to life without the possibility of parole for his murder conviction. The sentencing scheme in place at the time of appellant's offense did not require a mandatory sentence of life without parole for the murder. Miller is inapplicable, and appellant would not be entitled to relief even if *Miller* applies retroactively.

Secondly, Respondent submits the sentencing scheme in effect at the time of Petitioner's sentence clearly allowed a sentencing court to take certain mitigating factors into account when imposing a sentence. Section 921.0026 Florida Statutes (2003), permitted a trial judge to downwardly depart from the lowest permissible sentence shown on the Criminal Punishment Code scoresheet. See *State v. Ayers,* 901 So.2d 942 (Fla. 2nd DCA 2005). As the Fourth District Court of Appeal explained in *State v. Cooper,* 889 So.2d 119, 119 (Fla. 4th DCA 2004):

> Three elements must be shown to establish the existence of the mitigating circumstance listed in section 921.0026(2)(j): (a) the offense must have been "committed in an unsophisticated

> manner," (b) the offense must have been "an isolated incident," and (c) the defendant must have "shown remorse" for the offense. "To justify departure on this basis, all three elements must be articulated by the trial judge and supported by the record.

In the case at bar, Petitioner's conviction and sentence were affirmed in a *per curiam* decision of the Fourth District Court of Appeal with no written opinion. See *Atwell v. State,* 614 So.2d 1104 (Fla. 4th DCA 1993). Therefore, there is nothing in the record to support Petitioner's argument that the trial court imposed a mandatory sentence without considering factors which may have been unique to him.

Finally, Respondent submits that where, as here, a district court of appeal merely rules on an argument which is based on an opinion from the United States Supreme Court, it does not "expressly" construe a provision of the federal constitution as required by the Florida Rules of Appellate Procedure. In *Rojas v. State,* 288 So.2d 234 (Fla. 1974) this Court specifically rejected such an expansive reading of the Rule saying:

> Although our direct appeals jurisdiction includes cases in which the trial court inherently passes upon the constitutionality of a Statute, we may not accept a direct appeal based upon an Inherent construction of a Constitutional provision; it is

> insufficient to invoke our direct appeals jurisdiction that there was an Inherent construction of a Constitutional provision in the judgment appealed from, but rather there must be a ruling by the trial court which explains, defines or overtly expresses a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal. [footnote omitted] In the present case, there is no such definition or explanation of the Fourteenth Amendment or any other constitutional provision as far as the petit jury challenge is concerned. The trial court, if anything, merely Applied the provisions of the Fourteenth Amendment to the facts it determined existed in the instant case; in fact, the apparent basis of the ruling was that no showing of unconstitutional discrimination was made. Applying is not synonymous with Construing; the former is NOT a basis for our jurisdiction, while the Express construction of a constitutional provision is. Hence, no basis for direct appeal to this Court has been presented in the petit jury challenge.

In the case at bar, where the Fourth District Court of Appeal considered Petitioner's argument and found the holding of the United States Supreme Court inapplicable based on the facts of the case, this Court does not have jurisdiction to review that decision. Accordingly, Petitioner's petition for review should be rejected.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Petitioner respectfully prays for an Order of this Court should rejecting Petitioner's petition for review, and for such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on Jurisdiction" has been sent to PAUL E. PETILLO, Esq., Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, FL 33401 by electronic mail to ppetillo@pd15.state.fl.us and appeals@pd15.state.fl.us on February 28, 2014.

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CERTIFICATE OF TYPE SIZE AND FONT

I HEREBY CERTIFY that the foregoing "Petitioner's Brief on Jurisdiction" has been printed in 14-point Times New Roman proportionally spaced font.

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****

APPENDIX

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