IN THE SUPREME COURT OF FLORIDA

ARTHUR O'DERRELL FRANKLIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. SC14-1442

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
Tallahassee Bureau Chief, Criminal Appeals
OFFICE OF THE ATTORNEY GENERAL
Florida Bar No. 45489

SHARON S. TRAXLER
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
Tallahassee, Florida 32399-1050
850.414.3300

Florida Bar No. 558621

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced as Respondent, the prosecution or the State. Petitioner Arthur O'Derrell Franklin, the Appellant in the DCA and the defendant in the trial court will be referenced in this brief as Petitioner or by proper name.

The record on appeal will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the First District Court of Appeal who affirmed the Petitioner's sentence of 1000-years to be served concurrently in Department of Corrections in Franklin v. State, 141 So. 3d 210 (Fla. 1st DCA 2014). (Ex. A).

The State accepts Defendant's statement of the case as generally supported by the record, but has omitted facts critical to the issues presented. Accordingly, the State presents the following statement of facts:

The underlying facts of Defendant's three cases were set forth in exacting detail by the trial court in its 1984 Order justifying the retention of jurisdiction for one-third of Defendant's sentence. Those facts, the trial court's first-hand observations of the impact of Defendant's offenses on his victims, as well as the trial court's commentary on the basis for Defendant's sentence are set forth directly from the trial court's Order:

In case number 83-6212-CF, the facts proven at trial show that on the 16th day of April 1983, this defendant, hereinafter referred to as "Franklin," along with a co-defendant, Frankie Lee Owens, hereinafter referred to as "Owens," attacked the victim, [T.H.], as she was stopped in her car at a red light. Franklin and Owens forced their way into the victim's car, Franklin on the driver's side pushing the victim over to the middle and Owens on the passenger side, blocking the victim's escape. As Franklin drove off, Owens grabbed the victim by the hair of her head

and thrust her head violently between her own legs to the floorboard of her car. Within a few blocks Franklin stopped the car, put it in park and attempted to remove the victim from the front seat and force her in the back seat. When Franklin pulled the victim from the car she kicked him and momentarily broke free of him and ran. Within two steps of her attempted escape, the victim was tackled by Franklin, causing her head to be violently smashed into the pavement. The impact caused [the] victim's glasses to fly off and left her in a semi-conscious state. At this point, Franklin [dragged] the victim across the pavement to a nearby bush, causing a "road burn" on the victim's side.

Owens then moved from the passenger's seat to the driver's seat, placing the car in reverse and backed the car to the bush where Franklin was holding the victim. Franklin then forced the victim into the back seat of her car, forced her to the floor and Owens drove off. Shortly thereafter, Owens stopped at an intersection and asked Franklin which way to go. Franklin responded, "do it like we planned." Owens then turned right and drove directly to a secluded area and stopped the car.

Once the car came to a stop, Franklin attempted to remove the clothing of the victim but was unable to because of the struggle put up by the victim. Owens then entered the back seat of the car and assisted Franklin in removing the clothing of the victim.

At this point, Franklin penetrated the victim's vagina with his penis causing great

pain to the victim. While Franklin was forcing the victim to submit to him sexually, Owens was searching the front seat of the victim's car for items of value. Shortly after Franklin ended his penetration and as Owens approached the victim seemingly to take his turn, a helicopter flew over-head. This frightened both defendants away. The fled the scene taking approximately $200.00 of the victim's money from her purse in the front seat.

The victim testified at trial that almost continually from the beginning of the attack upon her to the end of said attack, she was being choked violently by Franklin and he had his hand over her face where she could not scream or breathe. She stated that several times she almost passed out.

At sentencing, the victim, who is 29 years old, testified that this crime has all but ruined her life. It has had numerous ill effects, including, but not limited to constant fear and paranoia, extreme fear of black men, she hasn't been able to work, her husband and her are no longer close, causing the near destruction of her marriage, her sex life with her husband is now non-existent, she is afraid in her own neighborhood because she was abducted only blocks from her home.

This court observed the emotional trauma caused to this victim both when she testified at trial and at sentencing. She shook almost constantly on both occasions. Furthermore, at the end of her testimony at trial, she broke down and had to be helped from the courtroom.

After a long recess the victim further testified that she feared that the defendants would kill her and she believed they had done this before based on how they committed this crime and what was said between them. The victim requested that this defendant be castrated and sentenced to life at hard labor.

In case number 83-5854-CF, the facts proven at trial show that on the 30th day of June 1983, the Petitioner, again with his partner Frankie Owens, entered a local convenience store. Owens held a knife to the back of a male employee while Franklin produced a revolver, pointed it at the female employee, [D.R.], hereinafter referred to as "Victim," and demanded money from the cash register. Franklin then jumped over the counter, opened the cash register and placed the money evenly into two bags.

As both defendants left the store they demanded that the victim produce the keys to her car. After victim produced said keys, the defendants forced the victim to leave the store with them. The victim was then forced into the back seat floorboard of her car by Franklin as Owens drove away. Franklin told the victim that this was not the first time, that they knew what they were doing and that they would never serve a single day in jail. While the victim was being driven to a secluded area Owens asked Franklin if he should "take her where he took the other one." Franklin responded, "take her to the new place we found."

While enroute to a secluded area, the defendants told the victim that they knew

her and knew she recently had a baby. This terrified the victim. Upon arrival at the secluded area, Owens got into the back seat of the victim's car along with the victim and Franklin. Franklin handed Owens the gun and Owens held the gun inches from the victim's head while Franklin forced the victim to have vaginal sexual intercourse. Franklin then took possession of the gun and held it inches from the victim's head while Owens forced the victim to have vaginal sexual intercourse with him.

Both defendants then searched the car for money and took jewelry from the person of the victim. The victim begged them not to take her wedding ring because it meant so much to her. The defendants didn't care and took her ring. After robbing the victim of her valuables, one of the defendants kicked the victim in the head and they fled with her car keys so that she would not be able to drive away. The victim then wandered in a dazed condition until she found help. At one-point Franklin had the gun in the ear of the victim and told her he was going to blow her brains out.

The victim testified at sentencing that she was hospitalized for two weeks following this ordeal. She further testified that two days after the crime her physical and emotional condition deteriorated to the point that she had lost the use of her right arm and right leg. She further testified that her doctors have told her that this condition is the result of the emotional trauma suffered from this crime.

During trial this victim "broke down" and could not continue with her testimony

for thirty minutes. She exhibited tremendous emotional scars. At the sentencing hearing she testified that she takes five or six baths per day because she feels unclean from being raped. She testified she is a 34 years old black female, married, with an infant baby that she has been totally unable to care for since this crime. She has also been unable to work and can only [walk] with the assistance of a "walker." She further stated that she would have killed herself if the defendants would not have been convicted. She stated that she lives in constant fear and was not even emotionally able to leave her own home for six months following this crime. She stated that both this defendant and Owens indicated that they had committed this type of crime several times before and hadn't been caught. She said she wanted them to suffer like she has and she wants them to be sent away forever. The victim shook uncontrollably during her testimony.

In the PSI report, the victim's doctor, Dr. Ernest Miller, stated that it will take several years of mental treatment before the victim could possibly be back to normal. He further stated that the aggressive acts committed against the victim will have a crippling effect on all areas of her life – for the rest of her life.

In case number 83-6211-CF, the facts proven at trial show that on the 28th day of May 1983, the victim, a 59-year-old female, was in her car stopped at a red light when one of the three black males threw a rock, hitting her car. One of the three men then reached into the victim's car, grabbing her purse and fleeing with it. The

suspect who grabbed the victim's purse will hereinafter be referred to as "suspect #2." At this point this defendant, hereinafter referred to as "Franklin" and a third suspect, hereinafter referred to as "suspect #3" forced their way into the victim's car. Franklin forced his way into the driver's seat of the victim's car. Suspect #3 forced his way into the passenger['s] side followed by suspect #2, who had thrown down the victim's purse and joined in the attack.

As Franklin drove away, suspect #2 pulled the victim by the hair of her head into the back seat of her car. The victim screamed and was violently beaten by suspect #3. Suspect #2 then forced the victim to submit to vaginal sexual intercourse in the back seat while Franklin drove the car to a secluded area.

Upon arrival at the secluded area, Franklin pulled the victim from the back seat, forced her onto the front seat and put his mouth on her vagina. Franklin then threw the victim to the ground where she was stripped of the remainder of her clothing. At this point the victim was forced to submit to vaginal sexual intercourse by all three suspects (including Franklin), one at a time. During this time suspect #3 also attempted to penetrate the anus of the victim with his penis. The victim, frightened and in pain, lost control of her bowels. Suspect #3 became enraged, beat the victim again and told her she was disgusting. She was then forced to clean herself up. The victim testified that the smell and mess was terrible. Suspect #2 then penetrated the mouth of the victim with his penis. The victim immediately bit his penis. She was

again threatened by him and he again penetrated her mouth with his penis.

Franklin then took the 59-year-old victim in her naked state to a nearby tree and tied her to the tree with telephone wire he found in the victim's trunk. Franklin then went back to the victim's car and discussed with the other suspects what they would do next. Franklin then returned to the victim and told her he would help her escape. She cried that she was afraid she would again be beaten severely. Franklin again advised that he would help her and he loosened her hands and told her which way to run.

The victim bolted away as fast as a 59-year-old woman could, only to be chased by Franklin, himself, who grabbed her by the hair of her head, called her a bitch and dragged her back to her car. All three suspects then lifted the victim into the trunk of her car and closed the trunk top, locking her inside, still naked.

The car was then driven around by the suspects for a period of time and ultimately came to a stop at a second (different) secluded area. The victim was removed from the trunk by the three suspects and again thrown on the ground and forced to submit to vaginal sexual intercourse by each of the three suspects, including Franklin. During this time the victim cried out to the suspects that she was in terrible pain. Franklin replied that she would hurt even more tomorrow.

The three suspects then literally carried the victim to a nearby railroad car and locked her inside and fled. The victim then waited for hours inside the darkened box

car. Her tongue was so dry and swollen that she used her own urine to wet her mouth so that she could swallow. The victim believed she would surely die from exhaustion and lack of food and water. She thought the suspects were gone for good and she would never be found alive.

Finally, Franklin and suspect #2 returned without suspect #3. The victim was taken from the box car and again forced into the back seat of her car. Suspect #2 drove while Franklin again forced the victim to submit to vaginal sexual intercourse. Franklin told the victim to "squeeze him like she loved it." Franklin then drove while suspect #2 again forced this poor woman to submit to vaginal sexual intercourse. The victim was finally abandoned in her car at a third secluded area after the suspects disabled her car. The victim was also robbed of her jewelry.

The victim testified these repeated acts of sexual intercourse were extremely painful. She was in the hospital for many days following this crime. She was raped a total of 10 times. At trial the victim trembled and cried as she recounted the horror she endured.

At sentencing the victim testified that this ordeal has totally ruined her life. She is afraid, even in her own home. Never until this did she feel like an old woman. (Ex. B).

Doctor Soonier, who performed the rape exam on the victim immediately following the crime, stated in the PSI report that this victim suffered the worst

damage to her vagina of anyone he had ever examined.

The Petitioner was 17 years old at the time of the commission of these crimes. The defendant's juvenile record indicates, that at age 11 he was given a judicial warning for assault. At age 13 adjudication was withheld and the defendant was placed on probation for petit theft. At age 15, the defendant was placed on Youth Mediation for committing a burglary and was later the same year committed for a grand theft.

The defendant's demeanor during all three trials was that of a cold callous individual totally lacking in shame or remorse. In his PSI report, the defendant, himself, stated that if someone would have committed these crimes against someone in his family, he would have killed them. The defendant stated to this court at sentencing that he wanted an opportunity to prove that he is a man – not an animal. He offered no explanation for his criminal acts. (Ex. B).

In all three cases this defendant displayed an inhuman attitude and approach to his victims. He taunted them, he made one believe he would help her escape, he made one believe he was going to blow her brains out. He repeatedly laughed at the cries of his victims for mercy.

On July 14 and 26, 1983, the State direct filed the Information in three cases that were ultimately amended to charge Defendant with, in Case No. 83-CF-6212, (1) one count of kidnapping, in violation of § 787.01, Fla. Stat., (2) one count of sexual

battery with physical force likely to cause serious bodily injury, in violation of § 794.011(3), Fla. Stat., and (3) one count of unarmed robbery in violation of § 812.13, Fla. Stat.; in Case No. 83-CF-5854, (1) one count of armed robbery, in violation of § 812.13, Fla. Stat., (2) one count of aggravated assault, in violation of 784.021(1)(a), Fla. Stat., (3) one count of kidnapping, in violation of §s 787.01 and 775.087, Fla. Stat., and (4) two counts of sexual battery, in violation of § 794.011(3), Fla. Stat.; in Case No. 83-CF-6211, (1) one count of kidnapping, in violation of § 787.01, Fla. Stat., (2) one count of unarmed robbery, in violation of § 812.13, Fla. Stat., and (3) ten counts of sexual battery, in violation of § 794.011(3), Fla. Stat..

Defendant proceeded to jury trial in all three cases and was found guilty as charged of all offenses in all cases. In Case No. 83-6211, by Judgment and Sentence rendered on September 19, 1985, Defendant was ultimately sentenced on ten counts of sexual battery (Counts III through XII) to 1,000 years imprisonment on each count, concurrent with one another, with the trial court retaining jurisdiction for one-third of the sentence. (R. 250-75.) In Case No. 83-6211, by Judgment and Sentence rendered September 19, 1985, Defendant was ultimately adjudicated guilty of Sexual Battery (Count II) and sentenced to 1,000 years imprisonment, concurrent with Case No. 83-6211, with the trial court retaining jurisdiction for one-third of the sentence. In Case No. 83-5854, by Judgment and Sentence rendered on January 30, 1987, Defendant was adjudicated guilty of aggravated kidnapping (Count III) and two

counts of Sexual Battery (Counts IV and V), and sentenced to 1,000 years imprisonment on each offense, concurrent with each other and the other cases, with the trial court retaining jurisdiction for one-third of the sentence. On each sentence, Defendant received 214 days credit for time served.

On May 13, 2011, Defendant filed a Motion to Correct Illegal Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, contending that his 1,000 years sentences, with one-third of that term having jurisdiction retained, with the possibility of parole, violated Graham v. Florida's prohibition on sentences of life without the possibility of parole. The State responded. On April 30, 2013, the trial court granted in part and denied in part Defendant's motion for post-conviction relief, wherein the trial court struck the reservation of jurisdiction for one-third of Defendant's sentence, making, by the trial court's determination, Defendant "eligible for parole, approximately in the year 2032 . . .". The trial court also determined that, based on decisions of this Court, the striking of the improper portion of the sentence, the retention of jurisdiction, was ministerial in nature and did not require the presence of Defendant or counsel for correction. On July 2, 2013, the trial court rendered corrected sentences in all three cases, striking the retention of jurisdiction.

On May 29, 2013, Petitioner filed an Initial Brief of the trial court's decision, contending that the "[r]etention of jurisdiction has no direct effect on an inmate's

presumptive parole release date. The release date on Franklin's Department of Corrections webpage remains [the year] 2352, the same as when the trial court retained jurisdiction. Parole eligibility fails to comply with the Eighth Amendment unless, at a minimum, the presumptive parole date falls within the defendant's life expectancy." (1D13-2516, 1D13-2517, 1D13-2518, Appellant's Initial Brief. 5). The State responded and on May 19, 2014, the First District held that "defendant's claim that his several concurrent sentences of 1,000 years in prison were unconstitutional under Graham v. Florida was facially insufficient and affirmed. Franklin, 141 So. 3d 210. Petitioner now appeals.

SUMMARY OF ARGUMENT

Issue I

Petitioner's sentencing hearing was sufficient to ensure that the safeguards imposed by the Eighth Amendment were in place as the sentencing court had information regarding all of the "Graham" factors presented at sentencing. Therefore, Petitioner's sentence should be affirmed. In the time since his incarceration for these truly heinous crimes, Petitioner has had ten separate interviews that afford him "a meaningful opportunity" to present facts to the parole board in support of his maturity and rehabilitation. That he has failed to take advantage of these opportunities does not make it less meaningful.

Finally, if Petitioner is entitled to be resentenced, all of the sentencing provisions of the 2014 sentencing statute would apply, not just the judicial review period. Therefore, Petitioner would be subject to a potential life sentence. Based on the fact that Petitioner committed egregious rapes of three women under horrendous circumstances, he will not likely be rehabilitated and is fortunate to have a guaranteed release date.

Issue II

The majority opinion from the First District correctly determined that Appellant's petition for post-conviction relief was facially insufficient as he "alleged no facts, cited no legal authority, and made no argument to show that the Parole

Commission is precluded from ever establishing a presumptive parole release date during his lifetime" and the "claim before the circuit court did not provide the information or arguments necessary".

ARGUMENT

Burden of Persuasion

Appellant bears the burden of demonstrating prejudicial error. § 924.051(7), Fla. Stat. (2008), provides:

> In a direct appeal ..., the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

"In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Moreover, because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999); see Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002).

ISSUE I **PETITIONER IS NOT ENTITLED TO RESENTENCING AS THE SENTENCING COURT CONSIDERED NECESSARY FACTORS AND HIS PAROLE REVIEW PROVIDED SUFFICIENT OPPORTUNITY FOR RELEASE. (RESTATED).**

Standard of Review

"The legality of a sentence is a question of law and is subject to *de novo* review." Pinkard v. State, 185 So. 3d 1289, 1289-90 (Fla. 5th DCA 2016) (quoting Flowers v. State, 899 So. 2d 1257, 1259 (Fla. 4th DCA 2005).

Merits

Petitioner alleges his sentence is unconstitutional because the presumptive parole release date is currently set for the year 2352, and that pursuant to Atwell v. State, 197 So. 3d 1040 (Fla. 2016), his sentence must be vacated and the case remanded for resentencing. (Petition at 8, 14). The State disagrees as Petitioner's sentencing hearing was sufficient to satisfy the "Graham factors" enunciated at § 921.1402, Fla. Stat., and the periodic parole review he is entitled to clearly provides him a "meaningful opportunity" to be released within his lifetime.

Chapter 2014-220, Laws of Florida were incorporated into the Florida Statutes in order to pronounce the factors sentencing courts should consider that are "relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the

> defendant.
> (b) The effect of the crime on the victim's family and on the community.
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
> (d) The defendant's background, including his or her family, home, and community environment.
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
> (f) The extent of the defendant's participation in the offense.
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
> (h) The nature and extent of the defendant's prior criminal history.
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
> (j) The possibility of rehabilitating the defendant."

§ 921.1401, Fla. Stat.

The facts in this instant case indeed show that at his sentencing hearing Petitioner received a full and complete review of all of § 921.1401 factors at the time of his offenses. Petitioner's sentencing hearing was held on May 4, 1984. (Ex. B). The Honorable Donald R. Moran, Jr., Circuit Judge presided both over the trial and the sentencing hearing. (Ex. B). The defense and the State presented witnesses. Ruthie Hammond, Petitioner's mother, and Petitioner himself testified for the defense. The victims of his crimes, T.H., D.R., and M.F, testified for the State. (Ex. B).

Section 921.231, Fla. Stat. (1985) required Pre-Sentence Investigation reports to be prepared "in any circuit court in Florida where the defendant was found guilty at trial, or where the defendant entered a plea of *nolo contendre* or guilty." These

reports are prepared by the Department of Corrections, and the report must include:

(1)(a) A complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript, if one has been made, and, at the offender's discretion, his version and explanation of the act.
(b) The offender's educational background.
(c) The offender's employment background, including any military record, his present employment status, and his occupational capabilities.
(d) The social history of the offender, including his family relationships, marital status, interests, and related activities.
(e) The residence history of the offender.
(f) The offender's medical history and, as appropriate, a psychological or psychiatric evaluation.
(g) Information about the environments to which the offender might return or to which he could be sent should a sentence of non-incarceration or community supervision be imposed by the court.
(h) Information about any resources available to assist the offender, such as:

1. Treatment centers.
2. Residential facilities.
3. Vocational training programs.
4. Special education programs.
5. Services that may preclude or supplement commitment to the department.

(i) The views of the person preparing the report as to the offender's motivations and ambitions and an assessment of the offender's explanations for his criminal activity.
(j) An explanation of the offender's criminal record, if any, including his version and explanation of any previous offenses.
(k) A recommendation as to disposition by the court. It shall be the duty of the department to make a written determination as to the reasons for its recommendation. The department shall include an evaluation of the following factors:

1. The appropriateness or inappropriateness of community facilities, programs, or services for treatment or supervision.
2. The ability or inability of the department to provide an adequate level of supervision for the offender in the community

> and a statement of what constitutes an adequate level of supervision.
> 3. The existence of other treatment modalities which the offender could use but which do not exist at present in the community.

§ 921.231, Fla. Stat. (1985).

A Pre-Sentence Investigation Report was ordered in this case and was submitted to the court and all attorneys prior to sentencing for their review. (Ex. B). Petitioner's trial counsel acknowledged he had received the Pre-Sentence Investigation reports that were ordered and that he had the opportunity to read them. Defense counsel requested two comments on dispositions of crimes that were 'nol-prossed' be deleted or stricken. (Ex. A 689-690). Defense counsel also requested the recommendation and assessment of the probation officer who composed the reports be struck from the record and that comments of others be stricken as either gratuitous or made by someone marginally involved in the case. (Ex. B).

The testimony at trial, the information contained within the pre-sentence investigation reports and the testimony from each of the victims at the sentencing hearing were all present and available for the sentencing court to utilize in considering each of the ten factors enumerated in § 921.1401(2) as they applied to the Petitioner. These factors, as applied in this case are discussed, as follows:

a) <u>The nature and circumstances of the offense committed by the defendant.</u>

Judge Moran acknowledged that he and the attorneys dealt with the facts and

issues raised "at some length during the trials". He heard the testimony of the witnesses as to what occurred during the Petitioner's crime spree, which are referenced in detail in Respondent's Statement of the Case and Facts above, and the prosecutor also recounted the facts of the case and elicited additional information from the victim witnesses at sentencing. Judge Moran acknowledged the Petitioner was before him for sentencing in over twenty (20) felonies, enumerating each one as he pronounced sentence. (Ex. B).

The pre-sentence investigation report addressed the circumstances of these offenses and contained "[a] complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript, if one has been made, and, at the offender's discretion, his version and explanation of the act." § 921.231(1)(a).

Therefore, the sentencing court was intimately aware of the "nature and circumstances of the offenses committed by Petitioner". § 921.1401(2)(a), Fla. Stat.

b) <u>The effect of the crime on the victim's family and on the community.</u>

As noted above, Judge Moran was the presiding judge at Petitioner's trial and heard the testimony of the victims and witnesses at trial, which are referenced in detail in Respondent's Statement of the Case and Facts above.

The sentencing court heard from victim T.H., that she is scared to go anywhere by herself, and that she sat for five months in her living room with a gun in her hand

because she was scared "that they were going to come to my house and find me because I had reported it to the police." (Ex. B). She testified that she had to take her son out of his school because it was close to "where it happened" and she couldn't go back to that area of town. T.H. testified that it nearly wrecked her marriage, that her husband had been sleeping on the couch for over a year, and that her life is upside down, that she doesn't feel like her own private person anymore.

She asked the court to have Petitioner castrated and have him "spend the rest of their life at hard labor". (Ex. B).

The sentencing judge next heard from D.R., who testified that she was thirty-four years old and that she had worked at the Minute Market for two years before the Petitioner "jumped the counter [of the store where she worked] with the gun and robbed the store". (Ex. B) Petitioner told her that "he had been doing this for a long time", that "he knew exactly what he was doing" and that "if he did get caught, he would never serve any time for it." (Ex. B). She testified that when she was in the car, she heard his co-defendant ask Petitioner "Where we took the other one?" to which Petitioner replied "No. We used that spot already" and that when stopped, Petitioner told the driver "Not this one. Let's take her to a place we found". (Ex. B).

D.R. told Judge Moran that she spent thirty-seven days in the hospital, not able to care for herself or her five-month old baby, that someone else had to care for her child. She testified that she was unable to work and had to walk with a cane and that

she had psychological issues since the incident. She testified that she remained, a year after the incident, under the care of two doctors and was told to expect that eventually, possibly "years from now" she could become "whole again". (Ex. B). She told the court that Petitioner's crime has her frightened, "scared to death and I'm living in a prison. I'm locked up and I keep the kids locked up in the house because I'm scared for them to even go outside." She testified that she takes between five and six baths each day, and didn't think she could live if Petitioner were found not guilty at trial. (Ex. B).

D.R. told the court that she knew the death sentence was not available, but that she would be "satisfied to know they would be locked up for the rest of their life and suffer every minute of the day the same way I have."

M.F. also testified at the sentencing hearing, telling Judge Moran that she had been raped a total of ten (10) times during this crime, that she was taken out of her car, raped systematically over an unknown period of time. She retold how she was tied naked to a tree and was moved to a boxcar, locked inside and left in the dark for an unknown amount of time before Petitioner returned to victimize her again, ultimately raping her in her vehicle and locking her in the trunk. She testified that she had not been able to deal with those events until just before the sentencing hearing, where she was under the care of a psychiatrist. She stated she had been "tough" all of her life, but after the Petitioner's crimes felt ashamed and dirty. (Ex.

D). She testified that she saw Petitioner sitting at the hearing and realized "they have ruined my life and I was tough all my life. I was tough. But no more now. I'm so scared." She has had to install burglar alarms, and cannot go out at night. That she has had to "get rid of that car" because she could not go back into it again. And that she had to change homes, and reported that she couldn't wear her clothes, that she couldn't stand to have them touch her. (Ex. B).

She asked the court to give Petitioner "the worse sentence any human being could possibly get for what he made me go through, what I'm going through now". (Ex. B).

Thus, the sentencing court was thoroughly informed of the effects of the Petitioner's crime on the victims, and the victims' families. § 921.1401(2)(b), Fla. Stat.

c) <u>The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.</u>

Information regarding the Petitioner's individual characteristics were addressed in the Pre-Sentence Investigation report as required in § 921.231(1)(f) which require the "offender's medical history and, as appropriate, a psychological or psychiatric evaluation."

Defense counsel emphasized Petitioner's age at the sentencing hearing, and his mother testified on his behalf, stating that he had issues with other people "picking on him, bothering him all the time…after then, that's when I noticed that he started

bothering in drugs and alcohol. And I just don't believe that he would have did something like that if he wasn't under the influence." (Ex. B).

Further, the record here is clear that evaluations of Petitioner were made and reports submitted to the sentencing court for consideration. Defense counsel made objections to the recommendations of the Petitioner's doctors, asking the court to strike some of their statements and recommendations as gratuitous. (Ex. B, C).

The pre-sentence investigation report contained statements from Dr. Chafin of the University Hospital, and from Dr. Sonnier of the University Hospital. It included statements from officers and detectives involved in the case and it was written by a probation officer. (Ex. B, C).

Therefore, the sentencing court was able to consider "the defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense". § 921.1401(2)(c), Fla. Stat.

d) <u>The defendant's background, including his or her family, home, and community environment.</u>

Petitioner's "social history" which included "his family relationships, marital status, interests and related activities" were addressed as required in the Pre-Sentence Investigation according to § 921.231(1)(d), Fla. Stat. Also addressed was "information about the environment" under which the offender lived and might return to, as required under § 921.231(g). As defense counsel made no objection to this information, it was certainly included in the report for the sentencing court to

consider.

Further Petitioner's mother testified at the sentencing hearing, stating that she was present and heard everything presented at trial, and that she believed "most of the stuff came from when he was shot in the face" that she believed he started having problems with other people around that time. She also testified that she knew he was involved with drugs and alcohol, and stated she did not "believe that he would have did something like that if he wasn't under the influence." (Ex. B).

Therefore, the sentencing court had information it considered regarding Petitioner's background, family, home and community environments which it considered during sentencing the Petitioner. § 921.1401(2)(d), Fla. Stat.

e) <u>The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.</u>

Judge Moran considered the Petitioner's conduct during trial, and his participation at various stages, and he had the Pre-Sentence Investigation Report before him that presented "a complete description of the situation surrounding the criminal activity…and at the offender's discretion, his version and explanation of the act" § 921.231, Fla. Stat. (1985). (Ex. B, C).

The sentencing court had information regarding Petitioner's conduct and participation during the trial, as well as the various motions and objections made by the Petitioner, Judge Moran observed these factors and was able to consider them as applied to petitioner during sentencing. (Ex. B). § 921.1401(2)(e), Fla. Stat.

f) The extent of the defendant's participation in the offense.

It is clear from a reading of the transcript, along with the statements of the victims made at the sentencing hearing that the Petitioner was a major participant in these crimes.

In case 83-6212, Petitioner jumped into T.H.'s vehicle, pushed her to center of the seat and drove her car away, he pulled T.H. from the vehicle and tackled her when she momentarily broke free and dragged her into the back seat of her car, choked her, then removed her clothing and penetrated her vagina with his penis.

In case 83-5854, Petitioner jumped onto the counter while holding a revolver pointed at D.R. and demanded money from the cash register. He was the one who went over the counter and grabbed the cash. Petitioner told the victim that it was not his first time, that they knew what they were doing and that he would never serve a day in jail if caught. The Petitioner forced D.R. to have vaginal sex with him, then held a gun to her head while his partner raped her. Petitioner was the one who held his gun in the victim's ear and told her he was going to blow her brains out.

In case 83-6211, Petitioner and his crime partners forced their way into M.F.'s vehicle and Petitioner drove the car while one suspect beat her violently and another suspected raped her in the back seat of her car. Once Petitioner parked the car, he threw M.F. onto the ground and orally and vaginally penetrated her again. This happened repeatedly. Petitioner took this 59-year-old woman and tied her, naked,

to a tree with telephone wire. After loosening her bonds and telling M.F. he was helping her escape, Petitioner chased her down and dragged her back to her car by her hair. After placing her in a boxcar of a train and leaving her for several hours, Petitioner forced her back into the back seat of her car and forcibly penetrated her yet again. She was raped a total of 10 times.

The sentencing court clearly had knowledge of the involvement of Petitioner in this crime that it considered during Petitioner's sentencing. § 921.1401(2)(f), Fla. Stat.

g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

Information was before the sentencing court regarding Petitioner's education background, his employment background, and his occupational capabilities, as well as the social history, i.e. familial relationships, his interests and any related activities, including information about his environments under the requirements of the Pre-Sentence Investigation Report required under § 921.231, Fla. Stat. (1985).

Further at the sentencing hearing, defense counsel presented the testimony of Petitioner's mother who testified that Petitioner had been affected by peer pressure since he was shot in the face. She informed the court that "other people started picking on him, bothering him all the time, and that's when she noticed he became involved with drugs and alcohol. (Ex. B). There is no evidence that he was forced into these criminal behaviors, nothing indicated he succumbed to peer pressure.

Rather the evidence showed that he was clearly acting from his own free will.

Therefore, sufficient information was in front of the court addressing this issue so that Judge Moran considered the effect of familial and peer pressure on his actions at the time of the crime. § 921.1401(2)(g), Fla. Stat.

h) The nature and extent of the defendant's prior criminal history.

As required by the Pre-Sentence Investigation Report under § 921.231(j), Fla. Stat. (1985), the offender's criminal record, if any, including his version and explanation of any previous offenses was provided to the sentencing court. This gave Judge Moran a thorough snapshot of his criminal past. The information in the Pre-Sentence Investigation report was discussed in detail at the sentencing hearing, where defense counsel took exception to the August 27, 1981 offense where Petitioner was arrested for attempted burglary of an auto that was "nol-prossed" on September 23, 1981 and the entry of a petit theft dated December 8, 1982, that reported a disposition of "None available". (Ex. B, C).

Clearly, this information was before the sentencing court and was considered when Judge Moran determined Petitioner's sentence in accordance with the requirements of § 921.1401(2)(h), Fla. Stat.

i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

At his sentencing, Petitioner's defense counsel argued extensively for mitigation, pointing out petitioner was "seventeen years old when this occurred.

He's now eighteen. He has a lot of years left." (Ex. B). Defense counsel argued that Petitioner has remorse over this case, and apologized for what he did, and that he told the court that he would "like to have the opportunity to come back someday and prove to the court and to the world that he is not an animal, that he would like to have the opportunity to come back someday and prove that he could be a citizen and live among the people." (Ex. B).

The Pre-Sentence Investigation Report requires a comprehensive look into the offender's life and situation at the time of the crime which is required under § 921.1401(2)(i), Fla. Stat. Also, during the sentencing hearing, his defense counsel argued that Petitioner "was the victim of a crime himself, apparently. Another person had committed a robbery and the man was leaving the scene of a robbery, according to the PSI, and tried to steal the bicycle away from Derrell Franklin and when Derrell Franklin refused to give him his bicycle, the man put a gun to his face and fired point blank and he now has a hole in his face. And, apparently, that had a significant impact on him." (Ex. B, C). The last comment from defense counsel to the sentencing court was:

> I'm not saying it excuses in any way what he did, but I'm just saying that **the Court should consider the factors that went into making him the person that he is today**.

(Ex. B).

Because Judge Moran had this information in the record at the time of

Petitioner's sentencing, he was able to consider this factor at the hearing.

j) The possibility of rehabilitating the defendant.

The Pre-Sentence Investigative Report provided the court and the attorneys with "[i]nformation about the environments to which the offender might return or to which he could be sent should a sentence of non-incarceration or community supervision be imposed by the court." § 921.231(g), Fla. Stat. (1985). The report also had "[i]nformation about any resources available to assist the offender, such as: treatment centers, residential facilities, vocational training programs, special education programs, or services that may preclude or supplement commitment to the department." § 921.231(h), Fla. Stat. (1985). (Ex. E).

The sentencing court also heard from the Petitioner and from his attorney, who informed Judge Moran that Petitioner wanted the opportunity to prove that he could be a productive citizen someday, pointing out that he has an eighth grade education, a minimal criminal history, and asking the court to "consider the factors that made him the person he is today". (Ex. B).

Therefore, the sentencing court had information regarding the factors required to be considered under § 921.1401(2)(j), Fla. Stat. when making his sentencing decision.

Judge Moran succinctly stated his findings at the sentencing hearing, after carefully considering the Pre-Sentencing Investigation Report and the testimony

presented, and ruled:

> "I want to thank the probation officer for all the reports that you have here. I have read them and I appreciate the effort that went into compiling it. And they're lengthy and they certainly do assist the court.
>
> The other thing I wanted to do is thank the people for coming down and helping with the sentencing; Ms. Hendricks, Ms. Rasberry, and Ms. Fiorito. I know it is difficult and the trials were difficult and the court does appreciate your coming down, especially for the sentencing.
>
> And finally, Mr. Jones, all the work that you have done on the case, I know that you have been very diligent in presenting the cases, and I appreciate it, the professional way in which they were handled and the same thing applies to Mr. Treece and Mr. Parker. These were difficult cases to represent your clients and all the attorneys did admirable jobs, and it was a pleasure to sit through the trials.
>
> At any rate, having said that, Mr. Parker, if you and your client will come forward, please.
>
> Mr. Treece, you and your client come forward, also. It is not – Mr. Owens and Mr. Franklin, I have, of course, spent a lot of time with you as the Judge and they have been difficult cases. And as eloquent as Mr. Jones was, even he left out a number of the things that occurred in these offenses and that were testified to, heinous things, things that were said. Intimidation was inflicted upon these people, and he left out, even though he covered it very well, he left out the attitude displayed by y'all and the laughter and the fun associated with your acts.
>
> And he didn't mention, which I'm aware of, the comments that you made to me during the trials in which you wished to speak to the court and how I wasn't fair and how the court wasn't doing this and wasn't doing that and you didn't like that and you didn't like that. It's really been kind of a game, I guess, and of course, your lawyers did the best job they could.

And like I say, it was very, very good. But the game is over. It's all over. You sat down here and we have spent hours and hours down here until early in the morning; 2:00 o'clock in the morning; 11:00 o'clock at night. We spent a lot of time.

But it is all over, the fun and games. The fun and games have ended. There's really no way, and Mr. Jones pointed out, that a sentence can be imposed upon either of you that reflects adequately what you did in terms of years and numbers run together, but the sentence should and even those that may come behind us may look and say, well, that sentence doesn't sound right. It should, at least, bring to their attention that there is something more to you two individuals than there is to anyone else and the sentence should be reflective of that because the one thing that I'm sure both of ya'll, particularly, from hearing from Mr. Franklin today, is that something like this should never, ever happen again. And so I know I feel comfortable that even though there is no way to express the moral outrage felt by society and the things that you inflicted upon these victims, the fact that you have broken their lives; you have ruined them; they have to live with it constantly; in their sleep they live with it. They can't even sleep to get away from it.

I know that each of you would approve of the sentence that would make sure that y'all were never allowed to engage in that type of conduct again.

***

Now, Mr. Franklin, of course, you have twenty felonies in which the jury has returned verdicts of guilty...

On the kidnapping, which is a first-degree felony, the maximum sentence is life and the court is going to sentence you to serve a term of one-thousand years in the Florida State Prison.

Sexual battery, one-thousand years with a minimum sentence of thirty. Unarmed robbery will be fifteen years.

On the Rasberry case, the sentence is punishable by life, and it will be one-thousand years. Aggravated assault will be five years. The

> armed kidnapping, that carries a minimum sentence of thirty years and it will be one-thousand years. Sexual battery will be a thousand. Sexual battery will be a thousand.
>
> On the Fiorito case, it is a first degree punishable by life and it will be one-thousand years. Unarmed robbery will be fifteen years and the ten counts of sexual battery will be one thousand.

(Ex. B).

Because the Pre-Sentence Investigation report provided information on all of the factors that this Court required under Atwell, there is no demonstrable need for another sentencing hearing where the same information would be reconsidered. The trial court was able, and did in fact, consider factors that allowed it to take into consideration regarding Petitioner's juvenile status at the time of his sentencing.

The Atwell Court expanded recent jurisprudence in juvenile, non-homicide offenders requires a resentencing hearing be held for "parole-eligible inmates who were juveniles at the time of the crime". Atwell, 197 So. 3d at 1044.

Under Atwell, this Court determined that Florida's parole system does not provide for the individualized consideration of a defendant's youth at the time of the offense in compliance with Miller and that resentencing was required for offenders who were sentenced to lengthy prison sentences even with the opportunity for parole when that sentence provided a "a virtual certainty" they would spend the rest of their life in prison, as "Florida's existing parole system…does not provide for individualized consideration of Atwell's juvenile status at the time of the murder"

finding "[t]he Miller factors are simply not part of the equation". Atwell, 197 So. 3d at 1041.

While this may have been true under the facts of Atwell, it certainly does not hold here. In the case at bar, it is clear from a complete review of the record that, at his sentencing hearing on May 4, 1984, Petitioner received all due consideration regarding his "youth and attendant characteristics" and the sentencing court, had the opportunity to consider all mitigating circumstances. In fact, the sentencing court has had several opportunities since May 4, 1984 to consider all of these factors of youth:

Testimony and proceedings were held seven times since his original sentencing date: September 19, 1985, December 19, 1985, January 30, 1987, February 9, 1990, February 28, 2013, March 18, 2013, and on March 22, 2013. As a result of these proceedings, Petitioner's sentence was set aside and he was resentenced on three separate occasions: November 20, 1985, January 30, 1987, and April 27, 1989, the sentencing court Granted in part and denied in part a motion to vacate judgment and sentence, and on February 9, 1990, his sentence was again set aside and resentenced. Additionally, Petitioner's sentence was last addressed March 22, 2013, when the sentencing court, the Honorable Tatiana Salvador, Circuit Judge, struck the retention of jurisdiction of the trial court, which restricted the Parole Commission's decision. As the sentencing court explained, this correction would allow the parole board to

adjust his presumptive parole date.

Petitioner's Appendix includes ten Interview Reports, along with two Memorandum, dated March 23, 2004 and December 3, 2013, recommending his presumptive parole release date remain 2352 as previously established.

However, the presumptive parole release date is an ever changing date. Many factors contribute to the presumptive parole release date. In 1978, the Florida Legislature enacted "Objective Parole Guidelines Act of 1978" which require the Parole Commission to develop and implement rules and criteria upon which parole decisions were to be based, including risk-assessment and historical Commission experience. See 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 aggravating and/or mitigating circumstances, the hearing officer recommends a presumptive parole

release date – or tentative parole release date as determined by the objective parole guidelines – to the Parole Commission, which adopts or modifies that date. §§ 947.005(8), 947.172(1-3), Fla. Stat.

The inmate may then 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 such as petitioner, who was 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. § 947.147(1)(b), Fla. Stat. In a subsequent interview, the hearing officer determines whether there is any additional information, mitigating or aggravating, 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.

Contrary to Petitioner's argument, Graham and its progeny do not require a "guarantee [of] eventual freedom". Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 2016 (2010). As noted by the First District in review of Petitioner's direct appeal,

> Graham does not foreclose the possibility that a juvenile non-homicide offender will remain behind bars for the duration of his or

> her life if that offender ultimately proves to be "irredeemable". Graham. What Graham requires is that a juvenile non-homicide offender have "some meaningful opportunity to obtain released based on demonstrated maturity and rehabilitation." Id. This court has applied Graham to invalidate term-of-years sentences that amounted to de facto life sentences due to the combination of their lengths and that lack of parole eligibility. However, the extreme length of a sentence does not in itself establish a Graham violation when that sentence is parole-eligible and no constitutional deficiency in the parole system has been established.

Franklin, 141 So. 3d at 212 (citations omitted).

Courts have recognized that not "all juveniles convicted of non-homicide crimes must be given an opportunity for early release by parole or its equivalent from their term-of-years sentences". Lambert v. State, 170 So. 3d 74 (Fla. 1st DCA 2015). Graham itself acknowledged that "[i]t bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile non-homicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." Graham, 130 S.Ct. at 2029.

In the facts in this case, Petitioner has had interviews with the parole board at least once every seven years, and has had "current progress reports, psychological reports and disciplinary reports". § 947.174, Fla. Stat. (Petitioner's Ex. B-L). Graham and Miller holdings do not require parole be given, only that an offender have a "meaningful opportunity for release." Franklin, 141 So. 3d 210.

From a strictly policy position, to subject society to resentencing juveniles sentenced to a lengthy incarceration, with the possibility of parole is an unnecessary burden that is being placed on courts and prosecutors across the State. To surmise, that factually no juvenile sentenced before 2015 had their "immaturity, their "lessened" or "diminished culpability", or their "youth and attendant characteristics" considered is simply an appellate court taking the easy way out. Each sentencing hearing is unique and with its own accompanying mitigations and enhancements.

In order to resentence a defendant, one must reconvene all parties and actually re-litigate the entire proceeding. This creates numerous logistical difficulties that do not normally accompany the retroactive application of these new rules. In new prosecutions, both sides have full incentives to develop the record relevant to sentencing and both sides have the capacity to do so, given that the crime occurred relatively recently. However, in cases such as this one, because many years will have passed since original crime, the judge will likely be different from the judge who presided over trial, so he or she would be unable to use his or her experiences to make the appropriate sentencing determination. The law does not necessarily require that the same judge who presides at trial also hand down the sentence. But nearly every jurisdiction has made this the strongly preferred practice. People v. Berry, 67 Cal. Rptr. 315, 622 (Ct. App. 1968); People v. Gomez, 425 N.Y.S.2d 776, 777-78 (Cnty. Ct. 1980). These jurisdictions have set that presumption for obvious reasons.

Sentencing is an art, and an important component consists of the judge's observations from the trial. The judge at a postconviction Miller hearing, in contrast, will need to make do with a transcript and the cold record.

There is substantial reason for concern that offenders will have incentive to manufacture false arguments about their purported rehabilitation or the events surrounding the crime that, due to the passage of time, prosecutors cannot easily rebut. The passage of time also can make it more difficult for prosecutors to rebut certain assertions from the defense. As in any new trial ordered by a postconviction court, offenders may make allegations that are "false in fact," but the State "may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial." Peyton v. Rowe, 391 U.S. 54, 62 (1968) (internal quotation marks omitted). While, some offenders, no doubt suffered serious problems in their childhood, prosecutors - and critically, the courts - have little means of distinguishing legitimate claims from false ones when offenders make them for the first time decades later.

The inability of State to bring forth witnesses/victims to resentencing hearing because of the elapse of time is another consequence of this new policy. The actual trial of the defendant has happened long before. Witnesses may have moved or have since died. Relevant documents and evidence are difficult to find. The prosecutor who brought the original case, the attorney who defended it, the judge who presided

over it - each of those persons may be far out of reach.

In sentencing hearings, the focus is on the offender's behaviors at time of sentencing and the impact the crime has had on his/her victims. A resentencing, this many years later nearly discounts that focus and instead, Petitioner is asking court to focus on what has happened in the years AFTER he committed his crime, while he was in prison. This results in rules applying differently in new prosecutions and in postconviction review – the prosecutors and defense lawyers in those cases may have had no incentive to develop a record with evidence that is probative on various sentencing factors, including but not limited to the factors Miller emphasizes relating to an offender's youth. This reality means that postconviction Miller hearings will likely implicate one of the core concerns that has animated the retroactivity doctrine over the years: "unusual difficulties" can "arise in identifying and resolving constitutional issues in cases long final and, if a constitutional claim prevails, in conducting a retrial." Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 Harv. L. Rev. 1731, 1815 (1991). Prosecutors on postconviction thus often must make their case without the benefit of evidence from the first trial, and may be developing the record on these points for the first time.

That reality is a particular problem in Miller hearings because the various factors this Court deemed relevant to the sentencing inquiry require backwards-looking

factual determinations. The court may consider evidence relating to the defendant's age, maturity, and life circumstances at the time of offense. The parties ordinarily would present this evidence through child-protection documents, medical records, school records, and trial records. But these records may be largely unavailable years after the fact. These are the sorts of "stale facts" that Justice Harlan rightly said can render new proceedings on habeas inherently unreliable. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part).

In light of the "[p]assage of time, erosion of memory, and dispersion of witnesses" that this Court has noted may attend any postconviction proceeding, developing the appropriate record for the Miller inquiry can be extraordinarily hard. Engle v. Isaac, 456 U.S. 107, 128 (1982). Even Montgomery's *amici* concede that this Court has recognized that, as a result of these considerations, "retrying an individual on collateral review unduly risks obtaining a result less reliable than" the original trial. ACLU *Amicus* Br. 16. Yet those *amici* offer no persuasive reason why these concerns "do not extend to the original sentencing." Prof. Berman *Amicus* Br. 9. To the contrary, on-the-ground experience shows that these concerns can be present in full force. "[T]he passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult or even impossible". Engle, 456 U.S. at 127–28; See Smith v. State, 500 So. 2d 125 (Fla. 1986).

There is a significant toll on victims and their families when their perpetrators have been awarded a new sentencing hearing and they must endure another round of hearings. Victims and their relatives have likely been told that the court rendered a final judgment, that the issue is 'closed' and that the defendant will never be released, and they are told they can now move on with their lives. It is difficult to overstate the pain victims' families have suffered when they learn that these cases and their emotional wounds are to be reopened and that their tormentor is likely to be released within their lifetime.

If this Court finds that resentencing is required, when he is resentenced according to the provisions of chapter 2014-220, the State would be free to seek life imprisonment with judicial review. According to Kelsey v. State, 206 So. 2d 5, 11 (Fla. 2016), "there is no compelling reason that the State must be precluded from seeking a life sentence that complied with Graham". Even if Petitioner was entitled to be resentenced under the 2014 sentencing statute, the remedy would be that he would get a completely new sentencing hearing, not the same sentence with a judicial review, as he was the one who requested to be resentenced under the statute. When a defendant gets a new sentencing hearing, pursuant to his request, he does not get to pick and choose which parts of the 2014 sentencing scheme that he likes and dispense with the parts he does not like.

Therefore, the sentencing court received testimony and had the Pre-Sentence

Investigation Report before it so that information regarding Petitioner's "youth and attendant characteristics" could be considered. Further, this Petitioner has ample opportunities to present any evidence or argument regarding his rehabilitation or maturity to his future hearing officer at his parole interviews. Therefore, Petitioner's claim should fail and his judgment and sentence should be affirmed.

ISSUE II NO ERROR OCCURRED AS THE FIRST DISTRICT COURT PROPERLY DENIED PETITIONER'S POST-CONVICTION MOTION AS INSSUFICIENT. (RESTATED).

Standard of Review

In McLin v. State, 827 So. 2d 948, 954 (Fla. 2002), this Court also has enunciated the proper standard of appellate review when an appellate court reviews a summary denial of a rule 3.850 claim, including a claim of newly discovered evidence:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

Foster v. State, 810 So. 2d 910, 914 (Fla.2002) (quoting Peede v. State, 748 So. 2d 253, 257 (Fla.1999)).

Merits

Here, Petitioner alleges the First District was in error when they denied his postconviction pleading as it was insufficient to support his claim. (Petition at 15). Petitioner filed a post-conviction motion in the circuit court in which he argued that "his several concurrent sentences of 1,000 years in prison, imposed in 1984 for crimes committed in 1983, are unconstitutional under Graham v. Florida, 560 U.S. 48 (2010), as modified (July 6, 2010), despite the fact that they are parole-eligible." The circuit court denied the motion, and petitioner appealed. The First District stated that they "affirm due to the facial insufficiency of Appellant's claim." Franklin, 141

So. 3d at 211. The First District explained that petitioner's claim was facially insufficient because:

> The issue Appellant presented to the circuit court was based on the United States Supreme Court's holding in Graham, which forbids a sentence of life without the possibility of parole for a non-homicide offense committed by a juvenile.
>
> ***
>
> In the proceedings below, Appellant alleged no facts, cited no legal authority, and made no argument to show that the Parole Commission is precluded from ever establishing a PPRD during his lifetime due to the sentence the court imposed. Although he argued that the parole system would not provide him with a meaningful opportunity for release, this argument was conclusory at best. Without allegations indicating an inherent deficiency in the parole system's ability to address a 1,000–year sentence consistently with Graham, as opposed to a failure on Appellant's part to demonstrate maturity and rehabilitation, Appellant's claim was legally insufficient to establish that his parole-eligible term-of-years sentence is unconstitutional.
>
> The fact that Appellant's PPRD is currently set at September 1, 2352, does not establish a Graham error in the sentence. The Parole Commission, not the sentencing court, is responsible for setting a parole-eligible prisoner's PPRD and for periodically reviewing that determination. See §§ 947.13(1)(a), 947.16(4)-(5), 947.172, 947.174(2)-(3), Fla. Stat. (2013). If the Parole Commission violated the law or abused its discretion in establishing Appellant's current PPRD outside his life expectancy while being legally able to establish it otherwise, then that error is a matter for review in proceedings challenging the establishment of the PPRD, not in a motion challenging the legality of the sentence from the outset. Cf. Johnson v. Fla. Parole Comm'n, 841 So.2d 615, 617 (Fla. 1st DCA 2003) (recognizing that prisoners may seek review of final orders of the Parole Commission in circuit court through a petition for an extraordinary writ); Florida Parole Com'n v. Huckelbury, 903 So. 2d

977 (Fla. 1st DCA 2005) (reviewing a circuit court's order on a petition challenging the suspension of an inmate's PPRD).

Franklin, 141 So. 3d at 212–13.

Petitioner failed to provide information or argument sufficient for the First District Court to hold Petitioner's sentence unconstitutional, "even assuming the truth of every fact alleged." Id. Because he failed to allege a *prima facie* case for relief, the First District properly denied petitioner's motion as legally insufficient.

CONCLUSION

Based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court affirm Appellant's conviction and sentence.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by electronic mail to Glen Gifford, at glen.gifford@flpd2.com this 6th day of March, 2017.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief was computer generated using Times New Roman 14-point font.

Respectfully submitted and served,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/
By: SHARON S. TRAXLER
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
Sharon.Traxler@myfloridalegal.com
crimappth@myfloridalegal.com
850.414.3300
Florida Bar No. 0558621
L14-1-19110

Attorney for the State of Florida