Filing # 10096843 Electronically Filed 02/10/2014 02:53:21 PM

RECEIVED, 2/10/2014 14:53:42, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC13-2000
CONSOLIDATED SC13-1938

ANTHONY DUWAYNE HORSLEY, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

PAMELA JO BONDI
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 773026

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 618550
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax (386) 238-4997

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS

Horsley was indicted for the offenses of first degree murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm (R 111-13). He was seventeen years old at the time of the offenses (R 95, 115). After a series of *Faretta* inquiries, the trial court found that Horsley was of sound mind and capable of representing himself (T 20-22, SR 1042-44, SR 1060-61).

Evidence at trial showed that the victim and his wife, Mr. and Mrs. Patel, owned a convenience store in Palm Bay (T 179-80). Mr. Patel was in the front of the store behind the counter, and Mrs. Patel was in the back (T 182-83). She heard the door open, and a second or two later heard a gunshot (T 186). She was told not to come out front or she would be shot (T 187-88). The gunman was wearing a mask, as were the two other people with him (T 189-90). They could not open the cash register, so they threw it on the floor to break it, and took cash, money orders and checks from it, and also took beer and cigarettes (T 191). Mr. Patel died from a gunshot wound to the chest (T 283).

Richard Douglas, a regular customer, heard a gunshot as he was stepping up to the store, and saw a gunman and two other people (T 215-18). He started to turn to leave, and the gunman came out and told him not to move or he would shoot (T 219). Douglas ran across the street to a police substation (T 219-20). He identified

Horsley in court as the gunman (T 229-30). Horsley's codefendants, Hassan Scott and Dwan Smith, both testified, and said that they all knew they were going to rob a store, and that Horsley was the only one with a gun when they entered the store (T 323, 325, 480, 482, 891, 924-26). Horsley gave a statement to the police in which he said that he sat in the car the whole time, and testified at trial that he was not there and had never been in Mr. Patel's store (T 466, 759).

Horsley was convicted of first degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated battery with a firearm. He was sentenced to life without the possibility of parole on the first degree murder. While his appeal was pending, he filed a motion to correct his mandatory life sentence, based on *Miller v. Alabama*. At Horsley's resentencing proceeding, the prosecutor argued that the only two sentencing options available to the judge were life without parole and life with the possibility of parole after 25 years (R 1277-93). Defense counsel agreed that the trial court had the discretion to sentence Horsley to life with the possibility of parole after 25 years (R 1293). It was originally defense counsel's position that the trial court did not have discretion to sentence Horsley to a term of years, so the trial court observed that they were all in agreement (R 1293-94).

The trial court then asked defense counsel if he was going to

present "juvenile mitigation factors," and counsel replied that he was not going to, and requested a continuance to do so; if one was not granted, he would present Horsley's testimony (R 1301). The prosecutor noted that it had been understood by everyone that the resentencing would be that day, and trial court made the following findings:

> I think we should do that. I will make my initial ruling, so you all can go forward with the resentencing portion of it.
>
> The defendant must be resentenced. We all agree with that. The premise of statutory revival requires the court to include life with the possibility of parole after 25 years.
>
> Obviously, the second one is revived, and those are the only two choices.
>
> The Court must take into consideration all the factors associated with the juvenile's deficiencies, so to speak, as a result of age and maturity level, or for lack of a better phrase, juvenile mitigation factors.
>
> I think what I said at sentencing was the Legislature believes that Mr. Horsley should be sentenced to life in prison without the possibility of parole, and at the time, that was the law.
>
> So, now, I will hear those mitigating factors that would allow me to make a decision as to whether or not his sentence is life with the possibility of parole after 25 years, or life without parole.

(R 1303-04).

Defense counsel then put on the record that Horsley disagreed with counsel's assessment, and that Horsley believed the court had the discretion to sentence him to a term of years (R 1304). Counsel then argued that the court *did* have the discretion to

sentence Horsley to a term of years, although he did not have the case law in front of him (R 1305). The trial court told counsel that he preserved it for appeal (R 1305). Counsel then said that Horsley wanted to make sure that the court understood their position, which appeared to be that they were asking the court to sentence him under the guidelines (R 1306).

Horsley testified, the parties presented argument, and the trial court found:

> After consideration of all the mitigating juvenile factors presented, I believe he should be sentenced to life in prison without parole, as well.
>
> There is no evidence the Mr. Horsley did not intend to kill the victim. He's never shown any remorse for his actions. It was cold, calculated, unnecessary, heinous, and is the result of a depraved heart.
>
> Mr. Patel made no efforts to resist, and, without warning, was gunned down in his place of business, with his family right there.
>
> Mr. Horsley was 17 years of age at the time of the murder. There is no evidence Mr. Horsley was immature or impetuous.
>
> In fact, Mr. Horsley did an excellent job representing himself in a two-week-plus trial. His handwritten motions were articulate, well written, and well supported with relevant case law.
>
> His mother supported him throughout the trial, and was here almost every day that she wasn't locked up in jail.
>
> He was in the care of his family throughout his youth. Many of us – many people in this country are raised in extended-family households. I don't find that to be a mitigating factor at all.
>
> There was no evidence that it was peer pressure that

was involved in this crime.

His testimony today that he wasn't at the scene of the crime is different than what he testified at trial. At trial he stated he was there. Today he says otherwise.[1]

He has shown a great capacity to deal with prosecutors and defense attorneys during the trial. His mastery of discovery requests, continuances, and pre-trial motions was amazingly high.

He articulately stated he wanted to represent himself no less than twenty times. The Defendant, as I have mentioned, must be resentenced, and the statutory requirements are that he has – I have two options.

I believe Mr. Horsley could be the definition of irreparable corruption, as referenced in Miller. He was the leader of this murderous cabal. He planned it. He was the shooter and the driver.

I do not find the statutes cited to be unconstitutional on their face, or in any way unconstitutional.

Mr. Horsley has no verifiable history of mental illness during his childhood.

I sentence Mr. Horsley to life without the possibility of parole on Count 1, premeditated murder.

(R 1346-48).

On appeal, Horsley claimed that his life sentence without the possibility of parole violated *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The Fifth District Court of Appeal applied the principle of statutory revival, and held that the only sentence now available

---

[1] The prosecutor later pointed out that Horsley's trial testimony had been consistent with a claim of not being there, and that it had been during a police interview that he admitted he was there.

in Florida for a charge of capital murder committed by a juvenile is life with the possibility of parole after twenty five years. *Horsley v. State*, 121 So.3d 1130 (Fla. 5th DCA 2013). The court then certified the following question to this Court as a matter of great public importance:

> Whether the Supreme Court's decision in *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.3d 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, 121 So.3d at 1133.

SUMMARY OF ARGUMENT

Horsley's life sentence without the possibility of parole for the crime of first degree murder does not violate *Miller v. Alabama*. The trial court conducted an individualized sentencing, and provided Horsley with the opportunity to present mitigating evidence. The trial court determined, based on the facts of the case, that a life sentence was appropriate. Under the plain language of *Miller*, as well as the holdings of the First and Third District Courts of Appeal, a trial court may constitutionally sentence a juvenile convicted of first degree murder to life without the possibility of parole. In fact, in finding that a sentence of life without the possibility of parole is no longer possible for the crime of first degree murder in Florida, the district court has provided an additional protection for juvenile murderers beyond that provided for by the United States Supreme Court and the United States Constitutions, which violates the Conformity Clause of the Florida Constitution.

ARGUMENT

HORSLEY'S SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR THE CRIME OF FIRST DEGREE MURDER DOES NOT VIOLATE *MILLER V. ALABAMA*.

Horsley was convicted of first degree murder, and sentenced to life without the possibility of parole. After seeking relief pursuant to *Miller v. Alabama,* 132 S.Ct. 2455 (2012), and a de novo resentencing hearing, he was again sentenced to life without the possibility of parole. On direct appeal, Horsley claimed that his life sentence without the possibility of parole was contrary to the spirit and dictates of *Miller v. Alabama,* 132 S.Ct. 2455 (2012), and further claimed that the trial court was mistaken in its belief that it could not sentence him to a term of years.[2] While the district court framed Horsley's argument as the trial court erring by rejecting the idea it had discretion under *Miller* to sentence Horsley to a term of years, it did not address that issue, and without further analysis, applied the principle of statutory revival, and held 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 25 years. *Horsley v. State*, 121 So.3d 1130, 1131 (Fla. 5th DCA 2013). The court certified the

[2] Petitioner asserted that this claim was not preserved for appellate review, because although the trial court stated that Horsley "preserved that for appeal," counsel's only argument, contrary to what he had agreed to earlier, was a statement that the court had the discretion to sentence Horsley to a term of years, although he did not have the case law in front of him.

following question:

> Whether the Supreme Court's decision in *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.3d 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?

Id. at 1133. Petitioner agrees that statutory revival is an option, but submits that it is not, as the district court held, the only option, and that it does not even become a consideration until the sentencing court determines that life without parole is not warranted.

As a general rule, the determination of the sentence to be imposed falls within the sound discretion of the trial court and should not be disturbed if the sentence is authorized by law. *Jones v. State*, 387 So. 2d 401, 403-04 (Fla. 5th DCA 1980). Further, "mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." *Hilton v. State,* 961 So.2d 284, 293 (Fla. 2007). *See also Connor v. State,* 803 So.2d 598, 605 (Fla. 2001). However, when considering Eighth Amendment challenges, appellate courts must yield "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that

trial courts possess in sentencing convicted criminals." *Solem v. Helm*, 463 U.S. 277, 290 (1983).

In *Miller v. Alabama*, the Supreme Court held that **mandatory** life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id*. at 2469 The *Miller* majority concluded its opinion by stating:

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate the principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475. Petitioner thus submits that Horsley's sentence of life in prison without the possibility of parole does not violate *Miller*, because Horsley was not sentenced to "mandatory" life in prison, and pursuant to *Miller*, he was provided an individualized sentencing hearing, at which he was provided the opportunity to present mitigation. Under the plain language of *Miller*, a trial court may constitutionally sentence a juvenile convicted of first degree murder to life without the possibility of parole. *See Miller*, 132 S.Ct. at 2469 ("Although we do not foreclose a sentencer's ability to make that judgment [life without parole] in homicide cases, we require it to take into account how children are

different, and how those differences counsel against irrevocably sentencing them to life in prison.").

In this respect, Petitioner would also point out that by completely foreclosing a Florida sentencing judge from imposing a sentence of life without the possibility of parole, the district court has provided an additional protection for juvenile murderers beyond that provided for by the United States Supreme Court and the United States Constitutions, which violates the Conformity Clause of the Florida Constitution. Article I Section 17 of the Florida Constitution, states in relevant part:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Cf. Valle v. State, 70 So.3d 530 (Fla. 2011)(recognizing that under the Conformity Clause, Florida's courts are bound by precedent of the United States Supreme Court on issues regarding cruel and unusual punishment); *cf. Holland v. State,* 696 So.2d 757 (Fla. 1997)(explaining that the conformity clause prohibits a state court from providing greater protection than what is provided in United States Supreme Court precedent). As demonstrated, it is only a mandatory life sentence that violates the Eight Amendment.

This is the approach taken by both the First and Third District Courts of Appeal. While the district court here stated

that the other district courts that have addressed the issue did not provide "definitive direction" to trial courts regarding the available sentencing options, both the First and Third Districts have included life without the possibility of parole as a sentencing option,[3] and the First District has even affirmed the imposition of such sentence. Beginning with *Washington v. State*, 103 So.3d 917 (Fla. 1st DCA 2012), the majority stated:

> Nevertheless, far from categorically barring a penalty for a class of offenders as it did in *Roper* and *Graham*, the Supreme Court in *Miller* ruled its decision "mandates only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty," emphasizing that "youth matters for purposes of meting out the law's most serious punishments." *Id.* at 2471.

Id. at 919. The court then observed that the *Miller* Court's resolution of reversing and remanding for "further proceedings not inconsistent with this opinion," gave little guidance to trial court's regarding sentencing options, but found it certain, that "if the state again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence. **Under *Miller*, a sentence of life without the possibility of parole**

[3] Interestingly, the district court here stated that further elaboration on the issue on which it had granted relief was unnecessary in light of opinions by Judges Wolf and Makar from the First District Court of Appeal, but at the same time the district court created conflict with The First District Court of Appeal.

remains a constitutionally permissible sentencing option. A discourse on **other** sentencing options is premature." ***Id*. at 920** (emphasis supplied).

Next, in *Partlow v. State*, 38 Fla. L. Weekly D94 (Fla. 1st DCA January 4, 2013), the court stated in a footnote that it had expressly declined in *Washington* to address the sentencing options available on remand, "and left open the possibility for the juvenile defendant in that case to again be sentenced to life without the possibility of parole should the court deem such sentence justified after conducting the individualized inquiry required by *Miller*." *Id.* at n.1. The court declined to pass on the revival option or any other option, to avoid intra-district with *Washington* and the potential for disparate sentencing treatment of similarly situated juveniles. *Id.* In other words, the court declined to discuss any option other than life without parole after a mitigation hearing.

In *Ortiz v. State*, 119 So.3d 494 (Fla. 1st DCA 2013), the court again specified that life without parole was a sentencing option for first degree murder. There, a juvenile sought dismissal of his first degree murder indictment based on a claim that no legal sentence currently existed for such crime. The court found this argument was unpersuasive, and that it also ignored the court's decision in *Washington*, which "clearly set forth a valid sentencing option on remand, one that operates as a ceiling and is

applicable to juvenile defendants: life without parole after a juvenile mitigation inquiry." *Id.* at 495. In clarifying his earlier statements on this issue, Judge Makar, in a concurring opinion, stated:

> What safely can be said at this juncture is that the defendant, if convicted, likely faces one of three lengthy sentences: life without parole (after a youth mitigation hearing)(*Washington*)[4]; life with parole-eligibility after twenty-five years (the statutory revival argument); or a substantial term of years (Judge Wolf's position in *Washington* and *Partlow*). A fourth possibility, that an appellate court will hold that no sentencing option exists for a first degree homicide, even if committed by a sixteen year-old (the defendant's age at the time of the charged offense), appears highly unlikely given these other viable options.

Id. at 496 (Makar, J. concurring).

Most recently, in *Copeland v. State*, 39 Fla. L. Weekly D181 (Fla. 1st DCA January 17, 2014), the district court affirmed a sentence of life without the possibility of parole that was imposed on a juvenile convicted of first degree murder. There, the trial court considered several mitigating factors, including the defendant's age, background and circumstances surrounding the murder, and found that life without the possibility of parole was an appropriate sentence where a fifteen year old was dead, and there was no other justification besides that defendant's being seventeen years old. The district court stated:

> Consistent with out holding in *Washington*, the

[4] This is the procedure the trial court in the instant case followed.

> sentencing court conducted an individualized mitigation inquiry, considering several potential mitigation factors before finding that life without the possibility of parole was, nevertheless, appropriate in this case. Accordingly, we AFFIRM Copeland's judgment and sentence.

Id.

The Third District Court of Appeal, in *Hernandez v. State*, 117 So.3d 778, 783 (Fla. 3d DCA 2013), found that a mandatory life without parole sentence for first degree murder was unconstitutional because the trial court did not have the opportunity to consider mitigating circumstances under the sentencing statute. The court determined, however, that if the State again sought the imposition of a life sentence, the trial court would be required to take an individualized approach to sentencing. The district court then adopted "the measured approach of the majority" in *Washington, supra*. *See also Neely v. State*, 126 So.3d 342, 348 (Fla. 3d DCA 2013)(finding that *Miller* did not categorically bar a life sentence without parole for a juvenile, and directing the trial court to conduct an individualized examination of mitigating circumstances in considering the fairness of imposing a life sentence).

Thus, the Fifth District Court of Appeal is alone in Florida, and perhaps even the country,[5] in finding that the only possible

[5] *See State v. Williams*, 108 So.3d 1169 (La. 2013)(the *Miller* Court did not establish a categorical prohibition against life without parole for juveniles, and instead required that sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the

sentence for a juvenile convicted of first degree murder is life with the possibility of parole after 25 years. In effect, without explanation or analysis, the district court implicitly found that section 775.082(1), Florida Statutes, is unconstitutional across the board. Petitioner submits that it is not, and is only potentially unconstitutional, as applied, to those juveniles who do

---

harshest possible penalty for juveniles; *State v. Bear Cloud,* 294 P.3d 36, 47 (Wyo. 2013)(*Miller* does not guarantee the possibility of parole for a juvenile offender, but requires only an individualized sentencing hearing for every juvenile convicted of first degree murder at which the sentencing court must consider the individual, the factors of youth, and the nature of the homicide in determining whether to order a sentence that includes the possibility of parole); *Williams v. Virgin Islands*, 2013 WL 5913305 (V.I. November 5, 2013)(while the Eighth Amendment does not categorically prohibit a sentence of life without parole for juveniles, it should be "uncommon," and a court must conduct a sentencing hearing to determine the juvenile's youth and attendant characteristics); *Arrendondo v. State*, 406 S.W.3d 300, 306 (Tex. Crim. App. 2013)(*Miller* prevented the *mandatory* imposition of life without parole for juvenile offenders, but specifically allowed a *discretionary* sentence of life without parole when the circumstances justify it); *State v. Riley*, 104 Conn. App. 1, 13-16, 58 A.3d 304 (2013), lv. gtd. in part 308 Conn. 910 (2013)(it is apparent that life without parole sentences can still be imposed pursuant to an individualized sentencing process, and *Miller* requires only the opportunity to present mitigating evidence to a court permitted to consider, and to impose a lesser sentence in its discretion); *People v. Eliason*, 844 N.W.2d 357, 369-72 (Mich. Ct. App. 2013), review granted *People v. Eliason*, 839 N.W.2d 193 (Mich. 2013)(a trial court can still sentence a juvenile who committed a homicide to life in prison without the possibility, so long as that sentence is an individualized one that takes into consideration the factors outlined in *Miller* - *Miller* requires nothing more and certainly did not invalidate the legislature's judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder); *Conley v. State,* 972 N.E.2d 864, 879 (Ind. 2012)(finding, post-*Miller*, that seventeen year-old's sentence of life without parole for first degree murder did not violate the Eighth Amendment, based on the facts of the case).

not meet the criteria for a life without parole sentence, as outlined in *Miller*. Again, *Miller* does not hold that it is unconstitutional to sentence a juvenile offender to life in prison for a homicide offense. While Petitioner agrees that statutory revival is an option, it is not, as the district court here determined, the only option. Petitioner submits that statutory revival does not even become a consideration until the trial court has found that a sentence of life without the possibility of parole is not the appropriate sentence.

Finally, petitioner would note that the concept of an individualized sentencing proceeding is not a revolutionary or complicated concept, and in fact is already required to satisfy due process. *See Griffin v. State*, 517 So.2d 669, 670 (Fla. 1987)(the pronouncement of sentence upon a criminal defendant is a critical stage of the proceedings to which all due process guarantees attach, and the presence of defendant is as necessary at resentencing as it was at the time of the original sentence so that the defendant has the opportunity to submit evidence relevant to the sentence if warranted). *See also* Fla. R. Crim. P. 3.720(b)(At the sentencing hearing, "[t]he court shall entertain submissions and evidence by the parties that are relevant to the sentence."). Likewise, the presentation of mitigating evidence is a well established aspect of a sentencing proceeding, and has always played an integral role in the sentencer's exercise of discretion

in determining an appropriate sentence. As in *Copeland*, *supra*, the trial court here conducted an individualized mitigation inquiry before finding that a sentence of life without the possibility of parole was the appropriate sentence, and as such, Horsley's sentence should be affirmed. *See Eliason, supra* at 310-11 (under MCR 6.425(E)(1), a trial court is already required to hold a sentencing hearing, so the remedy of an individualized hearing to consider *Miller* factors is expressly permitted by court rule and is not an unconstitutional trip by the judiciary into the legislative realm).

CONCLUSION

Based on the arguments and authorities presented herein, the State requests this Court hold that for certain juvenile offenders convicted of first degree murder, a sentence of life without the possibility of parole is a legal sentence.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Wesley Heidt
WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026

/s/Kellie A. Nielan
KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 618550
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 (FAX)
CrimAppDAB@MyFloridaLegal.com

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Petitioner has been furnished by email to counsel for Appellant, Kathryn Rollison Radtke, 444 Seabreeze Boulevard, Suite 210, Daytona Beach, FL 32118, at radtke.kathryn@pd7.org, and appellate.efile@pd7.org, this 10th day of February, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/Wesley Heidt
WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 773026

/s/Kellie A. Nielan
KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC13-2000

ANTHONY DUWAYNE HORSLEY, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

APPENDIX

PAMELA JO BONDI
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 773026

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 618550
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
Fax (386) 238-4997

COUNSEL FOR 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