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IN THE SUPREME COURT OF FLORIDA,

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

PETITIONER'S REPLY BRIEF

On Review from the
Fourth District Court of Appeal

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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*.

The State argues that this Court would violate the conformity clause of article I, section 17, Florida Constitution, if it ruled in Atwell's favor. *Answer Brief at page 23*. But Atwell argues that this Court would violate the conformity clause if it ruled *against* him: as explained in the Initial Brief, the best reading of *Miller v. Alabama*, 132 S.Ct. 2455 (2012), requires that juveniles receive individualized sentencing. *Cf. Yacob v. State*, 136 So. 3d 539, 546-50 (Fla. 2014). Moreover, in 1990, when Atwell's offenses occurred, there was no conformity clause in article I, section 17, Florida Constitution, and it forbade cruel *or* unusual punishments. That version of article I, section 17, Florida Constitution, applies here. *See Adaway v. State*, 902 So. 2d 746, 747 n.2 (Fla. 2005).

The State argues that Atwell's capital sentencing hearing satisfied the requirement of an individualized sentencing hearing and therefore "Petitioner received exactly the kind of sentencing hearing he claims was denied to him." *Answer Brief at page 24*. But a hearing that results in one of two mandatory sentences "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. Not surprisingly, the purpose of an individualized sentencing hearing is to individualize the sentence. This satisfies the "basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id*. at 2463 (quotations marks and citation omitted).

POINT II

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

It is true, as the State asserts, that the Fourth District stated that it was improper to raise this issue for the first time on appeal. *Atwell v. State*, 128 So.3d 167, 169 (Fla. 4th DCA 2013). But Atwell's claim is apparent on the face of the record—there was no dispute that for an armed robbery committed when he was 16 years old he was sentenced to life imprisonment. Thus, it would have been more improper to ignore this issue than to raise it for the first time on appeal. *See Larry v. State*, 61 So. 3d 1205, 1207-08 (Fla. 5th DCA 2011) ("By addressing the issue now, we can 'avoid the legal churning, … which would be required if we made the parties and the lower court do the long way what we ourselves should do the short.'" c.o.). Moreover, it wasn't improper to raise for the first time on appeal the vindictive sentence in *Hernandez v. State*, 145 So. 3d 902 (Fla. 2d DCA 2014), or the sentence imposed without a scoresheet in *Cosme v. State*, 111 So. 3d 280 (Fla. 4th DCA 2013), or the improper sentencing consideration in *Davis v. State*, 149 So. 3d 1158 (Fla. 4th DCA 2014), or the arbitrarily imposed sentence in *Cromartie v. State*, 70 So. 3d 559 (Fla. 2011).

To avoid the necessity of filing another motion in the lower court, this Court should address this issue.

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 9th day of March, 2015.

/s/ PAUL EDWARD PETILLO
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CERTIFICATE OF FONT

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

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