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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC13-2000
CONSOLIDATED SC13-1938

ANTHONY DUWAYNE HORSLEY, JR.,

Respondent.
________________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

INITIAL SUPPLEMENTAL BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

By their express language, the statutes that were amended and enacted pursuant to chapter 2014-220, Laws of Florida, are only applicable to crimes committed after July 1, 2014. Further, the Florida Constitution provides that amendment of a criminal statute shall not affect punishment for any crime previously committed, so the application of this newly enacted legislation would be unconstitutional. Horsley's life sentence without the possibility of parole for the crime of first degree murder does not violate *Miller v. Alabama*, and should be affirmed.

ARGUMENT

HORSLEY'S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR THE CRIME OF FIRST DEGREE MURDER DOES NOT VIOLATE *MILLER V. ALABAMA* AND RECENT LEGISLATION HAS NO IMPACT ON THIS CASE.

The Florida Legislature recently enacted legislation which amended section 775.082, Florida Statues, to provide that a person under the age of eighteen who actually killed, (as Horsley did), "shall be punished by a term of imprisonment for life if, after a sentencing proceeding conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence." Ch. 2014-220, § 1, Laws of Fla. In addition, section 921.1401, Florida Statues, was created to provide for a sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence for those offenders who committed such offense "on or after July 1, 2014,..." *Id.* at § 2. Horsley committed his murder long before July 1, 2014, so the newly enacted legislation is not applicable to his case.

Further, the Florida Constitution imposes a restriction on retroactive application of criminal legislation. Article X, section 9 states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision thus precludes any newly enacted criminal statutes from applying to pending criminal cases. *See*

Smiley v. State, 966 So.2d 330, 336-37 (Fla. 2007)(newly enacted self defense statute qualified as criminal statute because it has a direct impact on the prosecution of the offense of murder in Florida, and article X, section 9 of Florida's constitution made it impermissible for it to receive retroactive application where it would provide the defendant with a new affirmative defense); *Castle v. State*, 330 So.2d 10, 11 (Fla. 1976)(because ten years was the maximum penalty in effect when the crime was committed, the imposition of a later enacted lower sentence would be unconstitutional pursuant to article X, section 9 of the Florida Constitution); *State v. Pizzaro*, 383 So.2d 762 (Fla. 4th DCA 1980)(because retroactive application of an amended statute affecting prosecution is unconstitutional, the Youthful Offender Act, which alters the prescribed punishments for those persons meeting its requirements, cannot apply to offenses committed before it effective date).

Petitioner again submits that Horsley's sentence of life in prison without the possibility of parole does not violate *Miller*, because Horsley was not sentenced to "mandatory" life in prison, and pursuant to *Miller*, he was provided an individualized sentencing hearing, at which he was given the opportunity to present mitigation. As stated, under the plain language of *Miller*, a trial court may constitutionally sentence a juvenile convicted of first degree murder to life without the possibility of parole. *See*

Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012). The life sentence that was imposed on Horsley for this first degree murder must be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, the State requests this Court hold that for certain juvenile offenders convicted of first degree murder, a sentence of life without the possibility of parole is a legal sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Supplemental Brief of Petitioner has been furnished by email to counsel for Appellant, Kathryn Rollison Radtke, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, FL 32118, at radtke.kathryn@pd7.org, and appellate.efile@pd7.org, this 16th day of July, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC13-2000

ANTHONY DUWAYNE HORSLEY, JR.,

Respondent.
_______________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

APPENDIX

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District Court of Appeal of Florida,
Fifth District.

Anthony Duwayne HORSLEY, JR., Appellant,
v.
STATE of Florida, Appellee.

No. 5D12–138.

Aug. 30, 2013.
Rehearing and Rehearing En Banc Denied Sept. 27, 2013.

Background: Defendant was convicted in the Circuit Court, Brevard County, Charles G. Crawford, J., of first-degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm. Defendant appealed.

Holding: The District Court of Appeal, Lawson, J., held that as a consequence of *Miller v. Alabama,* and pursuant to doctrine of statutory revival, the only sentence now available in the state for a charge of capital murder committed by a juvenile is life with possibility of parole after 25 years.

Affirmed in part; remanded with instructions for resentencing.

Question certified.

West Headnotes

KeyCite Citing References for this Headnote

211 Infants
211XVI Rights and Privileges as to Adult Prosecutions
211XVI(C) Sentencing of Minors as Adults
211k3011 k. In general. Most Cited Cases

350H Sentencing and Punishment KeyCite Citing References for this Headnote
350HVII Cruel and Unusual Punishment in General
350HVII(L) Juvenile Justice
350Hk1607 k. Juvenile offenders. Most Cited Cases

As a consequence of the United States Supreme Court's decision in *Miller v. Alabama,* which invalidated statute providing that a mandatory life sentence without parole for capital murders committed by juveniles violated the Eighth Amendment, and pursuant to the doctrine of statutory revival, the only sentence now available in the state for a charge of capital murder committed by a juvenile is life with possibility of parole after 25 years. U.S.C.A. Const.Amend. 8; West's F.S.A. § 775.082(1).

*1131 James S. Purdy, Public Defender, and Kathryn Rollison Radtke, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

LAWSON, J.

Anthony Horsley, Jr. appeals his convictions for first-degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm. He also appeals his resentencing to life without parole on the murder count. Regarding his resentencing, Horsley, who was seventeen years old at the time of these offenses, argues that the trial court erred by rejecting the idea that it had discretion under *Miller v. Alabama,* ––– U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), to sentence him to a term of years. *Miller* held that a mandatory life sentence without parole for capital murders committed by juveniles—the only sentence allowed by section 775.082(1), Florida Statutes—violated the Eighth Amendment to the United States Constitution. Although this issue has been addressed by the First, Second and Third Districts, none of them have given definitive direction to trial courts regarding the available sentencing alternatives after *Miller.* *See* *Neely v. State,* ––– So.3d ––––, 2013 WL 1629227, 38 Fla. L. Weekly D851 (Fla. 3d DCA Apr. 17, 2013); *Hernandez v. State,* 117 So.3d 778 (Fla. 3d DCA 2013); *Walling v. State,* 105 So.3d 660 (Fla. 1st DCA 2013); *Partlow v. State,* ––– So.3d ––––, 2013 WL 45743, 38 Fla. L. Weekly D94 (Fla. 1st DCA Jan.4, 2013); *Washington v. State,* 103 So.3d 917, 920 (Fla. 1st DCA 2012); *Rocker v. State,* ––– So.3d ––––, 2012 WL 5499975, 37 Fla. L. Weekly D2632 (Fla. 2d DCA Nov.14, 2012). Applying the principle of statutory revival, we hold that the only sentence now available in Florida for a charge of capital murder committed by a juvenile is life with the possibility of parole after twenty-five years. Accordingly, we vacate the life without parole sentence on the murder charge, and remand for resentencing on that charge only. We affirm in all other *1132 respects. Although Horsley argues that several alleged errors warrant a new trial on all charges, we find that none of the other issues raised by Horsley merit relief or further discussion.

With respect to the sentencing issue on which we have granted relief, we also find further elaboration to be largely unnecessary in light of two thorough and well-reasoned opinions out of the First District, authored by Judges Wolf and Makar. In a concurring opinion, Judge Wolf disagreed with the majority's failure to provide guidance to the trial court regarding the possible sentencing options available on remand, and thoroughly analyzes the available alternatives. *Washington,* 103 So.3d at 920 (J. Wolf, concurring). Judge Wolf advocates for allowing judicial discretion to select a term of years sentence for those cases where life without parole would not be permitted by *Miller*—and a life without parole sentence for the rare case [FN1] where *Miller* would allow that sentence. *Id.*

> FN1. *See* *Miller,* 132 S.Ct. at 2469 ("appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon").

In a competing thorough and thoughtful analysis, with which we fully agree, Judge Makar concluded that statutory revival should be used to revive the 1993 version of section 775.082(1), Florida Statutes, which mandated a sentence of life with the possibility of parole after twenty-five years. *Partlow v. State,* ––– So.3d ––––, 2013 WL 45743, 38 Fla. L. Weekly D94, 96–97 (Makar, J., concurring in part and dissenting in part). As noted by both Judges Wolf and Makar, the 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. The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself—thereby avoiding the type of "legislating from the bench" that would be required if we were to essentially rewrite the existing statute with original language which we feel might better meet the policy goals of the current legislature. And, while we are certainly cognizant of the fact that the legislature of late appears to be less than enamored with the concept of parole, we also note that the legislature has always been adverse to judicial discretion in sentencing in homicide cases, which could result in a perceived "lenient" term of years sentence in a case of this type. We also strongly believe that many of the considerations outlined in *Miller* would be far better addressed years after sentencing in a parole-type setting, once the juvenile has matured into an adult and his or her conduct during decades of confinement has been evaluated, than through the forward-looking speculation necessitated if these issues are to be addressed with finality at the time of sentencing.

Our resolution of the sentencing issue renders moot Horsley's argument that the trial court's attempt to address the individual mitigation factors required by *Miller* was inadequate, rendering his life without parole sentence illegal for failure to fully comply with the dictates of *Miller.*

Finally, consistent with our agreement with Judge Makar's opinion in *Partlow,* we certify to the Florida Supreme Court as a matter of great public importance the following*1133 question: “Whether the Supreme Court's decision in *Miller v. Alabama,* ––– U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which invalidated section 775.082(1)'s mandatory imposition of life without parole sentences for juveniles convicted of first-degree murder, operates to revive the prior sentence of life with parole eligibility after 25 years previously contained in that statute?” *Partlow,* ––– So.3d at –––– n. 16, 2013 WL 45743, 38 Fla. L. Weekly at 98 n. 16 (J. Makar, J., concurring in part and dissenting in part).

AFFIRMED in part; REMANDED with instructions for resentencing on single charge.

ORFINGER and WALLIS, JJ., concur.

Fla.App. 5 Dist.,2013.
Horsley v. State
121 So.3d 1130, 38 Fla. L. Weekly D1862