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IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY, JR.)) Petitioner,)) vs.)) STATE OF FLORIDA,)) Respondent.))	CASE NO. SC13-1938 L.T. Case No. 5D12-138; 05-2008-CF-010572-C

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

INITIAL BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Eighteenth Judicial Circuit, in and for Brevard County. On appeal to the Fifth District Court of Appeal, petitioner was the appellant and respondent was the appellee. In this brief, the parties will be referred to as they appear before this Court, except that respondent may also be referred to as "the state," and petitioner may sometimes be referred to by his name. The following symbols will be used to designate references to the record on appeal:

"R" - Court records, transcript of sentencing, and pleadings, Volumes 1, pp. 1-200; 2, pp. 201-400; 3, pp. 401-600; 4, pp. 601-800; and 5, pp. 801-844.

"SR" - Supplemental court records, pleadings, and transcripts of voir dire, and hearings. Volumes 16-24, pp. 1-200; 201-400; 401-600; 601-748; 845-1007; 1008-1072; 1073-1238; 1239-1270; and 1271-1358.

"T" - Transcript of the trial, Vol's. 1-9, pp. 1-200; 201-400; 401-600; 601-800; 801-1000; 1001-1200; 1201-1400; 1401-1600; 1601-1692.

INTRODUCTION

Like Evan Miller and Kuntrell Jackson, Anthony Horsley, Jr. was a child, seventeen years of age at the time of offense, and was sentenced to life imprisonment without the possibility of parole. In all three cases, state law mandated that each juvenile be sentenced to life in prison, without allowing the sentencing judge to consider whether "youth and its attendant characteristics, along with the nature of his crime," made a lesser sentence more appropriate. Miller v. Alabama, — U.S. —, 132 S.Ct. 2455, 2460 (2012).

While his appeal was pending, Anthony Horsley moved for a corrected sentence after the Miller decision was issued. His position at the hearing on the motion was that the trial court had the discretion to sentence him to a term of years as a result of the holding and reasoning in Miller. The State argued extensively at that hearing for either life without parole or for statutory revival to allow life with the possibility of parole after 25 years. The trial court did not feel it had discretion to sentence Mr. Horsley to a term of years, and the Fifth District Court of Appeals decided the case in favor of statutory revival and ordered that he be sentenced to life with the possibility of parole after 25 years.

The United States Supreme Court held that Evan Miller and Kuntrell Jackson had been sentenced under an unconstitutional sentencing scheme, which

failed to provide the individualized sentencing consideration required by the Eighth Amendment, and were entitled to sentencing hearings at which the judge has the opportunity to consider their age at the time of offense and age-related characteristics, as well as their crimes. Id. Because the landmark Miller decision includes a term of years as a sentencing option for a judge or jury to consider in the individualized sentencing of a person who was a juvenile at the time of offense, Anthony Horsley is entitled to an individualized sentencing hearing in which mitigation is considered and in which the judge understands that he or she has discretion, under the Eighth Amendment, to sentence him to a term of years. Id., at 2474-2475.

This brief will address the reasoning which informs Miller, and its pertinence to Anthony Horsley's case.

STATEMENT OF THE CASE AND FACTS

This case is before the Court pursuant to the Fifth District Court having certified as a matter of great public importance the 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?" Horsley v. State, 121 So. 3d 1130, 1133 (Fla. 5th DCA 2013).

Petitioner was accused, in a four-count Indictment with the offenses of first degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm (separate victims). (R 111-113) The offenses were alleged to have occurred on June 11, 2006. (R 111-113). Mr. Horsley was born in May of 1989, and was only 17 years of age at the time the offenses occurred. (R 95, 115). The State filed a notice of direct filing. (R 103). An order of transfer was entered. (R 110).

Initially, counsel was appointed to represent the petitioner. (R 124, 126, 134-135, 163). He later retained counsel. (R 190, 200). This attorney filed motions to suppress on his behalf. (R 215-219, 226-232). Following a *Richardson* hearing,

Mr. Horsley and his retained counsel parted ways and registry attorney Mr. Kramer was appointed to represent him. (R 353-354, 356-357). He filed a number of notices and motions, including a notice of alibi. (R 419). In 2011, Mr. Horsley moved to proceed pro se, and Mr. Kramer became standby counsel. (R 474-477; SR 956-1007).

This case was tried from October 31, 2011 to November 8, 2011, before the Honorable Charles Crawford, Circuit Judge. (T, vol.'s 1-9). Prior to the start of trial, the court conducted a series of *Faretta* inquiries and found that the petitioner was of sound mind, capable of representing himself. (T 20-22; SR 1042-1044; SR 1060-1061).

Evidence adduced at trial showed that on June 11, 2006, Kiran and Kanud Patel were in their food and beverage store in Palm Bay. (T 179-180, vol. 1). Mrs. Patel was in the back room, getting cigarettes, when she heard the front door open. (T 182). Her husband was behind the counter in the front of the store. (T 182-183). Immediately after she heard the front door open, she heard a gunshot. (T 186). She started toward the front and heard someone say, "Don't come all the way in front or I will shoot you." (T 186). Then he said to give him the money. (T 186). Upon hearing that, she went to the front of the store. (T 187).

Mrs. Patel saw a guy with a gun standing by the ice cream cooler. (T 188).

He wore a mask and his hands were black. (T 189). She further described the gunman as having the same height and build as Anthony Horsley, but she could not see the person's face. (T 189) the individual then pointed the gun at her and she was afraid he would shoot her. (T 190).

There were two other masked people there. (T 190). They couldn't open the cash register, so one of them threw it on the floor and broke it open. (T 191). They took beer, cigarettes, cash, money orders, and checks. (T 191). After they left, she saw her husband bleeding on the floor, so she called the police and a family member. (T 191). The cause of Kiram Patel's death was a perforating gunshot wound to the chest. (T 283, vol. 2).

Richard Douglas, a customer, pulled into the parking lot and noticed a car parked behind a wall alongside the store. (T 197). As he approached the store, he heard a gunshot and saw the gunman and two other people. (T 215-218). As he started to leave, the gunman came out and told him not to move or he would shoot. (T 219) He saw the gun pointed at him, so he ran across the street to a police substation. (T 219-220). He identified Anthony Horsley in court as the person he saw with the gun. (T 229, 230). Although the gunman wore a ski mask, he saw his lips and eyes and felt they matched those of Mr. Horsley. (T 230-231). Mr. Douglas had said at the time of the offenses that he didn't believe he would

recognize any of them, because their faces were covered, but at the trial he believed he recognized Mr. Horsley. (T 247).

Co-defendants Hassan Scott and Dwan Smith both testified that they had entered pleas in the case, and would be sentenced after testifying in Mr. Horsley's case. (T 317-318, vol. 2; T 881, 884, 888, vol. 5). Both said Mr. Horsley drove, that they all knew they were going to rob a store, and that Anthony Horsley was the only one with a gun when they entered the store. (T 323, 325, vol. 2; T 480, 482, vol. 3; T 891, 924-926, vol. 5).

Mr. Scott admitted that he'd been angry at the petitioner because, prior to the events giving rise to this case, he had pawned some things for Mr. Horsley which turned out to be stolen. (T 358, 364).

Mr. Smith admitted that he told Mr. Horsley's mother that her son was not involved. (T 897-900). Ms. DaSilva is also Mr. Smith's aunt. (T 896-897). He told her that the petitioner was at work. (T 900). He also told detectives that he and Mr. Horsley did not go to the store together. (T 901). He told Ms. DaSilva that he and her son had a disagreement. (T 908). It was his idea to call her, to try to help his cousin out. (T 920).

Mr. Horsley gave a statement to police, in which he said he sat in the car the whole time. (T 466). He told them that a man named Mike Harden shot the victim,

and the only thing he did was help get the gun. (T 715). Petitioner also testified in his defense. (T 758-781). He denied being in the car when the crimes occurred, and testified he was never in the Patels' store. (T 759). He said he lied to police when he said he was in the car because he was trying to cover up for his younger cousin, Dwan Smith, who was only 14 when it happened. (T 761-762). He said he was at work that weekend. (T 768).

Shamiki Wesley, petitioner's aunt, was also his guardian. (T 943, 953). Her car was taken and used in the robbery. (T 948). She had been dating Hassan Scott and allowed him to drive her car most of the time. (T 944, 950). Anthony Horsley worked for her brother at Jenkins Tree Service at the time, although she could not recall if his employment was in 2006. (T 952-953).

Christopher Jenkins testified that he did employ petitioner during the summer of 2006. (T 1071, 1075). Ms. DaSilva recalled that her son worked on June 11, 2006. (T 952-953).

The jury returned verdicts of guilt on all four counts, finding that the petitioner possessed and discharged a firearm in the robbery and death of Mr. Patel. (T 676-677; R 726-730).

Mr. Horsley was initially sentenced on December 16, 2011. (R 762-768). He was sentenced to life in prison without parole, as to count one. (R 764). He was

sentenced to 30 years in prison, with a 25 year minimum mandatory for robbery with a firearm. (R 764-766). For counts three and four, he was sentenced to five years each, with credit for 1,438 days time served. (R 764-766). Sentences for all counts were to run concurrent with each other. (R 765).

Notice of Appeal was timely filed. (R 789, 798). The Office of the Public Defender was appointed to represent Petitioner for purposes of appeal. (R 796).

Thereafter, petitioner filed a motion to correct sentencing error. (SR 1239-1244). The motion cited Miller v. Alabama, — U.S. —, 132 S.Ct. 2455 (2012) for the proposition that Anthony Horsley's life sentence, imposed under Florida's mandatory sentencing scheme, violates that mandates of this United States Supreme Court opinion and is unconstitutional. (SR 1239-1244). Petitioner's motion was heard on October 4, 2012. (SR 1271-1354).

At the outset of that hearing, defense counsel requested a continuance because he had other obligations and was not prepared to present mitigation evidence. (SR 1301). The trial court denied his motion. (SR 1302).

At that hearing, the State acknowledged that Mr. Horsley was entitled to a re-sentencing hearing on the authority of Miller, and agreed that he was 17 years of age at the time of the offenses. (SR 1276-1277, 1278). However, the prosecutor argued that the court has only two sentencing options: life in prison without

parole, or life with the possibility of parole after 25 years. (SR 1278). The state argued the theory of statutory revival extensively, taking the position that if the court was inclined to change the sentence after considering the factors required by Miller, then the 1994 Florida Statute allowing the imposition of life with the possibility of parole should be revived. (SR 1283-1288).

The petitioner believes the Court has the discretion to sentence him to a term of years pursuant to Miller. (SR 1304). The trial court allowed defense counsel to make the argument and declared the argument to be preserved for appeal, although the court disagreed that it had discretion to consider a term of years sentence. (SR 1304-1305).

The petitioner was the only witness at the hearing on his motion to correct sentence, for the purpose of providing the court with information on his age, background, and circumstances. (SR 1307-1313). (Immediately prior to the hearing on his motion to correct sentence, the court heard other witnesses on his motion for new trial.) Petitioner testified that he was 17 years old at the time of the offenses. (SR 1307). He had a ninth grade education, having dropped out of school. (SR 1307). He would like to obtain his GED while in prison and hopes to learn and pursue a trade. (SR 1307-1308). He lived with his grandmother until he was 14, when the Department of Children and Families removed him and placed

him with his aunt because of the abuse he had suffered at the hands of his grandmother. (SR 1308). His parents were cocaine addicts, his father in prison, and he couldn't live with his mother. (SR 1308). His maternal grandmother hit him and his siblings with extension cords and belt buckles on many occasions. (SR 1309). He denied committing the offenses of which he was convicted. (SR 1311). He believes he is a good candidate for rehabilitation. (SR 1317). No mental health experts were presented.

The trial court acknowledged that the law had changed since Mr. Horsley's original sentencing. (SR 1345). However, after considering the mitigating juvenile factors that were presented, the trial court believed he should again be sentenced to life in prison without possibility of parole. (SR 1346). The court based this decision on a lack of remorse, and found no evidence that he was immature or impetuous. (SR 1346). The court found there were only two statutory options for sentencing. (SR 1347-1348). The court further found petitioner to meet the definition under Miller for "irreparable corruption," and told the petitioner that he needed to be "culled from the herd." (SR 1348-1349). The sentence remained the same: life in prison without parole. (SR 1348-1350; 1261-1270).

On appeal to the Fifth District Court of Appeal, petitioner raised four issues: (1) that the trial court erred in sentencing Anthony Horsley to life in prison

without parole, operating under the misapprehension that there were only two sentencing options and in not considering his age and its characteristics, in spite of the dictates of the Miller decision; (2) that error occurred when the prosecutor expressed his personal opinion that state witnesses told the ttruth and that petitioner and defense witnesses lied; (3) that the trial court erred in permitting the prosecutor to ask petitioner whether he had filed a motion to suppress his out of court statements; and (4) that (2) and (3) constituted cumulative error requiring a new trial.

The Fifth District affirmed in part, and remanded with instructions for re-sentencing to life with the possibility of parole after serving 25 years. Horsley, at 1133.

This appeal follows.

SUMMARY OF ARGUMENT

The trial court erred in sentencing the petitioner, who was 17 years of age when the crimes were committed, to life in prison without parole, without considering the option of a sentence to a term of years. A term of years sentence is one of several sentencing options available for juveniles, according to the United States supreme Court decision of Miller v. Alabama, — U.S. —, 132 S.Ct. 2455 (2012). Judges Wright and Wolf, in the First District Court of Appeals, have also expressed the opinion that a term of years is an appropriate sentence under such circumstances, as has the Illinois Supreme Court.

The Miller decision requires that a sentencing court have discretion in sentencing and consider a number of factors relating to juveniles and how they are different. Those factors were not addressed by the trial court in this case. The trial court did not believe it had the discretion to consider a term of years sentence, and declined to consider it.

The Fifth District decided the case in favor of statutory revival, and decided the petitioner should be sentenced to life with the possibility of parole after 25 years. Statutory revival is not available when the predecessor statutes are also unconstitutional under Miller, as they apply to juveniles. Miller requires that petitioner be given a meaningful opportunity to obtain release based upon

demonstrated maturity and rehabilitation. The laws of Florida do not afford any such meaningful opportunity because section 947.16(6) removes parole eligibility for juvenile offenders who are sentenced as adults, even if the predecessor statutes were constitutional. In any event, review by a parole board would deny petitioner the individualized sentencing discretion weighing his youth, background, and potential for rehabilitation, and does not remedy the violation of the Eighth Amendment identified in Miller.

The petitioner seeks a remand for re-sentencing hearing, with periodic reviews by the trial court thereafter if a term of years is not imposed — as recommended by the AMA, to apply the juvenile factors identified by the Miller decision, and with directions for the trial court to consider a term of years sentence.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO LIFE IN PRISON, CONTRARY TO THE DICTATES OF MILLER v. ALABAMA, AND IN REFUSING TO CONSIDER A SENTENCE TO A TERM OF YEARS.

Standard of Review

The standard of review for judicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law, subject to the de novo standard of review. State v. Sigler, 967 So.2d 835, 841 (Fla. 2007).

Argument

"[A]dolescents commit crimes as they live their lives, in groups."
- Franklin E. Zimring[1]

Youth must be 18 to vote, 16 to drive, and 18 or 21 to purchase tobacco and alcohol. Until the recent line of Supreme Court cases on juvenile sentencing in homicide and non-homicide offenses, the justice system has blurred the distinction between children and adults and has administered life without parole punishments on an ever-increasing number of juvenile offenders. The life without parole sentence imposed on Anthony Horsley violates principles of proportionality and the Eighth Amendment to the United States Constitution.

When the United States Supreme Court ruled the death penalty

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[1]William G. Simon Professor of Law, UC Berkley School of Law.

unconstitutional on an individual under eighteen years of age in Roper v. Simmons, 540 U.S. 1160 (2004), Simmons was convicted of a murder he did not commit alone. The Simmons case, along with the case at bar, illustrate what Zimring calls the "well-known secret" of youth crime: "adolescents commit crimes as they live their lives, in groups."[2] Zimring states, "no fact of adolescent criminality is more important than what sociologists call its group context." Mary Berkheiser in *Capitalizing Adolescence: Juvenile Offenders on Death Row*, 50 U. Miami L. Rev. 135 (January 2005), notes that the most consistently reported feature of teenage criminality is its group nature and thoroughly examines the roles of peer influence and group offending. *Id.*, at 137-138. Berkheiser concludes, in part, that juvenile criminology is founded on the principle that children and youth are less responsible for their actions than adults because they are not yet fully developed; they are by definition less mature. She continues that teens who kill are not transformed into adults by virtue of the commission of the crime and that juvenile and criminal justice must develop a common strategy with the most important component being a consensus on basic principles of penal proportionality and the immaturity of youth. *Id.*, at 198.

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[2]Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret,* 72 J. Crim. L. & Criminology 867, note 1 (1981).

Per Miller v. Alabama, — U.S. —, 132 S.Ct. 2455 (2012), section 775.082(1), Florida Statutes (2012), which mandates death or a life sentence without the possibility of parole for defendants, including juveniles, convicted of first degree murder, is unconstitutional. There is no Florida Statute that authorizes a judge imposing sentence on a juvenile convicted of first degree murder to exercise judicial discretion. With no legislative response to the Miller decision, trial courts have little guidance. Although Florida Statutes exist in other areas that require written reasons from a sentencing judge when the court imposes a downward departure from the sentencing guidelines, a death penalty or departure for a juvenile from the Department of Juvenile Justice ("D.J.J.") recommendation, there are no statutory requirements, outside Miller, that detail factors and findings to be required of the court.

The United States Constitution prohibits cruel and unusual punishment. U.S.Const. Amend. VIII. Such punishment is an excessive sanction violating the "basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." Roper v. Simmons, 543 U.S. 551, 560 (2005). Whether a juvenile's sentence of life without parole constitutes

cruel and unusual punishment is an issue of national and international import[3] as well as the subject of much scholarly literature. In a 5-4 majority, the Supreme Court in Miller v. Alabama, 132 S.Ct. 2455 (2012), held that sentencing schemes that require mandatory life without parole for those under the age of 18 at the time of their crimes – including homicides – violates the principle of proportionality and the Eighth Amendment's prohibition on cruel and unusual punishments. Id., at 2460. The Miller court held that such sentencing violates the Eighth Amendment because a juvenile has "lessened culpability"[4] and greater 'capacity for change,'" and because precedent requires "individualized sentencing for defendants facing the most serious penalties." Miller, (quoting Graham v. Florida, 130 S.Ct. 2011, at 2026, 2030 (2010)).

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[3]As noted in Miller, an Amnesty International and Human Rights Watch (HRW) report in 2007 found that at least 2,225 prisoners in the United States are serving life without parole for crimes they committed as minors. The sentence is rare elsewhere in the world - a total of 12 child offenders are serving life terms in Israel, South Africa, and Tanzania.

[4] But the key in the Supreme Court's Eighth Amendment analysis in juvenile cases is its "judicial exercise of independent judgment" which "requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" together with a determination of whether the sentence at issue serves legitimate penological goals. Graham, 130 S.Ct. At 2026. With respect to juvenile offenders, these inquiries are underpinned by the Supreme Court's repeated recognition that juveniles are less culpable that adults and therefore are less deserving of the most severe punishments. Id.

The Miller Court stated that its precedents established that teenage offenders are constitutionally different from adults for sentencing purposes because their "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking, and that these distinctive attributes diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even those who commit the worst crimes. Miller, at 2468.

The Miller Court also held that imposing a mandatory life-without-parole sentence upon a juvenile precludes the sentencer from taking into account the defendant's youth and various issues related to the defendant's youth, such as a 'failure to appreciate risks and consequences." Miller, at 2468. The Court continued by saying that they require a sentencer to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id., at 2469. The decision held that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's "moral culpability" and enhanced the prospect that, as years go by and neurological development occurs, his "deficiencies will be reformed." Id.

Quoting 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." The Miller holding requires that a court be permitted to exercise discretion, but does not foreclose a sentencer's ability to make that judgment of the rare juvenile offender whose crime reflects irreparable corruption, but requires a sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison without the possibility of parole. Id., at 2469.

Anthony Horsley made a statement to police that he was in the car the whole time. (T 466) His two co-defendants, including one other juvenile and an adult, having entered pleas, testified that Mr. Horsley drove the car and had a gun when they entered the store. (T 323, 325, vol. 2; T 480, 482, vol. 3; T 891, 924-926, vol. 5). The petitioner was thus guilty of going along with friends, or mentors at an age when that is the norm. Analyzing factors associated with group offending and youth, Berkheiser stated to understand part of the reasons for crimes committed by teenagers as part of a group, the peer pressures of loyalty, fear of ridicule, and status-seeking all play powerful roles in criminal behavior of youth.

Other factors to be considered include:

"... chronological age and its hallmark features – among them,

> immaturity, impetuosity, and failure to appreciate risks and consequences ... the family and home environment that surround him and from which he cannot usually extricate himself no matter how brutal or dysfunctional ... the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him ... incompetencies associated with youth – for example his inability to deal with police officers or prosecutors ... or his incapacity to assist his own attorneys ... and finally ... disregards the possibility of rehabilitation. .."
>
> Id., at 2468.

None of these factors was considered as a mitigator by the judge in his case. Perhaps this was, in part, a reflection of the sentencer's belief that he had no discretion to consider any option except life in prison, either with or without parole. However, the sentencing judge in this case also erred in not considering the factors outlined in Miller, and in finding that this child was one of irreparable corruption who had to be "culled from the herd." The petitioner's crimes were committed as part of a group, and essentially constituted a robbery gone wrong. In this, the circumstances of the crime were not rare. Evan Miller also committed a robbery gone wrong and as part of a group, as did Rebecca Falcon, whose case is pending. As the Miller court states, quoting Graham: "Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible" — but "incorrigibility is inconsistent with youth.'" Miller,

at 2465.

The petitioner advocated for a term of years sentence. His defense counsel argued that, although he did not have any case law handy (perhaps because his motion for continuance was denied), Miller v. Alabama had eviscerated the Florida sentencing statutes as they relate to juvenile sentencing and therefore a term of years may be considered. (SR 1305). Miller does actually advocate a term of years as an option which should be available to a sentencing judge as part of the exercise of discretion required by the Eighth Amendment in juvenile cases such as these. Id., at 2474-2475. The Supreme Court is adamant that the limited judicial discretion available at the transfer to adult court phase of juvenile homicide case does not comport with the Eighth Amendment and the court must have discretion to consider either a lifetime prison term with the possibility of parole or a lengthy term of years. Id.

The sentencing option which is closest to the legislative expression of intent and involves the least rewriting of the statute is a sentence to a term of years without parole, as opined by Judge Wolf. Washington v. State, 103 So.3d 917 (Fla. 1st DCA 2013) In that case, Judge Wolf expressed the opinion that a term of years is the only sentencing option which is closest to the intent of the Supreme Court in Miller, and to the legislative intent in section 921.002(1)(e). Id., at 920.

The Iowa Supreme Court decided several cases last year which involved sentences of a term of years and that Court's take on Miller. The focus in these case is whether the term of years sentence is the equivalent of life, and to ensure that a person sentenced for crimes committed when he or she was a juvenile has the benefit of Miller and Graham protection as it relates to having a "meaningful opportunity" to demonstrate the "maturity and rehabilitation" required to obtain release and reenter society. Iowa v. Null, – N.W. 2d –, WL 4250939 (Iowa August 16, 2013); Iowa v. Pearson, – N.W.2d –, 2013 WL 4309189 (Iowa August 16, 2013); and Iowa v. Ragland, – N.W.2d –, 2013 WL 4309970 (Iowa August 16, 2013).

The Fifth District Court of Appeals decided this case in favor of statutory revival, and decided the petitioner should be re-sentenced to life in prison with the possibility of parole after serving 25 years. Horsley v. State, 121 So.3d 1130 (Fla. 5th DCA 2013). This Court has held that when the judiciary finds a statute to be unconstitutional, the predecessor statute is automatically revived, as long as that version is not also unconstitutional. B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994).

Mr. Horsley was sentenced under the 1995 version of section 775.082, Florida Statutes. The Miller/Jackson decision found the statutory scheme of Alabama, which is similar to that of Florida, to be unconstitutional in mandating

life without parole, including for persons who were juveniles when they committed murder. Thus, the 1995 version of this statute, as applied to juveniles at the time of offense, is unconstitutional.

The opinion by the Fifth District revives the 1993 version of the statute, which is not the immediate predecessor. The 1994 version of the statute was the immediate predecessor statute. The 1994 version of section775.082(1) was also unconstitutional as applied to juveniles because it also contained just two sentencing options for a first degree murder conviction: (1) death, and (2) life without parole. When the immediate predecessor statute – here, the 1994 version – is as unconstitutional as the 1995 version, then statutory revival is not possible under any circumstances. B.H. v. State, 646 So.2d, at 995, n.5. Further, the 1995 version amended the 1994 version by removing the distinction between first degree murder amd all other capital felonies for the purpose of parole eligibility. It served to repeal the 1994 statute for the purposes of revival because it is a revision of the earlier statute. Anglin v. Mayo, 88 So.2d 918, 921 (Fla. 1956) ("a revision of or a substitute for the earlier Act . . . operates as a repeal of the earlier Statute").

The 1993 version of the statute is also unconstitutional for purposes of revival and has also been revised by the 1994 version. The 1993 version, unlike the 1994 version, does not distinguish between the types of capital felonies for

purposes of parole eligibility. The 1993 version allows all defendants convicted of a capital crime to be parole eligible, whereas the 1994 version removes this eligibility for those convicted of first degree murder. Because the 1994 version revises the 1993 version, the 1993 statute is repealed. Accordingly, the 1993 version does not serve as the immediate predecessor statute for the purpose of revival and cannot be revived under B.H. v. State, 645 So.2d, at 995, n.5. ("This necessarily means that there cannot be revival of any statute other that the immediate predecessor."). The 1993 version is also unconstitutional to the extent that it also imposes a mandatory life sentence on juveniles. Neither does the 1993 version of the statute provide for individualized assessments as required by the Court in Miller. For this reason as well, it is unconstitutional as applied to juveniles and cannot be revived.

Miller requires that petitioner be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. The laws of Florida do not afford any such meaningful opportunity because section 947.16(6) removes parole eligibility for juvenile offenders who are sentenced as adults, even if the predecessor statutes were constitutional. See Judge Padovano's concurring opinion, Smith v. State, 93 So.3d 371, 375 (Fla. 1st DCA 2012). In any event, review by a parole board would deny petitioner the individualized sentencing,

with judicial discretion to weigh his youth, background, and potential for rehabilitation, and does not remedy the violation of his Eighth Amendment rights, as identified in Miller.

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

CONCLUSION

Based on the foregoing, the Petitioner respectfully asks this Honorable Court to reverse the decision of the Fifth District Court of Appeals, reverse the judgment and sentence and remand for a re-sentencing hearing to comply with the dictates of the Miller decision.

Respectfully submitted,

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CERTIFICATE OF FONT

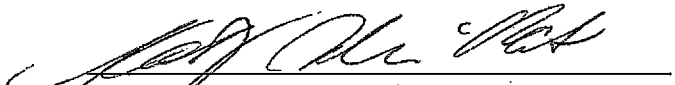
I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, crimappdab@myfloridalegal.com and mailed to Anthony Horsley, #E44830, North West Florida Reception Center, 4455 Sam Mitchell Dr., Chipley, FL 32428-3501 on this 10th day of February, 2014.

DESIGNATION OF EMAIL ADDRESS

The undersigned designates appellate.efile@pd7.org as its primary email address and radtke.kathryn@pd7.org as its secondary address.



KATHRYN ROLLISON RADTKE
ASSISTANT PUBLIC DEFENDER