Filing # 13761724 Electronically Filed 05/16/2014 01:42:31 PM

RECEIVED, 5/16/2014 13:43:39, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY, JR.,

Petitioner,

vs.

CASE No. SC13-1938
CONSOLIDATED SC13-2000

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

AMENDED REPLY BRIEF OF PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kathryn Rollison Radtke
Assistant Public Defender
Florida Bar No. 0656331
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
(386) 254-3758
radtke.kathryn@pd7.org

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Respondent suggests that Petitioner's life without parole sentence does not violate Miller. Petitioner's life sentence without the possibility for parole violates the dictates of Miller v. Alabama in several respects: (1) his motion for continuance was denied, even though his attorney was unprepared to present the mitigating evidence which the Miller Court required a sentencing court to consider. (2) The sentencing judge did not believe that he had the discretion to consider a term of years sentence; (3) The sentencing court did not consider all the Miller juvenile mitigating factors, and misapplied those factors which were addressed in re-sentencing hearing.

The Fifth District Court has decided that the answer to Miller is statutory revival and the only appropriate sentence is life with parole after 25 years. However, statutory revival does not work with section 775.082, Florida Statutes. Further, statutory revival fails because the predecessor statutes are also unconstitutional as applied to juveniles. The core holding in Miller is the sentencing court must have discretion, including a term of years. The Florida Legislature has recently agreed. Petitioner respectfully suggests that the certified question be answered in the negative.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING PETITIONER TO LIFE IN PRISON WITHOUT PAROLE, CONTRARY TO THE DICTATES OF MILLER v. ALABAMA, AND ABUSED DISCRETION BY DENYING PETITIONER'S MOTION TO CONTINUE RESENTENCING AND BY REFUSING TO CONSIDER A TERM OF YEARS SENTENCE. (RESTATED).

Anthony Horsley was convicted of first degree murder, and sentenced to life without the possibility of parole. After seeking relief in a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2), and relying on the decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), he received a hearing after his motion for continuance was denied, and was again sentenced to life without parole. On direct appeal, he argued that his life sentence without parole was contrary to the spirit and dictates of Miller v. Alabama, and that the trial court was mistaken in its belief that it could not sentence him to a term of years. Respondent claimed, then and now, that the issue regarding a term of years sentence was not preserved. Petitioner disagrees.

At Petitioner's second sentencing hearing, the court thought that there were only two options: life with- or life without parole. (SR 1303). The court adopted the State's statutory revival argument as an option. (SR 1302-1303). Mr. Horsley

then conferred with his attorney, who informed the court that Mr. Horsley disagreed with the attorney's assessment of sentencing options and believed the court to have an additional option of imposing a term of years sentence. (SR 1304).The court allowed the argument, and defense counsel adopted Petitioner's argument that the court has discretion to sentence him to a term of years. (SR 1304-1305). Defense counsel noted that he did not have case law in front of him (perhaps because his motion to continue was denied), but, pursuant to the case law cited in the motion (which included Miller v. Alabama (SR 1239-1242), he argued that the Court now has discretion because the Miller case has essentially eviscerated the sentencing scheme that was in place at the time Mr. Horsley was previously sentenced. (SR 1304-1305). The trial court disagreed that it had that discretion, but declared the argument to be preserved for appeal. (SR 1304-1305). In its decision, the district court noted Mr. Horsley's argument that the sentencing court had discretion to sentence him to a term of years, and applied the theory of statutory revival instead. Horsley v. State, 121 So. 3d 1130 (Fla. 5th DCA 2013).

It is well-established that no "magic words" are required to preserve an objection or argument. Spurlock v. State, 420 So. 2d 875, 876 (Fla. 1982); Walcott v. State, 460 So. 2d 915, 916 (Fla. 5th DCA 1984); State v. Johnson, 990 So. 2d 1115, 1116 (Fla. 3d DCA 2008). If an attorney's articulated concern informs the

court of the alleged error, then the issue is properly preserved for appeal. State v. Paulk, 813 So. 2d 152, 154 (Fla. 3d DCA 2002). In this case, defense counsel argued in favor of the court having discretion to sentence the petitioner to a term of years, as opposed to life, based on the cases cited in the motion – which included Miller v. Alabama– and also because that decision had "eviscerated" the sentencing scheme that had previously been in place in Florida. The trial court disagreed, but deemed the argument to be preserved for appeal. The Miller decision clearly states that a term of years sentence would be an option considered by a sentencing court. Id., at 2475. The Miller opinion was the only case at the time of the sentencing hearing which spoke of the term of years sentencing option. Since that time, there has been a groundswell of judicial opinions and legislative action which support Mr. Horsley's argument that a term of years sentence must be considered as an option in cases such as his, and the sentencing court has the discretion to do so.

Last week the Florida legislature unanimously passed CS/HB 7035, which, if signed by Governor Scott, would include a term of years sentencing option of at least 40 years. CS/HB 7035, Fla. Leg., Regular Sess., p. 3 (Fla. 2014). The bill also provides for review of a term of years sentence after 25 years. Id., at 3, 9. The Florida Legislature has provided for a person convicted of a murder committed as

a juvenile to be eligible for release in middle age. Parts of the legislation, and the minimum mandatory sentences provided by it, may run afoul of the intent of the Miller decision, but it indicates that the Florida Legislature intends to provide a term of years sentencing option, at least for those juveniles whose crimes are committed after July 1, 2014.

In response to the State's argument regarding briefing, it must be noted that Mr. Horsley's initial brief contains more argument on this issue than "two conclusory sentences, and a citation to Judge Wolf's concurring opinion." *See* IB at 22-23. Further, the argument was raised below before both the circuit court and the district court. Between Mr. Horsley's October 2012 hearing on his motion to correct sentencing error and the passing of CS/HB 7035 last week, there have been a number of opinions which address the argument for a term of years sentence.

The majority opinion in Washington v. State notes that the Miller court's resolution to remand Miller and Jackson for re-sentencing gave little guidance to trial courts regarding sentencing options. Washington v. State, 103 So.3d 917, 920 (Fla. 1st DCA 2013). Judge Wolf concurred in the majority's decision to remand for re-sentencing, but disagreed with the majority's decision not to determine the appropriate sentencing options available to the sentencing judge. Id., at 920. In order for a trial judge to exercise the discretionary sentencing mandated by Miller,

he reasoned, the trial court must be aware of the alternatives available to the court. Id. Both the state and defense in that case offered alternatives which provided for parole. Id., at 920. Judge Wolf's opinion was that our Legislature had repeatedly eschewed parole, and a court mandating a whole new class of people eligible for parole would violate the separation of power provision of the Florida Constitution, citing Art. II, sec. 3,Fla. Const. Judge Wolf concluded: because a life sentence is merely a term of years equaling the life-span of a person, any term of years is necessarily included within the purview of life – thus, he would urge the trial court to impose a term of years without the possibility of parole. Washington, at 922.

Judge Makar, in his concurring opinion in Partlow v. State, discussed the term of years option, and he would certify the question for this Court to consider the need to give trial courts the guidance necessary to conduct sentencing and re-sentencing of juveniles who have committed first degree murder. Partlow v. State, — So.3d — , 38 Fla. L. Weekly D94 (Fla. 1st DCA Jan. 4, 2013), p. 9-10.

In his concurring opinion, Judge Altenbernd suggested that there is a risk that a court could conclude that no statutory provision for punishment exists, but that § 775.02, Florida Statutes provides they could be sentenced either to a fine not exceeding $500 or imprisonment not exceeding 12 months. Toye v. State, 133 So. 3d 540, 550 (Fla. 2d DCA 2014).

Judge Wright's concurring opinion in Walling v. State also disagrees with the State's position on statutory revival. Walling v. State, 105 So. 3d 660, 664-665 (Fla. 1st DCA 2013). In his concurring opinion, Judge Wright agreed with judge Wolf that such a theory would violate the separation of powers provision of the Florida Constitution, and would also violate the spirit of the Miller decision due to that decision's emphasis on judicial discretion, requiring that the sentencer take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison. Id. Judge Wright also reasoned that where a sentence of life without parole is not justified, then the judge may sentence an offender to any period of years *up to* 40 years, citing Kellar v. State, 712 So. 2d 1133 (Fla. 1st DCA 1998). Walling at 665.

Most recently, a sentence of 40 years, imposed after a re-sentencing hearing conducted pursuant to Miller v. Alabama, for a juvenile convicted of first degree murder was approved and affirmed in Thomas v. State, – So.3d – , 2014 WL 1493192 (Fla. 1st DCA April 16, 2014).

The central issue in this and other cases affected by the Miller decision is what options are available to the sentencing court, now that mandatory life without parole sentences are forbidden and judicial discretion in sentencing juveniles is required by the Eighth Amendment. A term of years is part of that central

question. Miller, at 2475. The Fifth District Court decided that central issue, certifying as a question of great public importance whether the United States Supreme Court's decision in Miller, which invalidated § 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 (Fla. 5th DCA 2013).

Respondent contends that the imposition of life with parole after 25 years would take it outside the purview of the Miller decision. AB, p. 24. Because parole in Florida is not truly available to those whose offenses were committed when they were juveniles, it is still a life sentence and does not provide the individualized sentencing hearing required and so does not comply with Miller.

The problems with any mandatory sentence for juveniles convicted of first degree murder after Miller are three-fold: (1) the Miller decision insists that life sentences for homicide offenses should be "uncommon" for juvenile offenders, foreclosing Florida from universally applying mandatory life imprisonment without parole. *See* Miller, 132 S. Ct at 2469. (2) parole is not available for juvenile offenders, as noted by another district court. *See* Mediate v. State, 108 So.3d 703 (Fla. 5th DCA 2013). (3) A life sentence with the possibility of parole is

still life, which does not allow for judicial review. Statutory revival would set up an alternative mandatory sentence, falling afoul of the Miller requirement of judicial discretion, and would also deny offenders their Eighth Amendment right to an individualized judicial consideration of their circumstances, facts of their cases, and their diminished culpability and heightened capacity for change. *See* Miller, at 2469. Parole is not central to the Miller decision. The core holding of Miller is that mandatory sentences of life without parole for juveniles who are convicted of first degree murder are unconstitutional because the sentencer must have discretion to consider a range of sentences, including a term of years. Miller at 2475. Finally, the Florida Legislature has implicitly rejected the notion of statutory revival by enacting new law and extensively reworking § 775.082, Florida Statutes, in CS/HB 7035, which provides alternatives of life imprisonment or a term of years. Petitioner has briefed the problems with the statutory revival notion in his SC-1938 IB, and SC-2000 AB, and will not repeat arguments already made, but stands by them. Petitioner respectfully urges this Court to address the statutory revival theory for these reasons.

Respondent contends that Anthony Horsley's sentence of life without parole does not violate Miller, asserting he was not sentenced to "mandatory" life in prison, and that he was provided with an individualized sentencing hearing.

Petitioner responds that his life sentence without possibility of parole violates the dictates of Miller v. Alabama in several respects: (1) his motion for continuance was denied, even though his attorney was unprepared to present the mitigating evidence which the Miller decision requires a sentencing court to consider. This was an abuse of discretion, which prejudiced and denied him the opportunity to be evaluated by a pediatric psychologist or present other witnesses to his maturity level at the time of the offenses and other juvenile factors which were identified in the Miller decision. (2) The sentencing judge did not believe he had the discretion to consider a term of years sentence, in spite of the Miller court's insistence on judicial discretion in sentencing and specifically suggesting a term of years sentence as a possibility, and he refused to consider that sentence as a possibility. When a trial court is under a mistaken belief of law when it imposes sentence, and does not consider all sentencing options, it must be remanded for re-sentencing. Siler v. State, 2014 WL 1305896 (Fla. 1st DCA April 2, 2014).; (3) The sentencing court did not consider all the Miller juvenile mitigating factors, and misunderstood and misapplied those factors which were addressed in Petitioner's testimony at the sentencing hearing; (4) No evidence was presented to show any prior crimes committed by Petitioner, nor were the circumstances of the case so unusual as to justify sentencing Anthony Horsley to the life without parole sentence which the

Miller decision says should be rare.

In passing CS/HB 7035, the Legislature created Section 921.140, Florida Statutes, to provide for an individualized sentence hearing, and lists factors which a sentencing court must consider in determining whether life imprisonment is appropriate. CS/HB 7035, at 7-9. Most of the factors contained in the bill appear to be derived from the Miller decision. *C.f.* Miller at 2464-2469, 2471. The Miller factors include: (a) the juvenile's age, maturity, proclivity for risk, inability to assess consequences, and a child's lessened moral culpability; (b) those factors, including transient rashness, which enhance the prospect that as years go by and neurological development occurs, his deficiencies will be reformed; (c) the child's background, including family, home, and community environment; (d) the effect of familial pressure or peer pressure on the juvenile's actions; (e) whether he has been exposed to deviant peers; (f) immaturity and impetuosity; (g) capacity for rehabilitation; (h) mental traits; (i) the fact that a child's traits are less fixed than an adult's; (j) the inability to deal with attorneys, including his own, or with police officers. Id. The legislative factors include (c) the defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense. CS/HB 7035, at 8. This particular requirement (applicable to persons whose offense is committed after July 1, 2014) not only comports with Miller, but also

would require evaluation and testimony by a mental health expert, and the entry in evidence of school records. That did not occur in Petitioner's case, although it might have if his motion for continuance had been granted. Many Miller factors were not considered as mitigation by the sentencing court. One of those factors was the circumstances of the offense, which, like Evan Miller's and Kuntrell Jackson's offenses, was a botched robbery. Miller at 2465. Evan Miller's offense included beating the victim in the head with a baseball bat and setting fires, resulting in the victim's death from his injuries and smoke inhalation. Id., at 2462. In spite of the vicious nature of the murders committed by Evan Miller and Kuntrell Jackson, the Miller court found that "a pathological background" might have contributed to the commission of the crime, and that factor must be considered as mitigation by the sentencing court, because the Eighth Amendment forbids a sentencing scheme that does not take into account these factors, resulting in disproportionate sentences. Id., at 2468-2469. All the mitigating factors of Anthony Horsley's youth and maturity *at the time of the offense* must be considered by the circuit court. The Legislature has recognized that Miller requires those factors to be considered. The circuit court in this case abused its discretion in deciding that Petitioner's ability to write motions at the time of a trial, held several years after the offense, somehow showed he was mature at time of offense.

Anthony Horsley's sentence, imposed after an inadequate sentencing hearing, was not constitutionally imposed. He should not be sentenced to life without parole without the full, fair, individualized sentence hearing contemplated by the Miller Court, in which he has the Eighth Amendment right to present evidence relating to all the juvenile mitigation factors identified in that decision.

The Miller decision establishes a Constitutional procedure and re-asserts the connection between the Eighth Amendment right to proportionality of sentences and the proper exercise of judicial discretion. The theory of statutory revival fails because the predecessor statutes are also unconstitutional as applied to juveniles. The State's argument that statutory revival is what the Legislature would have done if it had known the statute was unconstitutional, also fails when the only indication of what the Legislature would have done if it had known the current statute and all the predecessor statutes were unconstitutional is recently passed bill CS/HB 7035, which includes a sentencing option of a term of years, and requires courts to consider many factors in sentencing. It does not provide for any sentence to include parole, in effect suggesting the district court's opinion provides for an illegal sentence. Although this bill is not strictly applicable to Petitioner's case, it supplies further persuasive reasons to answer the certified question in the negative.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Appellant respectfully requests that this Honorable Court answer the certified question in the negative, reverse his judgment and sentence and remand for a re-sentencing hearing to comply with the dictates of the Miller decision.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kathryn Rollison Radtke
Assistant Public Defender
Florida Bar No. 0656331
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
(386) 254-3758
radtke.kathryn@pd7.org

COUNSEL FOR THE PETITIONER

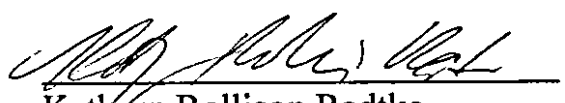
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to the Honorable Pamela Bondi, Attorney General, 444 Seabreeze Avenue, Fifth Floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com and kellie.nielan@myfloridalegal.com; to Paolo Annino at pannino@law.fsu.edu; to Tatiana A. Bertsch at tbertsch@rc-4.com; to Benjamin W. Maxymuk at bmaxymuk@eji.org; and was mailed to Anthony Horsley, Inmate #E44830, Northwest Florida Reception Center - Main Unit, Post Office Box 628, Lake Butler, Florida 32054-0628, on this 16th day of May, 2014.

Kathryn Rollison Radtke
Assistant Public Defender

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in this brief is proportionally spaced 14 pt. Times New Roman.



Kathryn Rollison Radtke
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY, JR.,

Petitioner,

vs.

Supreme Court Case No. SC13-1938
CONSOLIDATED SC13-2000

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX A

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kathryn Radtke
Assistant Public Defender
Florida Bar No. 0656331
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
(386) 254-3758
radtke.kathryn@pd7.org

COUNSEL FOR THE PETITIONER

District Court of Appeal of Florida,
Fifth District.

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

No. 5D12–138.

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

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

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

Affirmed in part; remanded with instructions for resentencing.

Question certified.

West Headnotes

KeyCite Citing References for this Headnote

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

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

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

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

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

LAWSON, J.

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

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

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

In a competing thorough and thoughtful analysis, with which we fully agree, Judge Makar concluded that statutory revival should be used to revive the 1993 version of section 775.082(1), Florida Statutes, which mandated a sentence of life with the possibility of parole after twenty-five years. *Partlow v. State*, —— So.3d ——, 2013 WL 45743, 38 Fla. L. Weekly D94, 96–97 (Makar, J., concurring in part and dissenting in part). As noted by both Judges Wolf and Makar, the judiciary's role in a case like this—where a legislative enactment is declared unconstitutional and the alternative of having no option to address the subject would be untenable-is largely guided by the doctrine of separation of powers. In other words, the judiciary is attempting to fill a statutory gap while remaining as faithful as possible to expressed legislative intent, but also attempting to avoid judicial intermeddling by crafting our own statute to address the issue with original language. The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself—thereby avoiding the type of "legislating from the bench" that would be required if we were to essentially rewrite the existing statute with original language which we feel might better meet the policy goals of the current legislature. And, while we are certainly cognizant of the fact that the legislature of late appears to be less than enamored with the concept of parole, we also note that the legislature has always been adverse to judicial discretion in sentencing in homicide cases, which could result in a perceived "lenient" term of years sentence in a case of this type. We also strongly believe that many of the considerations outlined in *Miller* would be far better addressed years after sentencing in a parole-type setting, once the juvenile has matured into an adult and his or her conduct during decades of confinement has been evaluated, than through the forward-looking speculation necessitated if these issues are to be addressed with finality at the time of sentencing.

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

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

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

ORFINGER and WALLIS, JJ., concur.

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