IN THE SUPREME OF THE STATE OF FLORIDA

CASE NO. SC14-193

ANGELO ATWELL,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099
crimappwpb@myfloridalegal.com

Counsel for Respondent

Table Of Contents

Page:

Table Of Citations

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 Petitioner 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.

Summary Of The Argument

The decision of the United States Supreme Court in Miller v. Alabama, 132 S. Ct. 244 (2012), has no application to Petitioner because Petitioner was not sentenced to the type of sentence found to unconstitutional in Miller. Instead, Petitioner was sentenced to life **with** the possibility of parole after 25 years. Therefore, he is not entitled to resentencing.

Petitioner's claim that in 1991 the sentencing court failed to take into account factors attendant with youth is untimely because it was not raised at the time of sentencing or on appeal therefrom. Such a claim existed at the time of the sentencing hearing because the capital sentencing statute required the trial court to consider the age of the defendant, his capacity to appreciate the criminality of his conduct and any other relevant evidence concerning the nature of the crime and the character of the defendant. Furthermore, Petitioner has failed to provide this Court with an adequate record upon which to determine whether error occurred at the time of his capital sentencing hearing because Petitioner failed to attach a transcript of the hearing to his original postconviction motion filed in the trial court. It is too speculative to determine whether Petitioner's original sentencing hearing was constitutionally deficient without review of the transcript. Finally, there is no error because Petitioner received the exact same sentence he would now receive under Chapter 2014-220: life

with review of the sentence after 25 years.

Petitioner's claims regarding the constitutionality of the Florida parole system are wholly speculative. Petitioner is not eligible for parole until the end of the year in 2016. Petitioner merely claims that he might be deprived of his due process rights at some unspecified point in the future. Petitioner's claim is not ripe for review, the record on this point has not been developed, and Petitioner is merely requesting this Court to issue an advisory opinion on the constitutionality of Florida's parole system for juvenile murderers.

Petitioner's request for a new sentencing hearing should be denied. Should this Court determine that the parole system is unconstitutional, the proper remedy would be for this Court to order that Petitioner's sentence review proceed under Chapter 2014-220.

Argument

PETITIONER'S SENTENCE IS CONSTITUTIONAL AND HE IS NOT ENTITLED TO RESENTENCING; PETITIONER'S CLAIMS REGARDING PAROLE ARE SPECULATIVE AND NOT RIPE FOR THIS COURT'S REVIEW.

Because Petitioner was 16 years old at the time he committed the murder, he was sentenced a life **with** the possibility of parole after 25 years. He was sentenced on November 8, 1991, making him eligible for parole at the earliest on November 8, 2016, almost 1.5 years from now.

Petitioner filed his postconviction motion soon after the Unites States Supreme Court issued its decision in Miller v. Alabama, 132 S. Ct. 244 (2012) (R. 1-2). The bare-bones motion asserted Petitioner was entitled to resentencing based on Miller ((R. 1). At no time did Petitioner argue that Florida's parole system violates the categorical ban on cruel and unusual punishment because it does not actually give a juvenile offender the ability to have a meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity. The trial court summarily denied the motion, ruling, inter alia, that Miller had no application to Petitioner because Petitioner was not sentenced to the type of sentence found to be unconstitutional in Miller (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).

On appeal to the Fourth District, Petitioner argued that his life **with** parole sentence was disproportionate and therefore constituted cruel and unusual punishment. Again, Petitioner failed to argue that Florida's parole system violated the categorical ban on cruel and unusual punishment. The Fourth District denied Petitioner any relief, finding that Miller was inapplicable to Petitioner because Petitioner was sentenced to life **with** the possibility of parole, a sentence allowed under Miller. Atwell v. State, 128 So. 3d 167 (Fla. 4th DCA 2013).

Now in his Supplemental Initial Brief, Petitioner expands on his argument that his sentence, which allows him to seek parole after serving twenty-five years, violates the cruel and unusual punishment clause of the United States Constitution. Petitioner argues that Chapter 2014-220, Laws of Florida, should be made retroactive to **all** juvenile offenders who have **ever** committed first degree murder, even if they received a constitutional sentence of life with the possibility of parole after 25 years. Petitioner first claims that his original sentencing hearing was constitutionally deficient because the trial court did not take into consideration the factors attendant with youth. Petitioner's second claim is that the Florida parole system is constitutionally deficient because it does not provide juveniles in general with a meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity. Petitioner then conflates these two arguments, and concludes that because

the application of parole to juveniles in general is constitutionally deficient, Petitioner should be resentenced under Chapter 2014-220.

A. Because Petitioner Received a Constitutional Sentence of Life with the Possibility of Parole after 25 Years, He Is Not Entitled to Resentencing.

As previously and repeatedly argued by the State, Petitioner's sentence of life **with** the possibility of parole is factually distinguishable from the sentence found unconstitutional in Miller. Whereas the court in Miller sentenced the defendant to life without the possibility of parole, Petitioner was sentenced to life **with** the possibility of parole after 25 years. Second, the Miller rationale is inapplicable to Petitioner's sentence because in Miller, the Supreme Court was concerned with the ability to have a meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity. Here, Petitioner is eligible for parole after 25 years and has an opportunity to obtain release at that time. Therefore, because Petitioner was properly sentenced in the first instance, he is not entitled to be resentenced.

1. Petitioner's Claim Is Untimely.

Petitioner uses the Miller decision as a gateway to present his untimely claim that his sentence of life with the possibility of parole after twenty-five years is unconstitutional because the trial court did not take into consideration the factors attendant with youth. However, Petitioner's complaint existed at the time of the

imposition of his sentence, decades prior to the issuance of the Miller decision. Therefore, Petitioner's claim that the trial court's alleged failure to take into account factors attendant with youth was cognizable at the time of Petitioner's original sentencing proceeding and should have been raised at that time or in the appeal therefrom. Petitioner is merely attempting to use the Miller decision to breathe new life into an untimely claim.

2. Petitioner's Claim is Not Supported by Any Record Evidence.

Additionally, in this postconviction proceeding Petitioner has failed to provide to any court at any time a copy of the sentencing transcript of his capital sentencing hearing for review. Thus, Petitioner has failed to provide this court with an adequate record upon which to adjudicate his claim that the trial court failed to take into account factors attendant with youth. The party seeking review has the burden of submitting a record sufficient to demonstrate reversible error. Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979). In the absence of an adequate record on appeal, a judgment that is not fundamentally erroneous must be affirmed. Id. Therefore, because Petitioner cannot affirmatively show the sentencing court failed to take into account factors attendant with youth, his claim must be denied.

3. The Limited Record Shows the Trial Court Conducted a Capital Sentencing Hearing, Which By Statute Would Have Included the Presentation of Mitigation Evidence.

Even assuming, arguendo, that Petitioner's claim is properly before this Court, the gist of his argument is that a trial court must be given discretion to consider the factors of youth before sentencing a juvenile to life with parole. In Petitioner's view, regardless of parole eligibility, a life sentence for a juvenile violates the prohibition against cruel and unusual punishment unless the trial court considered the youth factors set forth in Chapter 2014-220 before determining whether to impose that sentence. Petitioner's claim must fail.

Petitioner was provided with an individualized sentencing hearing that exceeded the minimum standards set forth in Chapter 2014-220. A capital sentencing hearing was conducted for Petitioner on November 8, 1991. According to §§ 921.141(6)(f) and (g), Fla. Stat. (1991), the trial court was required to consider the following mitigating factors:

> (a) The defendant has no significant history of prior criminal activity;
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime.

(Emphasis added). Additionally, the capital sentencing statute contains a catch-all provision permitting the trial court to consider **anything else** it "deems relevant to the nature of the crime and the character of the defendant. § 921.141(1), Fla. Stat. (1991). After a full and complete hearing, the trial court sentenced Petitioner to life **with** the possibility of parole after 25 years, a legal sentence even in the wake of Miller and its progeny.

It should be noted, again, that Petitioner failed to attach a copy of the transcript of the capital sentencing proceeding. Thus, Petitioner is left to generally argue that his sentencing proceeding must have been unconstitutional because it was conducted prior to May 25, 1994. Such a claim, without any transcript upon which to base it, is simply too speculative and does not warrant relief. Furthermore, even without the transcript, there is nothing in the capital sentencing statute to indicate that **in Petitioner's case**, the trial court failed or refused to take into account factors

attendant with Petitioner's youth.

In fact, the sentence Petitioner received is the same as the sentence that would now be imposed under Chapter 2014-220. Were Petitioner now to be sentenced for first degree murder, the trial court is required to sentence him to life. § 775.082(1)(b)1., Fla. Stat. (2015). Petitioner would not be allowed to seek judicial review of his sentence until after a period of 25 years has passed, almost the exact same scenario facing Petitioner with his current sentence. See § 921.1402(2)(a), Fla. Stat. (2015).

Therefore, even if Miller is applicable to Petitioner, Petitioner has failed to show that his capital sentencing proceeding was constitutionally deficient. To the contrary, Petitioner's capital sentencing hearing was constitutional in that it provided the trial court with the opportunity to consider Petitioner's youth and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Thus, there is no reason to order that this case be remanded for another sentencing hearing that will provide Petitioner with the same opportunity to present mitigating evidence to the trial court that he had at his capital sentencing hearing.

B. Petitioner's Claims Regarding the Constitutionality of the Florida Parole System Are Wholly Speculative and Not Ripe for this Court's Review.

Next, Petitioner claims that the implementation of the parole guidelines at 25 years is constitutionally deficient because it does not provide Petitioner with a meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity. Petitioner also argues that the Florida parole system is unconstitutional because it will not, at some unspecified point in the future, provide Petitioner with the following procedural safeguards: (a) the right to be present at the Commission meeting, (b) the right to appointed counsel, and (c) the right to appellate review.

While Petitioner argues that the parole system in Florida is unconstitutional because it does not give defendants **in general** a meaningful opportunity to obtain release based on demonstrated rehabilitation and maturity, he has failed to show there is any such issue **in his case**. That is because at this point, the claim is wholly speculative. Petitioner, who was sentenced on November 8, 1991, will not be eligible for parole until the end of the year in 2016. The claim that Petitioner **might** be deprived of his due process rights at some unspecified point in the future is also too speculative to warrant relief. Petitioner is merely requesting an advisory opinion from this court to use in the future. Parties are not allowed to request advisory opinions. Renish v. Clark, 765 So. 2d 197, 202 (Fla. 1st DCA 2000). There must be

a real case or controversy at issue. See id. "Courts of law are established for the sole purpose of deciding issues before them arising from litigated cases and should limit pronouncements of the law to those principles necessary for that purpose." Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964). The purpose of the court is not to issue advisory opinions or answer abstract questions of law. Id. Further, the power of a court does not include providing legal advice. Collins v. Horten, 111 So. 2d 746, 751 (Fla. 1st DCA 1959). Thus, at this point Petitioner's challenge to constitutional rights that may, but not necessarily, be violated at some unspecified point in the future, is far too speculative to warrant any relief at this time by this court.

Furthermore, there is no trial court record on this point upon which this Court could make a finding of unconstitutionality. The claims regarding the constitutionality of the Florida parole system were never presented to the trial court for review. The factual issues necessary to decide this claim were never developed by Petitioner during the postconviction proceedings. The record is completely silent on the facts surrounding Petitioner's commission of first degree murder. There has been no sworn testimony offered regarding the actual administration of parole with regard to juveniles in general, and as more fully discussed, supra, Petitioner in particular. The Florida Parole Commission, which is the proper responding party to an attack on parole, has never been given the opportunity address Petitioner's claims.

Both Petitioner and the amicus merely offer anecdotal unsworn information to support their claims. Therefore, the record as developed thus far in this case, is insufficient for this Court to resolve Petitioner's claim.

Consequently, it would be a disservice to all parties, including the Florida Parole Commission, for this Court to decide Petitioner's claim without a thorough vetting of the claim in the trial court once Petitioner is eligible for parole. As far as the State's concerned, all affected parties should be given a full and fair opportunity to be heard and develop a record on the constitutionality of parole as applied to Petitioner.

There is nothing in Miller to suggest that individuals who are under the age of eighteen when they commit murder in the first degree necessarily should be paroled once they have served a statutorily designated portion of their sentences. The severity of this particular crime cannot be minimized even if committed by a juvenile offender. **At the appropriate time**, it is the purview of the Florida parole commission to evaluate the circumstances surrounding Petitioner's commission of the crime, including his age, together with all relevant information pertaining to his character and actions during the intervening years since conviction. By this process, Petitioner will be afforded a meaningful opportunity to be considered for parole suitability. Petitioner merely argues that the Florida parole system has the **potential**

to deprive him of that meaningful opportunity, not that it has actually done so. Again, Petitioner's claim is merely speculative.

Finally, Petitioner has requested the wrong remedy. Importantly, Appellant never explores the idea that even if Chapter 2014-220 is applied retroactively, the solution would be for the Florida Parole Commission to treat Appellant's sentence as it would under Chapter 2014-220, which would provide Appellant with a "constitutional" opportunity to obtain release based on demonstrated rehabilitation and maturity. Should this Court determine that parole does not meet constitutional muster, the proper procedure is to order that Petitioner's sentence review proceed under the procedure outlined in Chapter 2014-220. Thus, resentencing would not be required.

Conclusion

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

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Celia A. Terenzio
CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Petitioner

Certificate Of Service

I HEREBY CERTIFY that on this 27th day of July, 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.

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General

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.

/s/ Heidi L. Bettendorf
HEIDI L. BETTENDORF
Assistant Attorney General