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IN THE SUPREME COURT OF FLORIDA

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

ANTHONY DUWAYNE HORSLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF OF PUBLIC INTEREST LAW CENTER AS AMICUS CURIAE ON BEHALF OF PETITIONER

On Discretionary Review from the Decision
of the Fifth District Court of Appeal

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CH. 2014-220, LAWS OF FLA., CREATES A SENTENCING SCHEME THAT APPEARS TO COMPLY WITH *MILLER V. ALABAMA*, 132 S.Ct. 2455 (2012), WHICH WOULD APPLY TO JUVENILES CONVICTED OF HOMICIDE AT A RESENTENCING HEARING.

I. Introduction

The Public Interest Law Center (PILC) previously filed an amicus brief in Mr. Horsley's case on the issue of whether Florida's parole system provides juveniles with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" as required by *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012). PILC is filing this supplemental brief in response to the Florida Supreme Court's Order from June 26, 2014 instructing the Parties to address the impact of Ch. 2014-220, Laws of Fla., on this case. This brief primarily focuses on the issue of whether Ch. 2014-220, Laws of Fla., provides juveniles with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. This brief also discusses what the Court might do to ensure that Ch. 2014-220, Laws of Fla., applies to cases where the offense was committed prior to July 1, 2014.

In *Miller v. Alabama*, the United States Supreme Court prohibited the States from imposing mandatory sentences of life without parole on juvenile offenders. 132 S.Ct. 2455, 2469 (2012). The Supreme Court allowed the States to retain life without parole as a sentencing option for the rare juvenile offender whose crime

reflects "irreparable corruption," but required that all others be provided with a meaningful opportunity to obtain release based on maturity and rehabilitation. *Id.* In response to *Miller*, the Fifth District Court of Appeal held that life with parole eligibility after 25 years is the only sentence available to juveniles convicted of a homicide offense under the doctrine of "statutory revival." *Horsley v. State*, 121 So. 3d 1130, 1131(Fla. 5th DCA 2013). However, "statutory revival" of life with parole eligibility after 25 years does not comply with *Miller v. Alabama* because, as amicus previously argued, Florida's parole system is structurally insufficient to provide juveniles with "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See* PILC Amicus Brief.

The Florida Legislature recently passed a remedial statute, Ch. 2014-220, Laws of Fla., to bring Florida's sentencing scheme into compliance with *Miller v. Alabama* and *Graham v. Florida*, 560 U.S. 48 (2010), which was signed into law by Governor Scott on June 20, 2014. The new legislation contains both statutory criteria to consider when first sentencing a juvenile and a mechanism for judicial review of a juvenile's sentence, which mandates early release if the juvenile has demonstrated maturity and rehabilitation. The new state law provides nine factors for a reviewing judge to consider listed in the newly-created § 921.1402(6), Fla. Stat. (2014), almost all of which are tailored to the issue of whether the juvenile offender is rehabilitated. Moreover, the law calls for the necessary procedural

safeguards to ensure that the judicial review is conducted fairly and accurately. Therefore, it appears that this new law does provide juveniles with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation in compliance with *Miller v. Alabama*.[1]

Ch. 2014-220, Laws of Fla., states that it takes effect on July 1, 2014 and that it applies to offenses committed "on or after July 1, 2014." Similarly, Art. X, § 9, Fla. Const., provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." However, this Court has previously held that changes to criminal sentencing laws "could be retroactively applied since we found that it did not change the substance of the sentencing law to the detriment of the defendant." *Justus v. State*, 438 So. 2d 358, 368 (Fla. 1983) (discussing *Combs v. State*, 403 So. 2d 418 (Fla. 1981)). Additionally, Florida law is well-established that a resentencing hearing is *de novo* and that the law in effect at the time of a *de novo* resentencing applies to that proceeding. *State v. Fleming*, 61 So. 3d 399, 408 (Fla. 2011). So, if this Court were to vacate the sentence imposed by the Fifth District in this case and remand for resentencing, Ch. 2014-220, Laws of Fla., would apply to Mr. Horsley's resentencing hearing.

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[1] The new law introduces sentencing reform for juveniles sentencing to both homicide and nonhomicide offenses. However, since *Horsley* is exclusively a *Miller* case, this Brief will be limited to discussion of only the provision regarding juveniles convicted of capital homicide offenses.

II. Ch. 2014-220, Laws of Fla., Appears to Provide Juvenile Offenders with a Meaningful Opportunity to Obtain Release Based on Demonstrated Maturity and Rehabilitation.

As a brief recap, Florida's parole system does not provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation for two reasons. First, the opportunity for release that Florida's parole system provides is not meaningful. *See generally Franklin v. State*, --- So. 3d ---, 2014 WL 2041081 (Fla. 1st DCA May 19, 2014) (affirming a juvenile offender's presumptive parole release date of September 1, 2352 as compliant with *Graham v. Florida*). The potential for parole release occurs too late for a juvenile to lead a meaningful life outside of prison and the parole process lacks fundamental safeguards such as the right to counsel, the right to appeal, and the right to be present. Second, the opportunity is not based on demonstrated maturity and rehabilitation. The Parole Commission is statutorily obligated to give primary weight to the seriousness of the offense, § 947.002(2), Fla. Stat. (2013), and to treat juvenile status at the time of the offense as an aggravator, Fla. Admin. Code R. 23-21.007(4) (2013), which completely contradicts the Supreme Court's science- and common sense-based analysis of juvenile culpability in *Miller v. Alabama*.

By contrast, Ch. 2014-220, Laws of Fla., sets up a system of judicial review that appears to comply with the minimum requirements of *Miller v. Alabama* in the

majority of cases. To start, Ch. 2014-220 creates § 921.1402(2)(a), Fla. Stat. (2014), to provide review for most homicide offenders after 25 years of incarceration, which is also when a juvenile would first be reviewed by the Parole Commission. However, "exceptional program achievement... would not normally be considered at the time of the initial interview [in the parole system]." Fla. Admin. Code R. 23-21.010(5)(b)(2)(h). The initial review by the Parole Commission simply sets a presumptive parole release date based on the facts of the crime without regard for subsequent rehabilitation, which is considered at a subsequent review 7 years later. § 947.16(4)(g), Fla. Stat. (2013).

On the other hand, Ch. 2014-220 creates § 921.1402(6), Fla. Stat. (2014), which outlines several criteria for a reviewing judge to consider, the first two factors being "Whether the juvenile offender demonstrates maturity and rehabilitation," and "Whether the juvenile offender remains at the same level of risk to society that he or she did at the time of the initial sentencing." While inmates before the Parole Commission will often have to wait until a subsequent interview for the Commission to exercise its discretion to consider demonstrated maturity and rehabilitation, a juvenile sentenced under Ch. 2014-220, Laws of Fla., is guaranteed to have these factors considered by a judge after 25 years of incarceration.

Additionally, unlike the parole system, Ch. 2014-220, Laws of Fla., deals separately with juveniles convicted of homicide who did not "actually kill, intend to kill, or attempt to kill" (essentially, juveniles convicted under the felony murder rule) in § 921.1402(2)(c). Juveniles convicted of "felony murder" are entitled to judicial review of their sentences after 15 years of incarceration under § 921.1402(2)(c), which gives those juveniles more of an opportunity to lead a meaningful life outside of prison if released.

As for procedural safeguards, the review mechanism set up in Ch. 2014-220, Laws of Fla., is the Florida parole system's polar opposite. The parole review process in Florida is procedurally deficient because it fails to provide inmates with three fundamental rights—the right to counsel, the right to appeal, and the right to be present. *See* PILC Amicus Brief at 9-14. In contrast, Ch. 2014-220, Laws of Fla., provides that juveniles shall be notified of their judicial review 18 months in advance and appointed a public defender if needed to assist them in putting on a case of rehabilitation pursuant to § 921.1402(3)-(5). Additionally, § 921.1402(7) provides that "[i]f the court determines that a juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified." The purpose of this written order is to ensure that reviewing courts can determine whether factors such as rehabilitation were given due weight by the trial court.

Finally, the judicial review is predominantly focused on the question of whether the juvenile has demonstrated maturity and rehabilitation while incarcerated. § 921.1402(6), Fla. Stat. (2014), lists nine factors for a judge to consider at a sentence review. Of these nine factors, eight of them are focused on the juvenile's maturity and rehabilitation (the only exception is a factor requiring the judge to take into account the wishes of any victims and/or victim family members). Significantly, § 921.1402(6)(f), specifies that a judge is to consider "[w]hether the juvenile's age, maturity, and psychological development at the time of the offense affected his or her behavior." Unlike the Florida parole system, which treats juvenile status at the time of the offense as an aggravator,[2] Ch. 2014-220, Laws of Fla., authorizes the trial court to consider juvenile status as a mitigator.

Unlike Florida's parole system, the review system created in Ch. 2014-220, Laws of Fla., appears to be meaningful. The opportunity for release provided by the new legislation occurs at a time that renders the possibility of a juvenile achieving a meaningful life outside of prison substantially more realistic than the opportunity provided by the parole system, especially for juveniles convicted of

[2] *See* PILC Amicus Brief at 17-19. The amicus brief that PILC initially filed in this case explains how the Florida Parole Commission is required to give inmates an additional 2 Salient Factor Score points because of their status as a juvenile during the commission of the offense when calculating an inmate's presumptive parole release date. Fla. Admin. Code R. 23-21.007(4) (2013). These extra two points can translate into an additional 10 years of incarceration.

felony murder. Additionally, the judicial review procedure carries with it the fundamental rights needed to ensure the accuracy and integrity of the proceeding, such as the right to counsel, the right to appeal, and the right to be present. Finally, the review mechanism statutorily emphasizes the significance of a juvenile's maturity and rehabilitation, whereas the Florida Parole Commission is statutorily obligated to give primary weight to the seriousness of the underlying offense. § 947.002(2), Fla. Stat. (2013). For these reasons, it appears that the system of review set up by Ch. 2014-220, Laws of Fla., is a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

III. Application of Ch. 2014-220, Laws of Fla., to Cases in which the Offense Occurred Prior to July 1, 2014.

Ch. 2014-220, Laws of Fla., states that it takes effect on July 1, 2014 and that it applies to crimes committed "on or after July 1, 2014," which raises questions about whether or not it can be seamlessly applied to cases such as Mr. Horsley's where the crime occurred years before the new law was enacted. Similarly, Art. X, § 9, Fla. Const., creates apparent "hurdles" to retrospective application of the new law, since it states that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." *See Partlow v. State*, 134 So. 3d 1027, 1031-32 n. 7 (Fla. 1st DCA 2013) (Makar, J., concurring in part, dissenting in part).

However, this Court has previously held that changes to criminal sentencing laws can be retroactively applied so long as said changes do not act to the detriment of the criminal defendant. *Justus v. State*, 438 So. 2d 358, 368 (Fla. 1983) (discussing *Combs v. State*, 403 So. 2d 418 (Fla. 1981)). In *Combs*, the Florida Supreme Court upheld the retrospective application of the "cold, calculated, and premeditated" aggravator because it inured to the benefit of the defendant. 403 So. 2d at 421 (Fla. 1981). Based on *Combs*, the Florida Supreme Court responded to an Art. X., Section 9, Fla. Const., challenge to retrospective application of the "cold, calculated, and premeditated" aggravator by claiming that it lacked merit. *Justus*, at 368. Ch. 2014-220, Laws of Fla., clearly acts to the benefit of juveniles because it sets forth a list of factors designed to limit the State's imposition of life sentences. The Florida Constitution is no barrier to retrospective application of the new law.

Additionally, Florida law is well-established that a resentencing hearing is *de novo* and that the law in effect at the time of a *de novo* resentencing applies to that proceeding. *State v. Fleming*, 61 So. 3d 399, 408 (Fla. 2011) (holding that the rules announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), apply at a resentencing hearing even if the original judgment and sentence were final prior to those cases being issued). As the Florida Supreme Court stated in *Fleming*, "[t]he trial court has discretion at

resentencing—within certain constitutional confines—to impose sentence using available factors not previously considered." 61 So. 3d at 406. So, if this Court were to vacate Mr. Horsley's life with parole sentence on grounds that it is unconstitutional under *Miller v. Alabama* and remand for resentencing, Mr. Horsley's resentencing would be governed by the law in effect at the time of Mr. Horsley's resentencing, which is Ch. 2014-220, Laws of Fla.

To be clear, just as *Apprendi* itself does not apply retroactively, *Hughes v. State*, 901 So. 2d 837-38 (Fla. 2005), the new legislation does not apply retroactively to any and all juvenile offenders who might benefit from its individualized sentencing and review process. However, for any juvenile offender whose sentence is vacated and remanded for resentencing due to some constitutional infirmity,[3] Ch. 2014-220, Laws of Fla., would govern that *de novo* resentencing hearing.

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[3] There are several constitutional issues currently pending before this court that could result in a juvenile offender being granted a right to resentencing. The first issue is the one presented by this case, in which the District Court imposed a sentence of life with parole on a juvenile convicted of homicide in violation *Miller v. Alabama* because Florida's parole system does not provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *See Horsley v. State*, 121 So. 3d 1130 (Fla. 5th DCA 2013). The second issue is whether *Miller v. Alabama* is held to apply retroactively to cases that had concluded the direct review process prior to *Miller* being decided. *See Falcon v. State*, 111 So. 3d 973 (Fla. 1st DCA 2013). Finally, there is the issue of whether a trial judge violated *Graham v. Florida* by resentencing a juvenile to a term of years that is the "functional equivalent" of life without parole. *See Henry v. State*, 82 So.

Of course, retrospective application of the new legislation is complicated by the fact that the language of Ch. 2014-220, Laws of Fla., states that it only applies to cases where the offense was committed on or after July 1, 2014. To ensure that juveniles who committed a homicide offense prior to the new legislation are sentenced in accordance with the Legislature's intent, it may be the simplest and least judicially intrusive approach to interpret this language to mean that Ch. 2014-220, Laws of Fla., applies to any cases sentenced or resentenced after July 1, 2014.

IV. Conclusion

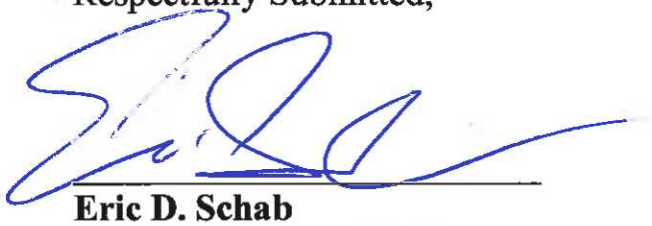
Unlike Florida's parole system, Ch. 2014-220, Laws of Fla., appears to provide juvenile offenders with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Under Ch. 2014-220, Laws of Fla., some juveniles convicted of homicide are eligible for review after 15 years of incarceration. Additionally, juveniles have many important rights not afforded to inmates by the parole system, including the right to counsel, the right to appeal, and the right to be present. Finally, the factors listed in Ch. 2014-220, Laws of Fla., for a reviewing judge to consider are heavily focused on maturity and rehabilitation.

In order to apply this legislation retrospectively to cases that occurred prior to July 1, 2014 such as Mr. Horsley's, this Court simply needs to remand for a *de*

3d 1084 (Fla. 5th DCA 2012); *Gridine v. State*, 89 So. 3d 909 (Fla. 1st DCA 2011).

novo resentencing hearing and to provide trial courts with the instruction that the current law of the land is to be the applicable law at these resentencing hearings.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by eService on Kellie Nielan, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, crimappdab@myfloridalegal.com; Kathryn Radtke, Counsel for Petitioner, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118, radtke.kathryn@pd7.org; Tatiana Bertsch, Amicus Counsel on behalf of Petitioner, 401 South Dixie Highway, Suite 200, West Palm Beach, FL 33401, tbertsch@rc-4.com; and, Benjamin Maxymuk, Amicus Counsel on behalf of Petitioner, 122 Commerce Street, Montgomery AL 36104, bmaxymuk@eji.org on this 16th day of July, 2014.

Eric D. Schab

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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