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IN THE SUPREME COURT OF FLORIDA

ANTHONY DUWAYNE HORSLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

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

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

SUPPLEMENTAL BRIEF OF KYLE WALLING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF CITATIONS. ii

ARGUMENT.. 1

I. Chapter 2014-220 Further Undermines the Basis for the "Statutory Revival" Remedy Endorsed by the Fifth District Court of Appeal and the State and Supports the Term-of-Years Remedy Previously Advocated by Petitioner and Amicus. 1

II. This Court Can and Should Use Its Authority to Craft a Remedy for Pipeline Cases That Mirrors the Features of Chapter 2014-220. 4

A. Constitutional principles of fairness and equal treatment require all non-final cases to be treated equally in the absence of a compelling reason to treat them otherwise. 4

B. This Court should interpret the criminal code and use its judicial authority to ensure that pipeline cases are treated similarly to cases arising after Chapter 2014-220's effective date. 6

CONCLUSION. 11

CERTIFICATE OF COMPLIANCE.. 12

CERTIFICATE OF SERVICE. 12

TABLE OF CITATIONS

CASES

Castle v. State, 330 So. 2d 10 (Fla. 1976).. 8

Cramp v. Bd. of Public Instruction, 137 So. 2d 828 (Fla. 1962). 3

Griffith v. Kentucky, 479 U.S. 314 (1987). 4

State v. Griffith, 561 So. 2d 528 (Fla. 1990).. 7

Hall v. State, 853 So. 2d 546 (Fla. 1st DCA 2003).. 7

State v. Hogan, 451 So. 2d 844 (Fla. 1984). 7

Miller v. Alabama, 132 S. Ct. 2455 (2012).. . . . . passim

Partlow v. State, 134 So. 3d 1027 (Fla. 1st DCA 2013).. 7

State v. Scott, 439 So. 2d 219 (Fla. 1983).. 6

Smith v. State, 598 So. 2d 1063 (Fla. 1992). 5, 6

State v. Watts, 558 So. 2d 994 (Fla. 1990). 8, 9

CONSTITUTIONS, STATUTES, AND RULES

Art. 5, § 2, Fla. Const... 10

Art. 3, § 3, Fla. Const... 10

Art. 10, § 9, Fla. Const.. . . . . 7, 8, 9, 10

Ch. 2014-220, Fla. Laws.. . . . . passim

§ 775.082, Fla. Stat... . . . . 2, 5, 8, 9

§ 921.1401, Fla. Stat... . . . . 8, 10

§ 921.1402, Fla. Stat.. . . . . 2, 5, 6, 10

Fla. R. Crim. P. 3.800. 10

ARGUMENT

This Court requested briefing on how, if at all, the enactment of ch. 2014-220, Laws of Fla., impacts the issues in this case. Chapter 2014-220 affects the issues before this Court in two primary ways. First, the new statute provides strong and direct evidence of legislative intent, which is relevant to the issues previously raised and briefed to this Court. Second, the passage of chapter 2014-220 requires this Court to consider to what extent the new statutory provisions should be applied to "pipeline" cases like Anthony Horsley's and Kyle Walling's. These points are addressed in turn below.

I. Chapter 2014-220 Further Undermines the Basis for the "Statutory Revival" Remedy Endorsed by the Fifth District Court of Appeal and the State and Supports the Term-of-Years Remedy Previously Advocated by Petitioner and Amicus.

Kyle Walling initially appeared as an amicus party in this litigation in order to argue two points with regard to the sentencing remedy required by *Miller v. Alabama*, 132 S. Ct. 2455 (2012): (1) that the Fifth District Court of Appeal had improperly applied this Court's statutory-interpretation precedents in applying statutory revival to provide a parole-based remedy; and (2) that those precedents, properly applied – as well as *Miller* itself – required a term of years as the alternative sentencing remedy. *See* Br. of Kyle Walling as *Amicus Curiae* in Support of Pet'r. (Feb. 20, 2014) ("Walling Amicus Br."). The concept of legislative intent plays a substantial role in

each of these arguments, given the overriding concern in this area of jurisprudence with (a) not contravening legislative intent where that intent is clear; (b) attempting to reasonably approximate legislative intent where that intent is not clear. Specifically, Kyle argued that the "statutory revival" theory of statutory construction adopted by the Fifth District Court of Appeal and endorsed by the State failed, in part, because it contravened a longstanding and clear legislative intent to abolish parole in Florida. Walling Amicus Br. 10. And conversely, Kyle argued that a severance-based interpretive approach which resulted in the availability of a term-of-years sentencing range was appropriate, in part, because it meshed comfortably with the broader legislative sentencing hierarchy and with the legislative preference for determinate sentencing. Walling Amicus Br. 3, 8–10. By enacting a discretionary term of years as the *Miller*-required alternative sentencing range for juvenile offenders convicted of capital murder,[1] chapter 2014-220 strongly supports Kyle's arguments as to both of these points.

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[1]The term-of-years option applies if the trial judge does not determine (after a *Miller*-compliant hearing) that life is an appropriate sentence. In a case like Kyle's where the juvenile did not kill or intend to kill, the statute allows a sentence of any number of years up to life. § 775.082(1)(b)(2), Fla. Stat. (West 2014) (as amended). For a juvenile who actually killed or intended to kill the victim, the statute requires a minimum sentence of 40 years. *Id.* § 775.082(1)(b)(1) (as amended). In a non-intent case where a sentence greater than 15 years is imposed,, the juvenile is entitled to seek judicial modification after 15 years; in an intent case, judicial modification may be sought after 25 years. *Id.*; *id.* § 921.1402(2)(a), (c).

As argued in the initial amicus brief, the first step in the required analysis (before even considering statutory revival) is to determine whether the unconstitutional portions of the statute are severable. Kyle argued that the statute was severable, in part because the results of that severance – authorizing trial courts to impose term-of-years sentences – would be consistent with inferred legislative intent regarding criminal sentencing. *See* Walling Amicus Br. 6, 8–10 (citing, e.g., *Cramp v. Bd. of Public Instruction*, 137 So. 2d 828, 830 (Fla. 1962)). The legislature's express endorsement of a term-of-years remedy removes the need for inferences and provides even stronger evidence in favor of that remedy.

Further, even if this Court could reach the step of the analysis where statutory revival can properly be considered, such a remedy is fundamentally inappropriate in a situation like this one where the revival of a 1993 statute would contravene decades of clear legislative policy rejecting parole as part of Florida's sentencing scheme. As noted in Kyle's previous brief, none of the cases cited by the State or the Fifth District Court of Appeal involves revival of a statute that had been repealed nearly twenty years earlier. *See* Walling Amicus Br. 10 n.4. In addition, none of those cases involves a situation where the revival of the earlier statute would contravene, rather than further, the intent and policy of the legislature. That revival here would be contrary to legislative policy rejecting parole is even clearer now that the legislature has enacted a post-*Miller* statute showing no inclination to deviate from that policy.

Under these circumstances, it would be nonsensical for this Court to allow a mechanistic application of its precedents to undermine the very respect for legislative intent and legislative prerogatives that those precedents were designed to protect.

In short, especially after the enactment of chapter 2014-220, there is no reasonable or doctrinal basis for the "revival" of the 1993 capital murder statute, and there is strong support for a term-of-years remedy that harmonizes with the approach preferred by the legislature – whether under a severance theory or one of the alternative legal bases suggested by district court judges Wolf, Wright, and Osterhaus. At a minimum, this Court should adopt such a term-of-years remedy. In fact, the following section explains that this Court actually can and should do more to harmonize the remedy available for pipeline cases with the remedy enacted in Chapter 2014-220.

II. This Court Can and Should Use Its Authority to Craft a Remedy for Pipeline Cases That Mirrors the Features of Chapter 2014-220.

A. Constitutional principles of fairness and equal treatment require all non-final cases to be treated equally in the absence of a compelling reason to treat them otherwise.

This Court and the United States Supreme Court have repeatedly recognized that the interests of fairness and consistency require equal treatment under the law for all non-final criminal cases. *E.g.*, *Griffith v. Kentucky*, 479 U.S. 314 (1987) (noting "'actual inequity that results'" when one defendant is "'chance beneficiary' of a new

rule" while similarly situated defendant is treated differently) (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)) (emphasis omitted)); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (holding, under equal protection and due process provisions of Florida Constitution, that "principles of fairness and equal treatment underlying *Griffith* . . . compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinal cases"). In addition, the Florida Legislature has also recognized equal treatment as a goal of the criminal code. *See, e.g.*, § 775.082(11), Fla. Stat. (West) ("The purpose of this section is to provide uniform punishment for those crimes made punishable under this section . . . .").

For this reason, this Court should take whatever steps are within its authority to avoid creating "inequity" between Kyle Walling, Anthony Horsley, and other defendants in pipeline *Miller* cases and a hypothetical defendant who committed the identical crime on July 2, 2014. For example, if such a hypothetical defendant was convicted of a felony murder where he did not kill or intend to kill and received a 30-year sentence under the revised statute, he would be eligible under new section 921.1402(2)(c) to apply for judicial modification of that sentence after 15 years. But if Kyle Walling was given the same sentence for the same crime, absent the benefit of 921.1402(2)(c), or a similar procedure authorized by this Court, he would have to serve the entire 30-year sentence – even if he could show after 15 years that he had

been fully rehabilitated in prison. And even worse, if Kyle was given a life sentence, he would have no statutory hope for release at all,[2] whereas the hypothetical defendant would still be entitled to seek judicial modification under 921.1402(2)(c). This Court has condemned such inequitable circumstances, *see, e.g.*, *Smith*, 598 So. 2d at 1066, and it should interpret the criminal code and use the full extent of its judicial authority to reduce or eliminate such unwarranted discrepancies.

B. This Court should interpret the criminal code and use its judicial authority to ensure that pipeline cases are treated similarly to cases arising after Chapter 2014-220's effective date.

Although chapter 2014-220 states that it applies to crimes committed after July 1, 2014, there are several avenues this Court can use to ensure that its provisions – or equivalent procedures implemented by this Court – apply to pipeline cases, thus eliminating or reducing discrepancies between similarly situated defendants.

First, this Court could interpret the statute to apply retrospectively to all sentencings and resentencings that occur after its effective date, regardless of the date of the crime. *See generally State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983) (resentencings are de novo proceedings). In interpreting criminal provisions –

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[2]Although the issue is not before the Court at this time, Kyle has consistently maintained that the Eighth Amendment categorically bars a life without parole sentence for a felony murder offender like him who did not kill or intend to kill. *See Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).

particularly when harmonizing those provisions with Eighth Amendment requirements – this Court is not bound by the literal, context-free definitions of statutory terms. For example, in dealing with provisions prescribing the size of the jury in criminal cases, this Court held that prosecution for a crime designated a "capital felony" by statute did not constitute a "capital case" for purposes of the jury provisions where the Eighth Amendment had rendered the death penalty for that crime legally unavailable. *State v. Hogan*, 451 So. 2d 844 (Fla. 1984) (interpreting "capital case" as used in statute and criminal rule as term of art encompassing only those cases where death penalty is legally available); *see also State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990); *Hall v. State*, 853 So. 2d 546 (Fla. 1st DCA 2003). A similar interpretation in this case would be perhaps the simplest way to apply the legislature's preferred remedy to all non-final cases.[3]

Although at least one judge has expressed concern that the Savings Clause, Art. 10, § 9, Fla. Const., might prohibit such a retrospective application of the actual statute, *see, e.g.*, *Partlow v. State*, 134 So. 3d 1027, 1032 n.7 (Fla. 1st DCA 2013) (Makar, J., concurring in part and dissenting in part), this should not in fact present

[3]The majority of the provisions in chapter 2014-220, such as the procedures for a *Miller*-compliant sentencing hearing and the availability of judicial review, are defendant-protective measures which should in general be unobjectionable under the Ex Post Facto Clause. To the degree that certain defendants might be disadvantaged by application of particular provisions of 2014-220, those objections could be resolved on an individual basis.

an obstacle to the even-handed application of the new statute to pipeline cases. As to the new procedures outlined in sections 921.1401 and 921.1402, the reason for this is straightforward: these newly created provisions do not constitute the "repeal or amendment" of the criminal statute defining the crime of homicide or its punishments, and thus they fall outside the scope of the Savings Clause by its own terms. *State v. Watts*, 558 So. 2d 994, 999 (Fla. 1990) (Savings Clause did not bar retrospective application of changes to criminal law benefitting defendant where changes involved "completely separate provision" than provisions controlling original prosecution and sentence).

With regard to the amendments to the sentencing range under section 775.082, however, the Savings Clause, as interpreted in cases such as *Castle v. State*, 330 So. 2d 10 (Fla. 1976), may at first appear to present a barrier. However, *Castle* and the other cases in that line deal with changes in legislative policy – i.e., where the legislature chooses in its discretion to repeal a valid criminal statute, or to amend one in a way that benefits criminal defendants. *See, e.g.*, *id.* at 11 (noting that change at issue in *Castle* was legislative reduction of maximum sentence for arson from 10 to 5 years). By contrast, it does not appear that any opinion of this Court has analyzed the proper application of the Savings Clause in the context of a legislative change occasioned by an *unconstitutional* criminal statute. And there is a world of difference between the two contexts. The rationale of the Savings Clause in large part is to

avoid providing windfall benefits to defendants from a change in the criminal law. *See Watts*, 558 So. 2d at 999–1000 (explaining 19th century impetus for amendment establishing Savings Clause). But while this may be sensible in the situation where the law in question was valid at the time of the original offense, it makes little sense when the law applicable at the time of the offense is later determined to be invalid. Such an application would create the opposite problem – it would provide a windfall benefit to the *State* due simply to its original imposition of a cruel and unusual punishment and the delay in recognition of the law's unconstitutionality. Thus, to the extent that this Court views the Savings Clause as an issue in this case, it should interpret that clause as a matter of first impression in light of the unique constitutional considerations presented when the amendment of a criminal statute is occasioned not by a change in legislative policy, but by the original statute being struck down as a violation of the Eighth Amendment.[4]

In addition, and as an alternative to direct retrospective application of the statute, this Court may also replicate many or all of the provisions chosen by the legislature in chapter 2014-220 under its judicial authority to fill gaps in the statutory

[4]For example, under such circumstances, it is far from clear that the new statute should be considered a "repeal or amendment" under the Savings Clause at all. While chapter 2014-220 may use the word "amended," in practice by the time the legislature acted there was no valid sentencing provision to amend. Unlike the valid 10-year sentence for arson at issue in *Castle*, the sentencing provisions for capital murder, as applied to juveniles, were a constitutional dead letter after *Miller*.

scheme, provide remedies for constitutional violations, complete the exercise of its jurisdiction, and make rules for the administration of the criminal courts. With regard to authorizing sentencing judges to impose term-of-years sentences, Amicus and Petitioner have already explained how this Court's statutory-interpretation precedents and inherent duty to fill gaps in the criminal statutes in harmony with legislative intent support the severing of the original statute to accomplish this end. As for the procedural protections and sentencing review enacted by the legislature under sections 921.1401 and 921.1402, this Court's rule-making authority is broad enough to allow for the implementation of similar procedures by criminal rule. *See* Art. 5, § 2(a), Fla. Const. (providing rule-making authority); *see also* Fla. R. Crim. P. 3.800 (already providing for judicial modification of sentences under certain circumstances). And to the extent that these sources of authority are insufficient, the all-writs clause provides flexible authority for precisely such a situation, to enable this court to engage in the "complete exercise of its jurisdiction." Art. 5, § 3(b)(7), Fla. Const. In this case, the complete exercise of jurisdiction requires this Court to provide a complete, effective, and equitable remedy for the State's violation of the Eighth Amendment, and this can most fairly be accomplished by ensuring that defendants in pipeline cases are given the benefit of any procedures the legislature has found appropriate to protect juveniles' Eighth Amendment rights under *Miller*.

CONCLUSION

Amicus Curiae Kyle Walling respectfully asks this Court to reverse the decision of the Fifth District Court of Appeal on the grounds argued above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief is submitted in Times New Roman 14-Point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties, through below-listed counsel, on this 16th day of July, 2014, by eService:

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