IN THE FLORIDA SUPREME COURT

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

PETITIONER'S AMENDED SUPPLEMENTAL BRIEF

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 Appellant

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

Chapter Law

Court Rules

Law Review Articles

Other Authorities

SUMMARY OF THE ARGUMENT

This Court held that *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies retroactively, and that the remedy is resentencing under chapter 2014-220, Laws of Florida. This remedy, not Florida's parole system, should apply to juveniles who committed first-degree murder before May 25, 1994. The provisions of chapter 2014-220, Laws of Florida, unlike Florida's parole system, comply with *Miller* for three reasons: first, they give juvenile offenders a chance at release at a meaningful point in time; second, they afford rehabilitated juvenile offenders a realistic likelihood of being released; and, three, they employ procedures that allow a juvenile offender a meaningful opportunity to be heard, and a meaningful opportunity to demonstrate maturity and growth. Because there is no difference between juveniles who committed first-degree murder before May 25, 1994, and those who committed first-degree murder on or after May 25, 1994, they should be treated the same. This Court should order that Atwell's sentence for first-degree murder be reversed and remanded for resentencing under the provisions of chapter 2014-220, Laws of Florida.

ARGUMENT

CHAPTER 2014-220, LAWS OF FLORIDA, COMPLIES WITH *MILLER V. ALABAMA* AND ATWELL SHOULD BE RESENTENCED UNDER ITS PROVISIONS

This Court held that *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies retroactively, and that the remedy is resentencing under chapter 2014-220, Laws of Florida. *Falcon v. State*, 40 Fla. L. Weekly S151 (Fla. Mar. 19, 2015); *Horsley v. State*, 160 So. 3d 393 (Fla. 2015).[1] This remedy should apply to juveniles like Atwell who committed first-degree murder before May 25, 1994.

As Atwell argued in his briefs, the pre-May 25, 1994, mandatory penalty of life imprisonment without the possibility of parole for 25 years violates *Miller* for two reasons: first, it is disproportionate because it treats juveniles like more culpable adults and all juveniles the same; and, second, the parole process does not provide a meaningful opportunity for release and is not an adequate substitute for the individualized sentencing hearing required by *Miller*.

The sentencing options and procedural protections afforded by chapter 2014-220, Laws of Florida, strengthen these arguments by making vivid the inadequacy, under *Miller*, of the single option (life imprisonment without the possibility of parole for 25 years) and procedures (parole) available to offenders like Atwell.

---

[1] It should be noted that the issue raised in this supplemental brief was well-briefed (initial and supplemental briefs) by the Public Interest Law Center as amicus curiae on behalf of the petitioner in *Horsley*.

As explained below, viewed as a group, there is no difference between the juveniles who committed first-degree murder before May 25, 1994, and those who committed first-degree murder on or after May 25, 1994; therefore, they should be treated the same. Not treating them the same will only deepen the existing sentencing disparity and deny them the evenhanded justice they are entitled to.

> *A. As a group, there is no difference between the juveniles who committed first-degree murder before May 25, 1994, and those who committed first-degree murder on or after May 25, 1994. Therefore, they should be treated the same*.

At the outset, it might be useful to consider the set of juvenile homicide offenders as a whole, undifferentiated by offense date. In this set, there will be offenders who actually killed, intended to kill, or attempted to kill; and there will be offenders who did not actually kill, intend to kill, or attempt to kill. There will be offenders from stable households, and offenders from chaotic, abusive households. There will be 17-year-old offenders and 14-year-old offenders. There will be offenders who were trapped in "horrific, crime-producing settings" (*Miller*, 132 S. Ct. at 2464) and those who were not. There will be offenders who have previously been convicted of violent felonies and those who have not.

This set can be divided by offense date: those who committed first-degree murder before May 25, 1994, and those who committed first-degree murder on or after May 25, 1994. Everything that was said about the offenders in the whole set can be said about the offenders in the two subsets. In short, the juvenile offenders

who committed first-degree murder before May 25, 1994, are no worse and no better than the juvenile offenders who committed first-degree murder on or after May 25, 1994. Unfortunately, they are not treated the same. As explained in detail below, juvenile offenders who committed first-degree murder on or after May 25, 1994, are entitled to resentencing and sentence-review hearings, and with the right to appointed counsel, the right to be present, and the right to appeal. On the other hand, juvenile offenders who committed first-degree murder before May 25, 1994, have only the remote possibility of parole and none of those procedural protections.

> *B. Chapter 2014-220, Laws of Florida, complies with* Miller *by giving juvenile offenders a chance at release at a meaningful point in time; by affording rehabilitated juvenile offenders a realistic likelihood of being released; and by employing procedures that allow juvenile offenders a meaningful opportunity to demonstrate maturity and growth.*

Juveniles who committed first-degree murder on or after May 25, 1994, are eligible to be resentenced under the provisions of chapter 2014-220, Laws of Florida. *Horsley*, 160 So. 3d at 405-06. This means that if the offender did not kill, intend to kill, or attempt to kill the victim, the sentencing range is any number of years in prison (or no prison sentence at all) up to life imprisonment. § 775.082(1)(b)2., Fla. Stat. (2014). If the sentence is greater than 15 years, the offender is eligible for a sentence-review hearing after serving 15 years. § 921.1402(2)(c), Fla. Stat. (2014).

If the offender actually killed, intended to kill, or attempted to kill the victim, the sentencing range is 40 years in prison to life imprisonment. § 775.082(1)(b)1., Fla. Stat. (2014). Unless the offender was previously convicted of an enumerated felony, the offender is eligible for a sentence-review hearing after serving 25 years. § 921.1402(2)(a), Fla. Stat. (2014).

Special procedures apply at these hearings. In determining whether a life sentence or imprisonment for a term of years equal to life is appropriate, the sentencing court must consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2), Fla. Stat. (2014). These factors largely mirror those outlined in *Miller*.

At the sentence-review hearing, the court must consider the opinion of the victim or the victim's next of kin, but the emphasis is on maturity and rehabilitation. § 921.1402(6), Fla. Stat. (2014).

At the sentencing (or resentencing) hearing, and at the sentence-review hearing, the offender is entitled to be present,[2] to be represented by counsel, and, if the offender cannot afford counsel, to appointed counsel.[3]

[2] *Cross v. State*, 18 So. 3d 1235, 1236 (Fla. 1st DCA 2009) ("A defendant has the right to be present and represented by an attorney at resentencing."); *see also Jackson v. State*, 767 So. 2d 1156, 1159-60 (Fla. 2000) (explaining that due process requires that defendant be present at any hearing where his or her sentence will be reconsidered).

If the court determines at the sentence-review hearing that the "offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years." § 921.1402(7), Fla. Stat. (2014). If the court determines that the offender has not "demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified." *Id*. The offender may appeal this order. *See* Fla. R. App. P. 9.140(b)(1)(D) (defendant may appeal "orders entered after final judgment or finding of guilt").

These options and procedures comply with *Miller* for three reasons: first, they give juvenile offenders a chance at release at a meaningful point in time; second, they afford rehabilitated juvenile offenders a realistic likelihood of being released; and, three, they employ procedures that allow a juvenile offender a meaningful opportunity to be heard, and a meaningful opportunity to demonstrate maturity and growth. *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 383 (2014) (explaining that a meaningful opportunity for release will encompass these three components).

---

[3] *Mosley v. State*, 141 So. 3d 1250, 1251 (Fla. 1st DCA 2014) ("A defendant has the right to be represented by counsel during a resentencing hearing where the court is exercising discretion."); § 921.1402(5), Fla. Stat. (2014) (right to appointed counsel at sentence-review hearing).

C. Florida's parole system does not comply with Miller *because it does not afford rehabilitated juvenile offenders a realistic likelihood of release.*

Parole in Florida is not the normal expectation in the vast majority of parole-eligible cases. In fact, it is rarely granted. In 2014, there were 4626 inmates eligible for parole release; only 23, or half a percent, were granted parole.[4] In 2013, of the thousands of parole eligible inmates, only 22 were granted parole.[5]

It is unsurprising that parole is rarely granted given that it is "an act of grace of the state and shall not be considered a right" (§ 947.002(5), Fla. Stat. (2014)); that "[t]here is no right to parole or control release in the State of Florida" (Fla. Admin. Code R. 23-21.001); and that inmates "do not have a legitimate expectation of liberty or right to expect release on a certain date even after they have been given a specific Presumptive Parole Release Date—much less when they are given a life sentence that allows for the possibility of parole." *Adaway v. State*, 902 So. 2d 746, 752 (Fla. 2005) (citation and quotation marks omitted).

The rarity with which parole is granted makes it an inadequate remedy under *Miller* because it does not afford rehabilitated juvenile offenders a realistic

[4] FLORIDA COMMISSION ON OFFENDER REVIEW ANNUAL REPORT 2014, at 8; online at: https://www.fcor.state.fl.us/docs/reports/FCORannualreport201314.pdf

[5] FLORIDA COMMISSION ON OFFENDER REVIEW ANNUAL REPORT 2013, at 8; online at: https://www.fcor.state.fl.us/docs/reports/FCORannualreport201213.pdf. The 2013 report states there were 5107 parole-eligible inmates. *Id*. The 2014 report states there were 4626 parole-eligible inmates. The Commission on Offender Review does not explain this discrepancy.

likelihood of release. In *Graham v. Florida*, 560 U.S. 48, 71 (2010), the Court rejected the argument that clemency was an adequate remedy for juvenile non-homicide offenders sentenced to life imprisonment because clemency is a "remote possibility." The Court cited *Solem v. Helm*, 463 U.S. 277 (1983), where the same argument was rejected. *Id*.

In *Solem*, the defendant was sentenced to life imprisonment without parole for a nonviolent offense under a recidivist statute. Solem argued that his sentence violated the Cruel and Unusual Punishments Clause. The state argued that the availability of clemency for Solem made the case similar to *Rummel v. Estelle*, 445 U.S. 263 (1980), in which the Court upheld a life sentence *with* the possibility of parole. But the Court rejected that argument because clemency was not comparable to the Texas parole system it reviewed in *Rummel*. *Solem*, 463 U.S. at 300-03.

The Court noted that in *Rummel* it "did not rely simply on the existence of some system of parole"; it looked, rather, "to the provisions of the system presented…." *Id*. at 301. The Court said that parole in Texas was a "regular part of the rehabilitative process"; it was "an established variation on imprisonment of convicted criminals"; and it was "the normal expectation in the vast majority of cases." *Id*. at 300-301 (citation omitted). By contrast, commutation was "an ad hoc exercise of executive clemency." *Id*. at 301.

In Florida, parole is no longer a "regular part of the rehabilitative process." *Solem*, 463 U.S. at 300; *see Horsley*, 160 So. 3d at 407 (observing that in last 30 years "the Legislature has consistently demonstrated its opposition to parole…."). It is not "the normal expectation in the vast majority of cases"; and it is not "an established variation on imprisonment of convicted criminals." *Solem*, 463 U.S. at 300-01. Instead, it is more like commutation: "an ad hoc exercise of executive clemency" (*id*. at 301) and a "remote possibility." *Graham*, 560 U.S. at 71.

D. Florida's parole system does not provide juvenile homicide offenders an opportunity for release based on demonstrated maturity and rehabilitation. By statute the Commission must give primary weight to the criminal offense and prior criminal record.

As outlined in Atwell's initial brief, parole is administered by the Florida Commission on Offender Review, an agency within the executive branch. § 20.32, Fla. Stat. (2014). One of its tasks is to "develop and implement objective parole guidelines which shall be the criteria upon which parole decisions are made." § 947.165, Fla. Stat. (2014).

In developing and implementing the objective parole guidelines, the Commission must follow statutory directives. *See* § 120.52, Fla. Stat. (2014); *State, Dept. of Bus. Regulation v. Salvation Ltd.*, 452 So.2d 65, 66 (Fla. 1st DCA 1984) ("It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute." c.o.). Thus, the Commission has little power to implement *Miller*.

By statute, the objective parole criteria must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2014); *see also* § 947.165(1), Fla. Stat. (2014) (guidelines must be based on "the seriousness of offense and the likelihood of favorable parole outcome."); § 947.002(2), Fla. Stat. (2014) (best predictor of recidivism is prior record). Further, no inmate may be granted parole "merely as a reward for good conduct or efficient performance of duties assigned in prison." § 947.18, Fla. Stat. (2014).

Whether and when an inmate will be granted parole depends on the Presumptive Parole Release Date (PPRD). § 947.172, Fla. Stat. (2014). The PPRD is simply the number of months selected from within the matrix time range, plus or minus the number of months assigned to the aggravating and mitigating factors.[6]

The Commission's matrices follow its statutory directives. Fla. Admin. Code R. 23-21.009(5)&(6). The matrices give primary weight to the seriousness of the offender's present criminal offense, with capital felony being the most serious; and they give weight, in the form of a "salient factor score," to various facets of the

[6] Once set, the PPRD should "be modified only for good cause in exceptional circumstances." § 947.173(3), Fla. Stat. (2014); *Florida Parole & Prob. Commission v. Paige*, 462 So. 2d 817, 819 (Fla. 1985) (stating PPRD "is not to be changed except for reasons of institutional conduct, acquisition of new information not available at the time of the initial interview, or for good cause in exceptional circumstances.").

offender's past criminal record (e.g., prior convictions, incarcerations, probation or parole revocations, escapes, and the like). *See* Fla. Admin. Code R. 23-21.007.[7]

Once the matrix time range is calculated, and the number of months within that range is selected, the hearing examiner (and, later, the Commission) applies the aggravating factors and decides how many months to increase the matrix time range. Fla. Admin. Code R. 23-21.010(5)(a).

Next, the hearing examiner (and, later, the Commission) considers whether there are any "[r]easons related to mitigation of severity of offense behavior" and "[r]easons related to likelihood of favorable parole outcome," and, if so, how many months these reasons decrease the matrix range. Fla. Admin. Code R. 23-21.010(5)(b).

By and large, the reasons listed in the code do not reflect the factors discussed in *Miller* and codified in sections 921.1401(2), 921.1402(6) Florida Statutes (2014). Indeed, rehabilitation alone is not enough: "No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison." § 947.18, Fla. Stat. (2014); *see also* Fla. Admin. Code R. 23-21.010(5)(b)2.j. ("[E]xceptional program achievement … would normally

[7] Until July 30, 2014, juvenile offenders were automatically assessed two salient factor points simply for being juveniles at the time of the offense. *See* http://www.flrules.org/gateway/ruleno.asp?id=23-21.007&Section=0. Although this provision was eliminated, it is undoubtedly true that youthfulness at the time of the offense delayed or denied parole for many juvenile offenders.

not be applied at the time of the initial interview but may be applicable after a substantial period of incarceration.").

Moreover, the number of months these aggravators and mitigators are assigned is up to each hearing examiner and commissioner; there are no published rules guiding their discretion. (There are also no published rules guiding their discretion on the number of months to select within the matrix range.) And although the written recommendations and the Commission's parole decisions are public record, they are not published; and without them it is impossible for an inmate to get a sense of how the Commission customarily or routinely goes about calculating the PPRD and whether there is a realistic chance at parole within his or her lifetime.

> *E. Unlike the procedural protections afforded by chapter 2014-220, Laws of Florida, an inmate seeking parole has no right to be present at the Commission meeting, no right to appointed counsel, and no right to appellate review.*

Unlike the sentencing (or resentencing) hearings, and the sentence-review hearings, the establishment of the PPRD is made with little or no input from the inmate. The hearing examiner sees the inmate, but the decision makers—the commissioners—do not: the inmate is prohibited from attending the Commission meeting. Fla. Admin. Code R. 23-21.004(13). "Certainly, it is important for the prisoner to speak directly to the decision maker. A decision maker needs to be persuaded by the prisoner that he or she is truly remorseful and reformed." Russell,

supra, 89 Ind. L.J. at 426. And while family and supporters of the inmate may request permission from the Chair to speak on the inmate's behalf (Fla. Admin. Code R. 23-21.004(1)), the meetings are, by and large, held in Tallahassee, far from most inmates' family and supporters.[8]

Further, there is no right to appointed counsel in parole proceedings. Although the Commission will accept a request to review the PPRD from an inmate's attorney (Fla. Admin. Code R. 23-21.012(1)), it's a safe bet that every (or nearly every) juvenile offender convicted of a pre-May 25, 1994, first-degree murder is indigent and cannot afford an attorney. "Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." Russell, 89 Ind. L.J. at 425. Counsel can do what an inmate cannot: investigate, collect, and present "factual information so that the release decision is based on a full presentation of the relevant evidence." *Id*. at 426. For these reasons, the Massachusetts Supreme Judicial Court recently held that juvenile offenders are entitled to appointed counsel in *Miller*-compliant parole hearings:

> [G]iven the challenges involved for a juvenile homicide offender serving a mandatory life sentence to advocate effectively for parole release on his or her own, and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the

[8] The Commission's voting schedule can be found at: https://fpcweb.fpc.state.fl.us/Schedule.aspx. The next two meetings, including Atwell's on June 10, 2015, are in Tallahassee.

> sentence, we conclude that this opportunity is not likely to be "meaningful" as required by art. 26 without access to counsel.

Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12, 27 N.E.3d 349, 361 (2015).

Again, the Legislature wisely mandated that counsel be appointed for sentence-review hearings. § 921.1402(5), Fla. Stat. (2014).

As noted in the initial brief, there is no right to appeal the Commission's decision; rather, the inmate must file a writ of mandamus. *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."). But an inmate is entitled to a writ of mandamus only when the Commission has an indisputable legal duty to perform a requested action. *See Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). Although the Commission "is required, as any other body, to comply with constitutional requirements," *Moore v. Florida Parole & Prob. Comm'n*, 289 So. 2d 719, 720 (Fla. 1974), the Commission must also follow statutory directives, as noted above. And without meaningful appellate review, it is unlikely the Commission will disregard the statutory directives and its rules, and become *Miller*-compliant.

Again, the Massachusetts experience is instructive. In order to ensure that the parole board complies with *Miller*, the Massachusetts Supreme Judicial Court required that there be meaningful judicial review:

> [T]he parole hearing acquires a constitutional dimension for a juvenile homicide offender because the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate. In this particular context, judicial review of a parole decision is available solely to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner, meaning that the art. 26 right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated.

Diatchenko, 27 N.E.3d at 349 (footnote omitted).

CONCLUSION

Under the provisions of chapter 2014-220, Laws of Florida, a juvenile offender who demonstrates maturity and rehabilitation has a realistic opportunity for release. The same cannot be said for offenders, like Atwell, who are subject to parole. Evenhanded justice requires that Atwell be afforded the same opportunity for release. This Court should order that Atwell's sentence for first-degree murder be reversed and remanded for resentencing under the provisions of chapter 2014-220, Laws of Florida.

CERTIFICATE OF SERVICE

I certify that this brief was served to Heidi Bettendorf, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 11th day of June, 2015.

/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