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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

SUPPLEMENTAL REPLY BRIEF OF THE PETITIONER

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SUMMARY OF ARGUMENT

Although the express language of the amended statutes and the new statutes enacted pursuant to chapter 2014-220, Laws of Florida, make them applicable to crimes committed after July 1, 2014, the application of the new laws can be made retrospective to Miller pipeline cases, under the principles of fairness and equal treatment. Article X, section 9 of the Florida Constitution does not preclude the application of ch. 2014-220, Laws of Florida, to pending cases where the changes do not act to the detriment of the criminal defendant. Additionally, it has been held that a re-sentencing hearing is *de novo* and that the law in effect at the time of a *de novo* re-sentencing applies to that proceeding. If this Court grants Mr. Horsley a re-sentencing hearing, then ch. 2014-220 would apply.

Legislative intent, as to the sentencing options to be considered by Florida courts when conducting Miller sentencing hearings, is now clear in the new laws. The sentence of life with the possibility of parole after 25 years, which was approved by the Fifth District Court of Appeals, is contrary to legislative intent and is unconstitutional because Florida's parole system does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation, as required by Miller.

Anthony Horsley was not provided with a Miller-compliant sentencing hearing because his motion to continue (tendered to the court on the grounds that his sentencing attorney was unprepared to present mitigation regarding Miller factors) was denied, which precluded him from presenting mitigation evidence pursuant to the Miller factors, which are now included in the new laws. His sentence of life should be reversed and the cause remanded for a re-sentencing hearing that complies with the dictates of Miller and ch. 2014-220, Laws of Florida.

ARGUMENT

MR. HORSLEY'S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR FIRST DEGREE FELONY MURDER VIOLATES THE DICTATES OF MILLER v. ALABAMA, AND RECENT LEGISLATION HAS SIGNIFICANT IMPACT ON THIS CASE.

The State argues that the newly enacted legislation is not applicable to Mr. Horsley's case because (1) it enacts new statute 921.1401, allowing for a life sentence if, after conducting a sentence proceeding to consider specific factors, the court finds a life sentence to be appropriate, and (2) by its terms, the new statute was created to provide this sentencing hearing only for those whose crimes were committed on or after July 1, 2014. The petitioner responds to refute these and other arguments made by the State in its supplemental responsive brief.

The State argues that the petitioner acknowledged in his initial supplemental brief that the newly enacted legislation did not apply to his case. What Petitioner actually stated was: "Although the new law does not directly apply to Mr. Horsley the law is clear and persuasive evidence of legislative intent to abrogate parole, provide a term-of-years sentencing option, provide for judicial sentence reviews after significant periods of time have passed, and provide for specific factors to be considered and addressed by the sentencing court." Supplemental Brief of

Petitioner, at 22. What was meant by this statement is that, while the new legislation does not, on it's face, appear to directly apply, it does have great impact on this case in the clear expression of legislative intent.

Chapter 2014-220, Laws of Florida, among other actions, enacts new statute 921.1401, to allow for a life sentence to be imposed if the sentencing court finds a life sentence appropriate – but only after conducting a sentence proceeding to consider certain listed factors. *See* Ch. 2014-220, Section 2, Laws of Florida. The new laws were enacted in response to Miller v. Alabama, 132 S. Ct. 2455 (2012), and incorporate many of the juvenile mitigation factors mandated for sentencing court consideration by that case. *See* Id., at 2468. Mr. Horsley's motion to continue his sentencing hearing was denied, and so he was precluded from presenting evidence with regard to the Miller juvenile mitigation factors.

By its terms, the new law was created to provide an opportunity to persons in a similar circumstance to Mr. Horsley to present Miller mitigation evidence, if their crimes are committed on or after July 1, 2014. However, the application of these new laws can be made retrospective to non-final criminal cases such as Mr. Horsley's, under certain circumstances and pursuant to principles of fairness and equal treatment. *E.g.*, Griffith v. Kentucky, 479 U.S. 314 (1987); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). By its terms, the purpose of § 775.082(11),

Fla. Stat., is to provide uniform punishment for crimes punishable under it. Further, Article 1, sections 9 and 16, Fla. Const., require that any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992). Miller v. Alabama has established such a rule of law.

Article X, § 9, Fla. Const., states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Article X, § 9 is silent as to the situation presented here, where a prior sentencing scheme is unconstitutional – violating the Eighth Amendment to the United States Constitution – as applied to a specific group of criminal defendants, such that it would be unfair and unconstitutional to sentence those persons under the old law. Although the State argues that this provision precludes any newly enacted criminal statutes from applying to pending criminal cases, all of the cases cited in its supplemental responsive brief are inapposite, as none of those cases involve legislative enactments designed to correct sentencing laws which violate the Eighth Amendment to the United States Constitution.

The State argues that the decision in Smiley v. State, 966 So. 2d 330, 336-337 (Fla. 2007) precludes *any* newly enacted criminal statutes from applying to pending criminal cases. However, the Court in that case took pains to note:

> "[F]or a change of law to be applied retroactively, it must: (1) originate in [the Supreme Court of Florida] or the United States Supreme Court; (2) be constitutional in nature; and (3) represent a development of fundamental significance."

Id., at 333. Chapter 2014-220, Laws of Florida, meets this test. The new legislation was enacted in response to the United States Supreme Court's Miller decision, it is constitutional in nature, and represents a development of fundamental significance. The new legislation does, therefore, apply to pending cases.

Just as Smiley v. State involved a statute establishing a new affirmative defense which was not constitutional in nature, Castle v. State, 330 So. 2d 10 (Fla. 1976), and State v. Pizzaro, 383 So. 2d 762 (Fla. 4th DCA 1980) also involved new statutes which involved new sentencing provisions which were not constitutional in nature and did not represent developments of fundamental significance. Except for the statement of the Witt test, which is contained in the Smiley case, the decisions cited by the State are inapposite to this analysis.

This Court has previously held that changes to criminal sentencing laws can be retroactively applied when the changes are not detrimental to the criminal defendant. Justus v. State, 438 So. 2d 358, 368 (Fla. 1983); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Justus, the Florida Supreme Court responded to an Art.

X, § 9, Fla. Const., challenge by holding that the retrospective application of the "cold, calculated, and premeditated" aggravator did not change the law to the defendant's detriment, and could therefore be applied. Id., at 368. Because CH. 2014-220, Laws of Florida, is not detrimental to Miller defendants, and would actually be beneficial in preserving Eighth Amendment constitutional rights, it follows that the Florida Constitution does not bar the retrospective application of the new law.

It is well-established that a re-sentencing hearing is *de novo*, and that the law in effect at the time of a *de novo* re-sentencing applies to that proceeding. State v. Fleming, 61 So. 3d 399, 408 (Fla. 2011). The Florida Supreme Court held in that case that the trial court has discretion at re-sentencing to impose sentence using available factors not previously considered. Id., at 406. Applying the holding in Fleming, Ch. 2014-220, Laws of Florida, would govern a re-sentencing hearing when the sentence is vacated and remanded in order to be constitutionally compliant.

Legislative intent, as to sentencing options to be considered by Florida courts when conducting Miller sentencing hearings, has been at issue in this case and is now made clear by the passage of Ch. 2014-220, Laws of Florida. The new law provides for sentencing options of life in prison, with judicial review after 25

years for a chance at modification of sentence with demonstrated maturity and rehabilitation, or a term of 40 years imprisonment for persons convicted of having committed homicide while juveniles. *See* Ch. 2014-220, § 1, Laws of Florida. Ch. 2014-220 makes no mention of parole. The sentence of life with the possibility of parole after 25 years, which was approved by the Fifth District Court of Appeals, is therefore contrary to the expression of legislative intent embodied in the new law. The sentence proposed by the District Court of Appeal is also unconstitutional, as against the Eighth Amendment, because Florida's parole system – unlike the new law – does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation as required by Miller.

Petitioner again submits, to refute the State's argument to the contrary, that Mr. Horsley's sentence of life in prison without possibility of parole violates the dictates of Miller, because he was not provided with a Miller-compliant sentence hearing. His motion to continue the sentencing hearing was denied, in spite of his attorney's frank statement that he was unprepared to provide mitigation evidence on Mr. Horsley's behalf and could only call the defendant as a witness if he were forced to proceed at that time. As a result, much evidence that could have otherwise been presented was not. Further, the sentencing judge did not believe he had discretion to consider the term-of-years sentence requested by Mr. Horsley,

even though the Miller decision listed a term of years sentence as an option. (In compliance with Miller, Ch. 2014-220, Laws of Florida, now requires sentencing courts to consider a term of years as a sentencing option.) Finally, the sentencing hearing was not compliant with the dictates of Miller or the principle of fairness, in that the sentencing court found that Mr. Horsley had not presented evidence of some Miller mitigating factors such as impetuosity and the immaturity of youth, even though a continuance would have allowed his attorney to present such evidence. In short, Mr. Horsley was not given the opportunity to present mitigation evidence which was then required by Miller, and is now also required by Ch. 2014-220, laws of Florida. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

The life sentence that was imposed on Mr. Horsley should be reversed and this cause remanded for a Miller-compliant re-sentencing hearing.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Honorable Court 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, as informed by the legislative intent expressed in Ch. 2014-220, laws of Florida, and also to comply with the provisions of the new law.

Respectfully submitted,

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CERTIFICATE OF FONT

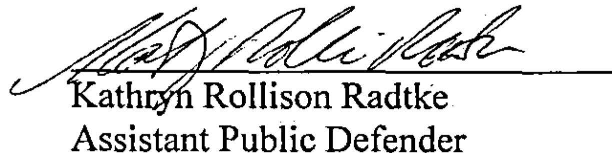
I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and radtke.kathryn@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, 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, 4455 Sam Mitchell Drive, Chipley, Florida 32428-3501, on this 18th day of August, 2014.



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