IN THE FLORIDA SUPREME COURT

CASE NO. SC16-2187

STATE OF FLORIDA,
Petitioner,

v.

BUDRY MICHEL,
Respondent.

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent Budry Michel, like Angelo Atwell,[1] was convicted in Broward County of first-degree murder and armed robbery. PDF 8. Michel committed his offenses in 1991; Atwell in 1990. PDF 21. Michel, like Atwell, was 16 years old at the time. PDF 24.[2]

Michel was sentenced by Judge Stanton Kaplan. PDF 7. Judge Kaplan imposed the only (non-death) sentence he could for first-degree murder: life imprisonment with the requirement that Michel "serve no less than 25 years before becoming eligible for parole...." § 775.082(1), Fla. Stat. (1991); PDF 12-14.

As for the armed robbery, Judge Kaplan could have departed from the sentencing guidelines and imposed a consecutive life sentence with no possibility of parole.[3] That was the sentence that Atwell received.[4] Instead, Judge Kaplan sentenced Michel to a concurrent term of 5½ years in prison with 3 years jail credit. PDF 15-17.

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[1] *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016).

[2] Michel was charged with codefendant Odis Thomas Cooper. PDF 21-22. The record does not reflect Cooper's age or the disposition of his case.

[3] *See* §§ 812.13(2)(a), 775.082(3)(b), 921.0015, Fla. Stat. (1991); Fla. R. Crim. P. 3.701(d)(12); *Bunney v. State*, 603 So. 2d 1270, 1271 (Fla. 1992) (holding that unscoreable capital offense is valid departure ground).

[4] *Atwell v. State*, 128 So. 3d 167, 168 (Fla. 4th DCA 2013) ("The court imposed a consecutive life sentence for the armed robbery in count two.").

In 2013, Michel moved to vacate his mandatory life sentence. PDF 24-25. He finished his armed robbery sentence years earlier. The trial court (now Judge Barbara McCarthy) denied the motion. PDF 2.

Michel appealed and the Fourth District reversed on the authority of *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). *Michel v. State*, 204 So. 3d 101 (Fla. 4th DCA 2016). The court disagreed "with *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016), and *Williams v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016), to the extent that those decisions suggest that relief under *Atwell* is dependent on the defendant's presumptive parole release date" and it certified conflict with those decisions.

SUMMARY OF THE ARGUMENT

The State and the Fifth District have misread *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). The decision was based on the broad principles that govern juvenile sentencing in serious cases, not Atwell's specific PPRD. All the reasoning employed by this Court supports that view. Further, Michel, like Atwell, was sentenced to *life imprisonment*. Although his sentence is parole eligible after 25 years, it must be treated as a life sentence because parole is not the normal expectation in the vast majority of cases. And because Florida's parole system does not comply with the substantive and procedural requirements of *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the parole decisions that the system produces pose too great a risk of disproportionate punishment. Finally, juvenile offenders like Michel have a liberty interest in a realistic opportunity for release based on demonstrated maturity and rehabilitation. Florida's parole system denies juvenile offenders this liberty interest without due process of law. For these reasons, the remedy must be resentencing under the provisions of chapter 2014-220, Laws of Florida, regardless of PPRD.

ARGUMENT

BUDRY MICHEL, LIKE ANGELO ATWELL, SHOULD BE RESENTENCED IN CONFORMANCE WITH CHAPTER 2014-220, LAWS OF FLORIDA. THE FOURTH DISTRICT CORRECTLY HELD THAT RELIEF UNDER *ATWELL* IS NOT DEPENDENT ON THE JUVENILE OFFENDER'S PPRD.

A. *Introduction*

This Court's decision in *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), was based on the broad principles that govern juvenile sentencing in serious cases, not Atwell's specific PPRD. As explained below, two general rules apply: first, sentences must be individualized; and, second, juvenile offenders must be given a meaningful opportunity to demonstrate maturity and rehabilitation. This Court held that the mandatory, one-size-fits-all nature of the pre-1994 sentence for first-degree murder violated the first rule, and the parole system as it currently operates violated the second. Chapter 2014-220, Laws of Florida, on the other hand, complies with both rules. Section 921.1401, Florida Statutes, provides for individualized sentencing, and section 921.1402, Florida Statutes, provides for a meaningful opportunity to demonstrate maturity and rehabilitation. This Court ordered that Atwell be resentenced in conformance with these statutes.

This Court did not hold that only juvenile offenders with a PPRD in the *de facto* life sentence range should be resentenced. Indeed, if resentencing depends on the PPRD, then juvenile offenders with more egregious offenses, longer prior

records, and poorer prison performance will be resentenced pursuant to *Atwell*, while less culpable, more reformed (or earlier reformed) juvenile offenders with a something-less-than-life PPRD[5] will be left behind: their only hope will be that some day they will be one of those rare Florida inmates granted parole. It would be a cruel irony indeed if a decision about correcting juvenile sentencing disparity compounded it in this way.

B. *Standard of Review*

Michel agrees with the State that this issue presents a pure question of law subject to de novo review. *See State v. Markus*, 42 Fla. L. Weekly S98, S100 (Fla. Jan. 31, 2017) (pure questions of law are reviewed de novo).

C. *Miller v. Alabama requires individualized sentencing and a meaningful opportunity to demonstrate maturity and rehabilitation*.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (*quoting Roper v. Simmon*, 543 U.S. 551, 560 (2005)). This right "flows from the basic precept of justice that

[5] Michel uses the term "something-less-than-life PPRD" because it isn't accurate to suggest that PPRDs are always either "right around the corner or long after [an offender's] life expectancy." *See Williams v. State*, 198 So. 3d 1084, 1086 (Fla. 5th DCA 2016). A something-less-than-life PPRD might be "right around the corner," but it is more likely to be 10, 15, or 20 years after parole eligibility (i.e., after serving 25 years). And under the Fifth District's rule, a juvenile offender with a year 2030 PPRD will be denied resentencing even if the offender was a 14-year-old accomplice (non-shooter) who has demonstrated great maturity and rehabilitation.

punishment for crime should be graduated and proportioned to both the offender and the offense." *Id*. (quotation marks omitted); *see also Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."); *Montgomery v. Louisiana*, 136 S. Ct. 718, 732–33 (2016) ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment[.]").

Certain punishments are disproportionate when applied to children because "children are different" (*Miller*, 132 S.Ct. at 2470) in three ways relevant to punishment:

- **Immaturity**. Children have a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S.Ct. at 2464 (citation and quotation marks omitted). [6]

- **Vulnerability**. Children are "more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. (citation and alterations omitted).[7]

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[6] Examples of immaturity abound, of course. The Supreme Court said Terrance Graham's in-court statement that he intended to play pro football "underscored his immaturity." *Graham*, 560 U.S. at 92.

[7] Bernell Hegwood is an example of a vulnerable juvenile offender who was trapped in an abusive household. He was convicted of three counts of first-degree murder and sentenced to death. *Hegwood v. State*, 575 So. 2d 170 (Fla. 1991). This Court reversed the sentence, noting that family members described Hegwood as a "generally good and obedient child who had an unfortunate and impoverished childhood." *Id*. at 173. This Court said that a "great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking,

- **Reformability**. A child's "character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." *Id*. (citation and alterations omitted). "[O]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Id*. at 2464 (citation and alterations omitted).[8]

The first two characteristics of children lessen their moral culpability and lead to the individualized sentencing requirement. A sentencer must consider youth and its attendant characteristics "before imposing a particular penalty." *Miller*, 132 S.Ct. 2455. If the sentencer doesn't do this, then there is "too great a risk of disproportionate punishment." *Id*. at 2469. As the Supreme Court said, "a sentencer misses too much if he treats every child as an adult." *Id*. at 2468.

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lying drug addict and convicted felon who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case." *Id*. This Court recently reversed Hegwood's life sentences and remanded for resentencing on the authority of *Atwell*. *Hegwood v. State*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016).

[8] Examples of rehabilitation, and even great achievement, by former juvenile offenders abound. *See, e.g.*, *Amicus Brief of Former Juvenile Offenders* filed in *Graham*, available at: http://www.scotusblog.com/case-files/cases/graham-v-florida/ As former Senator Alan Simpson described himself, "I was a monster." *Id*. at page 11. In *The Iliad*, we learn that Achilles' great friend, Patroclus, was a boy when he killed the son of Amphidamus in a quarrel over dice. Homer, *The Iliad*, (Stephen Mitchell trans., 2011) (bk. 23, ll. 82-90). Nonetheless, Patroclus grew up to be the kindest warrior in *The Iliad*, known for "his gentleness, the kind way [h]e had with everyone." *Id*. at bk. 17, ll. 647-648; *see also id*. at bk. 11, ll. 770-799 (Patroclus cares for Eurypylus); Homer, *The Iliad*, (Robert Fagles trans., 1998) (bk. 17, l. 755) (Patroclus was a "gentle man, the soul of kindness to all").

A sentencer also misses too much if he or she treats every child the same. But under a mandatory sentencing scheme like the one at bar "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id*. at 2467-68. Thus, the sentencer must be able to consider not only the "hallmark features" of youth, but also each child's "family and home environment … from which he cannot usually extricate himself"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; the child's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and, finally, the child's "possibility of rehabilitation." *Id*. at 2468.

The third characteristic of children—their greater prospects for reform—requires that they be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. 50; *Miller*, 132 S.Ct. at 2469. They "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S. Ct. at 736–37. "The opportunity for release will be afforded to those who demonstrate the truth of

Miller's central intuition—that children who commit even heinous crimes are capable of change." *Id*. at 736.

D. *Atwell v. State: The pre-1994 penalty for first-degree murder fails Miller's mandates.*

This Court held that Atwell's *sentence* was unconstitutional, not the PPRD. Indeed, this Court said the "judiciary has no input as to the operation of the parole system." *Atwell*, 197 So. 3d at 1047. This Court concluded that "Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional." *Id*. at 1041.

Contrary to the State's argument, Atwell's PPRD was not pivotal to this Court's holding and omission of it would not seriously impair the decision's analytical foundations. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 46-53 (2016) (distinguishing dictum from holding on this basis). This Court's holding and remedy were based on several strands of reasoning, but the following are the most salient, and they all point to the requirement of resentencing regardless of PPRD.

First, this Court recognized that Atwell did not receive an individualized sentence because the mandatory pre-1994 sentence for first-degree murder treated juveniles like adults and all juveniles the same. "Although the pre–1994 first-

degree murder statute under which Atwell was sentenced provided for parole eligibility, it remained a mandatory sentence that treated juveniles exactly like adults and precluded any individualized sentencing consideration." 197 So. 3d at 1042.

Second, this deficiency was not overcome by Florida's parole system because it does not take into account how children are different from adults and each other. By statute, the Florida Commission on Offender Review must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." *Id*. at 1047 (quoting section 947.002, Florida Statutes (2015)). "Further, the enumerated mitigating and aggravating circumstances in rule 23–21.010 of the Florida Administrative Code, even if utilized, do not have specific factors tailored to juveniles. In other words, they completely fail to account for *Miller*." *Id*. at 1048. This Court said that "[e]ven a cursory examination of the statutes and administrative rules governing Florida's parole system demonstrates that a juvenile who committed a capital offense could be subject to one of the law's harshest penalties without the sentencer, or the Commission, ever considering mitigating circumstances." *Id*. at 1049.

Third, the parole system fails to provide juvenile offenders a meaningful opportunity to demonstrate maturity and rehabilitation. This Court noted that other states had changed their parole criteria to comply with *Miller*. *Id*. California, for

example, requires the parole board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, *and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law*." *Id*. (citation omitted; emphasis added). But in Florida the "decision to parole an inmate 'is an act of grace of the state and shall not be considered a right.'" *Id*. at 1049 (quoting section 947.002(5), Florida Statutes). By statute the Commission must place primary weight on the severity of the offense and the juvenile's prior record—static factors that a juvenile offender cannot change. "The *Miller* factors are simply not part of the equation." *Id*.

Fourth, unlike the legislatures in other states, our Legislature did not modify Florida's parole system to comply with *Miller* and *Graham*. "Instead, the Legislature chose to enact chapter 2014–220, Laws of Florida, and to use substantively different criteria for evaluation, specifically tailored to juveniles and based on the *Miller* factors." *Atwell*, 197 So. 3d at 1049. "Parole is, simply put, 'patently inconsistent with the legislative intent' as to how to comply with *Graham* and *Miller*." *Id*. (*quoting Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015)).

Regardless of the PPRD, it remains the case that juvenile offenders like Atwell and Michel "did not receive the type of individualized sentencing consideration *Miller* requires." *Id*. at 1050. And regardless whether the PPRD is year 2025 or 2125 or something in between, there can be no confidence that it is a

proportionate punishment because the parole system does not take into account the characteristics of juvenile offenders that lessen their culpability, and it does not provide juvenile offenders a meaningful opportunity to demonstrate maturity and rehabilitation. (See Part F below.) In short, Florida's parole system "poses too great a risk of disproportionate punishment." *Miller*, 132 S.Ct. at 2369. Finally, regardless of the PPRD, it remains the case that parole is "'patently inconsistent with the legislative intent' as to how to comply with *Graham* and *Miller*." 197 So. 3d at 1049.

E. *This Court's decisions in Landrum v. State and Kelsey v. State support the Fourth District's reading of Atwell v. State*.

Cases decided by this Court since *Atwell* support the Fourth District's ruling. In *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), this Court reversed a juvenile offender's discretionary life sentence for second-degree murder for two reasons. First, the trial court was not required to consider the *Miller* factors before imposing sentence. "Even in a discretionary sentencing scheme, the sentencing court's exercise of discretion before imposing a life sentence must be informed by consideration of the juvenile offender's 'youth and its attendant circumstances' as articulated in *Miller* and now codified in section 921.1401, Florida Statutes (2014)." *Id*. at 460. Of course, Judge Kaplan did not consider the *Miller* factors before imposing Michel's sentence for first-degree murder, and, more importantly, neither will the Florida Commission on Offender Review.

This Court said that it isn't the mandatory nature of a sentence that violates the constitutional prohibition against excessive punishments, "[r]ather, the violation emanates from the United States Supreme Court's command that because children are 'constitutionally different,' *Miller*, 132 S.Ct. at 2464, the Eighth Amendment requires that sentencing of juvenile offenders be individualized in order to separate the 'rare' juvenile offender whose crime reflects irreparable corruption,' from the juvenile offender whose crime reflects 'transient immaturity.'" *Id*. at 466 (*quoting Montgomery*, 136 S.Ct. at 734). The Florida Commission on Offender Review does not do this kind of sorting, and, because it does not, there is the risk of disproportionate—and excessive—sentencing.

This Court reversed for a second reason: upholding the sentence would violate the basic precept that sentences be graduated and proportioned, "as a juvenile convicted of the lesser offense of second-degree murder would receive a harsher sentence than a juvenile convicted of first-degree murder." *Id*. at 461.

Similarly, the net effect of the Fifth District's rule will be that juvenile offenders with something-less-than-life PPRDs—and presumably set at something less than life because they are less culpable or more reformed (or earlier reformed)—will be treated worse than juvenile offenders with *de facto* life PPRDs. If it is patently unfair to treat "similar juvenile offenders differently" (*Atwell*, 197

So. 3d at 1042), then it is that much more unfair to treat less culpable juvenile offenders worse than more culpable juvenile offenders.

Consider, for example, that Atwell received a consecutive life sentence without parole on his accompanying armed robbery charge. Michel, by contrast, was sentenced by Judge Stanton Kaplan to a concurrent term of 5½ years in prison for armed robbery. This is at least some evidence that Michel's offense (or his role in the offense) was less egregious. *See Graham*, 560 U.S. at 63 (observing that a juvenile offender sentenced to life for a related nonhomicide offense is "in some sense being punished in part for the homicide when the judge makes the sentencing determination"). But if Michel's PPRD is in year 2030 or 2040, then he, unlike Atwell, will not be resentenced under the Fifth District's rule. Also compare Michel to Bernell Hegwood (discussed at page 6 n. 8). He was convicted of three counts of first-degree murder. This Court recently reversed Hegwood's life sentences and remanded for resentencing on the authority of *Atwell*. *Hegwood v. State*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016).

This Court's decision in *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016), also supports the Fourth District's ruling. Kelsey was originally sentenced to life imprisonment for nonhomicide offenses. After *Graham* he was resentenced to 45 years in prison; but because he was sentenced before the effective date of chapter 2014-220, his sentence did not provide for a judicial review hearing after 25 years.

He appealed, claiming that that he was entitled to this relief under chapter 2014-220. The First District affirmed, ruling that Kelsey was not entitled to any relief because 45 years is not a *de facto* life sentence. It certified a question of great public importance and this Court accepted review.

Before this Court, Kelsey argued that jeopardy attached to his 45-year sentence (and so it could not be increased at a resentencing hearing), but that it should include a judicial review hearing after 25 years. This Court agreed that Kelsey's sentence should include the review hearing. In that regard it disagreed with the First District that relief under the new law is reserved for juvenile offenders serving *de facto* life sentences. This Court said "[A]ll juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014–220, a sentence longer than twenty years, are entitled to judicial review." *Kelsey*, 206 So. 3d at 8. This Court said: "[O]ur focus has not been on the length of the sentence imposed but on the status of the offender and the possibility that he or she will be able to grow into a contributing member of society." *Id*. at 9. "After we made clear that *Graham* does indeed apply to term-of-years sentences, we have declined to require that such sentences must be 'de facto life' sentences for *Graham* to apply." *Id*. at 10 (citation omitted)

This Court disagreed with Kelsey's argument that jeopardy attached. This Court said Kelsey did not have a reasonable expectation of finality in his sentence

because it was illegal. And it was illegal, this Court said, not because of its length, "but because it did not provide him a meaningful opportunity for early release based on maturation and rehabilitation." *Id*. at 11. This Court remanded for resentencing at which the State could again seek a life sentence—as long it was subject to a judicial review hearing after 25 years.

Likewise, the focus should not be on the PPRD but the "status of the offender and the possibility that he or she will be able to grow into a contributing member of society." *Id*. at 9. Accordingly, this Court should decline to require that PPRDs be "de facto life" in order for *Miller* to apply.

F. *Given the structure and operation of Florida's parole system, the remedy must be resentencing under the provisions of chapter 2014-220, Laws of Florida, regardless of PPRD.*

Because Florida's parole system does not comply with *Miller's* substantive and procedural requirements, the parole decisions that the system produces pose too great a risk of disproportionate punishment. For this reason, the remedy must be resentencing under the provisions of chapter 2014-220, Laws of Florida, regardless of PPRD.

As this Court recognized in *Atwell*, Florida's parole system does not consider a juvenile offender's diminished culpability and demonstrated maturity and growth. The objective parole criteria must "give primary weight to the seriousness of the offender's present criminal offense and the offender's past

criminal record." § 947.002(2), Fla. Stat. (2016); *see also* § 947.165(1), Fla. Stat. (2016) (guidelines must be based on "the seriousness of offense and the likelihood of favorable parole outcome."); § 947.002(2), Fla. Stat. (2016) (best predictor of recidivism is prior record). Again, these are static factors that an inmate cannot change.

Further, no inmate "shall be placed on parole unless and until the commission is satisfied that he or she will be suitably employed in self-sustaining employment or that he will not become a public charge." § 947.18, Fla. Stat. (2016). Offenders who have been imprisoned since they were children, and imprisoned in a system that focuses on punishment instead of rehabilitation, *see* section 921.002(1)(b), Florida Statutes (2016), will not likely be able to prove that they have job skills that will ensure their employment.

And rehabilitation is not enough: "No person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison." § 947.18, Fla. Stat. (2014); *see also* Fla. Admin. Code R. 23-21.010(5)(b)2.j. ("[E]xceptional program achievement … would normally not be applied at the time of the initial interview but may be applicable after a substantial period of incarceration.").

The parole procedures are also inadequate. An inmate seeking parole has no right to be present at the Commission meeting. Although the hearing examiner sees

the inmate, the commissioners do not. Florida is one of only two states (the other is Alabama) that prohibits inmates from attending the Commission meeting. Fla. Admin. Code R. 23-21.004(13); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 402 (2014). "Certainly, it is important for the prisoner to speak directly to the decision maker. A decision maker needs to be persuaded by the prisoner that he or she is truly remorseful and reformed." Russell, 89 Ind. L.J. at 426. In addition, "[t]he ability to see and rebut information relied upon by a decision maker is a crucial part of ensuring a fair hearing." *Id*. at 424.

And while family and supporters of the inmate may request permission from the Chair to speak on the inmate's behalf (Fla. Admin. Code R. 23-21.004(1)), the meetings are often held in Tallahassee, far from most inmates' family and supporters. Further, supporters of the inmate who speak at the hearing must share a ten-minute allotment.[9] The Commission cannot possibly learn much about a juvenile offender's life and circumstances in 10 minutes.

There is no right to appointed counsel in parole proceedings. "Appointing counsel for indigent juvenile offenders would go a long way toward ensuring a meaningful hearing for juvenile offenders." Russell, 89 Ind. L.J. at 425. Counsel

[9] https://www.fcor.state.fl.us/mediaFactSheet.shtml ("All speakers, in support, must share the allotted 10 minute time frame for speaking. All speakers, in opposition, must share the allotted 10 minute time frame for speaking.").

can do what an inmate cannot: investigate, collect, and present "factual information so that the release decision is based on a full presentation of the relevant evidence." *Id*. at 426.

There is no right to appeal the Commission's decision. Instead, the inmate must file a writ of mandamus. *Armour v. Florida Parole Commission*, 963 So. 2d 305, 307 (Fla. 1st DCA 2007). But "[t]he law governing review of the Commission's decisions is arcane and often confusing." *Gibson v. Florida Parole Commission*, 895 So. 2d 1291 (Fla. 5th DCA 2005). At this point, few lawyers have experience litigating parole matters. And inmates incarcerated since they were juveniles are ill-equipped to draft petitions and effectively advocate for themselves. Russell, 89 Ind. L.J. at 423 (noting that offenders imprisoned since childhood often lack educational attainment necessary to write effectively).

Moreover, inmates have only one year to file a petition for writ of mandamus measured from the date the PPRD became final. §§ 95.031(1), §95.11(5)(f), Fla. Stats. Thus, many juvenile offenders will be time-barred. And if the inmate did not seek review of his or her PPRD under section 947.173, Florida Statutes, the inmate will be procedurally barred from seeking mandamus relief. *Pridgen v. Florida Parole Commission*, 380 So. 2d 557, 557 (Fla. 1st DCA 1980); *Polk v. Crockett*, 379 So. 2d 369, 369 (Fla. 1st DCA 1980).

And unlike judges who "seek with diligence and professionalism to take account of the human existence of the offender and the just demands of a wronged society," *Graham*, 560 U.S. at 77, parole decisions are made by the Florida Commission on Offender Review, an agency within the executive branch. § 20.32, Fla. Stat. (2016). The Commission is not a "sentencing court." *Holston v. Fla. Parole & Probation Commission*, 394 So. 2d 1110, 1111 (Fla. 1st DCA 1981).

Parole commissions typically "focus their release decisions more on managing dangerousness than anything else." Richard A. Bierschbach, *Proportionality and Parole*, 160 U. Pa. L. Rev. 1745, 1751 (2012). In fact, the Florida Commission on Offender Review's mission statement is "Ensuring public safety and providing victim assistance through the post prison release process."[10]

In stark contrast to parole, chapter 2014-220, Laws of Florida, complies with *Miller* for three reasons: first, it gives juvenile offenders a chance at release at a meaningful point in time; second, it affords rehabilitated juvenile offenders a realistic likelihood of being released; and, third, it employs procedures that allow a juvenile offender a meaningful opportunity to be heard, and a meaningful opportunity to demonstrate maturity and growth. *See* Russell, 89 Ind. L.J. at 383

[10] FLA. COMM'N ON OFFENDER REVIEW 2016 ANNUAL REPORT 1, available at: https://www.fcor.state.fl.us/docs/reports/FCORannualreport201516.pdf

(explaining that a meaningful opportunity for release will encompass these three components).

Under the provisions of chapter 2014-220, Laws of Florida, if a juvenile offender did not kill, intend to kill, or attempt to kill the victim, the sentencing range is any number of years in prison (or no prison sentence at all) up to life imprisonment. § 775.082(1)(b)2., Fla. Stat. (2016). If the sentence is greater than 15 years, the offender is eligible for a sentence-review hearing after serving 15 years. § 921.1402(2)(c), Fla. Stat. (2016); *see also Falcon v. State*, 162 So. 3d 954, 963 (Fla. 2015) ("If the trial court concludes that Falcon did not 'actually kill, intend to kill, or attempt to kill the victim,' the trial court has broader discretion to impose a sentence of any lesser term of years, with judicial review after fifteen years if Falcon is sentenced to more than fifteen years' imprisonment.").

Again, under the Fifth District's approach, the 14-year-old accomplice who did not "actually kill, intend to kill, or attempt to kill the victim" and who has a something-less-than-life PPRD will not be resentenced.

If the offender actually killed, intended to kill, or attempted to kill the victim, the sentencing range is 40 years in prison to life imprisonment. § 775.082(1)(b)1., Fla. Stat. (2016). Unless the offender was previously convicted of an enumerated felony, the offender is eligible for a sentence-review hearing after serving 25 years. § 921.1402(2)(a), Fla. Stat. (2016).

Special procedures apply at these hearings. In determining whether a life sentence or imprisonment for a term of years equal to life is appropriate, the sentencing court must consider ten factors "relevant to the offense and the defendant's youth and attendant circumstances." § 921.1401(2), Fla. Stat. (2016). These factors largely mirror those outlined in *Miller*.

At the sentence-review hearing, the court must consider the opinion of the victim or the victim's next of kin, but the emphasis is on maturity and rehabilitation. § 921.1402(6), Fla. Stat. (2016); Fla. R. Crim. P. 3.802.

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

If the court determines at the sentence-review hearing that the "offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years." § 921.1402(7), Fla. Stat. (2016). If the court determines that the offender has not "demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified." *Id*. The offender may appeal this order. Fla. R. App. P. 9.140(b)(1)(D).

As this Court said in *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015), chapter 2014–220, Laws of Florida, "was enacted in direct response to the

Supreme Court's decisions in *Miller* and *Graham*, and it appears to be consistent with the principles articulated in those cases—that juveniles are different as a result of their 'diminished culpability and heightened capacity for change'; that individualized consideration is required so that a juvenile's sentence is proportionate to the offense and the offender; and that most juveniles should be provided 'some meaningful opportunity' for future release from incarceration if they can demonstrate maturity and rehabilitation."

> G. *It remains the case that parole in Florida is not the normal expectation in the vast majority of parole eligible cases. The rarity with which it is granted makes it an inadequate remedy under Miller because it does not afford rehabilitated juvenile offenders a realistic likelihood of release*.

In *Atwell*, this Court noted that in "fiscal year 2013–2014, only 23 of the approximately 4,626 eligible inmates, half a percent, were granted parole." *Atwell*, 197 So. 3d at 1046 n.4. That pace has not quickened and is in fact remarkably consistent.[11]

Fiscal Year	Parole Eligible	Parole Granted	Percentage Granted
2015-16	4,545	24	0.53%
2014-15	4,561	28	0.61%
2013-14	4,626	23	0.50%
2012-13	5,107	23	0.45%

At this rate (approximately 25 per year), it will take 181 years to parole these inmates; this means, of course, that the vast majority of these inmates will die in

[11] The Florida Commission on Offender review's annual reports are available here: https://www.fcor.state.fl.us/reports.shtml

prison. And a life sentence with parole that is never granted "adds a cruel twist: the raised hope and the crushing disappointment of the illusory prospect of release, dangling like the fruit above Tantalus against the backdrop of a never-ending prison term." Jessica Henry, *Death in Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 70 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012).

Thus, it remains the case that parole in Florida is not the normal expectation in the vast majority of parole-eligible cases.[12] The rarity with which parole is granted makes it an inadequate remedy under *Miller* because it does not afford rehabilitated juvenile offenders a realistic likelihood of release. In *Graham*, 560 U.S. at 71, the Court rejected the argument that clemency was an adequate remedy for juvenile non-homicide offenders sentenced to life imprisonment because clemency is a "remote possibility." The Court cited *Solem v. Helm*, 463 U.S. 277 (1983), where the same argument was rejected. *Id.*

In *Solem*, the defendant was sentenced to life imprisonment without parole for a nonviolent offense under a recidivist statute. Solem argued that his sentence violated the Cruel and Unusual Punishments Clause. The state argued that the

[12] "What in the middle decades of the 20th century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole rarely granted." Sharon Dolovich, *Creating the Permanent Prisoner* in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

availability of clemency made the case similar to *Rummel v. Estelle*, 445 U.S. 263 (1980), in which the Court upheld a life sentence with the possibility of parole. But the Court rejected that argument because clemency was not comparable to the Texas parole system it reviewed in *Rummel*. *Solem*, 463 U.S. at 300-03.

In *Rummel*, the Court agreed that even though Rummel was parole eligible after serving twelve years "his inability to enforce any 'right' to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years." *Rummel*, 445 U.S. at 280. However, "because parole is 'an established variation on imprisonment of convicted criminals,' . . . a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id*. at 280-81 (*quoting Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

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

In Florida, parole is no longer a "regular part of the rehabilitative process." *Solem*, 463 U.S. at 300; *see Horsley*, 160 So. 3d at 395 (observing that in last 20 years "the Legislature has made its intent clear that parole is no longer a viable option."). It is not "the normal expectation in the vast majority of cases"; and it is not "an established variation on imprisonment of convicted criminals." *Solem*, 463 U.S. at 300-01. Instead, it is more like commutation: "an ad hoc exercise of executive clemency" (*id*. at 301) and a "remote possibility." *Graham*, 560 U.S. at 71. And because by statute Michel has no right to parole, *see* section 947.002(5), Florida Statutes (2016), this Court is precluded "from treating his life sentence as if it were equivalent to a sentence of [25] years." *Rummel*, 445 U.S. at 280.

H. *Juvenile offenders like Michel have a liberty interest in a realistic opportunity for release based on demonstrated maturity and rehabilitation. Florida's parole system denies him this liberty interest without due process of law.*

For adults, there is no liberty interest in parole to which due process applies unless that interest arises from statutes or regulations. *Swarthout v. Cooke*, 562 U.S. 216 (2011); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). Florida has been careful *not* to create a liberty interest in parole. § 947.002(5), Fla. Stat. (2016) ("It is the intent of the Legislature that the decision to parole an inmate is an act of grace of the state and shall not be considered a right."); Fla. Admin. Code R. 23-21.001 ("There is no right to parole or control release in the State of Florida.").

Again, however, children are different. The Eighth Amendment requires that they be sorted from adults and given a meaningful opportunity to demonstrate maturity and rehabilitation, as argued above. Accordingly, they *do* have a liberty interest to which due process applies. *See Hawkins v. New York State Dept. of Corr. & Cmty. Supervision*, 140 A.D.3d 34, 38, 30 N.Y.S.3d 397 (N.Y. App. Div. 2016); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015); *Greiman v. Hodges*, 79 F. Supp. 3d 933 (S.D. Iowa 2015).

As argued above, the Florida Commission on Offender Review does not comply with *Miller's* substantive and procedural requirements. Therefore, Michel's sentence violates not only the Cruel and Unusual Punishment Clauses, but also his right to due process pursuant under the Fourteenth Amendment and article I, section 9, of the Florida Constitution.

* * *

Under the provisions of chapter 2014-220, Laws of Florida, a juvenile offender who demonstrates maturity and rehabilitation has a realistic opportunity for release. The same cannot be said for offenders, like Michel, who are subject to parole. Evenhanded justice requires that he be afforded the same opportunity for release.

CONCLUSION

This Court should approve the decision under review and disapprove the decisions of the Fifth District Court of Appeal in *Stallings v. State*, 198 So. 3d 1081 (Fla. 5th DCA 2016), and *Williams v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016).

CERTIFICATE OF SERVICE

I certify that this answer brief was served to Assistant Attorney General Matthew Ocksrider, 1515 North Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this 13th day of March, 2017.

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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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