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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

REPLY BRIEF OF PETITIONER

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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*, 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 maintains throughout his brief that the decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), requires a sentencing option for juveniles that allows a realistic opportunity for release.[1] Petitioner contends that it does not. The *Miller* 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,

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[1] "*Miller* further holds that the judge must have a sentencing option that would allow a juvenile convicted of even the most heinous murder offense the realistic chance for release" (AB 21); "Because the Eighth Amendment requires that punishment for crime must be graduated and proportionate, it follows that a person who was a child at the time he committed a similar crime should not be sentenced to life without parole. *Miller* requires that a child in these circumstances be given a meaningful opportunity for release" (AB 22); "Quoting *Graham*, 130 S.Ct., at 2030, the *Miller* Court wrote that 'A state is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" (AB 25); "*Miller* requires that petitioner be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (AB 37).

> 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. 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.").

While often cited and analyzed together, the holdings in *Graham v. Florida*, 130 S.Ct. 2011 (2010), and *Miller* are **not** the same. *Graham* imposed a categorical ban on sentences of life without parole on juvenile **nonhomicide** offenders, and requires such offenders to be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Miller* applies only to juvenile **homicide** offenders, and if a sentence of life without the possibility of parole is an option, an individualized sentencing proceeding is required at the outset, so the sentencer can take into account how children are different, before imposing the "harshest possible penalty" for juveniles. In other words, *Graham* focuses on the defendant's future potential, while *Miller* requires only consideration of the past and present, but in

conjunction with the factors associated with youth.

Horsley also claims that his crimes were committed as part of a group, and essentially constituted a robbery gone wrong (AB at 26). The record refutes this assertion, and demonstrates that it was Horsley who had the car, Horsley who drove the car, Horsley who had the gun, and Horsley who shot and killed Mr. Patel as soon as he walked into the store (wearing a mask), and not in response to any of Mr. Patel's actions. One member of Horsley's group was his fourteen year-old cousin. In short, this was not a robbery gone wrong, and Horsley did not just go along with the group. This was a cold blooded execution of a man who did nothing more than open his store for business on a Sunday morning. As Mr. Patel lay dying, Horsley and his co-perpetrators helped themselves to alcohol, cigarettes and cash. Contrary to Horsley's claim, these are exactly the factors that were considered by the trial court:

> 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.[2]

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.[3]

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

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[2] Horsley's mother, Catherine DaSilva, testified at trial, and explained that she is an "illegal driver," meaning she drives without a license, and nothing else (T 1033, 1044).

[3] 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.

> 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). While Horsley appears to fault the trial court for not finding that peer pressure was involved, the record clearly shows that Horsley was not a victim of it, and was, as the trial court found, the leader.

Horsley also maintains that he "advocated for a term of years sentence" below (AB at 32), but the record demonstrates that he never presented any argument to the trial court on this issue. At the outset of the sentencing hearing, 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, and the trial court observed that they were all in agreement (R 1293-94). The trial court stated:

> 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 changed his position, and argued that the court *did* have the discretion to sentence Horsley to a term of years, but stated that 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).

While the trial court stated that Horsley preserved this issue for appeal, petitioner contends that any argument pertaining to a term of years sentence was waived, for several reasons. First, Florida case law and statutes require a defendant to preserve issues for appellate review by raising them first in the trial court. *Harrell v. State,* 894 So.2d 935 (Fla. 2005). Proper

preservation requires three components: (1) a litigant must make a timely, contemporaneous objection; (2) the party must state the legal ground for the objection; and, (3) the argument on appeal must be the specific contention asserted as the legal ground of the objection or motion below. *Id.* at 940. Horsley's failure to present any argument on this issue in the trial court thus precludes appellate review. *See also Booker v. State,* 969 So.2d 186, 194-95 (Fla. 2007)(when a defendant fails to pursue an issue during proceedings before the trial court, and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived).

Horsley also claims, for the first time in any appellate proceeding, and in a responsive pleading no less, that the trial court abused its discretion in denying his motion to continue. Petitioner first contends that it is improper to raise a substantive issue in an answer brief. Petitioner further submits that Horsley's failure to raise this claim in the district court constitutes a waiver of it. Finally, this issue is beyond the certified question, and this Court should decline to address it, since it did not provide the basis for this Court's review. *See Wheaton v. State,* 789 So.2d 975, n.2 (Fla. 2001)(we decline to address the other issue raised by Wheaton because it was not the basis for our review).

Horsley also claims that *Miller* requires that whoever decides

whether a juvenile can be released must weigh mitigating qualities of youth and demonstrated maturity and rehabilitation, and that the parole process cannot provide this. Again, any challenges to Florida's parole system were never raised in either the trial or appellate courts, and are waived. In fact, trial counsel agreed that the trial court had the discretion to sentence Horsley to life with the possibility of parole after 25 years.

In any event, as set forth previously, *Miller* does not require a sentencing option for juveniles convicted of homicide offenses that allows a realistic opportunity for release, and a life sentence with eligibility for parole removes it from the applicability of *Miller* altogether. *See Miller* at 2475 (a judge or jury must have the opportunity to consider mitigating circumstances before imposing the "harshest possible penalty" for juveniles). Significantly, the *Miller* majority distinguished a sentence of life with the possibility of parole in the third sentence of its opinion when describing the mandatory nature of the sentencing schemes before it. *Miller* at 2460 ("State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate"). Again, *Miller* **does not** require that a juvenile who has committed first degree murder be given a meaningful opportunity to obtain release based on

demonstrated maturity and rehabilitation.

Petitioner again 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 given the opportunity to present mitigation. As stated, 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.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply 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 19th day of May, 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).

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STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC13-2000

ANTHONY DUWAYNE HORSLEY, JR.,

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ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

APPENDIX

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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).

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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