IN THE FLORIDA SUPREME COURT

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

PETITIONER'S SUPPLEMENTAL REPLY BRIEF

On Review from the Fourth District Court of Appeal

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ARGUMENT

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

The State asserts Atwell is not eligible for parole until November 8, 2016. *Supplemental Answer Brief at page 3*. It comes to that conclusion by adding 25 years to what it thinks is Atwell's sentencing date. But the State has overlooked that jail credit is applied to sentences like Atwell's. *Sutton v. State*, 334 So. 2d 628, 629 (Fla. 4th DCA 1976) (holding that jail credit is applied to life with 25-year minimum sentence for first-degree murder); § 921.161(1), Fla. Stat. (1989) ("[T]he court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail."). Indeed, Atwell's parole hearing was held on June 10, 2015, and the Commission on Offender Review entered an order on his initial interview on June 12, 2015. This order and its accompanying worksheet are contained in the appendix that is being filed simultaneously with this brief.[1] The order has a "Time

[1] Atwell asks this Court to take judicial notice of these executive branch records. *See Schriver v. Tucker*, 42 So. 2d 707, 709 (Fla. 1949) ("This court will take judicial notice, as the court below could have done, of the records of extradition proceedings on file in the office of the Secretary of State."); *see also Wencel v. State*, 915 So. 2d 1270, 1272 (Fla. 4th DCA 2005) (holding that trial court erred in concluding it could not take judicial notice of parole commission's order); § 90.202(5), Fla. Stat. (2014) ("A court may take judicial notice of … [o]fficial actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States.").

Begins Date" of June 27, 1990, not November 8, 1991.[2] As discussed below, the Commission set a Presumptive Parole Release Date (PPRD) of December 27, 2130, and a subsequent interview in February, 2022.

The State argues, as it did in its answer brief, that Atwell's life sentence is constitutional because he has the possibility of parole after 25 years. *Supplemental Answer Brief at pages 3-5.* If Florida had a flexible, robust, parole system, one that accounted for a juvenile offender's diminished culpability and demonstrated maturity and growth, and one that did so in a procedurally fair way (i.e., with the right to be present, the right to counsel, and the right to appeal), then the State's argument might be well-taken. But as explained in the supplemental brief, Florida's parole system is not robust and it is not flexible; it does not account for either the diminished culpability of juvenile offenders, or an offender's maturity and growth. By statute the Commission must give primary weight to the criminal offense and prior criminal record, and these are "static factors that an inmate cannot change."[3]

The State argues that Atwell's claim is untimely. *Supplemental Answer Brief at pages 5-6.* But in *Falcon v. State*, 162 So. 3d 954, 956 (Fla. 2015), this Court

[2] The Commission's order doesn't explain how it arrived at a "time begins date" of June 27, 1990.

[3] Amicus Brief of Public Interest Law Center filed in *Horsley v. State*, No. SC13-1938, Feb. 18, 2014, at page 3.

held that *Miller v. Alabama*, 132 S.Ct. 2455 (2012), applies retroactively. The issue is whether Atwell's sentence violates *Miller*.

Atwell's sentence does violate *Miller*. As discussed in the supplemental brief, the possibility of parole is remote. And it isn't enough to have a sentence that complies with *Miller* in form only. This Court looks beyond labels and form to substance and reality. Thus, a 90-year sentence *is* a life sentence in violation of *Graham v. Florida*, 560 U.S. 48 (2010), even though "life in prison" isn't written on the sentencing documents. *Henry v. State*, 40 Fla. L. Weekly S147, S149 (Fla. Mar. 19, 2015) ("[W]e believe that the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison.'"); *see also Gridine v. State*, 40 Fla. L. Weekly S149 (Fla. Mar. 19, 2015) (70-year sentence unconstitutional).

In the same way, a PPRD set in year 2130 is no release date at all—it's a life sentence. And although Atwell will be interviewed again in February, 2022, when he is 47 years old, his PPRD can only be changed for "reasons of institutional conduct or the acquisition of new information not available at the time of the initial interview." § 947.16(5), Fla. Stat. (1989); *see also Florida Parole and Probation Commission v. Paige*, 462 So. 2d 817, 819 (Fla. 1985) ("[O]nce established, [the 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.").

Further, Atwell's PPRD was based in large part on static factors that he cannot change (mostly his prior record). The Commission decided that Atwell should be incarcerated for 1686 months (140.5 years), but only 84 of those months, or 4.98%, were for "[u]nsatisfactory institutional conduct." *Appendix at page 1*. Regarding mitigation, the Commission merely stated: "Mitigation was considered." *Id*.

The State argues both that Atwell did not prove that he did not get the kind of sentencing hearing he claims he is entitled to (because he did not produce his sentencing transcript), and that he must have gotten the kind of sentencing hearing he claims he is entitled to because he had a capital sentencing hearing. *Supplemental Answer Brief at pages 6-9*. 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.

The State argues that the "sentence Petitioner received is the same as the sentence that would now be imposed under Chapter 2014-220." *Answer Brief at page 9*. The State is incorrect. If Atwell 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, Atwell would be eligible for a sentence-review immediately because he has served more than 15 years. § 921.1402(2)(c), Fla. Stat. (2014).

If Atwell actually killed, intended to kill, or attempted to kill the victim, the sentencing range would be 40 years in prison to life imprisonment. § 775.082(1)(b)1., Fla. Stat. (2014). Unless Atwell was previously convicted of an enumerated felony, he would be eligible for a sentence-review hearing immediately because he has served more than 25 years.[4] § 921.1402(2)(a), Fla. Stat. (2014).

The State argues that Atwell's claims about Florida's parole system are "wholly speculative" because he is not eligible for parole until 2016. *Answer Brief*

[4] Section 921.1402(2)(a), Fla. Stat. (2014), states that "a juvenile offender is not entitled to review if he or she has previously been convicted of [an enumerated felony], if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence under s. 775.082(1)(b)." It appears from the Commission's order that Atwell has been convicted of an enumerated felony in a separate criminal transaction or episode. If so, and if Atwell killed, intended to kill, or attempted to kill the victim, then whether he will be entitled to a sentence-review hearing will depend on the meaning of "previously been convicted." In any event, a possible sentence as low as 40 years is preferable to a PPRD in year 2130.

at pages 10-11. Again, the State has overlooked that Atwell's parole hearing was held on June 10, 2015, and his PPRD was set at December 27, 2130.

The State argues that we don't know enough about the parole system to determine whether it provides a meaningful opportunity for release based on maturity and growth. *Supplemental Answer Brief at pages 11-12*. But we do know that the parole guidelines 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. (1989). The Commission's order in Atwell's case shows that the Commission gave primary weight to the seriousness of his offense and his past criminal record.

Admittedly, there is a lot we don't know about the parole process. For example, we don't know how the Commission arrived at the number of months it assigned to each aggravator (e.g., 120 months for each armed robbery, rather than, say, 80 or 60 or 40). Apparently, there are no rules guiding the Commission's discretion in this regard. (And apparently there are no rules guiding the Commission's discretion on the number of months to select within the matrix range.) As explained above, at a certain point the number of months assigned in aggravation makes a PPRD a *de facto* life sentence.

But this lack of transparency isn't a reason to approve the Fourth District's decision. Indeed, the State suggests that there should be a hearing at which "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." *Answer Brief at page 12.*

In the absence of any other relief, Atwell would welcome such a hearing. But the appropriate and constitutionally required remedy is at hand: resentencing under the provisions of chapter 2014-220, Laws of Florida. Accordingly, 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.

CONCLUSION

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 3rd day of August, 2015.

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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
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