IN THE SUPREME OF THE STATE OF FLORIDA

CASE NO. SC14-193

ANGELO ATWELL,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the following symbols will be used:

"R" to denote the record on appeal; and

"T" to denote the trial and sentencing transcript.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

Statement Of The Case And Facts

1. Course of Proceedings and Disposition in the Trial Court.

A grand jury sitting in the Seventeenth Judicial Circuit, in and for Broward County, returned an indictment charging Petitioner, along with Codefendant Otis Earl Clayton, with first degree murder (Count I) and armed robbery (Count II) (R. 18). The murder was alleged to have been committed on August 30, 1990 (R. 18). Petitioner was sixteen (16) years old at the time he was alleged to have committed the offenses (R. 1, 22).

On November 8, 1991, Petitioner was convicted by a jury of first degree murder (Count I) and armed robbery (Count II) (R. 9-10). A capital sentencing hearing was held a little over a week later, after which the jury recommended that instead of death, Petitioner be sentenced to life with the possibility of parole after 25 years (R. 20).

The trial court subsequently adjudicated Petitioner guilty (R. 9-10) and imposed a sentence of life with the possibility of parole after 25 years on Count I (first degree murder) and a consecutive life sentence on Count II (armed robbery) (R. 11-17). Petitioner's convictions and sentences were affirmed on direct appeal. Atwell v. State, 614 So. 2d 1104 (Fla. 4th DCA 1993).

2. Respondent's Motion for Postconviction Relief.

Twenty-one (21) years after his sentencing, the Office of the Public Defender filed a motion for postconviction relief on Petitioner's behalf, pursuant to Fla. R. Crim. P. 3.800(a) and 3.850 (R. 1-2). The bare-bones motion asserted Petitioner was entitled to resentencing based on the decision of the United States Supreme Court in Miller v. Alabama, 132 S. Ct. 244 (2012) (R. 1).

The State filed a response wherein it argued that Petitioner's motion should be denied for numerous reasons: (1) the motion was time-barred; (2) the motion was not filed with the proper oath, nor did it contain the additional elements required by Rule 3.850(c); (3) there was no authority for the Office of the Public Defender to file the motion since they were not appointed; (4) the motion was not timely under Miller because the appellate courts in Florida which had addressed Miller at the time had found Miller not to be retroactive; (5) Miller was no applicable to Petitioner because Petitioner had been sentenced to life with the possibility of parole after 25 years after a capital sentencing hearing (R. 4-7).

The trial court ultimately denied Petitioner's motion for postconviction relief for all of the reasons argued in the State's response (R. 21-23). First, the trial court noted that because the Office of the Public Defender had not been properly appointed to represent Petitioner, it had no authority to file the motion (R. 22). Next the trial

court found the motion was not filed under oath and also failed to contain the additional elements required by Rule 3.850(c) (R. 22). The trial court found the motion to be untimely because Petitioner had failed to set forth any exception to the two (2) year filing requirement (R. 22). Specifically, the trial court found that at the time of the order, Miller had not been ruled by any Florida appellate court to be retroactive (R. 22-23). Finally, the trial court ruled that even if Miller were determined by the courts to be retroactive, it would have no application to Petitioner because Petitioner was not sentenced to the type of sentence found to be unconstitutional in Miller: life without the possibility of parole (R. 23). Instead, Petitioner had been sentenced to life with the possibility of parole after 25 years, a sentence deemed constitutional under Miller (R. 23).

a. Direct Appeal.

The Office of the Public Defender filed a timely notice of appeal of the trial court's denial of Petitioner's postconviction motion (R. 26). Counsel raised two issues on appeal:

(1) Petitioner's life sentence for first degree murder (Count I), even with the possibility of parole, was disproportionate and constituted cruel and unusual punishment under the reasoning set forth in Miller; and

(2) Petitioner's life sentence for the non-homicide offense of armed robbery (Count II) constituted cruel and unusual punishment

under Graham v. Florida, 130 S. Ct. 2011 (2010).

After reviewing the Initial Brief filed on Petitioner's behalf, the Fourth District Court of Appeal affirmed the denial of Petitioner's postconviction motion. Atwell v. State, 128 So. 3d 167 (Fla. 4th DCA 2013).

The Fourth District began by acknowledging that although Petitioner's motion failed to contain to required oath, because Petitioner alleged an illegal sentence and sought relief under Rule 3.800(a), the motion could be considered properly filed and timely. Id. at 168.

Next, the Fourth District recognized that at the time of his sentencing, the trial court properly imposed a sentenced on Count I (first degree murder) of life with the possibility of parole after 25 years, pursuant to § 775.082(1), Fla. Stat. (1989). Id. The Fourth District found that the trial court had properly denied Petitioner's motion for postconviction relief because Petitioner failed to show his sentence was an illegal one subject to correction at any time pursuant to Rule 3.800(a). Id. at 169. The Court refused to rule on the issue of whether Miller was retroactive, finding that Miller was inapplicable to Petitioner because Petitioner was sentenced to life with the possibility of parole, a sentence allowed under Miller. Id.

Finally, the Fourth District refused to address Petitioner's claim under Graham that his sentence to life without parole on the armed robbery count was

unconstitutional, finding that the issue was improperly argued for the first time on appeal. Id.

Petitioner filed a motion for rehearing, arguing that the Fourth District had overlooked that portion of the Miller decision which stated that a mandatory sentencing scheme for juveniles "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change, and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." Miller, 132 S. Ct. at 2460. Petitioner also relied on comments made by Justice Roberts in his dissent. Importantly, Petitioner admitted that he was requesting the Fourth District to extend Miller beyond its current scope.

Impliedly conceding that the Graham claim had not been properly preserved for appellate review, Petitioner argued the claim should be reviewed to avoid "legal churning."

The Fourth District summarily denied the motion for rehearing.

b. Discretionary Review.

Petitioner filed a timely notice to invoke this Court's discretionary jurisdiction on the basis that the opinion of the Fourth District expressly construed a provision of the Federal Constitution. Petitioner claimed that in its opinion, the Fourth District had "explained or amplified" the cruel and unusual punishment clause of the Eighth

Amendment when it held that Miller did not apply to a juvenile's mandatory life sentence with the possibility of parole after 25 years. Consistent with his motion for rehearing, Petitioner argued that the Fourth District overlooked dicta from the Miller decision that a mandatory sentencing scheme for juveniles "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change, and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." Miller, 132 S. Ct. at 2460. Petitioner also relied on comments made by Justice Roberts in his dissent. Petitioner failed to concede, as he did in his motion for rehearing, that he was requesting the Court to extend the decision in Miller beyond its current scope.

In response, the State pointed out that Petitioner had relied on dicta and a dissenting opinion to support his request for discretionary jurisdiction. The State argued that based on the clear language in Miller, Petitioner's sentence, which provided for the possibility for parole after 25 years, was not a prohibited sentence. Accordingly, the Fourth District had properly determined that Miller did not apply to Petitioner and thus, had not explained or amplified a provision of the Federal Constitution. The State pointed out that merely because a district court of appeal ruled on an argument which is based on an opinion from the United States Supreme Court does not mean the opinion "expressly" construed a provision of the federal

constitution. Next, the State argued the record failed to support Petitioner's claim that the sentence imposed failed to take into account certain mitigating factors.

This Court rejected the State's arguments and, by order dated September 16, 2014, accepted jurisdiction.

Summary Of The Argument

I. Miller v. Alabama is not retroactively applicable to Petitioner's case. However, this Court need not reach the retroactivity issue because Miller does not apply to the circumstances of this case. The Supreme Court's holding in Miller was unambiguous in its application only to mandatory life **without** parole. Petitioner was sentenced to life **with** the possibility of parole after 25 years. Expanding the meaning of the Miller opinion, as requested by Petitioner, would violate the Conformity Clause of the Florida Constitution.

Petitioner has already received the individualized sentencing hearing he requests. The record conclusively shows that after a capital sentencing hearing, the jury recommended a sentence of life instead of death.

Finally, the Florida parole system offers Petitioner a meaningful opportunity for release based on maturity and rehabilitation. While release is, by no means, guaranteed, Florida is not required to guarantee that a juvenile offender, particularly one convicted of a homicide offense, will re-enter society. While life with the possibility of parole after 25 years is a severe sentence, the oals of maturity and rehabilitation are met by imposing the least severe penalty upon juveniles convicted of first degree murder.

II. In Graham, the Supreme Court of the United States concluded that states

violate the Eighth Amendment when they sentence juveniles to life imprisonment for only nonhomicide crimes; the Court placed no Eighth Amendment limits on prison terms resulting from homicide convictions or nonhomicide conviction crimes when sentenced with homicide convictions. Although Petitioner was found guilty of a homicide offense, he maintains that his life sentence as to his nonhomicide offense that was part of the same, single criminal episode is illegal under Graham. However, a life sentence under this fact pattern is not illegal under the express language of Graham. When offenses occur during a single criminal episode, and at least one offense is a homicide offense, there is no Eighth Amendment prohibition to sentencing a juvenile to life imprisonment for nonhomicide offenses at the same time.

Argument

I. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR POSTCONVICTION RELIEF BECAUSE PETITIONER FAILED TO SHOW HIS SENTENCE WAS UNCONSTITUTIONAL UNDER MILLER V. ALABAMA.

Petitioner is currently serving a sentence of life with the possibility of parole after 25 years for a murder he committed as a juvenile. He claims that the trial court erred in denying his motion for postconviction relief. Petitioner argues he is entitled to relief pursuant to the opinion of the United States Supreme Court in Miller v. Alabama, 132 S. Ct. 2455 (2012), which held that it violated the Eighth Amendment prohibition against cruel and unusual punishment to sentence a juvenile to life without the possibility of parole without individual consideration of mitigating circumstances. More specifically, Petitioner contends that he is entitled to relief because a new rule of constitutional law was set forth in Miller and the rule is entitled to retroactive application. He argues that the only sentence available for him to receive in this case was life in prison, a sentence which results in Petitioner spending at least 25 years in prison before the possibility of parole. He contends that Miller is applicable to his case, even though he did not receive a sentence of life without parole, because the mandatory sentence was imposed without consideration of mitigation. Finally, he argues that the Florida parole system does not offer him a

meaningful opportunity for release.

Before reaching the issue raised by Petitioner, the State reasserts its prior arguments, presented in its Brief on Jurisdiction, that discretionary review is precluded because Petitioner cannot show that the decision of the Fourth District explains or amplifies a provision of the United States Constitution, specifically the Eighth Amendment. Because the sentencing scheme in place at the time of Petitioner's offense (first degree murder) did not require a mandatory sentence of life without parole, Miller v. Alabama, 132 S. Ct. 2455 (2012), is inapplicable. Further, where 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. Therefore, the State requests this Court to reconsider it's order granting discretionary review in this case.

A. Miller v. Alabama Is Not Retroactive.

As conceded by Petitioner, the issue of the retroactivity of Miller has been fully briefed by all parties in Falcon v. State, SC13-865. The State incorporates and adopts those arguments herein, but briefly summarizes them below:

Petitioner contends that retroactive application of Miller is required because

the United States Supreme Court consolidated the case of Jackson v. Hobbs[1] with Miller v. Alabama. In Miller, the United States Supreme Court addressed two separate cases involving 14 year-olds convicted of murder and sentenced to mandatory sentences without parole. While Miller was on direct appeal, in the companion case, Jackson v. Hobbs, Jackson's sentence had already been affirmed by the Arkansas Supreme Court. The United States Supreme Court granted certiorari review in both cases and consolidated the cases for review. However, the issue in Jackson, like Miller, was whether the Eighth Amendment prohibited a life without parole sentence for juveniles involved in a homicide offense as Graham v. Florida, infra, had not addressed that issue. The issue of retroactivity was not addressed. Because Jackson was seeking relief under an extension of Graham, and it is most likely that Graham will be applied retroactivity as it appears to have categorically prohibited a specific punishment, the simple fact that the United States Supreme Court address the Eighth Amendment issue without addressing retroactivity, does not mandate that Miller must be applied retroactively. Instead, this Court must look to whether Miller qualifies for retroactive application under Witt v. State, 387 So. 2d 922 (Fla. 1980).

Miller v. Alabama, does not qualify for retroactive application under this

[1]Jackson v. Hobbs, 132 S. Ct. 2455 (2012)

Court's test announced in Witt v. State. Miller emanates from the United States Supreme Court and it is constitutional in nature as it involves whether a sentence violates the prohibition of cruel and unusual punishment. However, Miller does not constitute a development of fundamental significance. A change of law constitutes a development of fundamental significance if it removes from the state the authority to regulate certain conduct or impose certain penalties or if it is a change of sufficient magnitude to require retroactive application.

Miller's change in the sentencing procedures for juveniles is more akin to the effect Apprendi had on the sentencing procedures. The United States Supreme Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This Court stated that "[t]he decision in Apprendi was intended to guard against erosion of the Sixth Amendment's guarantee of the right to jury trial, by requiring that a jury decide the facts supporting a sentence that exceeds the statutory maximum." Hughes v. State, 901 So. 2d 837, 841 (Fla. 2005). Nevertheless, this Court stated that Apprendi "is procedural, as is clear from the Supreme Court's statement that its concern was with the adequacy of New Jersey's criminal procedure." Id. at 841. See Curtis v. United States, 294 F.3d 841, 843 (7th

Cir.) (stating that "Apprendi is about nothing but procedure-who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt)"), cert. denied, 537 U.S. 976 (2002).

While the Miller decision does involve sentencing, it did not remove the State's authority or power to impose a sentence of a life without the possibility of parole. The United States Supreme Court did not preclude a life sentence without parole, but the Court instead changed the procedures which are required in order to impose a life without parole sentence. Pursuant to Miller the sentencing judge must first consider the juveniles diminished culpability, heightened capacity for change, and other factors related to youth before imposing a life without parole sentence.

Miller is also not a change of sufficient magnitude to require retroactive application. To determine if a change of law is of significant magnitude this court must consider the purpose to be served by the new rule, the extent of reliance on the old rule and the effect of the rule on the administration of justice. The purpose to be served by the new constitutional rule is the foremost factor. A new rule is usually given retroactive effect when it effects the truth-finding function of a trial which raises serious questions about the accuracy of a guilty verdict. However, if a new rule marginally implicates the reliability of the factfinding process, but is primarily designed to foster other constitutional or policy concerns, the rule does not

necessitate retroactive application. The purpose of Miller is to provide a new process in juvenile homicide sentencing, but it does not affect the determination of guilt or innocence of a juvenile defendant.

The second prong of the test is the extent of reliance on the old rule. Historical reliance on the old rule does not weigh in favor of applying the new rule retroactively. In 1994, the Legislature amended the sentencing statute to make persons convicted of capital felonies involving death ineligible for parole. Thus, for 18 years trial courts have been imposing life without parole sentences on juveniles convicted of first degree murder.

The third prong of the test is the effect that retroactive application of the rule will have on the administration of justice. The new procedures under Miller will call for a sentencing hearing presenting evidence and testimony similar to that of a sentencing hearing in a capital murder case in which the death penalty is imposed. Expert testimony on the defendant's mental state and maturity will most likely have to be presented and countered. Moreover, unless the sentencing hearing follows soon after a trial, facts surrounding the crime, medical examiner's testimony as to the injuries, statements made by the defendant, and any other type of evidence which would be relevant to the trial court's sentencing decision will have to be presented. Accordingly, retroactive application of Miller will greatly impact the administration

of justice. Thus, Miller does not require retroactive application under Witt.

Miller v. Alabama is not retroactive under the federal test in Teague v. Lane, 489 U.S. 288 (1989). States are not required to use the Teague test for retroactivity. This Court has not adopted the Teague test, but instead relies on Witt. Nevertheless, even if this Court were to examine the Miller decision under the Teague standard, Petitioner would not be entitled to any relief. Pursuant to Teague, a new rule should be applied retroactively if it places its conduct beyond the power of the criminal law-making authority to regulate or if the new rule if the observance of procedures that are implicit in the concept of ordered liberty. The infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

Again, Miller did not prohibit the imposition of a life without parole sentence on a juvenile, but instead, changed the procedures in which it could be imposed. Miller did not effect the accuracy of the guilty verdict. Although Miller is highly important, it is not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Thus, even if this Court were to apply the Teague standard of retroactivity, petitioner would not be entitled to relief.

B. Miller v. Alabama Is Not Applicable To Petitioner's Case Where Petitioner Received A Sentence Of Life With The Possibility Of Parole After 25 years.

The trial court correctly concluded that because Miller stands for the proposition that a sentence of life imprisonment **without** the possibility of parole may not be mandatorily imposed upon a defendant who was a juvenile at the time of the crime without individual consideration of the mitigating circumstances, and because Petitioner received a sentence of life **with** the possibility of parole, which Miller suggests is an appropriate sentence, Miller, 132 S. Ct. at 2460, then Miller does not apply to his case.

Petitioner argues that the trial court erred because his life sentence **with** the possibility of parole after 25 years is contrary to the spirit of Miller v. Alabama. This argument is utterly devoid of merit. The Supreme Court's holding in Miller was unambiguous in its application only to mandatory life without parole. After noting that neither a judge nor a jury could have sentenced Miller to a life with parole sentence or other lesser sentence, the Supreme Court specifically held "that **mandatory life without parole for those under the age of 18 at the time of their crimes** violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Miller, 132 S. Ct. at 2460 (emphasis added). Furthermore, Miller is replete with indications that it is addressing only mandatory life without parole

sentences for juvenile offenders.[2] Since Miller, at least one court has rejected this

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[2]See Miller, 132 S. Ct. at 2463 ("As we noted the last time we considered **life-without-parole sentences imposed on juveniles** . . ."), 2463-64 ("Graham further likened **life without parole for juveniles** to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited **mandatory imposition of capital punishment**, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before **sentencing him to death**."), 2464 ("[T]he confluence of these two lines of precedent leads to the conclusion that **mandatory life-with-parole sentences for juveniles** violate the Eighth Amendment."), 2465 ("**Life without parole** 'forswears altogether the rehabilitative ideal. It reflects an '**irrevocable judgment** about [an offender's] value and place in society,' at odds with a child's capacity for change."), 2465 ("Graham's reasoning implicates **any life-without-parole sentence imposed on a juvenile** . . ."), 2465 ("Graham insists that youth matters in determining the appropriateness of a **lifetime of incarceration without the possibility of parole**."), 2465-66 ("And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a **life-without-parole** sentence disproportionate."), 2466 ("[T]he **mandatory** penalty schemes **at issue here** . . ."), 2466 ("[B]y subjecting a juvenile to the same **life-without-parole** sentence applicable to an adult-these laws prohibit a sentencing authority from assessing whether **the law's harshest term of imprisonment** proportionately punishes a juvenile offender."), 2466 ("And this **lengthiest possible incarceration** is an 'especially hard punishment for a juvenile . . ."), 2466 ("In part because we viewed this **ultimate penalty for juveniles** as akin to the death penalty, we treated it similarly to that **most severe punishment**."), 2467 ("[T]hese decisions too show the flaws of imposing **mandatory life-without-parole** sentences on juvenile homicide offenders. **Such mandatory penalties**, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. **Under these schemes**, every juvenile will receive the same sentence as every other . . . ."), 2468 ("To recap: **Mandatory life without parole for a juvenile** precludes consideration [of various factors]. . . . And finally, **this mandatory punishment** disregards the possibility of rehabilitation even when the circumstances most suggest it."), 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that **mandates life in prison without possibility of parole for juvenile offenders**. . . . By making youth (and all that accompanies it) irrelevant to imposition

exact argument, finding that an indeterminate life sentence with a minimum of 25 years does provide a meaningful opportunity for release for a juvenile murderer. See People v. Kelly, Case No. A129688, 2012 WL 3802280 (Cal. 1st Dist. App. Sept. 4, 2012) (finding post-Miller that sentence of 25 years to life imposed on a 17-year-old felony murderer did not violate the Eighth Amendment and recognizing that the sentence imposed "was substantially less severe than the sentences in Graham, [and California de facto life without parole sentences] in that the minimum term was 25 years, not a sentence that would inevitably keep defendant in prison until he dies or nears the end of his life.") (unpublished). See also Perry v. State, 2014 WL 1377579 (Tenn. Crim. App. April 7, 2014) (sentence of life with the possibility of parole after 51 years did not violate the holding in Miller) (unpublished).

Furthermore, the reasoning of Miller itself demonstrates that Petitioner's argument is devoid of merit. In Miller, the Court found:

> Graham further likened **life without parole for juveniles** to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited **mandatory imposition of capital punishment**, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense **before**

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of **that harshest prison sentence**, such a scheme poses too great a risk of disproportionate punishment."), 2469 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take account how children are different, and how those differences counsel against **irrevocably sentencing them to a lifetime in prison**.") (emphasis added).

> **sentencing him to death**. . . . Here, the confluence of these two lines of precedent leads to the conclusion that **mandatory life-without-parole sentences for juveniles** violate the Eighth Amendment.
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> * * *
>
> In part because we viewed this **ultimate penalty for juveniles** as **akin to the death penalty**, we treated it similarly to that **most severe punishment**. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. **And the bar we adopted mirrored a proscription first established in the death penalty context** - that the punishment cannot be imposed for any nonhomicide crimes against individuals.

Id. at 2463-64, 2466-67 (emphasis added). Thus, under Miller, life without parole is the "juvenile death penalty." See id. at 2466 (indicating that life without parole on juveniles is akin to the death penalty and "analogous to capital punishment" for a juvenile).

There is no question that mandatory life without parole can be imposed on an adult murderer, since it can be constitutionally imposed for far less severe offenses. See Harmelin v. Michigan, 501 U.S. 957 (1991) (mandatory sentence of life imprisonment without parole for the first offense of possession of more than 650 grams of cocaine was not cruel and unusual in violation of the Eighth Amendment); Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence without parole for three relatively minor non-violent felonies not Eighth Amendment violation). Just as the sentence of life without parole, which is less than death, can be constitutionally

imposed mandatorily on an adult murderer, a sentence less than the "juvenile death penalty" of life without parole, such as life with the possibility of parole after twenty-five years, can be imposed mandatorily on a juvenile murderer. In other words, Miller recognized that individualized sentencing is necessary for the **most severe penalty** for both adults and juveniles; death for the former, life imprisonment for the latter. However, Miller's own reasoning, that life without parole is the "juvenile death penalty," indicates that the Eighth Amendment **permits** mandatory sentencing for a juvenile murderer to **something less than life without parole**, such as "life **with** the possibility of parole," or, as here, life with the possibility of parole after 25 years. Miller, 132 S. Ct. at 2460. Indeed, as Miller recognized, "[l]ife-without-parole terms . . . 'share some characteristics with death sentences that are shared **by no other sentences**.'" Miller, 132 S. Ct. at 2466 (quoting Graham, 130 S. Ct. at 2027) (emphasis added).

Despite Miller's clear language, Petitioner is attempting to parlay his sentence of life **with** the possibility of parole after 25 years into a comparable sentence to the one in Miller (life **without** the possibility of parole), and he asks that it be declared unconstitutional under the same theory as the Miller sentence. Essentially, he is attempting to equate his sentence to a sentence of life **without** parole based upon the lengthy required service before he is eligible for parole. Petitioner argues that **any**

mandatory sentence for a juvenile murderer is unconstitutional under Miller because it only allows one sentence and precludes the court from considering other factors, including the offender's youth, his or her potential for rehabilitation, the circumstances of the offense, and his or her family environment. Petitioner asserts that the Court's holding in Miller supports a finding that a mandatory sentencing provision like the one applied to Petitioner violates the Eighth Amendment. In support of his argument, Petitioner relies on various quotes from Miller, which he says stand for the proposition that sentences and criminal process must be made proportionate to the level of maturity and culpability of the defendant. However, as discussed more fully, infra, the Miller Court did not hold that the Eighth Amendment prohibited any mandatory penalties but, rather, only mandatory life without parole sentences in certain circumstances. Petitioner was given a mandatory sentence of life with the possibility of parole after 25 years, which is a sentence that is far less egregious than the sentence of life in prison without the possibility of parole that the trial court gave to the Miller defendant and which was found to be unconstitutional.

While Petitioner argues that the next logical step is to extend protection to these types of sentences (life with the possibility of parole after 25 years), that is not the precedent which now exists and this Court should not expand the meaning of the Miller holding. Providing such additional protection for juvenile murderers beyond

that provided for by the United States Supreme Court and the United States Constitution, as urged by Petitioner, would violate the conformity clause of the Florida Constitution. Article I, Section 17, of the Florida Constitution states, in relevant part:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Cf. Valle v. State, 70 So. 3d 530 (Fla. 2011) (recognizing that under the Conformity Clause, Florida's courts are bound by precedent of the United States Supreme Court on issues regarding cruel and unusual punishment); cf. Holland v. State, 696 So. 2d 757 (Fla. 1997) (explaining that the conformity clause prohibits a state court from providing greater protection than what is provided in United States Supreme Court precedent). See also Yacob v. State, 136 So. 3d 539, 557-58 (Fla. 2014) (Canady, J., concurring in part and dissenting in part) (a sentence may be invalidated as cruel and unusual under the Florida Constitution only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual). As discussed infra, it is only a mandatory life sentence that violates the Eighth Amendment.

1. Petitioner Has Already Received The Individualized Sentencing Hearing He Requests.

Petitioner's contention that at the time of sentencing, "the trial court was precluded from considering how Atwell was different from adults and how he was different from other children" (Initial Brief on the Merits at pp. 10-11) is simply not supported by the record. Petitioner was charged with capital murder. The record conclusively shows that after a capital sentencing hearing, the jury recommended a sentence of life instead of death. Thus, the record shows Petitioner received exactly the kind of sentencing hearing he claims was denied to him.

2. The Florida Parole System Offers Petitioner A Meaningful Opportunity For Release Based On Maturity And Rehabilitation.

Petitioner's sentence, while lengthy, is parole eligible and therefore complies with the Eighth Amendment.

Parole is the release of an inmate, prior to the expiration of the inmate's court-imposed sentence, with a period of supervision to be successfully completed by compliance with conditions and terms of the release agreement ordered by the Parole Commission. See Burgess, William H., FLORIDA SENTENCING § 12:18 (2013-14 ed.). "[T]he decision to parole an inmate from the incarceration portion of the inmate's sentence is an act of grace of the state and shall not be considered a right."

§ 947.002, Fla. Stat.

In 1978, the Florida Legislature enacted "Objective Parole Guidelines Act of 1978" which required the Parole Commission to develop and implement rules and criteria upon which parole decisions were to be based on risk-assessment and historical Commission experience. See 1978 Laws of Fla. 78-417 (1978). Under that Act, "[a] person who has become eligible for an initial parole interview and who may, according to the objective parole guidelines of the commission, be granted parole shall be placed on parole . . . ." § 947.16(4), Fla. Stat.

An inmate who is eligible for parole has an initial interview with a hearing examiner, who provides the inmate with an introduction and explanation of the objective parole guidelines as they relate to the presumptive and effective parole release dates, as well as explaining the institutional conduct record and satisfactory release plan. § 947.172(1), Fla. Stat. Based on the initial interview, the objective parole guidelines and any other competent evidence related to aggravated and mitigating circumstances,[3] the hearing officer recommends a presumptive parole release date -- or tentative parole release date as determined by the objective parole

[3]Petitioner's argument that he is penalized 2 points because he committed the offense when he was a juvenile must fail. The salient factor scoring system was changed effective July 31, 2014 to remove the designation of assessing 2 points to those individuals who were 17 or younger at the time their crime occurred. R. 23-21.007, Fla. Admin. Code

guidelines -- to the Parole Commission, which adopts or modifies that date. §§ 947.005(8), 947.172(1-3), Fla. Stat. The inmate may request one review of his presumptive parole release date, in writing, setting forth individual particularities that the inmate believes justify modification, and the Parole Commission may affirm or modify the date based on the offender's request. § 947.173, Fla. Stat.

Otherwise, an inmate convicted of sexual battery, will have a subsequent interview no later than every seven years (although they can be more frequent) to review the inmate's presumptive parole release date. § 947.174(1)(b), Fla. Stat. (2013). In a subsequent interview, the hearing officer determines whether there is any additional information, whether aggravating or mitigating, that might affect the presumptive parole release date. § 947.174(1)(c), Fla. Stat. If there is information, including, but not limited to, current progress reports, psychological reports, and disciplinary reports, that could affect the presumptive parole release date, the Parole Commission can modify, by increasing or decreasing, the presumptive parole release date. §§ 947.16(5), 947.174(2-3), Fla. Stat.

When an inmate nears his presumptive parole release date and his institutional conduct is satisfactory, his presumptive parole release date becomes his effective parole release date -- or the actual parole release date, as determined by the presumptive date, institutional conduct and an acceptable parole plan. §§ 947.005(5),

947.1745, Fla. Stat. At that point, the Parole Commission engages in a process to determine if parole release remains appropriate, based on Sections 947.1745, 947.1746, and 847.18, Florida Statutes.

Thus, a review of the parole guidelines shows that Florida meets the challenge provided by Miller. While release is, by no means, guaranteed, Florida is not required to guarantee that a juvenile offender, particularly one convicted of a homicide offense, will re-enter society. The Florida parole system meets the requirements of providing some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. While life with the possibility of parole after 25 years is a severe sentence, the goals of maturity and rehabilitation are met by imposing the least severe penalty upon juveniles convicted of first degree murder.

II. THERE IS NO EIGHTH AMENDMENT PROHIBITION AGAINST SENTENCING A JUVENILE TO A LIFE SENTENCE WITHOUT PAROLE WHERE HE HAS COMMITTED BOTH HOMICIDE AND NONHOMICIDE OFFENSES WITHIN THE SAME CRIMINAL EPISODE.

Next, Petitioner argues that his life sentence for the non-homicide offense of armed robbery is cruel and unusual punishment under Graham v. Florida. The Fourth District found this claim was not properly preserved for appellate review because Petitioner failed to ever present it in the trial court. Atwell v. State, 128 So. 3d at 169.

The record supports the Fourth District's finding that Petitioner never presented any argument to the trial court on this issue (R. 1-2). Furthermore, after the Fourth District issued its opinion in the case at bar, Petitioner filed a motion for rehearing wherein he impliedly conceded that the issue had not been preserved. Thus, any argument pertaining to whether Petitioner's life sentence for armed robbery constitutes cruel and unusual punishment has been waived. Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court. Harrell v. State, 894 So. 2d 935 (Fla. 2005). Proper preservation requires three components: (1) a litigant must make a timely, contemporaneous objection; (2) the party must state the legal ground for the objection; and (3) the argument on appeal must be the specific contention asserted as

the legal ground of the objection or motion below. Id. at 940. Petitioner's failure to present any argument on this issue in the trial court thus precludes appellate review. See also Booker v. State, 969 So. 2d 186, 194-95 (Fla. 2007) (when a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived).

Turning to the merits of Petitioner's claim, Respondent relies on its argument presented in Lawton v. State, SC13-685, a portion of which is reproduced below:

In Graham v. Florida, 130 S. Ct. 2011 (2010), the United States Supreme Court held that unqualified life sentences for nonhomicides constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution when imposed upon persons who were minors when they committed the crimes. However, while the Court in Graham concluded that states violate the Eighth Amendment when they sentence juveniles to life imprisonment for only nonhomicide crimes, the Court placed no Eighth Amendment limits on prison terms resulting from homicide convictions or nonhomicide conviction crimes when sentenced with homicide convictions that arose from the same criminal episode. In its opinion, the Court stated that it opinion only concerned those juvenile offenders sentenced to life without parole solely for nonhomicide offenses. Graham, 130 S. Ct. at 2023.

In the instant case, Petitioner was found guilty and sentenced on a homicide, but still maintains that his life sentence as to his nonhomicide offense that was part of the same, single criminal episode are illegal under Graham. As the Second and Third District Courts of Appeal have both properly recognized, a life-sentence under this fact pattern is not illegal under the express language of Graham. When offenses occur during a single criminal episode, and at least one offense is a homicide offense, there is no Eighth Amendment prohibition to sentencing a juvenile to life imprisonment for a nonhomicide offense at the same time.

In declaring that a sentence of life without the possibility of parole (LWOP) imposed on a juvenile for a nonhomicide offense violates the Eighth Amendment, the Graham Court adopted a categorical approach to its analysis of whether a life sentence violated the Eighth Amendment when imposed on a juvenile offender who did not also commit a homicide offense. Graham, 130 S. Ct. at 2022-23. This categorical approach had previously been limited to death penalty cases. See e.g. Coker v. Georgia, 433 U.S. 584, 592 (1977) (execution for rape violates Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 569 (2005) (execution of minor violates Eighth Amendment); and Atkins v. Virginia, 536 U.S. 304, 321 (2002) (execution of mentally retarded person violates Eighth Amendment).

In its analysis, the Graham Court carefully explains why its holding does

notextend to nonhomicide sentences that are part of the same criminal episode as thehomicide. The Supreme Court began its analysis with "objective indicia of national consensus." Id. at 2023.[4] It was the State and its amici position before the Court that there was no national consensus against the sentencing practice at issue. Id. However, the Court found this argument to be "incomplete and unavailing." Id. Writing,

> "[t]here are measures of consensus other than legislation." Kennedy, supra, at ---, 128 S. Ct., at 2657. Actual sentencing practices are an important part of the Court's inquiry into consensus. See Enmund, supra, at 794–796, 102 S. Ct. 3368; Thompson, supra, at 831-832, 108 S. Ct. 2687 (plurality opinion); Atkins, supra, at 316, 122 S. Ct. 2242; Roper, supra, at 572, 125 S. Ct. 1183; Kennedy, supra, at ---, 128 S. Ct., at 2657–58. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non–Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009) (hereinafter Annino).

Graham, 130 S. Ct. at 2023.

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[4]"Six jurisdictions do not allow life without parole sentences for any juvenile offenders. . . . Seven jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes. . . . Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. . . . Federal law also allows for the possibility of life without parole for offenders as young as 13. . . ." Graham, 130 S. Ct. 2023.

The Court then went on to note that the State argued that the study's "tally [was] inaccurate because it did not count juvenile offenders who were convicted of both a homicide and nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide." Id. In response to this concern, the Court specifically noted that:

> 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.**

Graham v. Florida, 130 S. Ct. at 2023 (emphasis added).[5]

Graham created an exception for those juveniles who were sentence to LWOP and had only committed nonhomicide offenses. The Supreme Court has never held that a sentence of LWOP for a juvenile who has committed homicides or other nonhomicide offenses in the same criminal episode as the homicide violates the Eighth Amendment. On its face, the Court in Graham stated that "it is difficult to say

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[5]4In considering how to apply this language, the district courts of Florida have differed in their analysis. A full discussion of the conflict contained in those opinions is contained in the State's Answer Brief filed in Lawton v. State, SC13-685, at pp. 11-19.

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." Graham, 130 S. Ct. at 2023.

Petitioner was sentenced to the second harshest punishment -- life in prison without the possibility of parole -- for committing a crime in conjunction with a crime that falls within the category of the worst offenses. Although "[l]ife without parole is an especially harsh punishment for a juvenile," Graham, 130 S. Ct. at 2027, such a sentence is not overly harsh when compared to the crime of which Petitioner was convicted. This conclusion is buttressed by the Supreme Court's decision in Graham. In analyzing the constitutionality of Graham's sentence, the Court determined that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" and thus cannot be subjected to "the second most severe penalty permitted by law." Graham, 130 S. Ct. at 2028. Unlike the defendant in Graham, Petitioner committed capital murder and attempted robbery and thus does not have "twice diminished moral culpability." Likewise, although Petitioner committed one of Florida's worst offenses, he was sentenced to the second harshest penalty. Cf. Graham, 130 S. Ct. at 2032 (specifically restricting its holding to nonhomicide crimes).

In Graham, the Supreme Court specifically explained that the decision "concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Id. Petitioner posits that language should be ignored as it is dicta (Initial Brief at p. 17). However, this language is not simple dicta where it forms an integral and essential part of the Court's analysis. See e.g. Tate v. Showboat Marina Casino P'ship, 431 F.3d 580, 582 (7th Cir. 2005) (Posner, J.) (arguing that "the holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome"); WWC Holding Co., Inc. v. Sopkin, 488 F.3d 1262, 1271 n.6 (10th Cir. 2007) ("Because our analysis of the Telecommunication Act's provisions for assigning interstate and intrastate jurisdiction bears directly upon our review of the district court's holding and provides the rationale for our holding, it is integral to our decision and therefore not 'dicta.'"); In re Berwick Black Cattle Co., 394 B.R. 448, 456 (Bankr. C.D. Ill. 2008) ("It is a well established principle that the holding of a case includes, besides the facts and outcome, the reasoning essential to that outcome."). Moreover, if Petitioner is correct that the Graham language, regarding combined homicide and nonhomicide sentences, is only dicta that would mean that the Supreme Court did not reach or address that issue, since the facts were not before it. Consequently, that would mean that as to such a factual issue, prior case law from Florida state courts, and courts from outside the state, would have been

left undisturbed as to combined homicide and nonhomicide LWOP sentences. See e.g. McNamee v. State, 906 So. 2d 1171 (Fla. 4th DCA 2005) (upholding a juvenile's convictions and sentences to LWOP on first degree murder, robbery with a firearm, burglary of a dwelling while armed); Blackshear v. State, 771 So. 2d 1199 (Fla. 4th DCA 2000) (three LWOP sentences for armed robbery for defendant who pled guilty at 13 and later violated probation); Manuel v. State, 629 So. 2d 1052 (Fla. 2nd DCA 1993) (remanding to consider whether thirteen year old sentenced to life had counsel for prior juvenile convictions included in scoresheet which recommended life sentence for attempted murder and armed robbery); State v. Walker, 252 Kan. 117, 843 P.2d 203 (1992) (life sentence for fourteen year old active participant in two aggravated kidnappings and an aggravated arson); State v. Foley, 456 So. 2d 979 (La. 1984) (fifteen year old's life sentence without the possibility of parole for aggravated rape proportional); White v. State, 374 So. 2d 843 (Miss. 1979) (life without possibility of parole for sixteen year old armed robber and kidnaper); People v. Isitt, 55 Cal. App. 3d 23, 127 Cal.Rptr. 279 (1976) (seventeen year old sentenced to life without parole for kidnapping and robbery with bodily harm); Rogers v. State, 257 Ark. 144, 515 S.W.2d 79 (1974) (seventeen year old first time offender rapist sentenced to life without possibility of parole); Howard v. State, 319 So. 2d 219 (Miss. 1975) (sixteen year old's twenty-five year sentence for attempted armed

robbery not cruel and unusual); State v. Haley, 87 Ariz. 29, 347 P.2d 692 (1959) (not cruel and inhuman to sentence fifteen year old who committed robbery, aggravated assault, and lewd and lascivious acts to twenty-three to thirty years).

Accordingly, Petitioner is not entitled to relief on his armed robbery sentence because he was sentenced on a first-degree murder at the same time for offenses in the same criminal episode. Thus, when read in context, the Supreme Court was specifically applying Graham only to juveniles who had not committed a homicide offense. The Supreme Court has never held that a sentence of LWOP for a juvenile who has committed homicides violates the Eighth Amendment.[6] As the Court noted, juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. The Supreme Court's discussion on this point in Graham cannot be swept away as mere dicta, where it is inextricably intertwined with the reasoning that resulted in its holding. Accordingly, in considering Petitioner's age and the nature of his crimes, this Court should find that Petitioner is not entitled to relief on his LWOP sentence.

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[6]Even in Miller v. Alabama, 132 S. Ct. 2455 (2012), the Supreme Court only prohibited the mandatory imposition of LWOP. The Court did not find that a LWOP sentence can never be imposed on a juvenile who commits a homicide offense.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should affirm the decision of the Fourth District Court of Appeal in Atwell v. State, 128 So. 3d 167 (Fla. 4th DCA 2013).

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that on this 11th day of February, 2015, in accordance with Fla. R. Jud. Admin. 2.516, a .pdf copy of the foregoing with an electronic signature has been e-mailed to Paul Petillo, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, at appeals@pd15.state.fl.us, ppetillo@pd15.state.fl.us, and alefler@pd15.state.fl.us. Additionally, a .pdf copy of the foregoing with an electronic signature has been electronically filed at https://myflcourtaccess.com.

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Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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