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IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY, JR.,

Petitioner,

v. CASE NO. SC13-1938
CONSOLIDATED SC13-2000

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Horsley was indicted for the offenses of first degree murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm (R 111-13). He was seventeen years old at the time of the offenses (R 95, 115). After a series of *Faretta* inquiries, the trial court found that Horsley was of sound mind and capable of representing himself (T 20-22, SR 1042-44, SR 1060-61).

Evidence at trial showed that the victim and his wife, Mr. and Mrs. Patel, owned a convenience store in Palm Bay (T 179-80). Mr. Patel was in the front of the store behind the counter, and Mrs. Patel was in the back (T 182-83). She heard the door open, and a second or two later heard a gunshot (T 186). She was told not to come out front or she would be shot (T 187-88). The gunman was wearing a mask, as were the two other people with him (T 189-90). They could not open the cash register, so they threw it on the floor to break it, and took cash, money orders and checks from it, and also took beer and cigarettes (T 191). Mr. Patel died from a gunshot wound to the chest (T 283).

Richard Douglas, a regular customer, heard a gunshot as he was stepping up to the store, and saw a gunman and two other people (T 215-18). He started to turn to leave, and the gunman came out and told him not to move or he would shoot (T 219). Douglas ran across the street to a police substation (T 219-20). He identified

Horsley in court as the gunman (T 229-30). Horsley's codefendants, Hassan Scott and Dwan Smith, both testified, and said that they all knew they were going to rob a store, and that Horsley was the only one with a gun when they entered the store (T 323, 325, 480, 482, 891, 924-26). Horsley gave a statement to the police in which he said that he sat in the car the whole time, and testified at trial that he was not there and had never been in Mr. Patel's store (T 466, 759).

Horsley was convicted of first degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated battery with a firearm. He was sentenced to life without the possibility of parole on the first degree murder. While his appeal was pending, he filed a motion to correct his mandatory life sentence, based on *Miller v. Alabama*. At Horsley's resentencing proceeding, the prosecutor argued that the only two sentencing options available to the judge were life without parole and life with the possibility of parole after 25 years (R 1277-93). Defense counsel agreed that the trial court had the discretion to sentence Horsley to life with the possibility of parole after 25 years (R 1293). It was originally defense counsel's position that the trial court did not have discretion to sentence Horsley to a term of years, so the trial court observed that they were all in agreement (R 1293-94).

The trial court then asked defense counsel if he was going to

present "juvenile mitigation factors," and counsel replied that he was not going to, and requested a continuance to do so; if one was not granted, he would present Horsley's testimony (R 1301). The prosecutor noted that it had been understood by everyone that the resentencing would be that day, and trial court made the following findings:

> I think we should do that. I will make my initial ruling, so you all can go forward with the resentencing portion of it.
>
> The defendant must be resentenced. We all agree with that. The premise of statutory revival requires the court to include life with the possibility of parole after 25 years.
>
> Obviously, the second one is revived, and those are the only two choices.
>
> The Court must take into consideration all the factors associated with the juvenile's deficiencies, so to speak, as a result of age and maturity level, or for lack of a better phrase, juvenile mitigation factors.
>
> I think what I said at sentencing was the Legislature believes that Mr. Horsley should be sentenced to life in prison without the possibility of parole, and at the time, that was the law.
>
> So, now, I will hear those mitigating factors that would allow me to make a decision as to whether or not his sentence is life with the possibility of parole after 25 years, or life without parole.

(R 1303-04).

Defense counsel then put on the record that Horsley disagreed with counsel's assessment, and that Horsley believed the court had the discretion to sentence him to a term of years (R 1304). Counsel then argued that the court *did* have the discretion to

sentence Horsley to a term of years, although he did not have the case law in front of him (R 1305). The trial court told counsel that he preserved it for appeal (R 1305). Counsel then said that Horsley wanted to make sure that the court understood their position, which appeared to be that they were asking the court to sentence him under the guidelines (R 1306).

Horsley testified, the parties presented argument, and the trial court found:

> After consideration of all the mitigating juvenile factors presented, I believe he should be sentenced to life in prison without parole, as well.
>
> There is no evidence the Mr. Horsley did not intend to kill the victim. He's never shown any remorse for his actions. It was cold, calculated, unnecessary, heinous, and is the result of a depraved heart.
>
> Mr. Patel made no efforts to resist, and, without warning, was gunned down in his place of business, with his family right there.
>
> Mr. Horsley was 17 years of age at the time of the murder. There is no evidence Mr. Horsley was immature or impetuous.
>
> In fact, Mr. Horsley did an excellent job representing himself in a two-week-plus trial. His handwritten motions were articulate, well written, and well supported with relevant case law.
>
> His mother supported him throughout the trial, and was here almost every day that she wasn't locked up in jail.[1]
>
> He was in the care of his family throughout his

[1] Horsley's mother, Catherine DaSilva, testified at trial, and explained that she is an "illegal driver," meaning she drives without a license, and nothing else (T 1033, 1044).

youth. Many of us – many people in this country are raised in extended-family households. I don't find that to be a mitigating factor at all.

There was no evidence that it was peer pressure that was involved in this crime.

His testimony today that he wasn't at the scene of the crime is different than what he testified at trial. At trial he stated he was there. Today he says otherwise.[2]

He has shown a great capacity to deal with prosecutors and defense attorneys during the trial. His mastery of discovery requests, continuances, and pre-trial motions was amazingly high.

He articulately stated he wanted to represent himself no less than twenty times. The Defendant, as I have mentioned, must be resentenced, and the statutory requirements are that he has – I have two options.

I believe Mr. Horsley could be the definition of irreparable corruption, as referenced in Miller. He was the leader of this murderous cabal. He planned it. He was the shooter and the driver.

I do not find the statutes cited to be unconstitutional on their face, or in any way unconstitutional.

Mr. Horsley has no verifiable history of mental illness during his childhood.

I sentence Mr. Horsley to life without the possibility of parole on Count 1, premeditated murder.

(R 1346-48).

On appeal, Horsley claimed that his life sentence without the possibility of parole violated *Miller v. Alabama*, 132 S.Ct. 2455

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[2] The prosecutor later pointed out that Horsley's trial testimony had been consistent with a claim of not being there, and that it had been during a police interview that he admitted he was there.

(2012). The Fifth District Court of Appeal applied the principle of statutory revival, and held 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. *Horsley v. State*, 121 So.3d 1130 (Fla. 5th DCA 2013). The court then certified the following question to this Court as a matter of great public importance:

> Whether the Supreme Court's decision in *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.3d 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?

Horsley, 121 So.3d at 1133.

SUMMARY OF ARGUMENT

Horsley's life sentence without the possibility of parole for the crime of first degree murder does not violate *Miller v. Alabama*, so this Court does not even need to reach the issue of statutory revival. Should this Court reach the issue, respondent submits that this Court should answer the certified question in the affirmative. The principle of statutory revival is the most logical way to provide a remedy for the juveniles who commit first degree murder and cannot be sentenced to life in prison without the possibility of parole. First, statutory revival appears to make a common-sense acknowledgment that the legislature would not have amended a statute if it had known that the amendment was unconstitutional. Second, statutory revival acknowledges what the legislature would have done had it known that an amendment was unconstitutional by the best evidence of that intention: what the legislature had already enacted. Third, statutory revival keeps this Court from engaging in policy judgments that are properly relegated to the legislature and tethers resolution of the invalidation of a statute to prior acts of the legislature, the policy-making branch of government.

ARGUMENT

STATUTORY REVIVAL PROVIDES THE CORRECT REMEDY WHERE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNCONSTITUTIONAL AS APPLIED TO CERTAIN JUVENILES CONVICTED OF FIRST DEGREE MURDER.

Horsley was convicted of first degree murder, and sentenced to life without the possibility of parole. After seeking relief pursuant to *Miller v. Alabama,* 132 S.Ct. 2455 (2012), and a de novo resentencing hearing, he was again sentenced to life without the possibility of parole. On direct appeal, Horsley claimed that his life sentence without the possibility of parole was contrary to the spirit and dictates of *Miller v. Alabama,* 132 S.Ct. 2455 (2012), and further claimed that the trial court was mistaken in its belief that it could not sentence him to a term of years. Respondent asserted that this claim was not preserved for appellate review, because although the trial court stated that Horsley "preserved that for appeal," counsel's only argument, contrary to what he had agreed to earlier, was a statement that the court had the discretion to sentence Horsley to a term of years, although he did not have the case law in front of him.

While the district court framed Horsley's argument as the trial court erring by rejecting the idea it had discretion under *Miller* to sentence Horsley to a term of years, it did not address that issue, and without further analysis, applied the principle of statutory revival, and held 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 25 years. *Horsley v. State*, 121 So.3d 1130, 1131 (Fla. 5th DCA 2013). The court certified the following question:

> Whether the Supreme Court's decision in *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.3d 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?

Id. at 1133. Respondent submits that the district court was correct in finding that statutory revival may be an appropriate remedy, although as set forth in the consolidated case of *State v. Horsley*, SC13-2000, not the only remedy.[3]

Respondent would first note that while Horsley states that he "advocated for a term of years sentence" below (IB at 22), the record demonstrates that he never presented any argument to the trial court on this issue. Thus, any argument pertaining to a term of years sentence has been waived, for several reasons. First, Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court. *Harrell v. State,* 894 So.2d 935 (Fla. 2005). Proper preservation requires three components: (1) a litigant must make a timely, contemporaneous objection; (2) the party must state the

[3] As argued by the state in that case, *Miller* does not foreclose the option of a life without parole sentence for juveniles convicted of first degree murder.

legal ground for the objection; and, (3) the argument on appeal must be the specific contention asserted as the legal ground of the objection or motion below. *Id.* at 940. Horsley's failure to present any argument on this issue in the trial court thus precludes appellate review. *See also Booker v. State,* 969 So.2d 186, 194-95 (Fla. 2007)(when a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived).

Further, Horsley's argument about the propriety of a term of years sentence is limited to two conclusory sentences, and a citation to Judge Wolf's concurring opinion in *Washington v. State*, 103 So.3d 917 (Fla. 1st DCA 2013)(IB at 22). As this Court has repeatedly stated, the failure to fully brief and argue points on appeal constitutes a waiver of those claims. *Coolen v. State,* 696 So.2d 738, 742 n. 2 (Fla. 1997)(stating that a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"); *Victorino v. State,* 23 So.3d 87, 103 (Fla. 2009)(points were presented in a "conclusory manner" and failure to fully brief and argue those points constitutes a waiver)*; Duest v. Dugger,* 555 So.2d 849, 852 (Fla. 1990)("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have

been waived."). *See also Simmons v. State,* 934 So.2d 1100, 1111 n.12 (Fla. 2006); *Cooper v. State,* 856 So.2d 969, 977 n.7 (Fla. 2003); *Randolph v. State,* 853 So.2d 1051, 1063 n.12 (Fla. 2003). *Rose v. State*, 985 So.2d 500 (Fla. 2008). Finally, respondent would point out that this issue is beyond the scope of the question certified by the Fifth District Court of Appeal, and was never addressed by the Fifth District Court of Appeal.

Next, respondent disputes several of the factual and legal claims upon which Horsley's argument is premised, so before addressing the validity of the option of statutory revival, respondent will address those matters. Horsley states that he was "guilty of going along with friends, or mentors at an age when that is the norm," and that "his crimes were committed as part of a group, and essentially constituted a robbery gone wrong" (IB at 20-21). He asserts that the sentencing judge failed to consider these matters is sentencing him.

The record demonstrates that it was Horsley who had the car, Horsley who drove the car, Horsley who had the gun, and Horsley who shot and killed Mr. Patel as soon as he walked into the store (wearing a mask), and not in response to any of Mr. Patel's actions. One of Horsley's "friends" or "mentors" was his fourteen year-old cousin. In short, this was not a robbery gone wrong, and Horsley did not just "go along." This was a cold blooded execution of a man who did nothing more than open his store for business on

a Sunday morning. As Mr. Patel lay dying, Horsley and his co-perpetrators helped themselves to alcohol, cigarettes and cash. Contrary to Horsley's claim, these are exactly the factors that were considered by the trial court:

> After consideration of all the mitigating juvenile factors presented, I believe he should be sentenced to life in prison without parole, as well.
>
> There is no evidence the Mr. Horsley did not intend to kill the victim. He's never shown any remorse for his actions. It was cold, calculated, unnecessary, heinous, and is the result of a depraved heart.
>
> Mr. Patel made no efforts to resist, and, without warning, was gunned down in his place of business, with his family right there.
>
> Mr. Horsley was 17 years of age at the time of the murder. There is no evidence Mr. Horsley was immature or impetuous.
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> In fact, Mr. Horsley did an excellent job representing himself in a two-week-plus trial. His handwritten motions were articulate, well written, and well supported with relevant case law.
>
> His mother supported him throughout the trial, and was here almost every day that she wasn't locked up in jail.[4]
>
> He was in the care of his family throughout his youth. Many of us – many people in this country are raised in extended-family households. I don't find that to be a mitigating factor at all.
>
> There was no evidence that it was peer pressure that was involved in this crime.
>
> His testimony today that he wasn't at the scene of

[4] Horsley's mother, Catherine DaSilva, testified at trial, and explained that she is an "illegal driver," meaning she drives without a license, and nothing else (T 1033, 1044).

> the crime is different than what he testified at trial. At trial he stated he was there. Today he says otherwise.[5]
>
> He has shown a great capacity to deal with prosecutors and defense attorneys during the trial. His mastery of discovery requests, continuances, and pre-trial motions was amazingly high.
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> He articulately stated he wanted to represent himself no less than twenty times. The Defendant, as I have mentioned, must be resentenced, and the statutory requirements are that he has – I have two options.
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> I believe Mr. Horsley could be the definition of irreparable corruption, as referenced in Miller. He was the leader of this murderous cabal. He planned it. He was the shooter and the driver.
>
> I do not find the statutes cited to be unconstitutional on their face, or in any way unconstitutional.
>
> Mr. Horsley has no verifiable history of mental illness during his childhood.
>
> I sentence Mr. Horsley to life without the possibility of parole on Count 1, premeditated murder.

(R 1346-48).

In addition, Horsley states that "[q]uoting *Graham*, 130 S.Ct., at 2030, the *Miller* Court wrote that 'A state is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (IB at 19-20). The *Miller* Court did quote this sentence from *Graham v. Florida*, 130 S.Ct. 2011 (2010), but the

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[5] The prosecutor later pointed out that Horsley's trial testimony had been consistent with a claim of not being there, and that it had been during a police interview that he admitted he was there.

citation was preceded by "Cf." *Miller*, 132 S.Ct. at 2469. Later in his brief, Horsley states that *Miller* "requires that petitioner be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (IB at 25). *Miller* contains no such requirement, and several sentences after the foregoing *Graham* quote, the *Miller* Court stated, "Although we do not foreclose a sentencer's ability to make that judgment [life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison [footnote omitted.]" *Miller*, 132 S.Ct. at 2469.

In short, the holdings in *Graham* and *Miller* are **not** the same. *Graham* imposes a categorical ban on sentences of life without parole on juvenile nonhomicide offenders, and requires such offenders to be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Miller* applies only to juvenile homicide offenders, and if a sentence of life without the possibility of parole is an option, an individualized sentencing proceeding is required at the outset, so the sentencer can take into account how children are different, before imposing the "harshest possible penalty" for juveniles.

Respondent also briefly reiterates its position set forth in *State v. Horsley*, SC13-2000, that Horsley received the individualized sentencing required in *Miller*, and since his

sentence of life without parole was properly imposed, statutory revival need not even be considered in this case. Again, in *Miller v. Alabama*, the Supreme Court held that **mandatory** life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 2469. The *Miller* majority concluded its opinion by stating:

> *Graham, Roper*, and 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. By 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 the principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475. Respondent 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*, 132 S.Ct. at 2469.

Respondent also reiterates that by completely foreclosing a Florida sentencing judge from imposing a sentence of life without

the possibility of parole, the district court has provided an additional protection for juvenile murderers beyond that provided for by the United States Supreme Court and the United States Constitutions, which violates the Conformity Clause of the Florida Constitution. Article I Section 17 of the Florida Constitution, states in relevant part:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Cf. Valle v. State, 70 So.3d 530 (Fla. 2011)(recognizing that under the Conformity Clause, Florida's courts are bound by precedent of the United States Supreme Court on issues regarding cruel and unusual punishment); *cf. Holland v. State,* 696 So.2d 757 (Fla. 1997)(explaining that the conformity clause prohibits a state court from providing greater protection than what is provided in United States Supreme Court precedent). *See also Yacob v. State*, 39 Fla. L. Weekly S174 (Fla. March 27, 2014)(Canady, J., concurring in part and dissenting in part)(a sentence may be invaildated as cruel and unusual under the Florida Constitution only if a decision of the United States Supreme Court requires invalidation of the sentence as cruel and unusual). As demonstrated, it is only a **mandatory** life sentence that violates the Eight Amendment.

In any event, respondent submits that statutory revival is the

appropriate option where a sentencer determines, after taking into consideration all the factors of youth and attendant circumstances, that a sentence of life without the possibility of parole is not the appropriate sentence for a juvenile who has committed murder. Horsley asserts that statutory revival is not possible because he was sentenced under the 1995 version of section 775.082, Florida Statutes, and the 1993 statute, which the district court found was revived, is not the immediate predecessor to the 1995 statute. He contends, based on *dicta* in this Court's decision in *B.H. v.* State, 645 So.2d 987, 995 n.5, (Fla. 1994), that when the immediate predecessor statute, which he claims is the 1994 statute, is as unconstitutional as the 1995 version, statutory revival is not possible under any circumstances. Respondent submits that this argument misapprehends and misapplies the principle of statutory revival.

First, Florida Courts have repeatedly held that statutory revival is appropriate in the case of an unconstitutional statute. In *B.H.*, this Court considered whether the offense of escape from a juvenile commitment facility in violation of section 39.01, Florida Statutes, was an unconstitutional delegation of legislative authority to an administrative agency. After determining that a portion of the enactment was a violation of the nondelegation doctrine, the court applied the principle of statutory revival, finding that the "invalidity of the juvenile escape must work an

automatic revival of the earlier escape statute...based on well established principles of statutory revival." *Id.* at 995. The court determined that in conformity with the "overwhelming weight of authority throughout the United States," that "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language revives the predecessor...." *Id.* at 995, 996. The court indicated that statutory revival applies where "the loss of the invalid statutory language will result in a 'hiatus' in the law that would be intolerable to society." *Id.*

As stated, Horsley does not challenge the principle of statutory revival, but instead claims that it cannot be applied to section 775.082, Florida Statutes, because the 1994 statute is unconstitutional as well. However, respondent asserts that the 1995 version of section 775.082(1), Florida Statutes, was not a repeal of the 1994 version of the statute, because both provide the same penalty for first degree murder. Under the 1994 version of the statute, the only non-death sentence for first degree murder is life without the possibility of parole.[6] Under the 1995 version of

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[6] The 1994 version of section 775.082(1) provides:

> (1) 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 s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such

the statute, the only non-death sentence for first degree murder is life without the possibility of parole.[7] The only change in the statute related to other capital felonies. Thus, as to first degree murder, the 1995 statute is not a repeal of the 1994 statute. *See Solloway v. Department of Professional Regulation*, 421 So.2d 573, 574 (Fla. 3d DCA 1982)(a statute that is simultaneously repealed and reenacted is considered repealed; an amendment and reenactment of a statute constitutes a continuation of those provisions which are carried into the new act and permits a prosecution under the original act irrespective of its nominal repeal). In other words, the relevant (and eventually unconstitutional) amendment occurred in 1994 and was unchanged in 1995, so the fact that it has been declared unconstitutional results in a revival of its immediate predecessor, the 1993

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person shall be punished by life imprisonment, and;

(a) If convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole, or

(b) If convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

[7] The 1995 version of section 775.082(1) provides:

(1) 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 s. 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.

version. *See McKibben v. Mallory*, 293 So.2d 48, 53 (Fla. 1974)(where a statute has been repealed and substantially reenacted by a statute which contains additions to or changes to the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect).

This can best be demonstrated by using the exact language from *B.H.*, where the court stated "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional." *Id.* at 995. Inserting the facts from the instant case to this statement of law leads to the following conclusion: when the legislature made the punishment for the crime of first degree murder life without the possibility of parole (as applied to juveniles), and repealed the predecessor, which was life with the possibility of parole, striking the language of "shall be ineligible for parole" revives the language "shall be required to serve no less that 25 years before becoming eligible for parole." § 775.082(1), Fla. Stat. (1993).

Respondent thus submits that the determination of whether a statute is a continuation or a repeal is based upon the **substance**

of the amendment, not the act of changing anything in the statute, whether or not the substance is affected. A simple example demonstrates the flaw in Horsley's position. In 1997, the Florida legislature enacted a complete reworking of the Florida Statutes to eliminate gender-specific references in the Laws of Florida. *See* ch. 97-102, Laws of Fla. (1997). However, this law did not change the substance of the vast majority of the statutes enacted by the legislature, and only eliminated gender-specific references to make them gender-neutral. Under Horsley's theory, this 1997 change made to eliminate gender-specific references would now be the "immediate predecessor" of every statute that it changed, no matter how old or unchanged the law, because the legislature enacted an "amendment" to the statute.

Further, the statement relied upon from footnote 5 in *B.H.*, was not necessary to the holding, and is therefore *dicta*. *B.H.* did not deal with a statute that was anything other than the most recent version. Thus, the Court had no occasion to hold that revival could only apply to the immediate predecessor, and in fact cited no authority for this notation. *B.H.*, 645 So.2d at 995 n.5. Likewise, no case law cited in *B.H.* made this determination either. In fact, one of the cases cited in *B.H.*, *Brister v. State*, 622 So.2d 552, 553 (Fla. 3d DCA 1993), perhaps summarizes the principle of statutory revival most succinctly: "..when an amendment to a statute is declared unconstitutional, the statute as it existed

prior to the amendment remains effective." *See also Miffin v. State*, 615 So.2d 745 (Fla. 2d DCA 1993). Respondent submits that any other interpretation would contravene the purpose of statutory revival, which allows the judiciary to avoid the legislative arena, yet provide a remedy most consistent with the legislature's intent. As the *Horsley* Court stated, "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.*

In sum, the principle of statutory revival is the most logical way to provide a remedy for the juveniles who commit first degree murder and cannot be sentenced to life in prison without the possibility of parole. First, statutory revival appears to make a common-sense acknowledgment that the legislature would not have amended a statute if it had known that the amendment was unconstitutional. Second, statutory revival acknowledges what the legislature would have done had it known that an amendment was unconstitutional by the best evidence of that intention: what the legislature had already enacted. Third, statutory revival keeps this Court from engaging in policy judgments that are properly relegated to the legislature and tethers resolution of the invalidation of a statute to prior acts of the legislature, the policy-making branch of government.

Respondent would also add that this Court has applied statutory revival as a remedy to a class of offenders where a statute was held unconstitutional "as applied" to that class of offenders. *Waldrup v. Dugger*, 562 So.2d 687 (Fla. 1990). There, this Court determined that the 1983 changes to gain time violated the *ex post facto* Clause of the federal constitution, and held that the appropriate remedy was statutory revival. The court stated that "upon this opinion becoming final, DOC shall be barred from applying the 1983 reduction in incentive gain time to inmates convicted of offenses occurring before the effective date of the 1983 act." *Id.* at 692. The court also held that the effect of its opinion was to revive the statute as applied to the class of inmates affected by the unconstitutionality, recognizing the effect of its holding was "to reinstate the incentive gain-time statutes in force at the time of the offense, and to declare unconstitutional the 1983 incentive gain time *as applied* to those inmates." *Id.* at 692 (emphasis added).

The district courts have done the same with regard to the habitual offender statute, *See, e.g., King v. State*, 585 So.2d 1199 (Fla. 1st DCA 1991)(applying *Wright, infra*, to find that because King "would have been habitualized under the pre-amendment statute as well, we decline to consider his argument on this issue."); *Wright v. State*, 579 So.2d 418 (Fla. 4th DCA 1991)(expressly relying on statutory revival and citing *Henderson v. Antonacci*, 62

So.2d 5 (Fla. 1952), for its decision not to consider the appellant's constitutional attack on the habitual offender statute because appellant would have been habitualized under the pre-amendment statute as well); *Brister, supra* (refusing to provide relief under *Johnson v. State*, 616 So.2d 1 (Fla. 1993), where defendant met criteria for habitual offender status under pre-amended version of statute; *Miffin, supra* (*Johnson* provides a basis for relief only for those defendants affected by the amendments in chapter 89-280 because the statute as it existed before the unconstitutional amendment remains in effect); *Rankin v. State*, 620 So.2d 1028, 1030 (Fla. 2d DCA 1993)(finding that a defendant would only be entitled to resentencing "if a different sentence would have been called for under the version in place before chapter 89-280).

Horsley also claims that the 1993 version of the statute is unconstitutional because it also imposes a mandatory life sentence on juveniles, and does not provide for the individualized assessments as required by *Miller*. This claim overlooks the fact that the life sentence in the earlier version of the statute comes with eligibility for parole after twenty five years, which removes it from the applicability of *Miller* altogether. *See Miller* at 2475 (a judge or jury must have the opportunity to consider mitigating circumstances before imposing the "harshest possible penalty" for juveniles). In fact, the *Miller* majority distinguished a sentence

of life with the possibility of parole in the third sentence of its opinion when describing the mandatory nature of the sentencing schemes before it. *Miller* at 2460 ("State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate"). As demonstrated earlier, *Miller* **does not** require that a juvenile who has committed first degree murder be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

In any event, even with statutory revival, a juvenile who has committed first degree murder will still receive an individualized sentencing hearing, so that a trial judge can determine whether the appropriate sentence is life without the possibility of parole, or the lesser sentence of life with the possibility of parole. The concept of an individualized sentencing proceeding is not a revolutionary or complicated concept, and in fact is already required to satisfy due process. *See Griffin v. State*, 517 So.2d 669, 670 (Fla. 1987)(the pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach, and the presence of defendant is as necessary at resentencing as it was at the time of the original sentence so that the defendant has the opportunity to submit evidence relevant to the sentence if warranted). *See also* Fla. R.

Crim. P. 3.720(b)(At the sentencing hearing, "[t]he court shall entertain submissions and evidence by the parties that are relevant to the sentence."). Likewise, the presentation of mitigating evidence is a well established aspect of a sentencing proceeding, and has always played an integral role in the sentencer's exercise of discretion in determining an appropriate sentence. *See e.g. People v. Eliason*, 833 N.W.2d 357, 369 (Mich. Ct. App. 2013)(under MCR 6.425(E)(1), a trial court is already required to hold a sentencing hearing, so the remedy of an individualized hearing to consider *Miller* factors is expressly permitted by court rule and is not an unconstitutional trip by the judiciary into the legislative realm). The trial court here conducted an individualized mitigation inquiry before finding that a sentence of life without the possibility of parole was the appropriate sentence, and respondent submits that as such, that sentence should be affirmed. In addition, in those cases where a trial court finds, after consideration of the juvenile murderer's "youth and its attendant characteristics, along with the nature of the crime," that a sentence of life without the possibility of parole is not appropriate for that individual, then revival of the 1993 statute provides the correct constitutional alternative.

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, but if not, revival of the 1993 statute provides the correct and constitutional remedy.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent 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 17th day of April, 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

ANTHONY DUWAYNE HORSLEY, JR.,

Petitioner,

v.

CASE NO. SC13-1938
CONSOLIDATED SC13-2000

STATE OF FLORIDA,

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).

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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