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IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY, JR.,

Petitioner,

vs.

CASE No. SC13-1938
CONSOLIDATED SC13-2000

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Florida's penalty statute, section 775.082(1), Florida Statutes, prior to July 1, 2014, provides for a punishment of either death or life imprisonment without the possibility of parole for a person convicted of first-degree murder. Anthony Horsley was sentenced pursuant to this statute. The rule of law established by Miller v. Alabama, 132 S. Ct. 2455 (2012) rendered this statute unconstitutional as applied to persons less than 18 years old at the time of offense.

This Court's precedent is clear that the Court has the overriding obligation and power to enforce constitutional guarantees and safeguard fundamental rights. The separation of powers doctrine requires the Court, in exercising this power, to choose a remedy that respects legislative intent. Legislative intent is now made clear in ch. 2014-220, Laws of Fla., requiring sentencing courts to consider a term of years sentence for persons convicted of first-degree murder when they were children at the time of the offense, provides for an individualized sentencing, and sentence reviews after significant periods of incarceration.

Although Miller does not dictate the remedy that the States must use to comply with the Eighth Amendment in juvenile sentencing, it does require: (1) mandatory life without parole is forbidden for any juvenile, regardless of the crime; (2) an individualized sentencing should be held, at which evidence regarding the juvenile's age and attendant hallmark features can be presented and considered by a sentencer who has the discretion to impose a proportional sentence; (3) a life sentence without parole is precluded except for the rare

juvenile who demonstrates irreparable corruption; and (4) suggests alternative sentencing options, including a term of years. Because cases in which life-without-parole would be proportional are uncommon, lesser sentences must be available for the vast majority of children. Anthony Horsley was later re-sentenced by a sentencing judge who denied counsel's motion to continue, so moved because he was not prepared to present mitigation evidence, mis-applied and left out mitigating factors to be considered under the dictates of Miller, and did not believe he had the discretion to consider a term of years sentence. As a result, the lesser sentence option contemplated and the Eighth Amendment protections mandated by Miller were denied to Mr. Horsley.

Uniform re-sentencing to life imprisonment with parole is an unacceptable remedy for Miller violations. The Legislature, through statutes enacted over the last 20 years, has made clear that parole is not favored. Indeed, ch. 2014-220 constitutes a continuation of the Legislature's distaste for parole. To reinstate parole eligibility for juveniles who are sentenced as adults would require invalidating a separate statute that precludes parole eligibility for such juveniles. Further, Miller is clear that uniform sentences for all juveniles is not the individualized sentencing contemplated by the Court.

Revival of the 21-year-old penalty statute is also not the answer. Appellate courts and judges who have suggested this as a remedy have ignored the immediate predecessor statute because that is also unconstitutional, and have adopted the predecessor to the predecessor statute. The statute provided for life

imprisonment with parole consideration after 25 years. Case precedent, however, forbids revival of any statute other than the immediate predecessor.

Moreover, if that statute were to be revived as written, then the revived penalty would apply to adult offenders. However, Miller does not require invalidation of the current mandatory life-without-parole statute for adults. The pre-July 2014 statute is only unconstitutional as applied to juveniles. Because the statute does not distinguish between adult or juvenile offenders, the proposed revival remedy would require dividing the term "person" as used in the statute into subclasses of adults and juveniles, and applying the pre-July 2014 statute to adults, and the predecessor to the predecessor statute to juveniles. This would involve not only the revival of a dead statute, but also considerable grafting and excision by the Court. In short, the revival theory requires judicial re-writing.

If the goal of revival is to return to a lawful statute that best epitomizes legislative intent, then resurrecting a statute that authorizes parole consideration must fail because it would obstruct legislative intent as expressed through years of statutory enactments, up to and including ch. 2014-220. Striking the statute which precludes parole for juveniles sentenced as adults is not required by Miller's holding, and unnecessarily striking valid statutes must be avoided under the separation-of-powers doctrine.

Re-sentencing to a term of years is the most principled response to Miller. That remedy would require the Court to declare the pre-2014 section 775.082(1), Florida Statutes, unconstitutional only as applied to juveniles, order individualized

sentence hearings, afford discretion so that a proportionate sentence could be imposed, and permit life sentences only in the rarest of cases.

Appellate judges have favored this remedy for two reasons. First, a term of years sentence is close to legislative intent and requires the least judicial rewriting, because if a life term is seen as a term of years equal to a life span, then a lesser term of years is necessarily included. Secondly, since federal law has invalidated the two statutory options for juvenile capital-felony sentencing, a juvenile offender must be punished under the "other . . . life felony" provision of section 775.082(3)(a)3. Under that provision, imprisonment for life or for a term of years not exceeding life is prescribed.

The new juvenile sentencing law, ch.2014-220, Laws of Fla., provides for subsequent judicial review by the court of original jurisdiction after the passage of significant time, rather than parole. This Court could effect that legislative intent by augmenting Florida Rule of Criminal Procedure 3.800(c), which governs reduction and modification of criminal sentences, to provide for reduction or modification of juvenile sentences that are covered by the Miller decision. Enhancing the rule would satisfy Miller by recognizing the difficulty of knowing what punishment is necessary when sentencing a person who offends as a child, and preserving the possibility of a later sentencing modification because a child's character traits are often transient and rehabilitation is a distinct possibility.

The new law is effective for offenses committed on or after July 1, 2014. Mr. Horsley's offense was committed prior to that date, however, the principles of

equal justice should apply such that the protections of the Miller decision and ch. 2014-220 should both apply to juveniles whose offenses were committed prior to that date. This is so because the new law was enacted in response to the Miller decision, and it would make no sense for this Court to craft a sentencing remedy in response to Miller without reference to the legislative intent of ch. 2014-220.

ARGUMENT

BECAUSE SECTION 775.082(1), FLORIDA STATUTES (2013), IS UNCONSTITUTIONAL AS APPLIED TO JUVENILE DEFENDANTS, THE COURT SHOULD ORDER THAT TRIAL COURTS MAY IMPOSE A TERM OF YEARS ON JUVENILE DEFENDANTS CONVICTED OF FIRST-DEGREE MURDER.

A. Florida's Pre-July 1, 2014 Sentencing Scheme.

The pre-July 1, 2014 penalty statute, which is the statute under which Anthony Horsley was sentenced, punishes a person convicted of first-degree murder with either a sentence of death or a sentence of life imprisonment without parole eligibility. Specifically, § 775.082(1), Florida Statutes (2013), provides:

> A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Subsection 2 of the statute provides a savings clause should the death penalty be held unconstitutional by this Court or the Supreme Court, in which case any death sentence is reduced to life imprisonment without parole, as set forth in

subsection 1. § 775.082(2), Fla. Stat. There is no savings clause for mandatory life sentences without parole eligibility.

Subsection 3 of the statute provides for different levels of punishment for persons convicted "of any other designated felony." § 775.082(3), Fla. Stat. Under subsection 3(a)3., a person convicted of a life felony committed on or after July 1, 1995 may be sentenced to "a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment." § 775.082(3)(a)3., Fla. Stat.

B. The Role of the Judiciary in Prescribing a Constitutional Remedy Where the Legislature's Statute is Unconstitutional as Applied To Juveniles.

Anthony Horsley was first sentenced under a statute that mandates life imprisonment without parole for a juvenile convicted of first-degree murder, who is ineligible for the death penalty under Roper v. Simmons, 543 U.S. 551 (2005). He was later sentenced again to life imprisonment by a trial judge who did not believe he had any discretion to consider a term of years sentence under Florida law. A mandatory life-without-parole sentence is unconstitutional under Miller, but only when applied to juveniles.

The question of the appropriate remedy requires consideration of two principles: the separation-of-powers , and the inherent power of the Court.

Florida applies a strict separation-of-powers doctrine. State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000), that is expressly codified in Article II, Section 3, of the Florida Constitution. Article II, Section 3 vouchsafes the integrity of three

distinct governmental branches, and precludes any branch from exercising powers "appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. "It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved – blend them, and constitutional law no longer exists." Otto v. Harllee, 119 Fla. 266, 270, 161 So. 402, 403-04 (1935)(citation omitted).

However, in considering judicial functions, the judiciary has an overriding "obligation to guard and enforce every right secured by [the Federal] Constitution." Smith v. O'Grady, 312 U.S. 329, 331 (1941) (citation omitted). One of the Court's "primary judicial functions is to interpret statutes and constitutional provisions." Locke v. Hawkes, 595 So. 2d 32, 36 (Fla. 1991). While the Court must enforce the policy of the law as expressed in valid statutes, the Court must decline to do so where the statutes violate organic law. State ex rel. Johnson v. Johns 92 Fla. 187, 196, 109 So. 228, 231 (1926).

The Court's inherent judicial power requires the Court "to do things that are absolutely essential to the performance of [its] judicial functions." Rose v. Palm Beach Cnty., 361 So. 2d 135, 137 (Fla. 1978). And the invocation of this inherent power doctrine "is most compelling when the judicial function at issue is the safeguarding of fundamental rights." Public Defender, Eleventh Judicial Circuit of Fla. V. State, 115 So. 3d 261, 271-72 (Fla. 2013) (citation and internal quotation marks omitted).

However, "the power to declare what punishment may be assessed against those convicted of [a] crime is not a judicial power, but a legislative power." Brown v. State, 152 Fla. 853, 858, 13 So. 2d 458, 461 (1943), *superseded by statute on other grounds,* § 562.45, Fla. Stat., *as recognized in* State v. Altman, 106 So. 2d 401 (Fla. 1958); *accord* State v. Bailey, 360 So. 2d 772, 773 (Fla. 1978) (Legislature's determination of punishment will be sustained unless the punishment is cruel and unusual). Therefore, the appropriate judicial response to a penalty statute that is unconstitutional under the Eighth Amendment, as applied to a subclass, should be one that requires the least statutory modification, and only modification that is most consistent with legislative intent. *See* Nelson v. State *ex rel. Gross*, 157 Fla. 412, 415, 26 So. 2d 60, 61 (1946) ("[c]ourts may extend a statute to new conditions as they arise, they may adjust Cnstitutional and statutory provisions to fit changing social concepts, but, in doing this, they are not permitted to remake or distort the statute so as to change its meaning"); In re Seven Barrels of Wine, 79 Fla. 1, 16-17, 83 So. 627, 632 (1920) ("[i]n determining the legality and effect of a statutory regulation, the court should ascertain the legislative intent; and, if the ascertained intent will permit, the enactment should be construed and effectuated so as to make it conform to, rather than violate, applicable provisions and principles of the state and federal Constitutions, since it must be assumed that the Legislature intended the enactment to comport with the fundamental law").

As the Fifth District observed in Horsley v. State, 121 So. 3d 1130 (Fla. 5th DCA), *review granted*, Nos. SC13-1938, SC13-2000, 2013 WL 6224657 (Fla. Nov. 14, 2013):

> [T]he judiciary's role in a case like this – where a legislative enactment is declared unconstitutional and the alternative of having no option to address the subject would be untenable – is largely guided by the doctrine of separation of powers. In other words, the judiciary is attempting to fill a statutory gap while remaining as faithful as possible to expressed legislative intent, but also attempting to avoid judicial intermeddling by crafting our own statute to address the issue with original language.

Id., at 1132.

C. Miller's Sentencing Requirements.

The Supreme Court did not dictate the sentencing remedies required in the aftermath of Miller. But the Court did provide guidance on what would, and what would not, comport with its Eighth Amendment analysis.

The Court held that a mandatory scheme requiring a sentence of life imprisonment without the possibility of parole for juveniles convicted of any offense violates the Eighth Amendment. Observing that "none of what [Graham v. Florida, 560 U.S. 48 (2010),] said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime specific," the Court invalidated all sentencing schemes that require a child to be sentenced to life in prison without parole. Miller, 132 S. Ct. At 2465.

The Court also emphasized that, in order to impose a constitutionally proportionate sentence for a child, the sentencer must conduct an individualized hearing. The individualized sentence hearing must include a consideration of "an offender's age and the wealth of characteristics and circumstances attendant to it." Id., at 2467. The sentencer must be afforded the opportunity to consider the "hallmark features" of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences," Id. At 2468; the "family and home environment," Id.; 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," Id.; "his inability to deal with police or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," Id.; and most importantly, "the possibility of rehabilitation." Id. The Court made clear that a sentencer is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. At 2469 (footnote omitted).

Additionally, the Court repeatedly emphasized the importance of sentencing discretion that would permit a variety of outcomes. The Court stated that a problem with the mandatory sentencing scheme under scrutiny was that "every juvenile will receive the same sentence as every other – the 17-year-old and the 14 year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." Id. At 2467-68. In distinguishing the sentencing determination in adult court from the transfer determination made in

juvenile court, the Court pointed out:

> Discretionary sentencing in adult court would provide different options:
> 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.

While the Court did not forbid a sentence of life without parole for juveniles convicted of homicide, the Court did all but that. In refraining from reaching the petitioners' alternative argument that the Eighth Amendment requires a categorical ban on lifetime sentences for children, Id. At 2469, the Court made clear:

> But given all we have said in Roper, Graham, and this decision about children's diminished culpability and hieghtened capacity for change, we think appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon.

Id. In emphasizing the difficulty that would be encountered in distinguishing between the atypical child who might warrant a lifetime sentence from those whose crime reflects "unfortunate yet transient immaturity," the Court spoke of the former as "the rare juvenile offender whose crime reflects irreparable corruption." Id. (citations omitted).

It follows that there must be alternative sentences available for the "common" juvenile offender. Discretion to impose an individualized sentence upon consideration of the pertinent factors that the Court identified is central to the Court's Eighth Amendment proportionality reasoning. Most importantly, under Miller, a sentence less than life without the possibility of parole must be the norm.

1. Uniform resentencing to life with parole is unacceptable as a Miller remedy.

While the Miller Court did not invalidate life-with-parole sentences as an *option*, if imposed in a discretionary scheme after an individualized sentencing hearing, uniform resentencing to life with parole would be anathema to the decision.

To start with, the Legislature has consistently opposed entrusting the decision of an inmate's release to a parole commission. Almost 31 years ago, the Legislature abolished parole for noncapital felonies committed on or after October 1, 1983. § 921.001(4)(a), (8), Fla. Stat. (1985); ch. 83-87, § 2, Laws of Fla. About a decade later, the Legislature abolished parole for those convicted of first-degree murder, § 775.082(1), Fla. Stat. (1994), ch. 94-228, § 1, Laws of Fla. (Effective May 25, 1994), and the next year extended the parole exclusion to those convicted of any capital felony. § 775.082(1), Fla. Stat. (1995); ch. 95-294, § 4, Laws of Fla. (Effective Oct. 1, 1995). The Legislature also made clear that parole would not apply to those sentenced under the Criminal Punishment Code. §

921.002(1)(e), Fla. Stat. (1997); ch. 97-194, § 3, Laws of Fla. (Effective Oct. 1, 1998). While the Legislature could not abolish parole entirely because of inmates who had been given parole-eligible sentences years before, it reduced the Parole Commission by half, effective July 1, 1996. § 947.01, Fla. Stat. (1996); ch. 96-422, § 12, Laws of Fla. (Effective July 1, 1996). In order to abide by the separation-of-powers doctrine, a proposed remedy that would require the executive branch to expand its current, reduced parole commission to carry out a newly acquired function that the Legislature has repeatedly rejected would be of no avail. *See* Thomas v. State, 135 So. 3d 590 (Fla. 1st DCA 2014) (Osterhaus, J., specially concurring); Washington v. State, 103 So. 3d 917, 921-22 (Fla. 1st DCA 2012) (Wolf, J., concurring).

Secondly, making parole available as the resentencing remedy would require another statute, § 947.16(6), Florida Statutes (2013), which precludes parole eligibility for juveniles sentenced as adults, to be held unconstitutional. This Court has always been reluctant to declare a statute unconstitutional unless absolutely necessary:

> The lawmaking power of the Legislature of a state is subject only to the limitations provided in the state and federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that under any rational view that may be taken of the statute it is in positive conflict with some identified or designated provision of constitutional law.

> A statute should be so constructed and applied as to make it valid and effective if its language does not exclude such an interpretation.

Johns, 92 Fla. At 196-97, 109 So. At 231; accord State ex rel. Crim. v. Juvenal, 118 Fla. 487, 490, 159 So. 663, 664 (1935) ("[c]ourts have the power to declare laws unconstitutional only as a matter of imperative and unavoidable necessity"). Miller does not require the statute precluding parole for juveniles to be declared invalid.

The Miller decision requires an individualized sentencing at which the sentencer may consider the identified factors relevant to childhood and exercise his or her discretion in choosing a proportionate, and therefore constitutional sentence. One-size-for-all approach is precisely what is *not* contemplated. *See, e.g.*, Miller, 132 S. Ct. At 2460 (mandatory scheme "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change") (citation and internal quotation marks omitted); Id. At 2467 ("a sentencer [must] have the ability to consider the mitigating qualities of youth") (citation and internal quotation marks omitted); Id. At 2475 ("our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles," and "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth

Amendment's ban on cruel and unusual punishment"); Id. At 2474 (with discretionary sentencing in adult court, "a judge or jury could choose rather than life-without-sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years"). Committing all juveniles entitled to a Miller resentencing to life sentences with parole is not the answer.

2. Revival of the statute prescribing life imprisonment with Parole consideration after 25 years is not an available remedy.

One remedy suggested is to "revive" the 20-year-old penalty statute that prescribed either death or life imprisonment with parole possible after 25 years for first-degree murder. *See* Horsley, 121 So. 3d at 1131-32; Toye v. State, 133 So. 3d 540, 547, 549 (Fla. 2d DCA 2014)(Villanti, J., concurring in part, dissenting in part); Partlow v. State, 134 So. 3d 1027, 1030-34 (Fla. 1st DCA 2013) (Makar, J., concurring in part, dissenting in part); Rodriguez-Giudicelli v. State, No. 2D12-5138, 2014 WL 2151966 (Fla. 2d DCA May 23, 2014). This theory fails because it attempts to revive, not the immediate predecessor to the constitutionally defective 2013 statute — because that, too, is also constitutionally defective for the same reason — but the predecessor to the predecessor. As this Court cautioned in B.H. v. State, 645 So. 2d 987, 995 n. 5 (Fla. 1994), revival is restricted to the "immediate predecessor" to the statute that is being held unconstitutional. *See* Washington, 103 So. 3d at 921 (Wolf, J., concurring).

The 1995 version of § 775.082, Florida Statutes, provided that first-degree murder was punishable by either death or life imprisonment without parole. Ch.

95-294, § 4, Laws of Fla.; *see* Partlow, 134 So. 3d 1027, 1032 (Makar, J., concurring in part, dissenting in part). This provision is still in effect and si unconstitutional as applied. The immediate predecessor to this statute, the 1994 version of § 775.082, identically provided for either a death sentence or life imprisonment without parole for first-degree murder. Ch. 94-228, § 1, Laws of Fla.; *see* Partlow at 1031-32 (Makar, J., concurring in part, dissenting in part). Thus, the argument for revival requires a jump back to the 1993 version of the statute that permitted a life sentence with parole consideration after 25 years, an additional retreat unauthorized under revival theory:

> [T]here cannot be a revival of any statute other than the immediate predecessor. If the immediate predecessor statute is defective, then no further revival is possible under any circumstances.

B.H., 645 So. 2d at 995 n. 5.

If the Court were to revive that statute, then first-degree murder committed by adults would also be punishable by a life sentence with parole eligibility after 25 years. Yet, the pre-July 1, 2014 statute is unconstitutional only as applied to a subclass — juveniles — in a statute that does not distinguish between adult or juvenile offenders. So the revival argument would require dividing "person" as used in the statute to subclasses of adults and juveniles, and applying the pre-July 1, 2014 statute to adults, while the predecessor to the predecessor statute to juveniles. As Judge Altenbernd explained in his concurring opinion in Toye:

> If a statute has been amended in an unconstitutional manner, returning to the last properly enacted statute

> to assure that a statute exists for application to all persons makes sense to me. I am less convinced, however, that it is a good idea or even permissible to revive a statute for application to a very small population of persons for whom the existing statute is essentially unconstitutional as applied.

133 So. 3d at 549.

It strains revival theory too far to judicially redraft the pre-July 1, 2014 statute to allow for parole for juveniles or to resurrect a statute prior to the prior statute in order to provide a remedy for a subclass – juveniles – never identified in either statute.

Judge Makar suggests, in his partial concurrence, partial dissent in Partlow, at 1031-32, that revival is possible since both the 1993 and 1994 statutes are identical in their treatment of all defendants convicted of first-degree murder. However, that argument ignores the foundation for revival analysis. Even if the immediate-antecedent requirement set forth in B.H. could be so easily set aside, the import of the change in the statute cannot be overlooked.

The statute was amended to exclude parole from a further list of felonies: no longer just for first-degree murder, but for all capital felonies. *See* § 775.082, Fla. Stat. (1995); Partlow, at 1032 (Makar, J., concurring in part, dissenting in part). As previously outlined, the Legislature's gradual abolition of parole preceded this change and has continued in years since, up to and including ch. 2014-220, Laws of Fla. As Judge Wolf commented:

> [E]ven if [the statute sought to be revived] were the immediate predecessor, parole was permitted "so long

> ago in the past that it no longer reflects the consensus of society." The Legislature abolished parole long ago. Thus, parole is no longer the consensus of society, as expressed by its legislative representatives.

Washington, 103 So. 3d at 921 (Wolf, J., concurring) (quoting B.H., 645 So. 2d at 995 n. 5).

If the goal of revival is to return to a lawful statute that best epitomizes legislative intent, while adhering to separation-of-powers requirements, then resurrecting a statute that authorizes parole consideration must fail because it would obstruct legislative intent as expressed through years of statutory enactments, up to and including ch. 2014-220. The new law also eschews parole, instead providing for judicial hearings – sentence reviews – to determine subsequent offender release.

Revival is not a sufficiently expansive concept that would justify the statutory reconstruction necessary to reintroduce life sentences with parole. Even judges who have suggested it as a remedy acknowledge that revival is appropriate when it shows respect for the legislative process. *See* Toye, 133 So. 3d at 548 (Villanti, J., concurring in part, dissenting in part) (advocating revival because, "rather than having courts essentially legislate from the bench by creating a new statutory scheme out of whole cloth,'we simply revert to a solution that was duly adopted by the legislature itself'" (quoting Horsley, 121 So. 3d at 1132)); Partlow, at 1030 (Makar, J., concurring in part, dissenting in part) (judicial revival "is based in large measure on separation of powers principles"). Revival is also flawed

because it would require the Court to declare unconstitutional another statute that is unaffected by Miller — § 921.002(1)(e), Florida Statutes (2013), which precludes parole eligibility for juveniles — to revive a system that has long been in legislative disfavor. For all the foregoing reasons, revival is not available as a remedy.

3. A term-of-years sentence is the most appropriate remedy.

The remedy that respects the Legislature's prerogative, as well as Miller's teachings, is to permit courts to sentence a juvenile homicide offender to a term of years, up to and including life imprisonment. That remedy would require the Court to declare the pre-July 2014 version of § 775.082(1), Florida Statutes, unconstitutional only as applied to juveniles, order individualized sentencing hearings, afford discretion so that a proportionate sentence could be imposed, and permit life sentences only in the rarest of cases.

This remedy was proposed by Judge Wolf in his concurring opinion in Washington, 103 So. 3d at 922, as most consistent with legislative intent and the dictates of Miller:

> The sentencing option which is the closest to the legislative expression of intent and involves the least rewriting of the statute is a sentence to a term of years without possibility of parole. This option also gives the trial court the discretion mandated by Miller.
>
> A life sentence is merely a term of years equaling the lifespan of a person. Any term of years is necessarily included within the purview of life. Thus, this alternative does not constitute a rewrite of the statute.

This remedy has been endorsed, under a slightly different theory, by Judge Osterhaus, in a specially concurring opinion in Thomas, 135 So. 3d 590, 591-592 (Fla. 1st DCA 2014). Judge Osterhaus suggests that, since "federal caselaw has abrogated both possible 'capital felony' sentences for juvenile offenders – death and *mandatory* life without parole," Id. at 592, a juvenile cannot be sentenced under the capital felony provisions of §§ 775.082(1) and (2), Florida Statutes. Thomas, 135 So. 3d 590, 591-592. Because the juvenile's offense is no longer "capital" within the meaning of the statute, "[w]hat is left of § 775.082 for juvenile offenders . . . is the provision addressing life felonies in § 775.082(3)." Id. Thus, a juvenile's offense may be punished under the "other . . . life felony" provision of section 775.082(3)(a)3., and he or she may be sentenced to the next highest penalty: imprisonment for life or imprisonment for a term of years not exceeding life. Id. At 592 & n. 2.

Under either theory, the remedy of a sentence of a term of years up to and including life best enforces the sanction choices of the recent legislation. With this remedy, statutes proscribing parole eligibility remain in force. Further, there would be no need for the Legislature to enact a new statute expanding the current three-person parole commission, nor would there be any need for the Executive branch to consider necessary changes and amendments to what would be a greatly expanded parole system. With this least possible statutory revision, the requisite separation of powers will be respected.

The Court's purpose in construing a statutory provision is to give effect to legislative intent, which is the polestar that guides a statutory construction analysis. Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008). The new sentencing law, ch. 2014-220, Laws of Fla., passed unanimously and signed into law, includes provisions for subsequent review by the court of original jurisdiction after the passage of a significant amount of time. These provisions are contemplated by Miller and are worthy of the Court's consideration. This Court could effect that legislative intent by augmenting Florida Rule of Criminal Procedure 3.800(c), which governs reduction and modification of a juvenile's lifetime or term-of-years sentence, to provide for reduction or modification of juvenile sentences that are covered by the Miller decision. *See* Art. V, § 2(a), Fla. Const. ("[t]he supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts").

Rule 3.800(c), titled "Reduction and Modification," provides a 60-day window after the last direct appeal or certiorari proceeding in state or federal court within which a court can reduce or modify a previously imposed criminal sentence. Enhancing that rule with a provision for reduction or modification of a juvenile's lifetime or term-of-years sentence after a substantial period of time would be consistent with Miller in two respects.

First, permitting modification or reduction at a later date would be in accordance with Miller's recognition of the "great difficulty . . . of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate

yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption." 131 S. Ct. at 2469 (citation and internal quotation marks omitted). Secondly, preserving the possibility of modification or reduction of a juvenile sentence beyond the current 60-day window would be consistent with the Court's acknowledgment that the "signature qualities [of youth] are all transient," Id. at 2467 (citation and internal quotation marks omitted), and so later scrutiny would underscore "the possibility of rehabilitation," id. at 2468, a juvenile's "heightened capacity for change," id. at 2469, and provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 2469 (quoting Graham, 560 U.S. at 75). Such a procedure would provide incentive for juveniles who face lengthy incarceration to participate in rehabilitative programs, and demonstrate model behavior while incarcerated.

D. Ch.2014-220, Laws of Florida

1. The new law provides for a term-of-years sentencing option.

The new juvenile sentencing law, ch. 2014-220, Laws of Fla., is effective for offenses committed on or after July 1, 2014. Mr. Horsley's offense was committed prior to that date. Although the new law does not directly apply to Mr. Horsley the law is clear and persuasive evidence of legislative intent to abrogate parole, provide a term-of-years sentencing option, provide for judicial sentence reviews after significant periods of time have passed, and provide for specific factors to be considered and addressed by the sentencing court.

The specific term-of-years option provided for in the new law is at least 40 years, but with a judicial review of sentence after 25 years for a person, as a sentence option for a juvenile offender in Mr. Horsley's position (if the offense occurs on or after July 1, 2014). Ch. 2014-220, Laws of Fla., at 2-3, 5.

2. The law creates § 921.1401, Fla. Stat., to provide for sentence hearings and dictates the factors a sentencing court must consider, in response to Miller's dictates. Those factors include: the nature and circumstances of the offense committed by the defendant; the effect of the crime on the victim's family (this one is not a Miller factor); the defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense; the defendant's background, including his or her family, home, and community environment; the effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences of the defendant's participation in the offense; the extent of the defendant's participation in the offense; the effect, if any, of familial pressure or peer pressure on the defendant's actions; the nature and extent of the defendant's prior criminal history; the effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment; and the possibility of rehabilitating the defendant. Id. At 4-5. The proof of mitigation in these factors will require that many juveniles will require mental health and educational experts and other witnesses be appointed to assist in presenting evidence of Miller mitigation. Mr. Horsley was re-sentenced after his motion to continue was denied, in spite of counsel's assertion that he was unprepared to present mitigation

evidence. The trial court did not believe he had discretion to consider a term-of-years sentence, and refused to consider it. He was not afforded the protections of the Eighth Amendment, as described by Miller. Although the Legislature has apparently left juveniles like Mr. Horsley, whose case was pending when Miller was decided but whose offense was committed prior to the effective date of the new sentencing law, to the Court to sort out, principles of Equal Protection and equal justice should apply in his case and others like him. The protections of Miller clearly apply to Mr. Horsley, and the protections of ch. 2014-220 should also apply because the new law was enacted in response to Miller, and it would make no sense for this Court to craft a sentencing remedy in response to Miller without reference to the legislative intent contained in the new law.

The petitioner respectfully requests this Court remand the case for a deliberative re-sentencing hearing, for the sentencing court to grant defense counsel time in which to have an expert evaluate petitioner, and for the court to apply the juvenile factors identified by the Miller decision, and with directions for the sentencing court to consider a term of years as a sentence possibility, and if that sentence is not imposed, for the sentencer to afford him periodic reviews as recommended by the American Medical Association in its amicus brief in the Miller case.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com and kellie.nielan@myfloridalegal.com; to Paolo Annino at pannino@law.fsu.edu; to Tatiana A. Bertsch at tbertsch@rc-4.com; to Benjamin W. Maxymuk at bmaxymuk@eji.org; and was mailed to Anthony Horsley, Inmate #E44830, Northwest Florida Reception Center - Main Unit, Post Office Box 628, Lake Butler, Florida 32054-0628, on this 16th day of July, 2014.

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CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in this brief is proportionally spaced 14 pt. Times New Roman.

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