IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

BUDRY MICHEL,
Respondent.

Case No. SC16-2187
Fourth District Court of Appeal Case No. 4D13-1123

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, State of Florida, was the prosecution in the trial court and the Appellee before the Fourth District Court of Appeal. The petitioner will be referred to herein as "the State." The respondent, Budry Michel, was the defendant in the trial court and the Appellant before the Fourth District Court of Appeal. The respondent will be referred to as "Respondent." Because the postconviction motion was summarily denied, the clerk did not index or paginate the record. *See* Fla. R. App. P. 9.141(b)(2)(B). Therefore, the documents contained within the summary record will be cited by document name followed by a page number, if any. Because the record was made electronic, a citation to the .pdf page number of the document will also be provided by the symbol "PDF."

STATEMENT OF THE CASE AND FACTS

Respondent Budry Michel was charged with first-degree murder, armed robbery, armed kidnapping, and attempted armed robbery in the shooting death of Lynette Grames and robbery of Adnan Shafi Dada. (Ex. 3, State's Response, Indictment; PDF. 21-22.) The crimes occurred on August 31, 1991 when Respondent was sixteen-years-old. *Id.* After a jury convicted him of first-degree premeditated murder and armed robbery, he was sentenced to life in the Department of Corrections with the possibility of parole after twenty-five years with a concurrent sentence for the armed robbery that has since expired. (Ex. 1, State's Response, Judgment, Sentence; PDF. 8, 12-17.) The Fourth District Court of Appeal affirmed Respondent's judgment and sentence on direct appeal. *See Michel v. State*, 727 So. 2d 941 (Fla. 4th DCA 1998).

After the Supreme Court of the United States issued its opinion in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), Respondent filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (Motion for Post Conviction Relief; PDF. 24-25.) The motion asserted that he was "sentenced to life in prison" for a homicide and, because he was under eighteen of the time of the crime, he was entitled to relief under *Miller*. *Id.* The State countered that Respondent was procedurally barred for various reasons and argued that *Miller*

was inapplicable because Respondent had the opportunity for release on parole. (State's Response at 1-3; PDF. 3-5.) The trial court summarily denied the motions for the reasons stated in the State's response. (Order Denying Defendant's Motion for Post-conviction Relief; PDF. 2.) No mention of Respondent's presumptive prison release date ("PPRD") was made during this proceeding.

Respondent appealed this denial to the Fourth District Court of Appeal and the district court reversed, concluding that this Court's opinion in *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), mandated resentencing of a juvenile offender even where the offender may later obtain parole:

> We reverse the order denying appellant's motion for postconviction relief and remand for resentencing pursuant to *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). We also certify conflict with the Fifth District Court of Appeal. We respectfully disagree with *Stallings v. State*, 41 Fla. L. Weekly D1934 (Fla. 5th DCA Aug. 19, 2016), and *Williams v. State*, 41 Fla. [L.] Weekly D1936 (Fla. 5th DCA Aug. 19, 2016), to the extent that those decisions suggest that relief under *Atwell* is dependent on the defendant's presumptive parole release date.
>
> Our reading of the Florida Supreme Court's decision in *Atwell* is that Florida's existing parole system does not provide the individualized sentencing considerations required by *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Thus, as in *Atwell*, appellant is entitled to be resentenced pursuant to the sentencing provisions enacted in Chapter 2014-220, Laws of Florida. *Atwell*, 197 So. 3d at 1050.

Michel v. State, 204 So. 3d 101, 101 (Fla. 4th DCA 2016). This Court accepted jurisdiction on January 18, 2017.

SUMMARY OF THE ARGUMENT

In *Atwell*, this Court found that the juvenile offender's life-with-parole sentence violated the spirit of *Miller* because, in part, his presumptive parole release date ("PPRD") was such that his sentence was the functional equivalent of life. The Fifth District properly concluded that pursuant to *Atwell*, trial courts must first determine whether a juvenile offender's PPRD results in a similar sentence before resentencing pursuant to chapter 2014-220, Laws of Florida. As it is clear that *Atwell* requires a case-by-case review to determine if a sentence is in fact the functional equivalent of life, the Fourth District's conclusion that the PPRD was irrelevant to this analysis ignores this Court's reasoning that the PPRD is a necessary fact used to determine whether a juvenile offender's sentence violates the spirit of *Miller*. This Court should quash the decision of the Fourth District, approve the decisions of the Fifth District, and remand this case so that Respondent's PPRD may be determined prior to any resentencing.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT THE PRESUMPTIVE PAROLE RELEASE DATE HAS NO PLACE IN DETERMINING WHETHER A JUVENILE OFFENDER QUALIFIES FOR RESENTENCING UNDER *MILLER* AND *ATWELL*.

A. Standard of review.

The certified conflict between the Fourth and Fifth Districts presents this Court with a question of law and therefore the standard of review is de novo. *See Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007) (citing *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006)).

B. Overview of juvenile sentencing in Florida.

This case involves whether juvenile offenders who committed homicide offenses and were sentenced to life-with-parole sentences are automatically entitled to resentencing pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and this Court's recent line of cases that conclude that the remedy for a *Miller* violation is resentencing pursuant to Florida's new juvenile sentencing scheme. Because trial courts must first consider the presumptive parole release date ("PPRD") of a juvenile offender to determine whether *Miller* applies, these offenders are not automatically entitled to resentencing. Instead, a case-by-case analysis must be employed to first determine whether the sentence violates the spirit of *Miller*. To

better understand the reasons why this is the case, it is necessary to first trace the recent developments in juvenile sentencing.

In 2014, the Supreme Court of the United States instituted a categorical ban on mandatory life-without-parole sentences for juvenile offenders. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012). The Court concluded that this penalty, when applied to a juvenile, ran afoul of its prior decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), which interpreted the Eighth Amendment to require an individualized sentencing for defendants who faced "the most serious penalties." *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 75 (stating that while a state is not required to "guarantee eventual freedom" to juvenile offenders, a state must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); *Roper*, 543 U.S. at 569-71 (concluding that juveniles differ from adults because they are less mature and responsible, more "vulnerable or susceptible to negative influences and outside pressures," and their characters are not as formed as adults and that "[o]nce the diminished culpability of juveniles is recognized, it is evidence that the penological justifications for the death penalty apply to them with lesser force than to adults.").

The mandatory nature of the sentence in *Miller* prevented the trial court

from making these individualized considerations and, in order to correct this constitutional deficiency while still permitting the states to seek life sentences for juvenile offenders, the Court held that "a judge or jury [must] have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 132 S. Ct. at 2475. In reaching this decision, the Court in *Miller* framed its holding with the sentencing scheme out of which the issue in that case arose:

> The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate.

Id. at 2460 (emphasis in original).

To further ensure that it was understood that life-with-parole sentences were not affected by its decision, the Court went on to provide examples of what discretionary sentencing in adult court could look like when faced with an argument that the individualized sentencing considerations occurred during a juvenile's transfer to adult court:

> There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a

> minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court - and so cannot satisfy the Eighth Amendment.

Id. at 2474-75 (emphasis in original).

At the time *Miller* was decided, Florida was one of the twenty-nine jurisdictions that made no distinction between sentencing a juvenile offender and an adult offender for the crime of first-degree murder; the mandatory sentence for those offenses committed at that time was life-without-parole. *See id.* at 2471; § 775.082(1)(a), Fla. Stat. (2013). In order to comply with *Miller*'s mandate, the Florida Legislature amended section 775.082, Florida Statutes (2014), and enacted sections 921.1401 and 921.1402, Florida Statutes (2014). *See* Ch. 2014-220, §§ 1-3, Laws of Fla. When the Florida Legislature acted to create these provisions, Florida's Constitution made it clear that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Art. X, § 9, Fla. Const. Further, the Florida Legislature explicitly included that the newly enacted statutes only applied to offenses that were committed on or after July 1, 2014. §§ 921.1401(1), 921.1402(1) Fla. Stat. (2014).

This action created a sentencing scheme unique to juvenile offenders that now permits a trial court to sentence a juvenile offender to a life sentence for a

homicide offense as long as the trial court conducts a sentencing hearing that complies with section 921.1401. § 775.082(1)(b), Fla. Stat. (2014). That section requires a trial court to "consider factors relevant to the offense and the defendant's youth and attendant circumstances" and includes a non-exclusive list of factors. § 921.1401(2), Fla. Stat. (2014). If after reviewing those factors the trial court concludes that a life sentence is appropriate, he or she is "entitled to a review of his or her sentence after 25 years." § 921.1402(2)(a), Fla. Stat. (2014). On the other hand, if the trial court concludes a life sentence is inappropriate, the juvenile offender "shall be punished by a term of imprisonment of at least 40 years[]" with "review of his or her sentence after 25 years." §§ 775.082(1)(b), 921.1402(2)(a), Fla. Stat. (2014).

In the wake of these actions, this Court was called upon to consider whether *Miller* applied retroactively and if so, the proper remedy for those cases already final when *Miller* was decided. *See Horsley v. State*, 160 So. 3d 393 (Fla. 2015); *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). It concluded that *Miller* applied retroactively because the "rule set forth in *Miller* constitutes a 'development of fundamental significance' and therefore must be given retroactive effect." *Falcon*, 162 So. 3d at 956. This Court then went on to conclude that when a *Miller* violation is demonstrated by a juvenile offender, the proper remedy regardless of

whether relief was applied retroactively, is a resentencing pursuant to chapter 2014-220. *Horsley*, 160 So. 3d at 405-07.

These decisions left open the question of whether juvenile offenders sentenced for first-degree murder before May 25, 1994, when parole was eliminated in Florida, qualified for relief under *Miller* when sentenced to life-with-parole sentences not explicitly affected by *Miller*. Ch. 94-228, § 1, Laws of Fla. Despite *Miller*'s implicit indication that a life-with-parole sentence was an acceptable punishment for a juvenile offender and the Florida Constitution's and Florida Legislature's explicit pronouncements that the amendments to the sentencing laws did not apply retroactively and only to crimes committed after July 1, 2014, this Court ultimately held that life-with-parole sentences for juvenile offenders also violated the spirit of *Miller*. *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016).

In reaching this conclusion, this Court made two separate, but interlocking, conclusions. First, this Court determined that Florida's parole system does not provide for "the type of individualized sentencing considerations *Miller* requires." *Id.* at 1050. Second, this Court found that based upon the individualized facts of the case before it, which included a PPRD beyond the defendant's natural lifespan, the sentence "effectively resemble[d] a mandatorily imposed life sentence without

parole . . . ." *Id.* It therefore concluded that based on the facts of the case, which largely depended on the defendant's PPRD, resentencing pursuant to *Horsley* and chapter 2014-220 was required. *Id.*

C. *Atwell* and the PPRD.

In order to reach this conclusion, this Court first determined that a sentence's phrasing, in *Atwell* life-with-parole, did not automatically exempt it from *Miller*'s reach. *Id.* at 1047; *see also Landrum v. State*, 192 So. 3d 459 (Fla. 2016) (concluding that a non-mandatory life sentence also violated the spirit of *Miller*). It then examined Florida's parole system, which begins with an initial interview. §§ 947.16, 947.172, Fla. Stat. (2016). After the initial interview, and upon consideration of objective parole guidelines and any other aggravating or mitigating circumstances, a PPRD is established. §§ 947.005(8), 947.172, Fla. Stat. (2016). The Parole Commission then adopts or modifies the PPRD. §§ 947.172(2), (3), Fla. Stat. (2016).

The offender is then afforded regular parole interviews - in the case of an offender convicted of murder, these occur every seven years. § 947.174(1)(b), Fla. Stat. (2016). As the PPRD draws near, and "the inmate's institutional conduct has been satisfactory, the presumptive parole release date shall become the effective parole release date . . . ." § 947.1745, Fla. Stat. (2016). A final review process

then occurs to determine whether release is appropriate. *Id.* According to Florida's Administrative Code, "an individual who was convicted of a capital offense under section 775.082 . . . will have a presumptive release date of anywhere from 300 to 9,998 months in the future." *Atwell*, 197 So. 3d at 1048 (citing Fla. Admin. Code R. 23-21.009 (2014)).

This Court then examined the defendant's PPRD, which was determined to be 2130, and concluded that "while technically Atwell is parole-eligible, it is a virtual certainty that Atwell will spend the rest of his life in prison." *Id.* at 1041. "A presumptive parole release date set decades beyond a natural lifespan is at odds with the Supreme Court's recent pronouncement in" *Montgomery v. Louisiana*, 136 S. Ct. 718, 736-37 (2016), which reaffirmed the Court's conclusion that juveniles "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." *Atwell*, 197 So. 3d at 1042, 1048. This Court stated that the substance of Florida's system of parole "demonstrates that a juvenile who committed a capital offense *could* be subject to one of the law's harshest penalties without the sentence, or the Commission, ever considering mitigating circumstances." *Id.* at 1049 (emphasis added).

This Court ultimately held that the defendant's sentence could not stand. In

its penultimate paragraph, the fact-specific analysis was summed up as follows:

> The Supreme Court has emphasized - and this Court's own case law has followed - that the Eighth Amendment requires a trial court to "take into account the differences among defendants and crimes" before imposing a sentence that is, in effect, a sentence to a lifetime in prison. *Miller*, 132 S. Ct. at 2469 n.8; *see Horsley*, 160 So. 3d at 399; *Falcon*, 162 So. 3d at 959. Atwell's sentence effectively resembles a mandatorily imposed life without parole sentence, and he did not receive the type of individualized sentencing consideration *Miller* requires. The only way to correct Atwell's sentence, consistent with this Court's case law in *Horsley*, is to resentence Atwell in conformance with chapter 2014-220, Laws of Florida.

Id. at 1050. Three Justices of this Court dissented because "[t]he majority's decision reaches too far into the merits of a parole process not at issue in this case because of the majority's unjustified perception and suspicion of the Parole Commission's periodic review." *Atwell*, 197 So. 3d at 1051 (Polston, J., dissenting).

D. The PPRD as a necessary consideration.

After *Atwell*, as parole eligible juvenile offenders sought resentencing, an issue arose whether a trial court must first determine the PPRD prior to determining if resentencing pursuant to *Horsley* and Chapter 2014-220, Laws of Florida, was necessary. The Fifth District concluded that while the parole system in Florida does not comply with *Miller*'s mandate, an additional step was required pursuant to *Atwell* to first determine an offender's PPRD:

> Because the Florida Supreme Court has stated that Florida's parole system is incompatible with the mandate of *Miller*, the postconviction court's reliance on the Extraordinary Review is no longer sufficient to conclude that Appellant is not eligible for resentencing. Accordingly, we reverse the order summarily denying Appellant's rule 3.850 motion and remand for the postconviction court to hold an evidentiary hearing to determine Appellant's presumptive parole release date and the Commission's recommendations for his parole release. On remand, the postconviction court shall also determine whether, in light of *Atwell*, Appellant must be resentenced pursuant to chapter 2014-220, Laws of Florida, as discussed in *Horsley*.

Stallings v. State, 198 So. 3d 1081, 1082-83 (Fla. 5th DCA 2016) (internal citations omitted).

On the same day *Stallings* was released, a separate panel of the Fifth District Court of Appeal found similarly:

> In this case, Williams has not alleged what his presumptive parole release date ("PPRD") is or what his final review determined. And, the record is silent on this issue. Thus, it is unclear whether Williams' PPRD places him outside the relief afforded by *Miller* and *Atwell*. *The date could be right around the corner or long after Williams' life expectancy*. What is certain is that, like Atwell, the statutory scheme Williams was sentenced under provided only for the death penalty or life with the possibility of parole after twenty-five years. § 775.082(1), Fla. Stat. (1988). The trial court was not able to consider factors that would have allowed it to individually tailor Williams' sentence based on his juvenile status. *See Miller*, 132 S. Ct. at 2469. As a result, if Williams' PPRD is calculated similarly to Atwell's, he will likely have no hope for release prior to his death, a consequence the United States Supreme Court has determined is unconstitutional. *See id.* (citing *Graham v. Florida*, 560 U.S. 48, 74-75 (2010)).
>
> Accordingly, in light of *Atwell*, we reverse the order under review and remand for the trial court to determine whether Williams' PPRD and

> Commission Review Recommendation for parole release implicates resentencing pursuant to *Horsley* and chapter 2014-220, Laws of Florida.

Williams v. State, 198 So. 3d 1084, 1086 (Fla. 5th DCA 2016) (emphasis added); *but see Bissonette v. State*, 201 So. 3d 731 (Fla. 5th DCA 2016) (concluding that where the PPRD of a juvenile offender was 2073, resentencing pursuant to *Horsley* and chapter 2014-220, Laws of Florida, was necessary).

E. The instant case.

In this case, this Court is now called upon to determine whether, as the Fifth District concluded, a trial court should first consider the PPRD of a juvenile offender prior to determining whether resentencing is required. Applying *Atwell*, the Fourth District reversed an order denying Respondent's postconviction motion and remanded for resentencing pursuant to *Atwell* and "the sentencing provisions enacted in Chapter 2014-220, Laws of Florida." *Michel*, 204 So. 3d at 101. In doing so, it concluded that *Atwell* mandated resentencing irrespective of a juvenile offender's PPRD because Florida's parole system "does not provide the individualized sentencing considerations required by *Miller* . . . ." *Id.* The Fourth District "respectfully disagree[d]" with the Fifth District on this point of law and certified conflict with *Stallings* and *Williams*, which each held that pursuant to *Atwell*, the PPRD is the threshold factor that determines whether *Horsley* applies.

Id.

This case therefore presents the limited question of whether the trial courts of this state should first consider the PPRD of juvenile offenders who received a life-with-parole sentence prior to determining whether they qualify for resentencing pursuant to *Horsley* and chapter 2014-220 as mandated by *Atwell*. While the State disagrees with the holding in *Atwell* and maintains the arguments previously made to this Court, Petitioner acknowledges that this Court has rejected the "narrow" readings of *Miller*. This case, however, does not present a narrow reading of *Miller*, nor does it present an issue of whether a certain class of juvenile offenders qualifies for *Miller* relief. If a juvenile offender's PPRD places him or her in the same category as the defendant in *Atwell* such that his or her sentence becomes the functional equivalent of life, he or she is entitled to resentencing.

As this Court has noted "[c]ategorical rules tend to be imperfect." *Atwell*, 197 So. 3d at 1046 (quoting *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015)). Thus, a categorical rule such as the one adopted by the Fourth District in this case, which requires all juvenile offenders who were sentenced to life-with-parole to be resentenced, overlooks those cases where a juvenile's PPRD might subject him or her to a more favorable sentence. The Fifth District spoke directly on this point in *Williams*, stating that without knowledge of the PPRD, a juvenile offender's

release "date could be right around the corner or long after [his or her] life expectancy." *Williams*, 198 So. 3d at 1086.

In fact, as Justice Polston pointed out in the dissent in *Atwell*, parole actually provides a greater review mechanism given that review occurs every seven years. *Atwell*, 197 So. 3d at 1050 (Polston, J., dissenting). This reading of *Atwell* is also consistent with cases interpreting *Graham*, which have declined to adopt a precise point where a term-of-years sentences transforms into a life sentence. *See, e.g.*, *Kelsey v. State*, No. SC15-2079, 41 Fla. L. Weekly S600b (Fla. Dec. 8, 2016); *Guzman v. State*, 183 So. 3d 1025, 1026 (Fla. 2016); *Henry v. State*, 175 So. 3d 675, 679 (Fla. 2015); *Gridine v. State*, 175 So. 3d 672, 674 (Fla. 2015). If the theme from these cases is that courts must first determine whether a certain term of years constitutes a life sentence, it would be impossible to reach this threshold question without the PPRD.

It is true, however, that this Court has stated that in *Miller* and its progeny, the "[t]he basis for the violation of the Eighth Amendment and the prohibition in article I, section 17, of the Florida Constitution against "Excessive Punishments," does not emanate from the mandatory nature of the sentence imposed." *Landrum*, 192 So. 3d at 466. Instead, this Court concluded:

> The violation emanates from the United States Supreme Court's command that because children are constitutionally different 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. (internal citations and quotations omitted). But this statement cannot mean that the length of the sentence has no place in an Eighth Amendment analysis post-*Miller*.

If that were true, then this Court would have not needed to make a determination as to what point a term-of-years sentence becomes a de facto life sentence because all sentences handed down before the passage of chapter 2014-220, Laws of Florida, would violate *Graham* or *Miller*. Recent orders, which Petitioner acknowledges lack any precedential value, underscore this point. *See McCullum v. State*, No. SC15-1770, 2017 WL 24756 (Fla. Jan. 3, 2017) (Pariente, J., dissenting); *Abrakata v. State*, No. SC15-1325, 2017 WL 24657 (Fla. Jan 3, 2017) (Pariente, J., dissenting). And had that been the case, there would have been no need for this Court to qualify its holding in *Horsley* that resentencing pursuant to chapter 2014-220 "applies to all juvenile offenders whose sentences are unconstitutional under *Miller*." *Horsley*, 160 So. 3d at 395; *see also Waiters v. State*, No. 2D14-4589, 41 Fla. L. Weekly D2597 (Fla. 2d DCA Nov. 18, 2016) (Kelly, J., concurring in result). Instead, if the sole issue to consider when determining whether a *Graham* or *Miller* violation has occurred was an offender's

age at the time of the commission of the crime, this Court would have simply applied the new sentencing framework applied to all juvenile offenders. But clearly the length of the sentence plays a role in this analysis.

Given the context of the sentencing structure set out in *Miller* and this Court's decisions after *Graham* and *Miller*, this Court's opinion in *Atwell* makes it clear that the PPRD is the determinative fact in determining whether *Miller* applies. If a juvenile offender's PPRD is 140 years after a crime is committed, as was the case in *Atwell*, then it is clear that juvenile offender is required to be resentenced under the new sentencing framework in order to ensure the constitutionality of his or her sentence. But, for instance, if a juvenile offender's PPRD falls within twenty-five years, the minimum permitted by the Administrative Code, the issue is akin to the limits placed on the application of *Graham* in determining whether a certain term-of-years constitutes a life sentence. *See Atwell*, 197 So. 3d at 1048.

And this underscores the internal inconsistency of *Atwell*. In one sense, this Court concluded that parole was unconstitutional under *Miller* and yet only reached that conclusion based upon the date of the defendant's PPRD. Therefore, in determining whether parole is a potential remedy for a *Miller* violation, it must be true that the PPRD is the determinative factor. Whether a life-with-parole

sentence in Florida violates the dictates of *Miller* turns on the question of whether the PPRD sets a sentence outside of the lifetime of the juvenile offender. And this is why the Fifth District did not opine on the parole issue in the conflict cases - it was not ripe to determine whether a *Miller* violation had occurred.

A juvenile offender's institutional conduct, which provides that offender the ability to demonstrate maturity and may help to determine whether the offender is irreparably corrupted, *see Montgomery*, 136 S. Ct. at 736-37, plays a role in determination of the PPRD. § 947.005(5), Fla. Stat. (2016). And a PPRD factors in objective guidelines as well as "any other competent evidence relevant to aggravating and mitigating circumstances." § 947.172(2), Fla. Stat. (2016). In that sense, the PPRD is flexible. Once established, the PPRD may be changed "for reasons of institutional conduct, acquisition of new information . . . or for good cause in exceptional circumstances." *See, e.g.*, *Florida Parole Com'n v. Spaziano*, 48 So. 3d 714, 722 (Fla. 2010) (citing *Florida Parole & Probation Com'n v. Paige*, 462 So. 2d 817, 819 (Fla. 1985)). It is reviewed every seven years where additional information may be considered. *See* §§ 947.16(5), 947.174(2), (3), Fla. Stat. (2016).

A history of PPRD dates that have been modified, or a lengthy history of institutional misbehavior demonstrates a failure to be rehabilitated. This is

relevant to establishing whether, as *Montgomery* discusses, a juvenile offender has demonstrated maturity or is irreparably corrupt. Or, on the other hand, it may demonstrate that an offender has maintained a satisfactory record in the prison setting. Because the PPRD takes this information into consideration, it is a relevant factor in considering whether the resulting sentence violates the dictates of *Miller*.

The Fifth District correctly analyzed this Court's decision in *Atwell* in concluding that the necessary precondition of whether a sentence violated the spirit of *Miller* was whether a juvenile offender's PPRD subjected him or her to a sentence in which "he will likely have no hope for release prior to his death, a consequence the United States Supreme Court has determined is unconstitutional." *Williams*, 198 So. 3d at 1086. Thus, the proper remedy for a juvenile offender sentenced with the possibility of parole is to "remand for the postconviction court to hold an evidentiary hearing to determine [the defendant's] presumptive parole release date . . . ." *Stallings*, 198 So. 3d at 1083. The trial court may then consider whether resentencing pursuant to *Horsley* and chapter 2014-220 is necessary in light of *Atwell*.

Just as this Court has consistently applied a case-by-case application of *Graham*, it applied a case-by-case, fact specific application of *Miller* in *Atwell*. It

used the defendant's PPRD in that case to determine that the sentence violated the spirit of *Miller*. The Fifth District employed this analysis in *Williams* and *Stallings* and concluded that an evidentiary hearing was first required in the trial courts to determine whether the PPRD caused the life-with-parole sentence to become a de facto life sentence. The Fourth District failed to conduct a fact specific analysis in this case and in doing so, violated the dictates of *Atwell*.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that this Honorable Court approve the decisions of the Fifth District Court of Appeal in *Stallings v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016), and *Williams v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016), and quash the decision of the Fourth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was sent by electronic mail to Paul Petillo, Esq., Assistant Public Defender, Counsel for Petitioner, 421 Third Street, West Palm Beach, FL 33401 at appeals@pd15.state.fl.us, ppetillo@pd15.state.fl.us, and alefler@pd15.state.fl.us on February 7, 2017.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Times New Roman font, 14 point, and double spaced.

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