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

REPLY 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." Reference to Respondent's answer brief will be by "AB." while reference to the Amicus brief will be by "AAB."

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of Case and Facts contained in Petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

Petitioner again submits that *Atwell* requires the trial courts of this state to first consider a defendant's presumptive parole release date ("PPRD") before it can rule that a juvenile offender's sentence is the functional equivalent of life. Therefore, 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. Reply to Answer Brief.

Respondent argues that the State and Fifth District have "misread" this Court's opinion in *Atwell*. (AB. 3.) Much of the answer brief relates to why Florida's sentencing structure fails to comply with *Miller* or why Florida's parole system does not accomplish the sentencing goals set forth in *Miller*. But this ignores that the limited issue currently before this Court is whether the PPRD must first be considered prior to a juvenile offender being entitled to postconviction relief. Just as was the case in *Atwell*, these arguments "reach 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 v. State*, 197 So. 3d 1040, 1051 (Fla. 2016) (Polston, J., dissenting). The complaints with Florida's parole system now raised for the first time in this appeal are best raised with the Legislature rather than the courts.

And as already conceded in the initial brief, 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. The trial court considering this postconviction claim should have the PPRD available before making the determination whether resentencing is necessary. Unless a PPRD has been set prior to the offender filing his or her postconviction motion, the trial court cannot determine whether resentencing is necessary.

Respondent argues that this Court's discussion regarding the use of the PPRD was dicta, had no bearing on this Court's analysis, and should virtually be ignored. (AB. 9.) In support of this assertion, Respondent cites this Court's own language in *Atwell* which 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*." *Atwell v. State*, 197 So. 3d 1040, 1041 (Fla. 2016) (emphasis added).

This language wholly undercuts the Respondents claim that the PPRD had no bearing on this Court's decision, because the determination that Atwell's sentence was "virtually indistinguishable from a sentence of life without parole" is premised on the PPRD. *Id.* at 1041, 1047-49. If *Atwell* stood for the proposition

that parole in Florida fails as a sentencing alternative for juvenile offenders after *Miller*, then it would have simply said so. Instead, this Court conducted a thoughtful, fact-specific analysis of Atwell's sentence and determined that the PPRD, was well outside of his life expectancy. *Id.* at 1041. It was this fact that caused the sentence to become the functional equivalent of life, rather than some possible outcome. Therefore, it cannot constitute dicta.

And Respondent's assertions regarding how a juvenile offender's PPRD could conceivably cause a "less culpable or more reformed" offender to be worse off than a juvenile offender who receives a de facto life PPRD is based on nothing more than speculation. It also ignores the fact that consideration of the PPRD prior to granting relief results in more individualized treatment of juvenile offenders. Requiring a trial court to consider the PPRD in determining whether a sentence amounts to a de facto life sentence, affords every juvenile offender the opportunity to have his or her case resolved on the specific facts of their cases. *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).

As argued in the initial brief, this Court has favored this individualized approach rather than announcing the point at which a term of years becomes a de

facto life sentence. Therefore, *Hegwood v. State*, 41 Fla. L. Weekly S621 (Fla. Dec. 13, 2016), is simply in line with this Court's consistent application of a case-by-case analysis wherever it asserted that a juvenile offender received a de facto life sentence.

While other states have disagreed with a case-by-case or fact specific approach employed by this Court in *Atwell* and instead concluded that parole satisfies the dictates of *Miller*, *see State v. Williams-Bey*, 144 A.3d 467 (Conn. App. Ct. 2016), this Court took a more individualized approach to reversal. In doing so, it concluded that because Angelo Atwell's sentence was set so far outside of his lifetime, it was the functional equivalent of life. *Atwell*, 197 So. 3d at 1042, 1048. In conducting this case specific analysis, it relied heavily upon the PPRD.

And neither *Landrum v. State*, 192 So. 3d 459 (Fla. 2016), nor *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016), support Respondent's claim that the PPRD is an insignificant fact that should not be considered by the trial courts. *Landrum* involved a discretionary life without the possibility of parole sentence and therefore clearly cannot be analogized to the highly fact specific cases such as this one that require courts to determine when a de facto life sentence occurs. *Landrum*, 192 So. 3d 460. *Kelsey* was a *Graham* case that mandated resentencing pursuant to chapter 2014-220 based on a forty-five year sentence. *Kelsey*, 206 So.

3d at 7. This Court described that sentence as one that did not provide judicial review despite being "sentenced to [a] term[] that will not provide [him] a meaningful opportunity for relief in [his] respective lifetime[]." *Id.* at 10. Thus, these cases do not compel the outcome requested by Respondent.

Further, because Respondent committed a homicide offense, *see* Ex. 3, State's Response, Indictment; PDF. 21-22, this case is not governed by *Graham*, and thus, any comparison to the rejection of clemency as a remedy for a *Graham* violation is inapposite. (AB. 24-26.) And finally, given the limited record in this case, which did not include the sentencing hearing, there is nothing to suggest what was actually considered by the trial judge at sentencing. Therefore any argument as to what was not considered by the trial judge with regard to Chapter 2014-220, Laws of Florida, is not supported by the record.

B. Reply to Amicus.

Amicus asserts that the PPRD is not a "reliable metric" and is irrelevant to assessing whether there is a meaningful opportunity for release. (AAB. 5, 7.) This is so, according to Amicus, because it does "not inform the courts as to when or whether an inmate might actually be released from prison so it cannot" constitute a "meaningful opportunity for release" pursuant to *Miller* or *Graham*. (AAB. 7.) As set forth in this Court's opinion in *Atwell* and in the initial brief, the PPRD

becomes the "effective parole release date" as it draws near and as "the inmate's institutional conduct has been satisfactory[.]" § 947.1745, Fla. Stat. (2016). As Amicus recognizes, the date becomes binding upon the Parole Commission. (AAB. 9.)

While a final review process must yet occur, the date is not some nebulous date. It remains that it is still a metric that a trial court should consider before it can grant postconviction relief. And it does not automatically follow, as Amicus and Respondent suggest, that the PPRD could not include the individualized considerations required by this Court's precedents. As Justice Polston noted in his dissent in *Atwell*, the parole process involves extended review and requires that certain factors be considered when determining and appropriate PPRD:

> Although the majority takes issue with the extended presumptive parole release date, section 947.174, Florida Statutes, requires a subsequent interview to review this date within 7 years of the initial interview and once every 7 years after that. As explained in *Franklin v. State*, 1410 So. 3d 210 (Fla. 1st DCA 2014), by Judge Ray in the majority opinion, and Judge Thomas in his concurring opinion, this statutorily required review satisfies the Eighth Amendment.
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> Pursuant to section 947.174(3), Florida Statutes, the presumptive release date is reviewed periodically in light of information "including, but not limited to, current progress reports, psychological reports, and disciplinary reports." This review should include the type of individualized consideration sought by the majority.

Atwell, 197 So. 3d at 1050-51 (Polston, J., dissenting).

There is nothing contrary to *Miller*, *Graham*, or *Atwell* in requiring a juvenile offender to serve a twenty-five year sentence before obtaining a PPRD. While a PPRD is not a sentence, a twenty-five year sentence for homicide was never found to be unconstitutional, nor do Amicus argue that the provisions contained within sections 775.082(1)(b) or 921.1402(2)(a), Fla. Stat. (2014) are unconstitutional. And as set forth above, any arguments related to clemency and *Graham* violations are inapposite to this case. Once again, these arguments reach "too far into the merits of a parole process not at issue in this case" and an "unjustified perception and suspicion of the Parole Commission's periodic review." *Atwell*, 197 So. 3d at 1051 (Polston, J., dissenting).

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.

Respectfully submitted,

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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, Paolo Annino, Esq., Public Interest Law Center, FSU College of Law, 425 W Jefferson St. Tallahassee, FL 32306 at pannino@law.fsu.edu, and Roseanne Eckert, Esq. Florida Juvenile Resentencing and Review Project, FIU College of Lawa, 11200 S.W. 8th St., RDB 1010, Miami, FL 33199, at reckert@fiu.edu on March 31, 2017.

/s/Matthew Steven Ocksrider
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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.

/s/Matthew Steven Ocksrider
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