IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, FLORIDA

ANTHONY NELL WILLIAMS,

Appellant,

Case No.: 1D17-1992
L.T. No.: 1998-CFAWS-008848

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On Appeal from the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida

JAMES S. PURDY,
PUBLIC DEFENDER

By: ROCCO J. CARBONE, III
SPECIAL ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO.: 0095544
444 SEABREEZE BLVD., SUITE 210
DAYTONA BEACH, FLORIDA 32118
TELEPHONE: (386) 254-3758
EMAIL: Rocco@rjc3law.com
SECONDARY EMAIL: appellate.efile@pd7.org

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

Appellant, ANTHONY NELL WILLIAMS, the Appellant in the Fifth District previously, and the defendant in the trial court, will be referenced in this brief as "Mr. Williams" or "Appellant." Appellee, State of Florida, the Appellee in the Fifth District previously, and the prosecution authority in the trial court, will be referenced herein as "the State" or "Appellee." References to the record on appeal will be designated by "R." in brackets followed by the relevant page number. The record consists of one volume and 591 pages.

STATEMENT OF THE CASE AND FACTS

Mr. Williams, was charged and convicted of first degree felony murder for an offense he committed when he was 17 years old. [R. 76; 99] He was sentenced to a mandatory life sentence with the possibility of parole after twenty-five years.[1] [R. 110-113] He filed a motion challenging his sentence as illegal under *Miller v. Alabama,* 132 S.Ct. 2455, 2463 (2012). [R. 99-109] The trial court denied this motion. [R. 565-568] Mr. Williams appealed to this court. During the pendency of his appeal, the Florida Supreme Court's decided *Atwell v. State,* 197 So. 3d 1040 (Fla. 2016). Based on *Atwell,* this court reversed and remanded Mr. Williams' case. [R. 560-563] This court remanded for a determination of Mr. Williams' presumptive

[1] Initially, he was incorrectly sentenced to life without the possibility of parole; however, this sentence was later corrected. [R. 568]

parole release date and for a determination whether he was entitled to a resentencing hearing pursuant to *Horsley v. State*, 160 So. 3d 393, 406 (Fla. 2015). [R. 563]

Following a hearing before the trial court, it was determined that Mr. Williams' presumptive parole release date is 2050. [R. 34; 37-8] At that time, he will be 79 years old and have served 62 years for this offense. [R. 39] Mr. Williams' presumptive parole release date would have been 2024; however, the Commission on Offender Review increased his release date by 26 years based on disciplinary records that were largely accumulated when he was in his early to mid-twenties. [R. 38-39]

The Fifth District and trial court erred. *Infra* Argument at 35-48. To understand why, one must first understand the federal and state constitutional and statutory framework that governs sentencing and resentencing for juvenile offenders. *Infra* Statement, Part I, A-B at 3-20. In reviewing this framework, the difference before and after the United States Supreme Court's decisions in *Graham* and *Miller* are critically important. *Infra* Statement, Part I, A. 2. at 6. In light of this precedent, one must next understand the facts and procedural history of this case. *Infra* Statement, Part II at 20.

In understanding Mr. Williams' case, it is important to know that the Commission on Offender Review does will not consider an inmate's youth at the time of the offense, or the inmate's maturation or rehabilitation since the offense,

nor any other factors articulated in *Graham*, *Miller*, or any other Florida Supreme Court precedent regarding juvenile resentencing jurisprudence. *Infra* Statement, Part II, E. at 26. Most importantly, the Commission on Offender Review has no intention of changing that lack of consideration in the future. *Id*.

I. The constitutional and statutory framework for evaluating juvenile defendant's criminal punishments.

A. The framework prior to the U.S. Supreme Court's decisions in *Graham* and *Miller*.

1. Florida's Parole System.

In 1978, the Florida Legislature established a "structured parole review process based on objective criteria." *Fla. Parole & Prob. Comm'n v. Paige*, 462 So. 2d 817, 819 (Fla. 1985); Chapter 78-417, Laws of Florida (1978). This parole review process is overseen by Florida's Commission of Offender Review. (hereinafter the "Commission")[2]. The process begins with an interview of the inmate.

When an inmate becomes eligible, a representative from the Commission conducts an interview of potential parolees to determine when, and if, the parolee will be released. §§ 947.172(1) and 947.16, Fla. Stat. (2016). Thereafter, the Commission sets the "presumptive parole release date" within a range of months based upon the "salient factor score" for that inmate. *Fla. Parole Comm'n v.*

[2] The Commission was formerly named the Florida Parole Commission.

Spaziano, 48 So. 3d 714, 722 (Fla. 2010). This is a numerical score based on several factors that include the inmate's past and current criminal history, the statutory severity of the inmate's offense, and other enumerated factors. *Spaziano,* 48 So. 3d at 722; Fla. Admin. Code R. 23-21.009; 23-21.002(26); 23-21.010(1) and 23-21.010(5).

The presumptive parole release date "becomes binding upon the Commission in the sense that, once established, it is not to be changed except for reasons of institutional conduct, acquisition of new information not available at the time of the initial interview, or for good cause in exceptional circumstances." *Fla. Parole & Prob. Comm'n v. Paige,* 462 So. 2d at 819; §§ 947.172(1), Fla. Stat. (2016). But, the presumptive parole release date does not mean the inmate will be paroled on that date. *Id.* This is so because "[p]rior to the arrival of this date, inmates are given a final interview and review in order to establish an effective release date after which the Commission must determine 'whether or not to authorize the effective parole release date.'" *Id.* (citations omitted).

Under Florida's parole system, the presumptive parole release date is only a step towards *potential* parole, there is no guarantee of release by the established date. This is evidenced by the plain language of the statutes that state the presumptive parole release date is only "a *tentative* parole release date". § 947.005(8), Fla. Stat. (emphasis added). Thus, the "presumptive" date gives no expectation of finality or

consistency. *See Van Zandt v. Florida Parole Commission*, 104 F. 3d 325, 328 (11th Cir. 1997) ("[W]e note that the grant of parole is entirely discretionary, and the parole release date is just a presumption, not an effective release date."); *Hunter v. Florida Parole & Probation Com'n*, 674 F. 2d 847, 848 (11th Cir. 1982) ("[N]o liberty interest in parole was created by the Florida statutes.").

There is no guarantee that an effective release date (the specific date the inmate would be released) will ever be authorized because other events may prohibit parole. *Fla. Parole and Probation Com'n v. Paige*, 462 So. 2d 817, 819 (Fla. 1985). As an example, before an effective parole release date can be established, the Commission sends written notice to the sentencing judge, who has the opportunity to object to parole. § 947.1745(6), Fla. Stat. (2015); Fla. Admin. Code R. 23-21.015. If the judge objects, "such objection may constitute good cause in exceptional circumstances as described in s. 947.173, and the commission may schedule a subsequent review within 2 years, extending the presumptive parole release date beyond that time." § 947.1745(6), Fla. Stat. (2015). The Commission does not give the sentencing judge any metrics to consider and has no obligation to inform the judge of the defendant's postconviction conduct. *See Inmon v. FL Comm'n on Offender Review*, 162 So. 3d 1114 (Fla. 1st DCA 2015). This parole system for eligible offenders continues to be in place today. However, parole in Florida is not the normal expectation in the vast majority of parole-eligible cases. Parole is granted

to a fraction of those eligible – less than one percent. *See* Florida Commission on Offender Review's Annual Report 2015-16, at 8.[3]

The evaluation of a defendant's parole does not explicitly take into account whether the defendant was a child at the time of the offense, nor whether he has since rehabilitated during his time of incarceration. However, since 2005, and critically in 2009 and 2012, the legal landscape regarding juvenile jurisprudence for sentencing has markedly changed.

2. The U.S. Supreme Court decisions in Graham and Miller.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual" punishment. U.S. CONST. AMEND. VIII. This "'guarantees individuals the right not to be subjected to prohibition excessive sanctions.'" *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (quoting *Rope r v. Simmons*, 543 U.S. 551, 560 (2005)). The right "flows from the basic precept of justice that 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 proportionate punishment is the central substantive guarantee of the Eighth Amendment[.]").

[3] Of the 4,545 parole eligible inmates, 1,237 parole release determinations were made, 24 inmates were granted parole and 23 inmates were released on parole. Available at: https://www.fcor.state.fl.us/docs/reports/FCORannualreport201516.pdf, last visited August 31, 2017.

Over the last several years, the United States Supreme Court has recognized that, under the Eighth Amendment, children are different than adults regarding the type of punishments the criminal justice system may impose on them. The Court has eliminated the death penalty for juveniles, *Roper v. Simmons*, 543 U.S. 551 (2005), mandatory life sentences without the possibility of parole for non-homicide offenses, *Graham*, 560 U.S. at 48, and mandatory life sentences without the possibility of parole for juvenile offenders who committed homicide offenses. *Miller*, 32 S.Ct. at 2463. In each of these cases, the United States Supreme Court recognized that these punishments are either categorically disproportionate when imposed on juveniles, or disproportionate when the sentencing authority does not take into account the hallmarks of an offender's youth. *Miller*, 132 S.Ct. at 2470. This "proportionate punishment" analysis for juveniles arises from two "strands of precedent" that the Court had previously considered in other contexts, namely, the death penalty. *Miller*, 132 S. Ct. at 2463.

The first strand dealt with the "mismatch[ ] between the culpability of a class of offenders and the severity of a penalty." *Id.* (citing *Graham*, 560 U.S., at 60-61). Certain types of offenders are categorically not eligible for the death penalty, *i.e.*, offenders who commit non-homicide offenses and mentally handicap defendants. *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Atkins v. Virginia*, 536 U.S. 304 (2002)). This prohibition is in place because the severity of the punishment is not

proportionate for these special categories of defendants, and therefore, the imposition of this punishment on these types of offenders violates the Eighth Amendment. *Id.*

Based on the first strand of precedent, the Court found that "children are constitutionally different from adults for purposes of sentencing" since juveniles "have diminished culpability and greater prospects for reform" and therefore juveniles "are less deserving of the most severe punishments." *Miller*, 132 S. Ct. at 2463-4 (citing *Graham*, 560 U.S., at 68). This reasoning was based on "three significant gaps between juveniles and adults". *Miller*, 132 S.Ct. at 2464. These gaps are children's immaturity, vulnerability, and reformability. *Id.*

In discussing these gaps, the Court stated that 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). 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). And based on their age, children have the potential for reform because a child's "character is not as well formed as an adult's; his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity." *Id.* (citation and alterations omitted).

The Court's reasoning rested not solely on the "common sense" of what "any parent knows" but also on "science and social science as well." *Id.* at 2464 (citing *Roper*, 542 U.S. at 561). Studies showed that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Id.* at 2464 (citing *Roper*, 543 U.S. at 570). Therefore, children have "distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders" because the justifications of punishment under theories of retribution, deterrence, incapacitation or rehabilitation are not supported based on the hallmark characteristics of youth. *Id.* at 2465 (citations omitted).

The reasoning discussed above was the United States Supreme Court's basis in both *Graham* and *Miller* for the ban on these types of punishments without a consideration of an offender's youth. *Miller*, 132 S. Ct. at 2455 ("But none of what it said about children--about their distinctive (and transitory) mental traits and environmental vulnerabilities--is crime-specific. … So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."). Thus, unequivocally, the Court in *Miller*, in relying on *Graham*, reasoned that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 2455.

Critically, in *Miller*, it was not just the fact a life sentence was imposed that was unconstitutional, it was the mandatory nature of the sentence without consideration of the juvenile's youth at the time of sentencing that was unconstitutional. The Court recognized that the "mandatory penalty schemes at issue [ ] prevents the sentence from taking account of these central considerations. By removing youth from the balance … these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offense." *Id.* at 2455. This mandatory imposition "contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2455. In holding these mandatory sentences are per se unconstitutional, *Graham* and *Miller* also made clear these mandatory schemes are defective because life without parole for juveniles is similar to the imposition of the death penalty, and is just as cruel because children will be incarcerated for longer portions of time than adults who commit the same offenses. *Id.* 2466.

All of the above reasoning culminated with a recognition of the second strand of precedent, namely, that because treatment of juvenile life sentences is "analogous to capital punishment," *Graham*, 560 U.S., at 189 (Roberts, C.J., concurring in judgment), there is a demand for "individualized sentencing." *Miller*, at 2566. In the

second strand of cases, the United States Supreme Court relied on its decisions that have previously prohibited "mandatory imposition of capital punishment" and required that the sentencing authority "consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-4 (citing *Woodson v. North Carolina*, 428 U.S., 96 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978)). In this strand, there is a recognition that there are "mitigating qualities of youth" and that "youth is more than a chronological fact" because it is "a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness." *Id.* (citations omitted). Therefore, the flaw of mandatory sentences for juveniles is that these "mandatory penalties, by their nature, preclude a sentencing authority from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller*, 132 S. Ct. at 2467.

If a sentencing authority does not acknowledge a juvenile's youth prior to imposing a sentence there is "too great a risk of disproportionate punishment," *id.* at 2469, because "a sentence misses too much if he treats every child as an adult." *Id.* at 2468. Thus, sentencing authorities 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.

Based on the above reasoning, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. It reasoned that when youth "and all that accompanies it" is irrelevant "to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* In response to the United States Supreme Court's decisions in *Graham* and *Miller*, the Florida Legislature responded with the enactment of chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florida Statutes.

B. The statutory framework after the U.S. Supreme Court's decisions in *Graham* and *Miller*.

1. *The Florida Legislature's enactment of Chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Fla. Stat. (2014).*

Under the provisions of chapter 2014-220, Laws of Florida, the Legislature enacted a sentencing scheme specifically to address juvenile sentences. *See Horsley*, 160 So. 3d at 406 (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."). Under this chapter, there are certain characteristics and considerations that a sentencing judge must only consider when the defendant is a juvenile offender sentenced as an adult.

The sentencing range and review of a sentence is different for juvenile offenders charged as adults under the new sentencing scheme. If a juvenile offender did not kill, intend to kill, or attempt to kill a 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). 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). Importantly, other special procedures apply at these hearings besides just the sentencing ranges.

Specific factors regarding a juvenile offender's youth must also be considered by the sentencing judge prior to imposing a sentence. 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*. *See, e.g.*, § 921.1401(2)(a)-(j) ("defendant's age, maturity, intellectual capacity"; "effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences"; "characteristics attributable to the defendant's youth on the defendant's judgment."). Another important distinction for resentencing hearings or sentencing-review hearings is the consideration of the defendant's development since the perpetration of the crime.

At the sentence-review hearings, while the court must consider the opinion of the victim, or the victim's next of kin, the emphasis is on an offender's maturity and rehabilitation. *See* § 921.1402(6)(a), Fla. Stat. (2016) ("When determining if it is appropriate to modify the juvenile offender's sentence, the court shall consider any factor it deems appropriate, including … Whether the juvenile offender demonstrates maturity and rehabilitation."). 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.*, and the offender may appeal the order. Fla. R. App. P. 9.140(b)(1)(D).

Since the Florida Legislature's enactment of this legislation, the Florida Supreme Court has issued several opinions to clarify the application of the United States Supreme Court's precedent on juvenile sentences in conformance with the Legislature's pronouncements.

2. Florida Supreme Court jurisprudence on juvenile sentencing following Graham and Miller.

Like the United States Constitution, the Florida Constitution similarly prohibits cruel and unusual punishment. Art. I, § 17, Fla. Const. When interpreting this prohibition, Florida courts must apply its precedent in conformity with decisions from the United States Supreme Court regarding the Eighth Amendment. *See* Art. I, § 17, Fla. Const. ("cruel and unusual punishment … [is] forbidden … The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."). In a series of cases, the Florida Supreme Court has worked to implement the application of *Graham* and *Miller's* mandates within Florida's sentencing laws.

The Florida Supreme Court provided for the retroactive application of *Miller* to juvenile offenders whose convictions were final at the time *Miller* was decided. *Falcon v. State*, 162 So. 3d 954 (Fla. 2015). When reviewing these pre and post-*Miller* sentences, the Florida Supreme Court has held that the appropriate remedy for an unconstitutional sentence is remand for a resentencing hearing in light of the juvenile sentencing legislation enacted by the Florida Legislature in 2014. *Horsely*, 160 So. 3d at 393.

The Court held a sentence is unconstitutional where the "offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Henry v. State*, 175 So. 3d 675, 679 (Fla. 2015) (quoting *Graham*, 560 U.S. at 75); *Gridine v. State*, 175 So. 3d 672 (Fla. 2015). This is so because "the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult." *Henry*, 175 So. 3d at 680. A juvenile offender's sentence may be unconstitutional even when the sentence is parole-eligible, *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016), or discretion was used to impose a life-without-parole sentence. *Landrum v. State*,192 So. 3d 459 (Fla. 2016). Resentencing of an offender is then appropriate even in these cases because the "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." *Kelsey v. State*, 206 So. 3d 5, 6-9 (Fla. 2016); *see also Johnson v. State*, 215 So. 3d 1237, 1240 (Fla. 2017) (*Graham* "does indeed apply to term-of-years sentences" and that such sentences need not be "de facto life" sentences to receive a resentencing). The Court's decision in *Atwell*, which discuss the sentences in light of Florida's parole system, is of particular importance to the case at bar.

In *Atwell*, the defendant was sixteen when he committed armed robbery and first-degree murder. *Atwell*, 197 So. 3d at 1041. Under the sentencing scheme at the time, he was sentenced to a mandatory term of life imprisonment with the possibility of parole after twenty-five years. *Id.* Under the existing parole statutory scheme, the Commission conducted a parole hearing for Mr. Atwell to determine his presumptive parole release date, which was set for the year 2130. *Id.* This was one hundred and forty years after the crime and "far exceeding" Mr. Atwell's life expectancy. *Id.* The issue the Court considered was whether Mr. Atwell's sentence was constitutional in light of *Miller*. *Id.* The Florida Supreme Court held it was not. *Id.* Specifically, the Court held 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.* The Court based its holding on three factors. *Id.*

First, this holding was consistent with the Florida Supreme Court's precedent interpreting the United States Supreme Court's juvenile sentencing jurisprudence "rather than an overly narrow interpretation." *Id.* at 1041. Second, the holding was consistent with *Miller* that a sentencing court must "take into account 'how children are different, and how those difference counsel against irrevocably sentencing them to a lifetime in prison". *Id.* The Court importantly noted that "Florida's parole process entirely fails to recognize" these factors. *Id.* (citing *Miller*, 132 S. Ct. at 2469). Third, its holding was "consistent with the legislative intent in Florida after the issuance of the *Graham* and *Miller* decisions." *Atwell*, 197 So. 3d at 1041-1042 (citations omitted). The Florida Legislature could have looked to the parole system as a basis to comply with the "principles established by the Supreme Court, [but] the Florida Legislature chose instead to enact a wholly new and distinct sentencing framework for juvenile offenders[.]" *Id.* at 1042.

The Court analyzed the statute that Mr. Atwell was sentenced under (the same statute Mr. Williams was sentenced under) and recognized that juveniles sentenced under the mandatory pre-1994 sentence for first-degree murder treated all juveniles like adults which "precluded any individualized sentencing considerations." *Atwell*, 197 So. 3d at 1042 ("Although the pre-1994 first degree murder statute under which

Atwell was sentenced provided for parole eligibility, *it remained a mandatory sentenced that treated juveniles exactly like adults and precluded any individualized sentencing considerations*.") (emphasis added). "Even 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 sentence, or the Commission, ever considering mitigating circumstances." *Id*. at 1049. Thus, after the enactment of the new sentencing scheme the Florida Supreme Court held that parole is "patently inconsistent with the legislative intent' as to how to comply with *Graham* and *Miller*." *Atwell*, 197 So. 3d at 1049.

Following *Atwell*, the Court remanded numerous similar cases to the lower courts. In each case, each was remanded with instructions to the circuit courts for resentencing hearings in conformance with the juvenile sentencing laws in sections 775.082, 921.1401, and 921.1402 Florida Statues. *See e.g. Lecroy v. State*, No. SC14-863 (Fla. Dec. 13, 2016); *Bonifay v. State*, No. SC13-2523 (Fla. Dec. 13, 2016); *Woods v. State*, No. SC14-544 (Fla. Dec. 13, 2016); *Hegwood v. State*, No. SC14-491 (Fla. Dec. 13, 2016). None of these remand orders mentioned the defendant's prisoner parole release date, nor relied on it in any way.

Following the United States Supreme Court's decision in *Miller*, and prior to the Florida Supreme Court's decision in *Atwell*, Mr. Williams filed his

postconviction motion challenging the legality of his sentence that gives rise to this case.

II. Facts and proceedings in this case.

A. Mr. Williams' age and offense.

Mr. Williams was born on January 30, 1971. [R. 76] In 1988, Mr. Williams was charged by indictment with the crime of first degree murder in violation of section 782.04, Florida Statutes. [R. 99] At the time of the crime, he was 17 years old. [R. 76] In 1990, following a jury trial, Mr. Williams was found guilty of first degree felony murder. [R. 110-113] He was sentenced to life in prison with jail credit of 479 days. [R. 99-109] At the time, the statutory scheme required a life sentence for capital felonies with a twenty-five year minimum mandatory term, with parole eligibility after serving the mandatory portion of the sentence. § 775.042(1), Fla. Stat. (1988). Following his conviction, Mr. Williams filed a direct appeal that the Fifth District *per curiam* affirmed. *Williams v. State*, 578 So. 2d 1116 (Fla. 5th DCA 1991).

B. Mr. Williams' Florida Rule of Criminal Procedure 3.850(b)(2) Motion.

In 2015, Mr. Williams filed a *pro se* motion seeking the correction of his illegal sentence pursuant to Florida Rule of Criminal Procedure 3.850(b)(2). [R. 99-109] In this motion, Mr. Williams alleged that his life sentence was in violation of

the Eighth Amendment to the United States Constitution as interpreted by the United States Supreme Court in its decision *Miller*. [R. 100-101] He further argued that *Miller* required retroactive application to his case. [R. 102-105] Mr. Williams argued he was entitled to a resentencing hearing. [R.107] Following an order requiring the State to respond, [R. 114], the State's Response, [R. 115-123], and Mr. Williams' Reply, [R. 124-127], the trial court denied Mr. Williams motion. [R. 565-568] The trial court did amend Mr. Williams sentence to be consistent with the pre-1994 statute to include the twenty-five-year mandatory minimum. [R. 568] Mr. Williams then timely appealed the trial court's denial of his motion before this Court.

C. The trial court's initial denial of his motion and appeal to the Fifth District Court of Appeal.

Prior to the Fifth District issuing an order on Mr. Williams' case, the Florida Supreme Court decided *Atwell*, 197 So. 3d at 1040. As discussed above, in reaching its conclusion, the Court discussed Mr. Atwell's sentence revealed that, although he was parole eligible, he would likely spend the rest of his life in prison. *Id.; supra* Statement, Part I, B.2. at 17-19. Importantly for the Fifth District, in part of the *Atwell* decision, the Court referenced Mr. Atwell's presumptive parole release date, as assigned to him by the Commission as being beyond his life time. *Id.* at 5248.

In response to *Atwell*, the Fifth District reversed and remanded the denial of Mr. Williams' motion. *Williams v. State*, 198 So. 3d 1084 (Fla. 5th DCA 2016).

However, rather than order a resentencing hearing pursuant to *Horsely*, it directed the trial court to hold an evidentiary hearing to determine Mr. Williams' presumptive parole release date. *Id.* Further, it remanded for a determination of whether Mr. Williams' presumptive parole release date and Commission recommendation for parole implicates resentencing pursuant to *Horsley*. *Id.*

Prior to the hearing on remand, the Fourth District reviewed this same issue regarding the need to an offender's presumptive parole release date prior to ordering a resentencing hearing. Unlike the Fifth District's decision, the Fourth District came to the opposite conclusion.

D. Florida Supreme Court review regarding the requirements to establish presumptive parole release dates prior to authorizing a resentencing hearing under chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Fla. Stat. (2014).

In *Michel v. State*, the Fourth District reversed the trial court's order denying the appellant's motion for postconviction relief based on *Miller*. 204 So. 3d 101 (Fla. 4th DCA 2016). The Fourth District remanded for resentencing pursuant to *Atwell*. *Id.* The court held that its "reading of the Florida Supreme Court's decision in *Atwell* is that Florida's existing parole system does not provide the individualized sentencing consideration required by *Miller*[.]" *Id.* As such, the appellant was "entitled to be resentenced pursuant to the sentencing provisions enacted in Chapter 2014-220, Laws of Florida." *Id.* (citing *Atwell*, 197 So. 3d at 1050).

In coming to this decision, the Fourth District recognized the Fifth District's decision on this issue and certified conflict with two of its decisions. *Id.* One of those decisions is this case. *Id.* The court stated that it "respectfully disagree[d] with *Stallings v. State*, 198 So. 3d 1081, 41 Fla. L. Weekly D1934 (Fla. 5th DCA Aug. 19, 2016), and *Williams v. State*, 198 So. 3d 1084, 41 Fla. Weekly D1936 (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." *Id.* After the Fourth District issued its opinion, the State invoked the Florida Supreme Court's discretionary jurisdiction to review the certified conflict. *State v. Michel*, SC16-2187. The Court accepted review. *Id.* Currently, the briefing has been perfected as of March 31, 2017, but the Court has yet to issue an opinion.

E. The Fifth District's remand to the trial court for a determination of Mr. Williams' presumptive parole release date.

1. Testimony from Ms. Tully of the Commission on Offender Review about the Commission and the parole process in Florida.

Following the Fifth District's decision to remand, and after the Florida Supreme Court accepted review of *Michel*, a hearing was held before the trial court to determine Mr. Williams' presumptive parole release date. [R. 13-98] At the hearing, the State called one witness: Ms. Laura Tully (hereinafter "Ms. Tully). [R. 26-77] Ms. Tully testified on behalf of the Commission in her capacity as the

Director of Field Services. [R. 28] At the time of the hearing, she had been employed by the Commission for nearly 17 years. [R. 28] Prior to her current position, she was an analyst for two separate commissioners. [R. 30]

Her current responsibilities include supervision of offices, the directors of those officers, and training field staff. [R. 29-30] The field staff that she trains are the individuals who go out to the jails and prisons to perform interviews of inmates and make recommendations on the inmates' anticipated presumptive parole release date, perform subsequent interviews for a determination to change the presumptive parole release date, and offer recommendations on whether parole is appropriate. [R. 30] In her prior role as an analyst, she reviewed cases and made recommendations for setting the initial presumptive parole release date and whether to reduce or extend that date, whether to recommend parole and whether to send particular inmates to certain programs. [R. 30-31]

Based on her description, the Commission consists of three commissioners responsible for reviewing parole eligible cases to determine whether to parole an inmate. [R. 31] At the time of the hearing, there were approximately 4,500 inmates parole eligible. [R. 31-32] Ms. Tully explained the process regarding parole evaluation once an inmate is eligible for review. [R. 32] She noted the policy had recently changed. [R. 32]

Previously, as occurred in this case, once an inmate was within 18 months of the expiration of the mandatory portion of the sentence, the inmate was scheduled for an interview with a field staffer from the Commission. [R. 32] After the interview, the field staffer makes a recommendation for the presumptive parole release date that includes the circumstances of the offense, what the inmate has done during his or her incarceration which includes disciplinary reports, program participation, and comments that the field staffer may have for the Commission. [R. 32]. This recommendation is then sent to the Commission where it is voted on by the Commission. [R. 32] Following receipt of each report, each commissioner's office separately reviews the recommendation and makes a determination on the initial presumptive parole release date. [R. 32-33]. This review is based on the "salient factors score and matrix time range and any aggravating and mitigating circumstances." [R. 33]

Later, the commissioners meet for a public hearing. [R. 33] The inmate is not allowed to be present at this hearing. [R. 33] The inmate can provide any documentation that he or she would like to provide to the commission during the interview process, or he or she can submit it separately to the commission. [R. 33] Although the inmate is not allowed to be present, the inmate's supporters and opposition may be present. [R. 33] The Commission sets the presumptive parole release date and then sets the next interview date. [R. 34]

2. The Commission does not intend to alter its policies or procedures to take into consideration Graham, Miller, or Atwell.

During her testimony, Mr. Williams' counsel showed Ms. Tully an email from another representative of the Commission, Ms. Rana Wallace, counsel for the Commission. [R. 61] In this email, it stated that as of January 31, 2017, the Commission did not plan to incorporate the *Miller*, *Graham*, or *Atwell* factors into the parole process because the Commission is going to continue to do things in the way their policies and procedures have been in the past. [R. 61-62] Specifically, the email stated:

> [T]he Commissions reads *Atwell* as saying that the Florida Supreme court intends for the trial courts to determine which inmates require resentencing under *Atwell*, and then to resentence them according to the dictates in the opinion. The resentencing contemplated for Atwell and, presumably for others similarly situated, is remedied by resentencing in the trial courts, not by the Commission. The Commission is then not required to institute a remedy to "reflect the status of the law."

[R. 551]

In essence, the email stated the Commission is going to leave it to the Courts to do the *Miller* and *Graham* work and the Commission is going to continue to do what it does. [R. 61-62; 551-553] Ms. Tully agreed that is what the email conveyed. *Id.* She also stated that during her time as director, no effort has been made to explore or change the Commission's policies or procedures to adopt a process to take into account considerations of *Miller*, *Graham*, or *Atwell*. [R. 62] Simply put, there has

been no effort to make changes to the Commission's official position on juvenile offenders previously sentenced as adults because, as Ms. Tully stated, "[p]arole is a grace and it's not a right[.]" [R. 77]

3. How the Commission decided to increase Mr. Williams' presumptive parole release date by 26 years based on disciplinary reports.

Mr. Williams was interviewed and the Commission determined his presumptive parole release date is July 7, 2050. [R. 34; 37-38] In 2050, Mr. Williams will be 79 years old. [R. 39] This presumptive parole release date was based on the circumstances of his conviction, his prior criminal history, and aggravators including the use of a firearm, the fact the victim was a vulnerable age, his history of alcohol and substance abuse, and, critically, his disciplinary reports. [R. 38]

Based solely on Mr. Williams conduct in prison, his presumptive parole release date was increased by over 26 years (320 months). [R. 38] This was based on 39 disciplinary reports. [R. 38] Ms. Tully testified that, but for these disciplinary reports, his presumptive parole release date would have been 2024, when he was fifty-three years old. [R. 38-39] If he is released in 2050, he will have served 62 years for this offense, and had he not had these 26 years added, he would have served 36 years by 2024. [R. 39]

In outlining Mr. Williams' presumptive parole release date, Ms. Tully explained a May 15, 2012 Florida Parole Commission form discussing Mr.

Williams' presumptive parole release date. [R. 40-42] In describing the assignment of numerical months, as an example, Ms. Tully testified that when any type of weapon is used during an offense the "standard amount of months" added to a presumptive parole release date is 60, and if multiple weapons were used, the Commission adds 60 months per weapon. [R. 42] However, when describing the months added for disciplinary reports, she stated there is no standardization. [R. 42] As she stated, "The months they got for the disciplinary reports, that's just a recommendation, you know, that they made." [R. 42] This is so, because coming to this number is "kind of subjective." [R. 46]

Based on her experience as an analyst, she stated that when the Commission makes a recommendation based on the disciplinary reports it looks at the nature of the disciplinary reports and the frequency of the reports. [R. 42] In this case, after a review of the field officer's recommendation of 318 months, the Commission increased this number to 320 months. [R. 46] When asked how the Commission came up with 320 months she stated that the Commission "probably" got there based on the type of disciplinary reports and the lack of mitigating programs completed by Mr. Williams during that time. [R. 47-48]

Ms. Tully briefly summarized Mr. Williams disciplinary reports. [R. 53] She stated the first was in 1990 and the last was in 2009. [R. 53-54] Since 1998, Mr. Williams had received above satisfactory evaluations for his work while

incarcerated. [R. 57] Importantly, Ms. Tully stated that most of the disciplinary report were from the beginning of his incarceration in 1990. [R. 59]

4. The parties' arguments at the conclusion of the hearing.

Following Ms. Tully's testimony, the parties made their arguments to the trial court. [R. 70-99] During argument, the parties agreed that, if this case arose in the Fourth District Court, based on the decision in *Michel*, Mr. Williams would be entitled to receive a resentencing hearing pursuant to *Horsely* regardless of his presumptive parole release date. [R. 71] During this discussion, however, the State argued that, even if *Michel* is decided favorably and resolved in the manner the Fourth District held requiring a per se resentencing hearing, Mr. Williams' case is distinguishable and, implicitly, argued would not be controlled by the Florida Supreme Court's decision. [R. 91-92] This is so because, according to the State, Mr. Williams' sentence does not implicate *Miller*. [R. 87]

The State argued that this case was not a de facto life sentence because Mr. Williams would have a presumptive parole release date within his life time except for his conduct in prison as reflected by the disciplinary reports. [R. 71] For support, the State relied on the Third District's decision in *Lewis v. State*, 118 So. 3d 291 (Fla. 3d DCA 2013) to distinguish *Atwell*. [R. 71; 82] Relying on *Lewis*, the State argued that if an inmate's behavior in prison caused an increase in that inmate's

presumptive parole release date the inmate is not afforded the protections under *Miller* because the inmate's own conduct increased the eligibility for parole. [R. 82-84] ("[I]t's my position that you have to look at why, you know, what went into that presumptive parole release date. And when you take a good look at it, you see, as the evidence showed, over 26 years of it is from the Defendant's own behavior while incarcerated.")

In discussing *Lewis* in relation to *Atwell*, the State argued that Mr. Williams' case was distinguishable from *Atwell* because of the "140.5 years only seven of them were unrelated to this charge, so that's what's important." [R. 86] The State argued that "it's my position that someone in Mr. Williams' position, his situation needs to be looked at differently as the Court found in *Lewis* … because it's the Defendant's behavior that put him in that PPRD." [R. 86] However, during its argument, the State even acknowledged that "when I went through [the disciplinary reports] certainly there were more in the beginning than toward the end[.]" [R. 85]

Mr. Williams' counsel made two arguments: First, not allowing Mr. Williams to receive a resentencing hearing violates the Equal Protection Clause. [R. 75-76] Second, Mr. Williams will not receive a meaningful opportunity for review from the Commission as called for by the United States Supreme Court and Florida Supreme Court in *Horsely* because the Commission is not going to change their policies in light of *Graham* or *Milller*, as testified to by Ms. Tully, and as shown in Ms.

Wallace's email. [R. 93-94; 551] Both the State and Mr. Williams agreed the Commission did not intend to change its policies and procedures to take into consideration *Graham* or *Miller* factors. [R. 94]

5. *The trial court's order denying Mr. Williams a resentencing hearing based on his presumptive parole release date.*

After the hearing, the trial court issued an order denying Mr. Williams relief. [R. 554-584] Specifically, in denying Mr. Williams a resentencing hearing, the trial court found the following:

> In the instant case, unlike Atwell, Defendant's static factors only accounted for 420 months (35 years) of Defendant's total PPRD of 740 months (61.67 years). The aggravating factor of Defendant's institutional conduct accounted for the additional 320 months (26.67 years). With only the static factors scored by the Commission, Defendant would have been eligible for parole in 2024 when he would be 53 years old. It was Defendant's own conduct in prison that resulted in a total of 320 months added to his PPRD, and his PPRD was then set in 2050. *See Lewis v. State*, 118 So. 3d 291, 293-94 (Fla. 3d DCA 2013) (holding that the presumptive release date determined by the Commission does not guarantee eventual release for a defendant but gives a defendant a "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation."). Thus, the Court finds that Defendant's PPRD does not implicate a resentencing under *Horsely* because Defendant's actual sentenced, including his PPRD based solely on static factors, is constitutional. The Court also notes that a grant of a resentencing for Defendant would be a disservice to other juvenile defendants who did not incur a poor and disruptive institutional conduct, but did not receive a resentencing under *Horsely*.

[R. 556-557]

Following the trial court's order denying relief, Mr. Williams filed his timely notice of appeal. [R. 586] This brief follows.

SUMMARY OF ARGUMENT

This case requires this Court both to: (i) analyze the constitutional and statutory framework interpreting Eighth Amendment jurisprudence for juvenile sentences; and (ii) evaluate Mr. Williams' arguments that requiring him to establish his presumptive parole release date prior to receiving a resentencing hearing in accordance with that jurisprudence violates his constitutional rights. Accordingly, Mr. Williams' arguments can be summarized as follows:

1. Requiring Mr. Williams, and inmates similarly situated to determine their presumptive prisoner release date prior to a resentencing hearing violates the Equal Protection Clause of the United States and Florida Constitutions. Juvenile offenders who commit the same offenses as these inmates today would be sentenced under chapter 2014-220, Laws of Florida, without the need to establish a presumptive parole release date. This infringement violates Mr. Williams fundamental right to be sentenced with consideration of his youth at the time of his offense. A strict scrutiny analysis applies, and the State cannot and has not, met its burden to establish requiring a presumptive parole release date for these inmates furthers a compelling state interest in the least intrusive manner. Therefore, requiring

Mr. Williams to establish his presumptive parole release date violates the Equal Protection Clause.

2. Florida's parole system does not provide a meaningful opportunity to review his sentence. Based on *Miller*, and *Atwell*, the courts erred in requiring Mr. Williams to establish his presumptive parole release date, and thereafter, preventing him from a resentencing hearing pursuant to chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 (2014), because Florida's Parole system does not provide a meaningful opportunity for review of his sentence. This is so for six reasons:

(i) the Commission's unwillingness to consider *Graham*, *Miller*, or *Atwell* factors;

(ii) 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;

(iii) the Commission's process for increasing a defendant's presumptive parole release date based on disciplinary reports is subjective, arbitrary, and does not provide a meaningful opportunity for review;

(iv) the trial court did not consider any *Miller* factors when prohibiting a resentencing hearing for Mr. Williams;

(v) the fact the majority of Mr. Williams disciplinary reports occurred when he was younger supports the basis for the United States Supreme Court's decisions in *Roper*, *Graham*, and *Miller* and the need for a resentencing hearing; and

(iv) the trial court's reliance on the Third District's decision in *Lewis v. State*, 118 So. 3d 291 (Fla. 3d DCA 2013), is misplaced and

> cannot be a basis for denying Mr. Williams a resentencing hearing.

The Fifth District and the trial court erred in requiring Mr. Williams' to establish his presumptive parole release date. On remand, the trial court should conduct a resentencing hearing based chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florida Statutes.

ARGUMENT

Issues presented.

I. **Whether requiring Mr. Williams to establish his presumptive parole release date before receiving a resentencing hearing pursuant to chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 (2014) violates the Equal Protection Clause of the United States and Florida Constitutions?**

II. **Whether the courts erred in requiring Mr. Williams' to establish his presumptive parole release date prior to resentencing, and thereafter, based on his presumptive parole release date erred in preventing Mr. Williams from receiving a resentencing hearing pursuant to chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Fla. Stat. (2014)?**

Preliminary Matters.

i. Jurisdiction. This is an appeal from Appellant's Florida Rule of Criminal Procedure 3.850(b)(2) motion. This court has jurisdiction to review this appeal pursuant to Rule 9.141 Fla. R. App. P.

ii. Standard of Review. This issue presents a pure question of law subject to *de novo* review. *State v. Markus*, 211 So. 3d 894 (Fla. 2017).

Merits.

I. The Equal Protection Clause is violated when juvenile offenders who received a mandatory life sentence (with or without the possibility of parole) prior to the enactment of chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florid Statutes (2014) must establish a presumptive parole release date prior to receiving a resentencing hearing pursuant to *Horsely*.

Under the Equal Protection Clause of the United States and Florida Constitutions, all natural persons must be treated equally before the law. U.S. CONST. AMEND., XIV ("No State shall … deny to any person within its jurisdiction the equal protection of the laws."); Art. I, § 2, Fla. Const. ("All natural persons … are equal before the law and have inalienable rights."). The Florida Supreme Court has stated, "[t]he constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Caldwell v. Mann*, 26 So. 2d 788, 790 (Fla. 1946). When a statute operates to the disadvantage of a suspect class or impairs the exercise of a fundamental right, then the law must pass strict scrutiny. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Mitchell v. Moore*,786 So. 2d 521, 527 (Fla. 2001).

The Court has defined a fundamental right as one which has its source in and is explicitly guaranteed by the federal or Florida Constitution. *Reno v. Flores*, 507 U.S. at 302. The United States Supreme Court's decision in *Miller* created a new

fundamental constitutional right that prohibited a sentencing court from imposing a mandatory life sentence on a juvenile offender sentenced as an adult without considering the characteristics of a juvenile's youth at the time of the offense. *Miller*, 132 S.Ct. at 2455. Today, if a juvenile offender commits an offense and is sentenced as an adult, a sentencing judge must consider certain sentencing factors regarding youth and provide a juvenile offender judicial review of that sentence within a certain number of years to adhere to the requirements of chapter 2014-220, Laws of Florida, *See, e.g.*, §§ 941.1401, 941.1402, and 775.082 Fla. Stat. (2014). Under the Fifth District's interpretation, that is not the case for those convicted and sentenced prior to the enactment of this chapter. This violates the Equal Protection Clause because defendant are being treated unequally under the law when some members of the same group must establish a presumptive parole release date prior to receiving a resentencing, and other offenders similarly situated do not.

Because a fundamental right is implicated, strict scrutiny applies.[4] *See Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985). The State carried the burden to demonstrate that requiring defendants to establish a presumptive parole release date prior to receiving a resentencing hearing serves a

[4] Juveniles are not a suspect classification because the United States Supreme Court has ruled that age is not a suspect classification under the Equal Protection Clause. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

compelling state interest and accomplishes its goal through the the least intrusive means. *Id.* at 545 (explaining that where law intrudes on fundamental right to privacy guaranteed in Florida's Constitution, the State must demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means). Here, Mr. Williams counsel made his argument that this violated the Equal Protection Clause, [R. 75-76], however, the State has made no such showing that this serves a compelling state interest nor accomplishes its goal through the use of the lease intrusive means.

Therefore, the requirement that a defendant must establish a presumptive parole release date prior to receiving a resentencing under chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florida Statutes violates the Equal Protection Clause of the United States and Florida Constitutions and cannot stand.

II. Based on *Miller*, and *Atwell*, the courts erred in requiring Mr. Williams to establish his presumptive parole release date, and thereafter, preventing him from a resentencing hearing pursuant to chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florida Statutes, because Florida's parole system does not provide a meaningful opportunity for review of his sentence.

A. The Commission's unwillingness to consider *Graham*, *Miller*, or *Atwell* factors requires Mr. Williams receive a sentencing hearing regardless of his presumptive parole release date.

Ms. Tully's testimony and Mr. Wallace's email was unequivocal in her assertion that the Commission does not intend to take in to consideration the courts decisions in *Graham*, *Miller*, or *Atwell* or modify the procedures currently in place for reviewing inmates for parole. [R. 61; 551] This unwavering position demonstrates that juveniles who were sentenced as adults are now being, and will continue to be, evaluated in the same manner as inmates who committed these same types of offenses as adults for purposes of parole.

The Commission's position is counter to the second reason the Florida Supreme Court articulated in reversing Atwell's sentence finding it was unconstitutional based on *Miller*. *Atwell*, 197 So. 3d at 1041. Specifically, that a sentencing court must "take into account 'how children are different, and how those difference counsel against irrevocably sentencing them to a lifetime in prison". *Id.* But, as testified to by Ms. Tully, and as evidenced by Mr. Wallace's email, "Florida's

parole process entirely fails to recognize" these factors and the Commission responsible for its oversight does not intend on changing this position. *Id.* (citing *Miller*, 132 S. Ct. at 2469). This lack of willingness to modify the parole process in light of this precedent is sufficient basis enough to warrant a resentencing hearing pursuant to *Horsely*. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

B. The rarity with which parole is granted makes parole an inadequate remedy under *Miller* because it does not afford rehabilitated juvenile offenders a realistic likelihood of release.

Ms. Tully testified that at the time of the hearing there were 4,500 parole eligible inmates. [R. 31-32] The Commission's annual report from 2015-2016 indicates that less than half one percent are paroled in any given year. *Supra* note 3 at 6. As noted above, even if paroled, during the evaluation process, a juvenile offender's youth when committing an offense is not taken into consideration. *Supra* Argument II, A., at 39. Critically, as Ms. Tully stated, "[p]arole is a grace and it's not a right[.]" [R. 77] Under *Miller*, a juvenile has a constitutional right to be sentenced as an adult must receive considerations of the juvenile's youth at the time of the offense. *Miller*, 132 S.Ct. at 2455. Therefore, because parole does not provide a "meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation," *Henry*, 175 So. 3d at 679 (internal citations omitted); *Gridine*, 175 So. 3d at 672, and thus beholden to the Commission's "grace," (which is shows its grace less than one percent of the time) Mr. Williams must be afforded an opportunity for a resentencing hearing, regardless of his presumptive parole release date. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

C. The Commission's process for increasing a defendant's presumptive parole release date based on disciplinary reports is subjective, arbitrary, and does not provide a meaningful opportunity for review.

A sentence is unconstitutional where the "offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Henry*, 175 So. 3d 675, 679 (Fla. 2015) (quoting *Graham*, 560 U.S. at 75); *Gridine*, 175 So. 3d at 672. The field officer and the Commission's evaluation of an inmate's disciplinary reports are admittedly "subjective." [R. 46] There is no set criteria for how a field officer must evaluates the disciplinary reports of an inmate. While Ms. Tully testified that the Commission generally looks at the substance and the frequency of the disciplinary report, [R. 42], there are no written guidelines or principles governing this evaluation that she testified existed to rely on in coming to this decision. Therefore, the application to each defendant is not based

on a set criteria and the resulting application is an arbitrary calculation not based on any consideration of a defendant's youth when committing an offense.

Here, this arbitrariness, and the impact the arbitrariness can have on the ultimate decision, is evident based on fact the field officer suggested to Mr. Williams; presumptive parole release date by an increase in 318 months, and then the Commission returned a finding that 320 months was more appropriate. [R. 46-48] Ms. Tully could not explain how the field officer arrived at 318 months. [R. 42] Although she stated the Commission generally looks at the offenses and frequency of those offenses, here, she said they "probably" did that in this case. [R. 47-48] This also means they may not have relied on her criteria. The fact is that Mr. Williams presumptive parole release date was enhanced by over twenty 26 years based on in articulable criteria from a recommendation of a field officer that the Commission appears to have readily accepted. This is not a meaningful opportunity for review to provide Mr. Williams, or other similarly situated inmates, an opportunity for release. *Henry*, 175 So. 3d at 679 (quoting *Graham*, 560 U.S. at 75); *Gridine*, 175 So. 3d at 672. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

D. The trial court did not consider any *Miller* factors when prohibiting a resentencing hearing for Mr. Williams, nor adhere to the Florida Legislature's intent.

In its order denying relief, the trial court made no findings regarding any of the factors articulated in *Miller*, or the Florida Legislature's new sentencing statutes. [R. 554-584]; *see, e.g.,* §§ 941.1401, 941.1402, and 775.082 (2014). This lack of findings, or even attempt to make such findings, departs from the Florida Supreme Court's third basis in reversing Mr. Atwell's sentence, namely, the need to adhere to legislative intent on how to deal with these types of sentences. *See Atwell*, 197 So. 3d at 1041-1042 (citations omitted) (articulating that its holding was "consistent with the legislative intent in Florida after the issuance of the *Graham* and *Miller* decisions" and the Florida Legislature could have looked to the parole system as a basis to comply with this precedent but "chose instead to enact a wholly new and distinct sentencing framework for juvenile offenders[.]")

Here, the trial court made a cursory statement regarding Mr. Williams' disciplinary reports accumulated over twenty-six years. [R. 556-557] There was no investigation regarding how these disciplinary reports occurred, discussion on the substance of these disciplinary reports at the hearing beyond the mere entry of those reports into evidence, [R. 69] and Ms. Tully's recounting of some of the bases for these reports. [R. 38-39] Therefore, because of the cursory nature of the disciplinary

report review, and the lack of review of those disciplinary reports in light of the statutory factors enumerated by the Florida Legislature, Mr. Williams has not received a meaningful opportunity for review to demonstrate he is entitled to parole as required in *Miller*. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

E. The fact the majority of Mr. Williams disciplinary reports occurred when he was younger supports the basis for the United States Supreme Court's decisions in *Roper*, *Graham*, and *Miller* and the need for a resentencing hearing.

Ms. Tully stated that most of the disciplinary reports accumulated by Mr. Williams occurred earlier in his incarceration. [R. 59] This was even echoed by the State. [R. 85] Mr. Williams entered his term of incarceration in 1988 when he was 17, and entered the Department of Corrections in 1990. [R. 36] However, the fact the majority of these disciplinary reports occurred earlier in his incarceration is never noted as a consideration by the trial court in its order. [R. 554-584] Most of Mr. Williams disciplinary reports occurred at the beginning of his incarceration. [R. 57-59] At that time, he would have been in his mid-twenties. This is consistent with evidence that Mr. Williams' youth had a role to play in his disciplinary reports.

As the United States Supreme Court noted, the reasoning in finding that children are different than adults rests not solely on the "common sense" of what

"any parent knows" but also on "science and social science as well" that youth can be a factor in a defendant's conduct and that children can be rehabilitated. *Miller*, 132 S.Ct. at 2464 (citing *Roper*, 542 U.S. at 561). This is supported by the fact that studies showed that "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior." *Id.* at 2464 (citing *Roper*, 543 U.S. at 570).

Mr. Williams' pattern of conduct was clearly not so entrenched because it changed over time as he aged. As evidenced by the fact these disciplinary reports decreased over time, his youth was a likely factor in his accumulation of these disciplinary reports in the first place. However, the undisputed fact this was not considered at all in the trial court's order when denying him a resentencing, demonstrating why parole, and the release date does not provide a meaningful opportunity for review. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

F. The trial court's reliance on the Third District's decision in *Lewis* is misplaced and cannot be a basis for denying Mr. Williams a resentencing hearing.

The State, and then the trial court, relied on *Lewis*, 118 So. 3d at 291 for the argument that Mr. Williams was not entitled to a resentencing hearing. [R. 82-86; 556-557] However, the State's and trial court's reliance on *Lewis* is misplaced.

Subsequent precedent relying on *Lewis* for the proposition argued for by the State was overturned by the Florida Supreme Court. *See McPherson v. State*, 138 So. 3d 1201 (Fla. 2d DCA 2014). Additionally, the Third District, the district court that decided *Lewis*, recently held that Florida's parole system does not provide a meaningful opportunity for review of a juvenile offender's sentence, and a juvenile offender must be resentenced regardless of the presumptive parole release date. *Reid v. State*, 2017 Fla. App. LEXIS 7808, *4-7 (Fla. 3d DCA May 31, 2017).

In *McPherson*, the appellant appealed the trial court's order denying his motion seeking resentencing for his life sentence with the possibility of parole after twenty-five years for a felony murder that occurred in 1994. 138 So. 3d at 1201. In this motion, the appellant claimed, "that his sentence to life imprisonment with parole eligibility after twenty-five years is cruel and unusual because he was sixteen at the time of the offense and was merely a principal to a felony murder." *Id.* McPherson relied on *Graham*, *Miller*, and Florida Rule of Criminal Procedure 3.850(b)(2) for relief. *Id.* The trial court denied his motion distinguishing *Miller* and *Graham* because these cases "do not involve life sentences with parole eligibility after a term of years." *Id.* In denying this relief, the Second District relied on the Fourth District's *Atwell v. State,* 128 So. 3d 167, 169 (Fla. 4th DCA2013) (which was later overturned by the Florida Supreme Court) and *Lewis*. The Second District relied on *Lewis* for the proposition that in *Lewis* the Third District declined to apply

Graham to a comparable sentence in a postconviction proceeding. *Id.* The Second District thus denied McPherson relief on the grounds that the motion was untimely because the courts had not announced a new law directed at sentences like his because his sentence was parole eligible. *Id.*

On August 26, 2016, the Florida Supreme Court issued an Order to Show Cause in *McPherson*. *McPherson v. State*, SC14-1369. Following briefing, based on a review of those responses, the Florida Supreme Court determined "that the Second District Court of Appeal's decision in this case is quashed, and this matter is remanded to the district court with instructions that the case be further remanded for resentencing in conformance with sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. *See Atwell v. State*, 197 So. 3d 1040, 41 Fla. L. Weekly S244 (Fla. May 26, 2016)." *McPherson v. State*, 2016 Fla. LEXIS 2378, *1, 41 Fla. L. Weekly S 578, 2016 WL 6357975 (Fla. Oct. 28, 2016).

Based on the foregoing authorities, the fact that *Lewis* has been cited as a basis to deny relief in a similar circumstance, on the same arguments, and then that opinion has been quashed by the Florida Supreme Court makes the basis that the State and the trial court relied on an insufficient reason to deny Mr. Williams relief for a new sentencing hearing. This is further evidenced by the Third District's recent opinion, that specifically addresses this issue.

In *Reid v. State*, the State argued that, *inter alia*, the appellant, unlike the defendant in *Atwell*, had a presumptive parole release date within his lifetime so denial of a resentencing hearing was appropriate. 2017 Fla. App. LEXIS 7808 at *4-7. In response to this argument, the Third District unequivocally stated that denying a resentencing on this ground is a **"**distinction[ ] without a difference." *Id.* at *4-5. The Third District "read *Atwell* to reject the notion that Florida's current parole scheme provides the individualized consideration of a defendant's juvenile status required under *Miller*." *Id.* at *7 (citations omitted). It further noted that in applying *Atwell* "we have reversed trial court orders denying *Miller* post-conviction claims even where, as in Reid's case, the presumptive parole release date was within the defendant's lifetime." *Id.* (citing *Carter v. State*, No. 3D16-1090, 2017 Fla. App. LEXIS 3463, 2017 WL 1018513, at *1 (Fla. 3d DCA Mar. 15, 2017); *Miller v. State*, 208 So. 3d 834, 835 n.1 (Fla. 3d DCA 2017)). The Third District reversed the trial court's "order denying Reid's motion for post-conviction relief and remand for a resentencing pursuant to section 921.1401." *Id.*

As it stands, the Third and Fourth District Courts unequivocally reject the presumptive parole release date as a basis for denying a resentencing hearing, and the Second District's decision in *McPherson* quashed by the Florida Supreme Court demonstrates its rejection of this argument as well. The State and the trial court's reliance on *Lewis* is misplaced and cannot be a basis to deny Mr. Williams a new

sentencing hearing. Therefore, the trial court's decision to deny Mr. Williams a resentencing hearing should be reversed and remanded to the trial court for resentencing.

CONCLUSION

Appellant, ANTHONY NELL WILLIAMS, respectfully requests this Court reverse and remand for resentencing in accordance with section chapter 2014-220, Laws of Florida, §§ 941.1401, 941.1402, and 775.082 Florida Statues.

Respectfully submitted,

s/ Rocco J. Carbone, III
ROCCO J. CARBONE, III
SPECIAL ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO.: 0095544
444 SEABREEZE BLVD., SUITE 210
DAYTONA BEACH, FLORIDA 32118
TELEPHONE: (386) 254-3758
EMAIL: Rocco@rjc3law.com
SECONDARY EMAIL: appellate.efile@pd7.org

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this the 8th day of September 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

s/ Rocco J. Carbone, III
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