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IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

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

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

BRIEF OF KYLE WALLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

Kyle Walling is a criminal defendant currently awaiting resentencing in the First Judicial Circuit Court for Okaloosa County after his mandatory life-without-parole sentence was vacated under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). *See Walling v. State*, 105 So. 3d 660 (Fla. 1st DCA 2013). In Kyle's case, the State of Florida is arguing for application of the same "statutory revival" theory adopted by the Fifth District Court of Appeal in *Horsley v. State*, 121 So. 3d 1130 (Fla. 5th DCA 2013). If the Fifth District Court of Appeal's holding in *Horsley* is affirmed by this Court, it will be difficult for Kyle to argue against application of that holding to him due to principles of *stare decisis*. Therefore, Kyle has an interest in the outcome of this case and in having his arguments—which differ from but complement the arguments of the petitioner—heard.

IDENTITY OF AMICUS

Kyle Walling is currently an inmate in the Florida Department of Corrections. He was convicted of first-degree felony murder for an offense that occurred when he was 16 years old in Okaloosa County. He is awaiting resentencing in the First Judicial Circuit Court. At trial, the jury found that Kyle participated with other teenagers in the planning of an armed robbery, which was actually attempted by two of Kyle's co-defendants while Kyle waited several blocks away. *Walling*, 105 So. 3d at 661–62. Although the plan was to use a gun merely to scare the victim, the plan

"went awry" and the victim was shot by a co-defendant, *Washington v. State*, 103 So. 3d 917, 918 (Fla. 1st DCA 2012), giving rise to the felony murder charge.

CONSENT OF THE PARTIES

Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Under this Court's precedent, the first question a court should ask when facing an unconstitutional legislative enactment is: Can the unconstitutional portion of the statute be severed? *Cramp v. Bd. of Public Instruction*, 137 So. 2d 828, 830 (Fla. 1962) ("The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act."). Only after the option of severing the invalid statutory language is considered and rejected, and only if the resulting failure of the statute creates a "hiatus" in the law, do this Court's precedents authorize statutory revival. *E.g.*, *B.H. v. State*, 645 So. 2d 987, 995 (Fla. 1994) (per curiam); *State ex. rel. Boyd v. Green*, 355 So. 2d 789, 795 (Fla. 1978). The Fifth District Court of Appeal, as well as the First District Court of Appeal concurrence which it adopted, erred by failing to address the question of severance before proceeding to consider and approve a remedy based on statutory revival. *See Horsley*, 121 So. 3d at 1130; *Partlow v. State*, No. 1D10-5896, 2013 WL 45743, at *3–8 (Fla. 1st DCA Jan. 4, 2013) (Makar, J., concurring).

In addressing the threshold question of severability, this Court should hold that

the statutory provisions rendered unconstitutional as applied to juveniles by *Miller* are severable from the remainder of the murder statute (section 782.04). Severing the statute to remove those invalid statutory provisions, in cases involving juveniles, would leave in place a complete and valid act which classifies first-degree murders as first-degree felonies punishable by a term of years up to life. This result respects the specific purpose of section 782.04 to provide serious punishment for first-degree murder as well as the more general purposes of the Legislature to reject parole as a sentencing option and to establish a graduated hierarchy of punishments for homicide in which the applicable sentencing range for an offense increases or decreases in proportion to culpability of the offender.

Finally, as opposed to the one-size-fits-all sentence that would result from the statutory revival remedy imposed below, a severance remedy better implements *Miller*'s individualized sentencing mandate, which requires that a sentencer give attention to not only the differences between juveniles and adults, but also the differences among individual juvenile offenders, and that the sentencer be able to give meaningful effect to those differences.

ARGUMENT

I. The Court Below Erred by Applying a Statutory Revival Remedy Without First Determining If the Unconstitutional Portion of the Murder Statute Was Severable.

This Court's precedents addressing statutory revival authorize that remedy only

after the option of severing the invalid statutory language is considered and rejected, and only if the resulting failure of the statute creates a "hiatus" in the law.[1] *E.g.*, *B.H.*, 645 So. 2d at 995; *Boyd*, 355 So. 2d at 789. Conversely, where the invalid statutory language can be severed so as to leave in place a coherent act that accomplishes the basic purpose of the Legislature, statutory revival is not appropriate. *See B.H.*, 645 So. 2d at 995.

In *Boyd*, the Legislature attempted to adopt a system of bifurcated trials in cases involving the insanity defense. 355 So. 2d at 791. Simultaneously, it repealed the criminal rule which had previously allowed pleading the affirmative defense of insanity during non-bifurcated trials. *Id.* This Court held that the first provision—adopting bifurcated trials—violated due process. *Id.* at 794. It then considered whether the remainder of the statute—i.e. the provision repealing the previous procedures for raising an insanity defense, which was otherwise unobjectionable—could stand. *Id.* at 794–95. This question was answered in the negative because leaving the second provision in place would have completely eliminated the insanity defense from the statutes, whereas the Legislature had

[1]There may be other requirements for statutory revival that are not met here, such as the requirement that the revived statute be the immediate predecessor of the unconstitutional statute or that the revival be consistent with legislative intent. However, these points are covered in the party brief and in Judge Wolf's concurring opinion in *Washington*. *See* Initial Brief of Petitioner 24–25; *Washington*, 103 So. 3d at 920–22 (Wolf, J., concurring).

intended to *preserve* the insanity defense while merely changing the method of raising it. *Id.* Therefore, only after finding that severance would be inappropriate, this Court held that the statute was unconstitutional in its entirety and that the prior version of the statute remained in force. *Id.* at 795. Similarly, in *B.H.*, this Court proceeded to address statutory revival only after finding that the invalid language in the challenged statute was "not reasonably severable from the remainder," and that, "[a]ccordingly, the entire statute fail[ed]." 645 So. 2d at 994–95.

The *B.H.* court further stated that statutory revival "generally is applicable only where the loss of the invalid statutory language will result in a 'hiatus' in the law that would be intolerable to society." *Id.* at 995. Such a hiatus existed in *B.H.* because the complete failure of the juvenile escape statute in that case would have rendered the State unable to prosecute and punish serious conduct which the Legislature clearly intended to be a crime. *See id.*

Neither the Fifth District Court of Appeal's opinion below nor the concurring opinion of Judge Makar which it adopts acknowledges this threshold step in the remedial analysis. *See Horsley*, 121 So. 3d at 1130; *Partlow*, 2013 WL 45743, at *3–8 (Makar, J., concurring). The former does not mention severance at all, whereas the latter mentions it only to note that it is a "close cousin" of statutory revival. *Partlow*, 2013 WL 45743, at *4. While this may be true, it nevertheless misses the import of this Court's precedents, which is that there is a conditional relationship

between the two remedies, with the failure of the first (severance) being a condition precedent for the consideration of the second (revival).

In fact, had they followed the proper analysis, the opinions in question never should have reached statutory revival, because the offending language in this case, unlike that in *B.H.* and *Boyd*, is reasonably severable from the remainder of the statute.

II. The Unconstitutional Portion of the Murder Statute Is Severable.

It is well established that an act or statutory provision need not be invalidated in its entirety simply because one aspect of the provision has been found unconstitutional. *See, e.g.*, *Schmitt v. State*, 590 So. 2d 404, 414–15 (Fla. 1991); *Cramp*, 137 So. 2d at 830. Rather,

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp, 137 So. 2d at 830; *accord Schmitt*, 590 So. 2d at 414–15 (citing *Cramp*).

Under this test, this Court can and should sever the murder statute (section 782.04) to remove the penalty provision that is unconstitutional as applied to

juveniles after *Miller* and to allow juveniles convicted of first-degree murder to be punished pursuant to the sentencing range otherwise applicable to second-degree murder—i.e., a term of years up to life.[2] Such a result would separate the valid and

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[2]The severed statute would read as follows:

(1)(a) The unlawful killing of a human being:

> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any [enumerated felony] . . . or
> 3. Which resulted from the unlawful distribution of [certain statutorily defined controlled substances] . . . by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and ~~constitutes a capital felony, punishable as provided in s. 775.082.~~
~~(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.~~

~~(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and~~ constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

In practice, however, most convictions would likely be reclassified as life felonies. *See* § 775.087(1)(a), Fla. Stat. (reclassifying first-degree felonies as life felonies where defendant uses weapon or firearm during commission of offense).

invalid provisions of the statute while leaving in place an act that is complete in itself. Indeed, the severed statute would be easily administrable by trial courts accustomed to engaging in discretionary sentencing within this kind of statutory range, guided by the Criminal Punishment Code and other relevant statutes.

In addition, the severed statute would continue to accomplish the overarching legislative purpose of the murder statute—condemning the taking of human life and providing serious penalties for such offenses. *Cf. B.H.*, 645 So. 2d at 995 (finding severance *not* appropriate where severed statute would have provided "no punishment whatsoever" for certain class of offenses). In fact, the severed statute would provide a remedy that is closely attuned to the general statutory framework, which provides a graduated scale of progressively harsher sentencing ranges for increasingly aggravated homicides. The severed statute would simply lower the offender's sentencing range one step according to this pre-established hierarchy, in order to give effect to *Miller*'s constitutional mandate. And this would be particularly appropriate given that the Legislature has defined the degrees of homicide largely based on successively less culpable mental states, *see generally* § 782.04, Fla. Stat., while *Miller*'s constitutional rationale is also based on the reduced culpability of juveniles as a class, compared to adults. *Miller*, 132 S. Ct. at 2460 (holding that mandatory life-without-parole sentences violated Eighth Amendment by "prevent[ing] those meting out punishment from considering a juvenile's 'lessened culpability'" (quoting

Graham v. Florida, 560 U.S. 48, 68 (2010))); *id.* at 2464–65 (reviewing development deficits affecting juvenile culpability, such as lessened capacity to appreciate risk and potential consequences, or to avoid or resist negative influences).

Indeed, other courts in analogous situations have found that providing a remedy that hews as close as possible to the Legislature's established sentencing hierarchy is such an important value that they have ordered sentencing according to the penalties for the next-lesser degree of homicide whether or not they relied specifically on severance to reach that result. *See, e.g.*, *State v. Hart*, 404 S.W.3d 232, 241–43 (Mo. 2013) (en banc) (holding that where sentencer is not persuaded beyond reasonable doubt that life without parole is appropriate notwithstanding *Miller* mitigation, juvenile defendant convicted of first-degree murder should be resentenced pursuant to statutory range for second-degree murder, which is 10 to 30 years or life with parole); *Commonwealth v. Brown*, 1 N.E.3d 259, 268 (Mass. 2013) (finding that juveniles convicted of first-degree murder should be sentenced within same range applicable to second-degree murder); *see also People v. Davis*, 371 N.E.2d 456, 466 (N.Y. 1977); *State v. Jenkins*, 340 So. 2d 157, 179 (La. 1976).[3]

[3]In 1976 the United States Supreme Court struck down numerous mandatory death-penalty statutes. Of these, counsel has identified two states—New York and Louisiana—that had no legislatively designated "fall back" penalty, putting them in an analogous position to Florida after *Miller*, i.e., having no legislatively defined punishment for capital murder. Both states ordered resentencing based on the legislatively enacted penalties for the next-most-culpable degree of homicide, second-

Certainly, a remedy which harmonizes with the overall legislative punishment scheme currently in place—whether based specifically on severance or more generally on the principle that relying on the legislatively enacted sentence for the next-lesser offense is the best way to respect legislative intent—is more in tune with legislative purpose than a remedy which re-imposes a sentence and an entire approach to criminal punishment that the Legislature has clearly rejected for a period of 20 years.[4]

Moreover, returning to the *Cramp* factors, it cannot be said that the specific punishment of mandatory life-without-parole is "inseparable in substance" from the definition of first-degree murder, such that the Legislature would not have passed a statute defining and condemning first-degree murder if it had known that it could not impose that punishment. This is particularly the case given that the severed statute will still result in the availability of severe penalties for juveniles convicted of first-degree murder.

In sum, far from leading to the sort of "absurd[]" result that would render the invalid language non-severable, *B.H.*, 645 So. 2d at 995, here the statutory language

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degree murder. *See Davis*, 371 N.E.2d at 466; *Jenkins*, 340 So. 2d at 179.

[4]None of this Court's cases cited below involved a gap between repeal and revival nearly this long. *E.g., B.H.*, 645 So. 2d at 989 (Fla. 1994) (addressing constitutionality of 1990 enactment); *Boyd*, 355 So. 2d at 795 (Fla. 1978) (addressing constitutionality of 1977 enactment); *see also, e.g.*, *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952) (addressing 1951 enactments).

remaining absent the stricken language would create a complete and valid provision entirely consistent with the general legislative scheme of graduated punishment and with the purpose of the homicide statutes.

III. The One-Size-Fits-All Sentencing Remedy Adopted Below Undermines *Miller*'s Mandate of Individualized Sentencing.

Finally, the severed statute described above would also be entirely consistent with the constitutional holding of *Miller*, with its requirement of individualized sentencing that takes into account not only the difference between juveniles and adults, but the differences among individual juvenile offenders. *See Miller*, 132 S. Ct. at 2467–68 ("[M]andatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other . . . ."). By contrast, the statutory revival remedy adopted below would reimpose a mandatory, one-size-fits-all parole regime that has been rejected by the Legislature for 20 years, and thus would be consistent with neither the legislative scheme nor *Miller*'s rationale of individualized sentencing. *Cf. Jackson v. Norris*, 2013 Ark. 175, 2013 WL 1773087, at *7 (2013) (rejecting State's suggestion to sever capital-murder statute to create "mandatory sentence of life imprisonment with the possibility of parole," because "imposition of that sentence . . . would not allow for

consideration of *Miller* evidence").[5]

Such an approach is particularly unwise in Florida. In addition to the normal variation in potential mitigating circumstances (family and school background, prior criminal history, crime facts, co-defendants, age, medical and psychological history, etc.), the range of individual circumstances is especially broad here for two reasons. First, unlike many states which require intent to kill as an element of capital or first-degree murder, Florida allows proof of first-degree murder without intent to kill under the felony murder provision. *See* § 782.04(1)(a)(2), Fla. Stat.; *see also, e.g.*, *Walling*, 105 So. 3d at 661–62; *Arrington v. State*, 113 So. 3d 20, 22 (Fla. 2d DCA 2012) (noting instances of juveniles convicted of first-degree felony murder), *review denied*, 104 So. 3d 1087 (Fla. 2012). And second, unlike many states that expose only older juveniles to adult sentencing, Florida has no minimum age for adult prosecution. *See generally* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20, 27–29 (2007), *available at*

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[5]In *Jackson*, the Arkansas Supreme Court applied a remedial analysis that is very similar to the remedy applicable in Florida—the court severed the relevant statute with the result that first-degree murder would be classified as the next-lesser degree of felony, authorizing a term-of-years sentencing range. *Jackson*, 2013 WL 1773087, at *7–8 (severing statute to allow resentencing pursuant to statutory range for next-lowest class of felony, which was 10 to 40 years or life, and holding that such severance would "not defeat [the purpose of] the statute. The purpose . . . was to provide a penalty for capital murder. Severing language . . . so that capital murder is a Class Y felony still serves that purpose by providing a penalty for the crime.").

http://www.eji.org/files/20071017cruelandunusual.pdf (citing cases of very young teens sentenced to life without parole in Florida). Thus it is particularly important that this Court adopt a remedy that allows for the development of an evidentiary record at sentencing and provides trial judges with sufficient discretion to impose a proportional sentence in each case, across the spectrum of individual circumstances.

CONCLUSION

This Court has held in some cases that an unconstitutional statutory provision is not reasonably severable because its removal would render the larger statutory unit unworkable, incomplete, absurd, or clearly contrary to legislative intent. In those cases, where the failure of the statute creates a "hiatus" in the law, this Court has applied the remedy of statutory revival.

But unlike in those cases, here the provisions of the murder statute rendered unconstitutional by *Miller* are reasonably severable from the remainder of the statute. Removing those provisions (i.e., the designation of first-degree murder as a capital felony and the requirement to impose a mandatory life-without-parole sentence) would create no hiatus in the law. The State would not be left without authority to prosecute or punish the underlying crime, like in *B.H.* The resulting scheme would not be absurd and contrary to legislative intent, like in *Boyd*. Instead, Kyle Walling, Anthony Horsley, and other affected juveniles would be subject to punishment by any term of years up to life, taking into account the application of the Criminal

Punishment Code and the special considerations necessitated by *Miller*—a result perfectly consistent with the general legislative scheme and purpose.

Therefore, this Court should reject the statutory revival remedy imposed below and hold that in cases where a juvenile is convicted of first-degree murder, the murder statute should be severed to allow punishment under the sentencing range otherwise defined for the next-most-serious degree of homicide, second-degree murder.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief is submitted in Times New Roman 14-Point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties, through below-listed counsel, on this 20th day of February, 2014, by eService:

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