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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1938
L.T. CASE NO. 5D12-138; 05-2008-CF-010572-C

ANTHONY DUWAYNE HORSLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF OF PUBLIC INTEREST LAW CENTER AS *AMICUS CURIAE* ON BEHALF OF PETITIONER

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

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I. INTEREST OF AMICUS

The Florida State University College of Law Public Interest Law Center works on behalf of adolescents in a variety of settings, including those involved in the juvenile and criminal justice systems. *Amicus* engages in advocacy and research and possesses a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems.

II. IDENTITY OF AMICUS

The Florida State University College of Law Public Interest Law Center (PILC) has extensive experience in the field of juvenile justice reform. Founded in 1991, PILC, formerly known as the Children's Advocacy Center, advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. In 1997, PILC established the Children in Prison Project, specifically to focus on the rights and interests of incarcerated children. PILC works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in protecting these rights.

III. CONSENT OF THE PARTIES

Both parties have consented to this filing.

IV. SUMMARY OF ARGUMENT

In 2012, the United States Supreme Court prohibited the mandatory imposition of life without parole on juvenile offenders convicted of homicide offenses. *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012). In prohibiting the mandatory nature of the sentence, the Supreme Court cautioned that the State's harshest possible penalty should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (citations and internal quotations omitted). For the vast majority of juvenile offenders whose criminal conduct "reflects unfortunate yet transient immaturity," the Supreme Court reiterated its holding in *Graham v. Florida*, 560 U.S. 48, 75 (2010), that the State "must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* (citation and internal quotations omitted). In response to *Miller*, Florida's Fifth District Court of Appeal held that life with parole eligibility after 25 years is the only sentence that is currently permissible for juveniles convicted of a capital homicide offense in Florida under the doctrine of "statutory revival." *Horsley v. State*, 121 So. 3d 1130, 1131 (Fla. 5th DCA 2013).

Florida's parole system fails to provide a meaningful opportunity to obtain release based on maturity and rehabilitation, as *Miller* requires for those juvenile offenders that are not found to exhibit "irreparable corruption," for two fundamental reasons. First, parole eligibility does not provide juveniles with a

meaningful opportunity to obtain release. Parole eligibility at 25 years occurs far too late in the juvenile's sentence to be meaningful. Further, the parole hearing process carries with it none of the procedural rights essential to making a meaningful case for release, such as the right to counsel, the right to appeal, and the right to even be present at the parole hearings.

Second, the opportunity for release provided by the parole system is not based on demonstrated rehabilitation and maturity. The parole system is "designed to give primary weight to the seriousness of the offender's present criminal offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2013). These are static factors that an inmate cannot change. "No person shall be placed on parole merely as a reward for good conduct or efficient performance of the duties assigned in prison." § 947.18, Fla. Stat. (2013). Despite the length at which the United States Supreme Court discussed the mitigating circumstances of youth in *Roper*, *Graham*, and *Miller*, Florida's parole system treats youthfulness at the time of the offense as one of a very small number of mandatory aggravators when determining an inmate's initial presumptive parole release date. Fla. Admin. Code R. 23-21.007(4) (2013). Florida's parole system focuses primarily on the seriousness of the offense with explicit statutory instruction not to reward inmates for rehabilitation, and it not only ignores the mitigating circumstances of youth, but it actually penalizes offenders for youthfulness at the time of offense; such a

system simply does not provide the opportunity for release based on demonstrated rehabilitation and maturity mandated by the Supreme Court.

Florida's parole system does not provide a meaningful opportunity for release, and the opportunity that it does provide is not based on demonstrated maturity and rehabilitation. For these reasons, "statutory revival" of parole eligibility after 25 years for juveniles convicted of capital offenses brings Florida's sentencing scheme no closer to compliance with *Miller v. Alabama* and cannot be a constitutional remedy under the Eighth Amendment.

V. ARGUMENT

FLORIDA'S PAROLE SYSTEM DOES NOT PROVIDE A SUITABLE REMEDY FOR JUVENILES AFFECTED BY *MILLER V. ALABAMA*, 132 S.Ct. 2455 (2012).

The *Roper-Graham-Miller* line of cases is predicated on the fact that "children are constitutionally different for the purposes of sentencing." *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). In *Graham v. Florida*, the Supreme Court prohibited the States from imposing a sentence of life without parole on juveniles convicted of nonhomicide offenses. 560 U.S. 48, 82 (2010). Though it did not require the State to "guarantee eventual freedom" to juvenile offenders, the Supreme Court did set forth the requirement that the State must "provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. In reaching this decision, the Court noted that "the

remote possibility of [executive clemency] does not mitigate the harshness of the [life without parole] sentence." *Id.* at 70. The Supreme Court stressed that if a State imposes a life sentence on a juvenile, "it must provide him or her with some *realistic* opportunity to obtain release before the end of that term." *Id.* at 82. (emphasis added). In *Miller*, the Court reiterated its holding in *Graham* when discussing the permissible alternatives to life without parole for juveniles convicted of homicide. 132 S.Ct. 2455, 2469 (2012).

The Supreme Court's rejection of executive clemency as a remedy in *Graham* establishes that the mere presence of an opportunity for release does not render a punishment any less severe unless that opportunity is realistic. 560 U.S. 48, 70 (2010). *See also Solem v. Helm*, 463 U.S. 277, 300-01 (1983) (distinguishing the severity between a life sentence with the possibility of parole after 12 years and a life sentence without parole, where the only chance of release is executive clemency). In *Solem*, the Supreme Court distinguished parole from executive clemency on grounds that "[a]ssuming good behavior, [parole release] is the normal expectation in the vast majority of cases." *Id.* at 300. However, as many scholars have noted, this is simply no longer true. "What in the middle decades of the 20th Century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted."

Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices and the Eighth Amendment*, 89 IND. L.J. 373, 397 (2014) (quoting Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110-11 (Charles J. Ogletree, Jr. & Austin Sara eds. (2012)).[1] In fact, of 1,782 parole release decisions made by the Florida Parole Commission in fiscal year 2012-2013, only 22 inmates (1.23% of inmates who came before the Commission) were actually released on parole.[2]

Miller v. Alabama requires that the State provide all juvenile offenders, except those found to exhibit "irreparable corruption," with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 132 S.Ct. 2455, 2469 (2012) (citations and internal quotations omitted). While Florida's parole system may provide an opportunity for release, it is neither meaningful nor based on demonstrated maturity and rehabilitation. *Graham* does

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[1] In 1983, the same year the Supreme Court issued *Solem v. Helm*, 463 U.S. 277 1983), Florida drastically limited its parole system's reach by enacting the *Sentencing Guidelines*, which eliminated parole eligibility for inmates convicted of nonhomicide offenses. *See History of the Parole Commission*, FLORIDA PAROLE COMMISSION, *available at* https://fpc.state.fl.us/History.htm. Florida abolished parole eligibility altogether in 1994. Ch. 94-288, § 1, Laws of Fla. Today, the Parole Commission spends less than 12% of its time reviewing cases from before parole eligibility was abolished. *See* FLA. PAROLE COMM'N ANNUAL REPORT 2012-13, at 8, *available at* https://fpc.state.fl.us/PDFs/FPCannualreport201213.pdf. Meanwhile, the Commission dedicates 45% of its time to reviewing clemency petitions. *Id.*

[2] *See* FLA. PAROLE COMM'N ANNUAL REPORT 2012-13, at 8, *available at* https://fpc.state.fl.us/PDFs/FPCannualreport201213.pdf.

not require the States to "guarantee eventual freedom" to juveniles, but inmates braving Florida's parole system do not have even an expectation of release assuming good behavior. Therefore, parole is ultimately no different than executive clemency as a means of compliance with constitutional requirements of *Miller v. Alabama.*

A. The Opportunity for Release provided by Florida's Parole System is Not "Meaningful."

Miller v. Alabama requires States to provide a meaningful opportunity to obtain release to all juveniles convicted of a homicide offense, except those rare few whose crime "reflects irreparable corruption." 132 S.Ct. 2455, 2469 (2012) (citation and internal quotations omitted). Florida's parole system fails to provide juveniles with a meaningful opportunity for release for two reasons. First, because of the 25 year mandatory minimum, the first opportunity for juveniles to obtain release occurs far too late for them to lead a meaningful life outside of prison. Second, no constitutional safeguards attach to the parole hearing process to ensure the veracity of the proceedings. Since the opportunity for release provided by Florida's parole system is not meaningful, "revival" of parole eligibility for juveniles would not bring Florida's statutory scheme into compliance with *Miller.*

i. Requiring Juveniles to Wait 25 Years Before Parole Eligibility Leaves Them No Opportunity to Live a Meaningful Life Outside of Prison.

In prohibiting life without parole sentences for juveniles convicted of nonhomicide offenses, the Supreme Court noted that such a sentence "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham v. Florida*, 560 U.S. 48, 79 (2010). Subsequently, courts have held that "[t]he prospect of geriatric release... does not provide the 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required *Graham*." *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (internal citations omitted). Rather, "the better view is that a 'meaningful opportunity' for release means that review should come at a point in time that provides the prisoner the chance to live a meaningful life outside of prison." Russell, *supra* at 408.

Because of the 25 year mandatory minimum, even the youngest juveniles affected by *Miller* would be nearly 40 years old by the time of their initial review by the Parole Commission.[3] "Such a sentence means being incarcerated past the

[3] The youngest juvenile serving a life without parole sentence for a homicide offense in Florida was 13 years old at the time of the offense. *See* Eric Schab, Paolo Annino, & Ashley Nellis, *Miller Resentencing Project Report* at 5, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374429. It is also worth noting that, while the initial presumptive parole release date is set after 25 years of incarceration, "exceptional program achievement... would not normally be applied at the time of the initial interview." Fla. Admin. Code R. 23-21.010(5)(b)(2)(h) (2013). Therefore, it will often be the case that program involvement and other evidence of rehabilitation will not be considered by the Parole Commission until the first subsequent interview, which occurs 7 years after the initial interview. § 947.16(4)(g), Fla. Stat. (2013). This means that most juveniles will not actually

typical childbearing age, past the timeframe in which one could start a meaningful career, and past the age in which one could expect parents or former caregivers to still be alive." Russell, *supra* at 408. A 25 year mandatory minimum prior to parole eligibility, therefore, leaves a juvenile with little "hope for fulfillment outside prison walls," meaning that the opportunity for release is not "meaningful" as contemplated by the Supreme Court in *Graham* and *Miller*.

ii. The Parole Hearing Process carries with it no Constitutional Safeguards to Ensure the Veracity of the Parole Board's Determination.

In Florida, the decision to parole an inmate, like the decision to grant clemency,[4] is "an *act of grace* by the state and shall not be considered a right." § 947.002(5), Fla. Stat. (2013) (emphasis added). Since "no entitlement to or liberty interest in parole is created by the Florida Statutes," due process rights do not attach to the parole process in Florida. *Staton v. Wainwright*, 665 F.2d 686, 688 (5th Cir. Unit B 1982). Consequently, Florida inmates lack three important procedural safeguards to ensure that parole release decisions are made with fairness and accuracy: the right to counsel, the right to appeal, and the right to be present at parole hearings.

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have an opportunity to demonstrate maturity and rehabilitation until they have been incarcerated for 32 years, at which point they will be between the ages of 45 and 49 years old.

[4] *See Rules of Executive Clemency*, FLORIDA PAROLE COMMISSION, at 1, *available at* https://fpc.state.fl.us/PDFs/clemency_rules.pdf.

The right to counsel is "essential to the fairness of a proceeding." *Beard v. Banks*, 542 U.S. 406, 418 (2004) (internal citation omitted) (reaffirming that *Gideon v. Wainwright*, 372 U.S. 335 (1963) is the only rule of criminal procedure to emerge that has been so significant that it merits retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989)). Inmates facing Florida's parole system lack this fundamental protection. Russell, *supra* at 403 n. 196. Though inmates may hire an attorney to appear on their behalf at a parole hearing, they do not have a right to have an attorney appointed for them if they cannot afford one. *Id.* at 402-03. Inmates face great difficulty "investigating, collecting, and presenting factual information so that the release decision is based on a full presentation of the relevant evidence" from behind prison walls without the assistance of counsel. *Id.* at 426. To further complicate matters, inmates are denied access to the information provided to the Florida Parole Commission by the prosecutor and by the victim or victim's representative. *Id.* at 405 n. 211-12. Without the assistance of counsel to investigate, collect, and present mitigation evidence to the Parole Commission, juveniles do not have a meaningful opportunity to demonstrate maturity and rehabilitation.

Inmates are entitled to review of their initial presumptive parole release date by the Parole Commission upon showing cause. § 947.173(1)-(2), Fla. Stat. (2013). Final agency action is usually subject to review by appeal to the

appropriate district court of appeal. § 120.68(2)(a), Fla. Stat. (2013). However, Section 120.81(3)(a), Florida Statutes (2013), creates an exception by which inmates have no statutory right to judicial review. Instead, inmates must file a writ of mandamus for further review of action by the Parole Commission. *Sheley v. Fla. Parole Comm'n.*, 720 So. 2d 216, 217 (Fla. 1998). This form of review is limited in that "[b]efore the court may issue a writ of mandamus, it must be shown that... there is an indisputable legal duty on the part of the respondent." *Lee Cnty. v. State Farm Mut. Auto. Ins. Co.*, 634 So. 2d 250, 251 (Fla. 2d DCA 1994).

The Florida Parole Commission has no statutory duty to consider the mitigating factors of youth when setting the presumptive release date or to parole an inmate (or even to reduce the number of months remaining before parole release) on subsequent reviews due to the inmate's demonstrated maturity and rehabilitation. *See* Fla. Admin. Code R. 23-21.007(4) (2013); § 947.18, Fla. Stat. (2013). Mandamus relief does not ensure that the Parole Commission abides by the Supreme Court's mandates in *Graham* and *Miller*, because the Commission has no "indisputable duty" to follow these mandates. "The ability to force decision makers to justify their decisions and be able to challenge these decisions before another body" is essential to ensuring that the decisions of Parole Commission are accurate, consistent, and meaningful. Russell, *supra* at 428. "One of the best procedural protections against arbitrary exercise of discretionary power lies in the

requirement of findings and reasons that appear to *reviewing judges* to be rational." *Roberson v. Fla. Parole Comm'n*, 444 So. 2d 917, 921 (Fla. 1983) (original emphasis) (internal citations and quotations omitted). Absent a statutory obligation to parole inmates because of their demonstrated maturity and rehabilitation, the writ of mandamus does not provide juveniles the necessary ability to hold the Parole Commission accountable for its release decisions, rendering the entire parole hearing process meaningless.

Inmates do not appear before the Parole Commission itself. Fla. Admin. Code R. 23-21.004(13) (2013). Instead, an interview is conducted with a parole examiner, who submits his or her findings to the Commission in writing. Fla. Admin. Code R. 23-21.006(9)-(11) (2013). The parole examiner lacks any decision-making authority and the Parole Commission is free to depart from his or her recommendations. Russell, *supra* at 401. As discussed above, inmates may hire a lawyer or have supporters speak on their behalf. But, even this can be difficult, since Parole Commission meetings occur exclusively in Tallahassee, Florida unless the Commission receives funding to appear elsewhere.[5] The expense and hardship of traveling from other regions of the State undoubtedly

[5] *See Parole Commission Facts and Frequently Answered Questions*, FLORIDA PAROLE COMMISSION *available at* https://fpc.state.fl.us/Facts.htm; *See also Commission Voting Schedule*, FLORIDA PAROLE COMMISSION *available at* https://fpcweb.fpc.state.fl.us/Schedule.aspx (showing that only three Parole Commission meetings are scheduled to take place outside of Tallahassee, Florida in 2014).

renders an appearance before the Parole Commission impossible for many would-be inmate supporters. Without even the basic right to be present before those deciding their fate, it can hardly be said that juveniles would have a "meaningful" opportunity for release via Florida's parole system.

The Supreme Court has required the States to provide juvenile offenders with a "*meaningful* opportunity to obtain release." *Miller*, 132 S.Ct. 2455, 2469 (2012) (emphasis added) (citation and internal quotations omitted). But, since inmates have no "liberty interest" in parole release, the Florida parole system has operated largely in the shadows of the Constitution, declining to provide inmates with fundamental rights, such as the right to counsel, the right to appeal, and the right to be present. *Staton v. Wainwright*, 665 F.2d 686, 688 (5th Cir. Unit B 1982). Simply adding due process requirements to Florida's parole system for juveniles would be problematic, since, as the Supreme Court has stated regarding executive clemency,[6] parole "would cease to be a matter of grace... if it were

[6] Executive clemency and Florida's parole system share many similar procedural elements. As the Parole Commission delegates the initial interview to a parole examiner who has no decision-making authority, the Clemency Board designates all investigations to the Parole Commission, which has no decision-making authority. *See Rules of Executive Clemency*, FLORIDA PAROLE COMMISSION, at 8, *available at* https://fpc.state.fl.us/PDFs/clemency_rules.pdf. As inmates must wait 7 years between subsequent parole hearings, parties seeking clemency must wait 5 years to reapply for clemency if their petition is denied. *Id.* at 14. All clemency hearings take place in Tallahassee, Florida. *See Driving Directions to the State Board of Executive Clemency Meetings*, FLORIDA PAROLE COMMISSION, *available at* https://fpc.state.fl.us/BoardDirections.htm. However, unlike parole hearings,

constrained by the sort of procedural requirements that respondent urges." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285 (1998). Ultimately, "[t]here should be no room for a 'shadow government' in a government in the sunshine." *Roberson*, 444 So. 2d 917, 921 (Fla. 1983).

B. The Opportunity for Release provided by Florida's Parole System is Not Based on Demonstrated Maturity and Rehabilitation.

Not only do *Graham* and *Miller* require that the State provide juveniles with a meaningful opportunity for release, but they also require that the opportunity be "based on demonstrated maturity and rehabilitation." *Miller*, 132 S.Ct. 2455, 2469 (2012) (citation and internal quotations omitted). Florida's parole system, however, is designed to give "primary weight" to the seriousness of the offense. § 947.002(2), Fla. Stat. (2013). Rehabilitation is, at best, a secondary consideration. *See* Fla. Admin. Code R. 23-21.009(5) (2013). Further, rather than acknowledging the mitigating factors of youth discussed so thoroughly in *Graham* and *Miller*, Florida's parole system actually penalizes inmates for youthfulness at the time of the offense. Fla. Admin. Code R. 23-21.007(4) (2013). For these reasons, Florida's parole system does not provide inmates with a chance to obtain release based on maturity and rehabilitation and, therefore, "revival" of parole for

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which inmates are prohibited from attending, the Clemency Board "encourages applicants to attend" the hearings. *Rules of Executive Clemency*, at 16.

juveniles would not bring Florida's statutory scheme into compliance with *Miller v. Alabama*.

i. The Parole Commission is Statutorily Obligated to Give Primary Weight to the Seriousness of the Offense.

"Objective parole criteria will be designed to give *primary weight* to the seriousness of the offender's present criminal offense and the offender's past criminal record." § 947.002(2), Fla. Stat. (2013) (emphasis added). "No person shall be placed on parole merely as a reward for good conduct or efficient performance of the duties assigned in prison." § 947.18, Fla. Stat. (2013). Rule 23-21.010(5), Florida Administrative Code (2013), provides examples of when the Parole Commission may choose to aggravate or mitigate from a presumptive parole release date. The majority of these discretionary aggravators and mitigators are focused on the circumstances of the present offense and the inmate's criminal history. *Id.*

In prohibiting the death penalty for juveniles, the Supreme Court noted that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments of youth as a matter of course." *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Florida's objective parole guidelines are designed to ensure that this is exactly what happens. *Miller v. Alabama* mandates that even juveniles convicted of homicide be provided an opportunity for release based on demonstrated maturity and rehabilitation, so long

as their criminal behavior does not indicate "irreparable corruption." 132 S.Ct. 2455, 2469 (2012) (citation and internal quotations omitted). Every single juvenile affected by *Miller* stands convicted of the State's most serious crime. A system of review predicated on the severity of the offense that provides for only the optional, secondary consideration of maturity and rehabilitation "means denial of hope; it means that good behavior and character improvement are immaterial." *Graham v. Florida*, 560 U.S. 48, 70 (2010) (internal citation omitted).

The reality is that nothing a juvenile does—no matter how many personal development certificates they earn, no matter whether they obtain a G.E.D. or complete college courses, no matter how many responsibilities they take on or whether they learn a trade—could ever undo the damage caused by the homicide offense. The Parole Commission cannot release these inmates "merely as a reward for good conduct." § 947.18, Fla. Stat. (2013). But, *Graham* and *Miller* require that the State provide juveniles with hope that their actions in prison will matter and that, with time, they can prove themselves fit to reenter society. *See Graham*, 540 U.S. 48, 79 (2010). Parole eligibility, on the other hand, haunts juveniles with the tragic consequences of their mistakes for the remainder of their lives. § 947.002(2), Fla. Stat. (2013).

Because Florida's parole system gives primary weight to "brutality or cold-blooded nature" of the offense, an unacceptable likelihood exists that, for virtually

all juveniles convicted of a homicide offense, life with parole after 25 years will be no different from life without parole. Therefore, "revival" of parole eligibility after 25 years for juveniles makes Florida's sentencing scheme no more constitutional than it currently is.

ii. Florida's Parole System Treats Youthfulness at the Time of the Offense as a Mandatory Aggravator when Calculating the Initial Presumptive Parole Release Date.

In *Miller v. Alabama*, the Supreme Court held that "children are constitutionally different from adults for purposes of sentencing." 132 S. Ct. 2455, 2464 (2012). Building off of *Roper* and *Graham*, the Court articulated three defining characteristics of youth that make them less deserving of the State's harshest penalties. *Id.* "First, children have a lack of maturity and an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." *Id.* (citation and internal quotations omitted). "Second, children are more vulnerable… to negative influences and outside pressures including from their family and peers" and "have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (citation and internal quotations omitted). Third, because a "child's character is not as well-formed as an adult's," his "traits are less fixed" and his "actions less likely to be evidence of irretrievabl[e] deprav[ity]." *Id.* (citation and internal quotations omitted). Because of these fundamental

differences, the Supreme Court required the States to provide all juveniles with "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," except for a rare few whose crime reflects "irreparable corruption." *Id.* at 2469. (citation and internal quotations omitted).

In stark contrast to the principles behind *Miller* and the cases leading up to it, youthfulness at the time of the offense is one of only a few mandatory aggravators that the Parole Commission must use when calculating an inmate's initial presumptive parole release date. Fla. Admin. Code R. 23-21.007(4) (2013).[7] Juveniles under the age of 18 at the time of the offense are automatically awarded an additional 2 points to their Salient Factor Score. *Id.* Even assuming that no other mandatory or discretionary aggravators are used, the additional 2 points can translate into as much as 10 additional years of incarceration, based solely on

[7] There are a total of seven mandatory aggravators used by the Parole Commission to compute an inmate's "Salient Factor Score." Each aggravator has a point value associated with it. The higher the inmate's "Salient Factor Score," the greater the maximum and minimum range is for the inmate's presumptive parole release date. Fla. Admin. Code R. 23-21.009(5) (2013). The seven aggravators are: 1.) number of prior convictions, 2.) number of prior incarcerations, 3.) total amount of time incarcerated, 4.) youthfulness at the time of the offense, 5.) number of probation or parole revocations, 6.) number of prior escape attempts, and 7.) burglary or breaking and entering as present offense. Fla. Admin. Code R. 23-21.007 (2013). Though the "Salient Factor Score" is used to establish a range for the inmate's presumptive parole release date, it is also worth noting that the Parole Commission has broad discretion to aggravate or mitigate from this range using the nonexhaustive list of factors contained in Rule 23-21.010(5), Florida Administrative Code (2013), at the initial interview and all subsequent interviews.

youthfulness at the time of the offense. Fla. Admin. Code R. 23-21.009(5) (2013).[8] A system of review that mandatorily increases a juvenile's sentence based on his or her status as a juvenile at the time of the offense completely contradicts the core principles announced in *Roper*, *Graham*, and *Miller* about the diminished culpability and increased potential for rehabilitation inherent in juveniles.

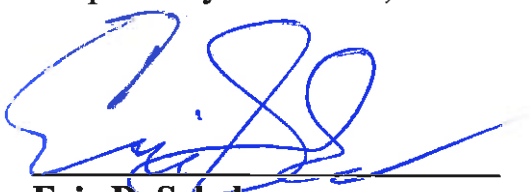
VI. CONCLUSION

Miller v. Alabama renders Florida's sentencing scheme unconstitutional as applied to juveniles. *Horsley v. State*, 121 So. 3d 1130, 1131 (Fla. 5th DCA 2013). In response to *Miller*, the Fifth District revived the 1993 version of Section 775.082(1), Florida Statutes, for juveniles, which provides for parole eligibility after 25 years for inmates convicted of a homicide offense. *Id.* at 1132. However, the 1993 version of Section 775.082(1) is still unconstitutional under *Miller*. *Miller v. Alabama* requires the State to provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" to all juveniles, except those rare few whose crime reflects "irreparable corruption." 132 S.Ct. 2455, 2469 (2012) (citation and internal quotations omitted). Florida's parole

[8] Though Rule 23-21.009(5), Florida Administrative Code (2013), contains a separate matrix for "youthful offenders." This matrix is not automatically used when an inmate was under the age of 18 at the time of the offense, but rather if the inmate was sentenced as a "youthful offender." Juveniles convicted of a capital offense are not eligible for the downward departure and so no juveniles affected by *Miller v. Alabama* would receive the benefit of this matrix. § 958.04(1)(c), Fla. Stat. (2013).

system is incapable of providing juveniles with this opportunity for two reasons: 1.) it is not a meaningful opportunity to obtain release, and 2.) it is not based on demonstrated maturity and rehabilitation. Therefore, parole eligibility is not a constitutional remedy under *Miller*. Accordingly, this Court should vacate Petitioner Horsley's sentence and remand the case for resentencing in accordance with the Supreme Court's holding in *Miller v. Alabama*.

Respectfully Submitted,



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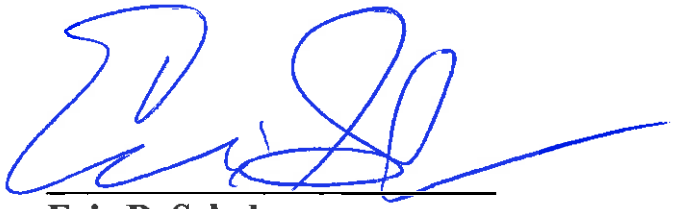
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by eService on Kellie Nielan, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, crimappdab@myfloridalegal.com, and Kathryn Radtke, Counsel for Petitioner, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, radtke.kathryn@pd7.org on this 18th day of February, 2014.



Eric D. Schab

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Eric D. Schab