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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-865

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SECOND SUPPLEMENTAL BRIEF OF PETITIONER REBECCA LEE FALCON

ON DISCRETIONARY REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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INTRODUCTION

Rebecca Lee Falcon, the Petitioner in this Court, was the appellant in the District Court of Appeal and the defendant in the Circuit Court. The state, the Respondent in this Court, was the Appellee in the District Court and the prosecution in the trial court. In this brief, Petitioner will be referred to by name or as Petitioner and the state will be referred to as the prosecution or the state.

This second supplemental brief is filed in response to the Court's June 26, 2014, order directing the parties to address the impact of the newly enacted Chapter 2014-220, Laws of Florida, on this case.

SUMMARY OF ARGUMENT

Ms. Falcon, in her initial briefs, has urged the Court to find that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is retroactive to cases on collateral review because of the fundamental significance of its Eighth Amendment rule. In her first supplemental brief and the supplemental reply brief, Ms. Falcon argued that the appropriate remedy would be an individualized resentencing to a term of years, up to and including life imprisonment, under the theories suggested by either Judge Wolf or Judge Osterhaus, or pursuant to the Court's inherent power or all-writs authority. Additionally, modification and reduction of a juvenile's sentence after a substantial period of time was proposed as an addition to Florida Rule of Criminal Procedure 3.800(c), which already provides for the modification and reduction of sentences.

The Supplemental Reply Brief was filed the day before the Governor signed into law the unanimously passed remedy statute. Both that brief and this brief note that that remedial statute aligns perfectly with the remedy formerly suggested by Ms. Falcon. The statute now serves as evidence of legislative intent, and, to promote the separation-of-powers doctrine, it is appropriate for the Court to fashion a remedy that is consonant with the statute.

The determination that *Miller*'s Eighth Amendment jurisprudence is fundamentally significant and therefore retroactive, is one for the court, not the legislature, to make. Indeed, Article X, Section 9 of the Florida Constitution appears to preclude the legislature from making a change in a criminal statute apply to past crimes, as it provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." But that does not make the statute insignificant. For it is the best evidence of what the Legislature deems a proper remedy, and certainly evinces that the Legislature does not favor a return to parole for the subsequent potential reduction of a juvenile's sentence.

Ms. Falcon and the state, in the prior supplemental briefing, concur that there is no principled distinction between cases before the Court on collateral review and those on direct review in terms of the proper remedy. Nor is there any principled distinction between defendants whose offense was committed before July 1, 2014, and those whose offense was committed after that date. The Eighth Amendment requires alternative sentences to mandatory lifetime incarceration for

all juveniles. The Court should provide a remedy that gives effect to *Miller* and its Eighth Amendment rule of law, guided by the remedy enacted by the Florida Legislature.

ARGUMENT

CHAPTER 2014-220, LAWS OF FLORIDA, SERVES AS AN IMPORTANT MODEL FOR THE COURT IN DETERMINING THE APPROPRIATE REMEDY FOR JUVENILES SENTENCED TO MANDATORY LIFETIME SENTENCES FOR FIRST-DEGREE MURDER.

In her initial Supplemental Brief, which is included in the attached appendix, (SB), Ms. Falcon proposed as an appropriate remedy, upon a finding that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is retroactive, an individualized resentencing to a term of years up to and including life imprisonment, under the theory advanced by Judge Wolf in *Washington v. State*, 103 So. 3d 917, 922 (Fla. 1st DCA 2012), or Judge Osterhaus in *Thomas v. State*, No. 1D13-2718, 2014 WL 1493192, *1-2 (Fla. 1st DCA Apr. 16, 2014 (SB at 18-20), and the court's inherent power to enforce constitutional rulings. (SB at 6-8). Additionally, Ms. Falcon suggested that the Court, under its rule-making authority, supplement Florida Rule of Criminal Procedure 3.800(c) — which already provides for subsequent modification and reduction of sentences — with a provision applicable to juvenile sentences, authorizing modification and reduction after a substantial period of time, in keeping with *Miller*'s recognition of the transient qualities of youth. (SB at 20-21).

Ms. Falcon filed her Supplemental Reply Brief (SRB) on June 19, 2014, the day before Governor Scott signed into law the Legislature's new *Miller* remedy statute. That brief, which is also included in the attached appendix, addresses the significance of the legislation that was unanimously passed by the Florida House and Senate. (SRB at 1-5). The brief urges the Court to consider the statute as evidence of legislative intent when fashioning the remedy for children sentenced under the mandatory sentencing scheme, and addresses the Court's authority to implement a remedy, including the all-writs power of the Court. (SRB at 5-8).

The newly enacted legislation provides for an effective date of July 1, 2014, and specifically applies to a juvenile whose offense was committed on or after that date, but does not address the issue of retroactivity. This is appropriate since the determination of whether a new rule of constitutional law – here, *Miller*'s Eighth Amendment holding – is fundamentally significant and therefore retroactive is for the courts, not the legislature. *See Witt v. State*, 387 So. 2d 922 (Fla. 1980).

Additionally, Article X, Section 9 of the Florida Constitution provides that the "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Thus, it has been suggested that the Legislature could not make its enacted remedy applicable to crimes committed prior to its effective date, regardless of its inclination. *Partlow v. State*, 134 So. 3d 1027, 1032 n. 7 (Fla. 1st DCA 2013) (Makar, J., concurring in part and dissenting in part). But the statute is important, for it elucidates the sentencing structure that the Legislature prefers: an individualized sentencing to a term of years up to and

including life, at the discretion of the trial judge; and the forum that should consider subsequent sentence modification and reduction: the trial court, not the parole commission. The separation-of-powers doctrine is best served by a remedy that is consonant with this structure.

The state has conceded that the same remedy is appropriate for persons whose cases are before the Court on direct review and those before the Court seeking post-conviction review. (State's Supplemental Answer Brief at 24). The state is right. And just as "there are no principled distinctions between the two" types of cases, *id.*, there are no principled distinctions between those whose offense was committed prior to July 1, 2014, and those whose offense is committed after that date.

The Eighth Amendment controls in all cases and mandates sentencing alternatives to mandatory life imprisonment for a juvenile. The Legislature has spoken as to the sentencing alternatives that it believes should obtain. It is now right and proper for this Court to ensure that equal justice is granted to all those whose sentence violates the Eighth and Fourteenth Amendments. Those sentenced under the unconstitutional mandatory scheme should be granted the opportunity for resentencing to a term of years up to and including life imprisonment, and for subsequent judicial review and reduction of the sentence after a significant period of time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this supplemental brief was sent via Registered e-mail on July 16, 2014, to:

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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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SUPPLEMENTAL BRIEF OF PETITIONER REBECCA LEE FALCON

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SUMMARY OF ARGUMENT

I. Florida's penalty statute, section 775.082(1), Florida Statutes, provides for a punishment of either death or life imprisonment without the possibility of parole for a person convicted of first-degree murder. Rebecca Falcon was sentenced pursuant to this statute. Under the rule of law established by *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this statute is plainly unconstitutional as applied to children under 18 years of age.

This Court's precedent makes clear that the Court has the overriding obligation – and the inherent judicial power – to enforce constitutional guarantees, particularly where, as here, the Court is safeguarding fundamental rights. But the separation-of-powers doctrine requires that the Court, when exercising its inherent power, must choose a remedy that respects legislative intent.

Although *Miller* does not dictate the remedy that the States must choose to comply with the Eighth Amendment in juvenile sentencing, it does elucidate: (1) mandatory life imprisonment without parole eligibility is forbidden for any juvenile, regardless of the crime; (2) an individualized sentencing should be held, at which pertinent evidence regarding the juvenile's age and attendant hallmark features can be presented and considered by a sentencer who possesses the discretion to impose a proportional sentence; and (3) a life sentence without parole is precluded except for the rare juvenile who demonstrates irreparable corruption. Because cases in which these life-without-parole sentences are proportional are uncommon, lesser sentences must be available for the vast majority of children.

Uniform resentencing to life imprisonment with parole is an unacceptable

remedy for *Miller* violations. The Legislature, through a variety of statutes erected over the last 20 years, has made clear that parole is no longer favored. Indeed, to reinstate parole for juveniles would require invalidating a separate statute that precludes parole eligibility for juveniles sentenced as adults. And *Miller* makes clear that uniform sentences for all juveniles is not the individualized sentencing contemplated by the Court.

Revival of the penalty statute from 20 years ago is also not the answer. Appellate judges who have suggested this remedy have bypassed the predecessor statute because that, too, is unconstitutional, and seized upon the predecessor to the predecessor statute. That statute provided for life imprisonment with parole consideration after 25 years. But there cannot be revival of any statute other than the immediate predecessor.

More importantly, if that statute were to be revived, then the revived penalty would apply to adult offenders. But *Miller* does not require invalidating the current mandatory life-without-parole statute for adults. The statute is only unconstitutional as applied to juveniles. Because the statute does not distinguish between adult or juvenile offenders, the proposed revival remedy would require dividing "person" as used in the statute into subclasses of adults and juveniles, and applying the current statute to adults, and the predecessor to the predecessor statute to juveniles. This is judicial rewriting, not revival.

Additionally, if the goal of revival theory is to return to a lawful statute that best epitomizes legislative intent, resurrecting a statute that authorizes parole consideration fails because it would contravene the intent of the Legislature as

expressed through years of statutory enactments. Moreover, revival, like providing for life sentences with parole, would require invalidating the current statute that precludes parole for juveniles sentenced as adults. But striking that statute is not required by *Miller*'s holding, and unnecessarily striking valid statutes is anathema to the separation-of-powers doctrine. For all these reasons, revival is neither an available, nor an appropriate, remedy.

Resentencing to a term of years, up to and including life imprisonment, is the most principled response to *Miller*. That remedy would require the Court to invalidate section 775.082(1), Florida Statutes, only as applied to juveniles, permit individualized sentencing hearings, afford discretion so that a proportionate sentence could be imposed, and permit the harshest of sentences, life without parole, in the rarest of cases.

Appellate judges have supported this remedy on two bases. First, a term-of-years sentence is closest to legislative intent and requires the least judicial rewriting, because a life term is simply a term of years equal to a lifespan, such that a term of years is necessarily included therein. Second, since federal law has invalidated the two statutory options for juvenile capital-felony sentencing, a juvenile's offense must be punished under the "other . . . life felony" provision of section 775.082(3)(a)3. Under that provision, imprisonment for life or for a term of years not exceeding life is prescribed.

The Legislature's most recent bill has provided for, instead of parole, subsequent judicial review by the court of original jurisdiction after the passage of significant time. This Court could effect that legislative intent by augmenting

Florida Rule of Criminal Procedure 3.800(c), which governs reduction and modification of criminal sentences, to provide, after a significant passage of time, for reduction or modification of juvenile sentences that fall within *Miller*'s purview. Enhancing the rule would satisfy *Miller* by recognizing the difficulty of foretelling what punishment is necessary when sentencing a child, and preserving the possibility of a later sentencing modification because a child's character traits are often transient and a heightened possibility of rehabilitation remains.

II. Because *Miller* is retroactive as a rule of fundamental significance under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), there is no principled distinction between children who are sentenced to mandatory lifetime incarceration before or after *Miller*. Their sentences identically violate the Eighth Amendment and the same remedy is required.

ARGUMENT

I. BECAUSE SECTION 775.082(1), FLORIDA STATUTES (2013), IS UNCONSTITUTIONAL AS APPLIED TO JUVENILE DEFENDANTS, THE COURT, TO CONFORM TO BOTH *MILLER V. ALABAMA*'S EIGHTH AMENDMENT ANALYSIS AND THE FLORIDA LEGISLATURE'S INTENT, SHOULD ORDER THAT TRIAL COURTS MAY IMPOSE A TERM OF YEARS, UP TO AND INCLUDING LIFE IMPRISONMENT, ON JUVENILE DEFENDANTS CONVICTED OF FIRST-DEGREE MURDER.

A. Florida's Current Sentencing Scheme.

The current penalty statute, that contains the identical provisions as the statute under which Rebecca Falcon was sentenced, punishes a person convicted of the capital offense of first-degree murder with either a sentence of death or a sentence of life imprisonment without parole eligibility. Specifically, section

775.082(1), Florida Statutes (2013), provides:

> A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Subsection 2 of the statute provides a savings clause should the death penalty be held unconstitutional by this Court or the Supreme Court, in which case any death sentence is reduced to life imprisonment without parole as set forth in subsection 1. § 775.082(2), Fla. Stat. There is no savings clause for mandatory life sentences without parole eligibility.

Subsection 3 of the statute provides for different levels of punishment for a person convicted "of any other designated felony." § 775.082(3), Fla. Stat. Under subsection 3(a)3., a person convicted of a life felony committed on or after July 1, 1995, may be sentenced to "a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment." § 775.082(3)(a)3., Fla. Stat.

B. The Judiciary's Role in Formulating a Constitutionally-Compliant Remedy Where the Legislature's Penal Statute is Unconstitutional as Applied.

It is manifest that Rebecca Falcon was sentenced under a statute that mandates life imprisonment without parole for a juvenile convicted of first-degree murder, who is ineligible for a death sentence under *Roper v. Simmons*, 543 U.S. 551 (2005). It is also patent that the mandatory life-without-parole scheme is unconstitutional under *Miller*, but only when applied to juveniles.

Ms. Falcon has demonstrated why *Miller*'s rule of law must apply

retroactively. The question of the appropriate remedy requires consideration of two somewhat competing principles: (1) the separation-of-powers requirement; and (2) the inherent power of the Court.

Florida applies a strict separation-of-powers doctrine, *see, e.g., State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000), that is expressly codified in Article II, Section 3, of the Florida Constitution. Article II, Section 3, vouchsafes the integrity of three distinct governmental branches, and precludes one branch from exercising powers "appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. "It is only by keeping these departments in their appropriate spheres, that the harmony of the whole can be preserved – blend them, and constitutional law no longer exists." *Otto v. Harllee*, 119 Fla. 266, 270, 161 So. 402, 403-04 (1935) (citation omitted).

That said, in considering judicial functions, no one can dispute that the judiciary has an overriding "obligation to guard and enforce every right secured by [the Federal] Constitution." *Smith v. O'Grady*, 312 U.S. 329, 331 (1941) (citation omitted). In fact, one of the Court's "primary judicial functions is to interpret statutes and constitutional provisions." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992). While the Court must enforce the policy of the law as expressed in valid enactments, the Court must decline to do so where the statutes violate organic law. *State ex rel. Johnson v. Johns*, 92 Fla. 187, 196, 109 So. 228, 231 (1926).

The Court's inherent judicial power permits, indeed requires, the Court "to do things that are absolutely essential to the performance of [its] judicial functions." *Rose v. Palm Beach Cnty.*, 361 So. 2d 135, 137 (Fla. 1978). And

invocation of this inherent-power doctrine "is most compelling when the judicial function at issue is the safeguarding of fundamental rights." *Public Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 271-72 (Fla. 2013) (citation and internal quotation marks omitted).

However, "the power to declare what punishment may be assessed against those convicted of [a] crime is not a judicial power, but a legislative power." *Brown v. State*, 152 Fla. 853, 858, 13 So. 2d 458, 461 (1943), *superseded by statute on other grounds*, § 562.45, Fla. Stat., *as recognized in State v. Altman*, 106 So. 2d 401 (Fla. 1958); *accord State v. Bailey*, 360 So. 2d 772, 773 (Fla. 1978) (Legislature's determination of punishment will be sustained unless the punishment is cruel and unusual). Accordingly, the appropriate judicial response to a penalty statute that is unconstitutional under the Eighth Amendment as applied to a subclass should be one that requires the least statutory modification, and only modification that is most consistent with legislative intent. *See Nelson v. State ex rel. Gross*, 157 Fla. 412, 415, 26 So. 2d 60, 61 (1946) ("[c]ourts may extend a statute to new conditions as they arise, they may adjust Constitutional and statutory provisions to fit changing social concepts, but, in doing this, they are not permitted to remake or distort the statute so as to change its meaning"); *In re Seven Barrels of Wine*, 79 Fla. 1, 16-17, 83 So. 627, 632 (1920) ("[i]n determining the legality and effect of a statutory regulation, the court should ascertain the legislative intent; and, if the ascertained intent will permit, the enactment should be construed and effectuated so as to make it conform to, rather than violate, applicable provisions and principles of the state and federal Constitutions, since it must be assumed that

the Legislature intended the enactment to comport with the fundamental law").

As the First District observed in *Horsley v. State*, 121 So. 3d 1130 (Fla. 5th DCA), *review granted*, Nos. SC13-1938, SC13-2000, 2013 WL 6224657 (Fla. Nov. 14, 2013):

> [T]he 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.

Id. at 1132.

C. *Miller*'s Sentencing Parameters.

The Supreme Court did not dictate the sentencing remedy required in the aftermath of *Miller*. But the Court did provide guidance on what would, and what would not, comport with its Eighth Amendment analysis.

First, the Court held that a mandatory scheme requiring a sentence of life imprisonment without the possibility of parole for juveniles convicted of any offense violates the Eighth Amendment. Observing that "none of what [*Graham v. Florida*, 560 U.S. 48 (2010),] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime specific," the Court invalidated all sentencing regimes that invariably require that a child be sentenced to life imprisonment without parole. *Miller*, 132 S. Ct. at 2465.

Second, the Court emphasized that, in order to impose a constitutionally proportionate sentence for a child, the sentencer must conduct an individualized

inquiry. Essential to this individualized sentencing is consideration of "an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. The sentencer, thus, must be afforded the opportunity to consider the "hallmark features" of youth, including "immaturity, impetuosity, and failure to appreciate risks and consequences," *id.* at 2468; the "family and home environment," *id.*; the "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," *id.*; "his inability to deal with police or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," *id.*; and, most importantly, "the possibility of rehabilitation." *Id.* The Court, accordingly, made clear that a sentencer is required "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469 (footnote omitted).

Third, concomitant with the second point, the Court repeatedly hailed the importance of sentencing discretion that permits a variety of outcomes. The Court pointed out that a problem with the mandatory scheme under scrutiny, was that "every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id.* at 2467-68. And in distinguishing the sentencing determination in adult court from the transfer or "bindover" determination made in juvenile court, the Court pointed out:

> Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-

> without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court – and so cannot satisfy the Eighth Amendment.

Id. at 2474-75.

Fourth, the Court did not forbid a sentence of life without parole for juveniles convicted of homicide. Yet, the Court did all but that. For in refraining from reaching the petitioners' alternative argument that the Eighth Amendment requires a categorical ban on lifetime sentences for children, *id.* at 2469, the Court elucidated:

> But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon.

Id. Indeed, in emphasizing the difficulty that would be encountered in distinguishing between the atypical child who might warrant a lifetime sentence from those whose crime reflects "unfortunate yet transient immaturity," the Court spoke of the former as "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* (citations omitted).

It ineluctably follows that there must be alternative sentences available for the "common" juvenile offender. And discretion to impose an individualized sentence upon consideration of the pertinent factors that the Court identified is central to the Court's Eighth Amendment proportionality reasoning. Most

importantly, under *Miller,* a sentence less than life without the possibility of parole must be the norm.

D. Potential Sentencing Remedies.

1. Uniform resentencing to life with parole is an unacceptable *Miller* remedy.

Just as *Miller* does not hold unconstitutional life sentences without the possibility of parole if imposed in a discretionary scheme and after an individualized sentencing, *id.* at 2469, it does not invalidate life sentences imposed with the opportunity for parole. *Id.* But there are several overriding reasons that making life with parole the resentencing option, as posited in this Court's supplemental-briefing order, is an inappropriate remedy.

First, the Legislature has consistently demonstrated its opposition to entrusting the decision of an inmate's release to a parole commission. Approximately thirty years ago, the Legislature abolished parole for noncapital felonies committed on or after October 1, 1983. § 921.001(4)(a), (8), Fla. Stat. (1985); ch. 83-87, § 2, Laws of Fla. A decade later, the Legislature abolished parole for those convicted of first-degree murder, § 775.082(1), Fla. Stat. (1994), ch. 94-228, § 1, Laws of Fla. (effective May 25, 1994), and the following year extended this parole preclusion to those convicted of any capital felony. § 775.082(1), Fla. Stat. (1995); ch. 95-294, § 4, Laws of Fla. (effective Oct. 1, 1995). The Legislature further made clear that parole shall not apply to those sentenced under the Criminal Punishment Code. § 921.002(1)(e), Fla. Stat. (1997); ch. 97-194, § 3, Laws of Fla. (effective Oct. 1, 1998). Although the Legislature could not

abolish parole entirely because of the inmates who had been given parole-eligible sentences years before, it did reduce the Parole Commission by half, effective July 1, 1996. § 947.01, Fla. Stat. (1996); ch. 96-422, § 12, Laws of Fla. (effective July 1, 1996). If the goal is to stay as faithful as possible to the basic separation-of-powers construct, then requiring the executive branch to expand its current, reduced-by-half, parole commission to carry out a newly acquired function that the Legislature has repeatedly eschewed is a very poor remedial choice. *See Thomas v. State*, No. 1D13-2718, 2014 WL 1493192, at *1-2 (Fla. 1st DCA Apr. 16, 2014) (Osterhaus, J., specially concurring); *Washington v. State*, 103 So. 3d 917, 921-22 (Fla. 1st DCA 2012) (Wolf, J., concurring).

Second, making parole available as the resentencing remedy would require holding unconstitutional an additional statute, section 947.16(6), Florida Statutes (2013), that precludes parole eligibility for juveniles sentenced as adults. This Court has always been reluctant to declare a statute unconstitutional unless it is absolutely required to do so:

> The lawmaking power of the Legislature of a state is subject only to the limitations provided in the state and federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that under any rational view that may be taken of the statute it is in positive conflict with some identified or designated provision of constitutional law.
>
> A statute should be so construed and applied as to make it valid and effective if its language does not exclude such an interpretation.

Johns, 92 Fla. at 196-97, 109 So. at 231; *accord State ex rel. Crim v. Juvenal*, 118

Fla. 487, 490, 159 So. 663, 664 (1935) ("[c]ourts have the power to declare laws unconstitutional only as a matter of imperative and unavoidable necessity"). Nothing in *Miller* mandates the invalidation of the statute proscribing parole for juveniles.

Finally, it is impossible to read all that *Miller* says about children without concluding that a one-size-fits-all approach is not at all what is contemplated. An individualized sentencing hearing at which the sentencer may consider the identified factors relevant to childhood and exercise his or her discretion in choosing a proportionate, and therefore constitutional, sentence is key. *See, e.g.*, *Miller*, 132 S. Ct. at 2460 (mandatory scheme "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change") (citation and internal quotation marks omitted); *id.* at 2467 ("a sentencer [must] have the ability to consider the mitigating qualities of youth") (citation and internal quotation marks omitted); *id.* at 2475 ("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," and "[b]y 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 this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"); *id.* at 2474 (with discretionary sentencing in adult court, "a judge or jury could choose rather than life-without-parole sentence, a lifetime prison term *with* the possibility of parole or

a lengthy term of years"). Committing all juveniles entitled to a *Miller* resentencing to life sentences with parole is not the answer.

2. Revival of the statute prescribing life imprisonment with parole consideration after 25 years is not an available remedy.

One remedy that has been suggested is to "revive" the penalty statute from 20 years ago that prescribed either death or life imprisonment with parole availability after 25 years for first-degree murder. *See Horsley*, 121 So. 3d at 1131-32; *Toye v. State*, 133 So. 3d 540, 547, 549 (Fla. 2d DCA 2014) (Villanti, J., concurring in part, dissenting in part); *Partlow v. State*, No. 1D10-5896, 2013 WL 45743, at *4-8 (Fla. 1st DCA Jan. 4, 2013) (Makar, J., concurring in part, dissenting in part). But this putative "revival" fails because it attempts to revive, not the immediate predecessor to the current constitutionally defective statute – because that, too, suffers from the same constitutional defect – but the predecessor to the predecessor. As this Court cautioned in *B.H. v. State*, 645 So. 2d 987, 995 n.5 (Fla. 1994), revival is restricted to the "immediate predecessor" to the statute that is being held unconstitutional. *See Washington*, 103 So. 3d at 921 (Wolf, J., concurring).

The 1995 version of section 775.082, Florida Statutes, provided that first-degree murder was punishable by either death or life imprisonment without parole. Ch. 95-294, § 4, Laws of Fla.; *see Partlow*, 2013 WL 45743, at *6 (Makar, J., concurring in part, dissenting in part). This provision is still in effect and, as discussed previously, is unconstitutional as applied. The immediate predecessor to this statute, the 1994 version of section 775.082, identically provided for either a

death sentence or a sentence of life imprisonment without parole for first-degree murder. Ch. 94-228, § 1, Laws of Fla.; *see Partlow*, 2013 WL 45743, at *5-6 (Makar, J., concurring in part, dissenting in part). So the argument for revival requires a jump back to the 1993 version of the statute that permitted a life sentence with parole consideration after 25 years, an additional retreat unauthorized under revival theory:

> [T]here cannot be a revival of any statute other than the immediate predecessor. If the immediate predecessor statute is defective, then no further revival is possible under any circumstances.

B.H., 645 So. 2d at 995 n.5.

But more importantly, if the Court were to revive that statute, then first-degree murder committed by adults would also be punishable by a life sentence with parole eligibility after 25 years. Yet, the current statute is unconstitutional only as applied to a subclass – juveniles – in a statute that does not distinguish between adult or juvenile offenders. So the revival argument would require dividing "person" as used in the statute to subclasses of adults and juveniles, and applying the current statute to adults, while the predecessor to the predecessor to juveniles. As Judge Altenbernd explicated in his concurring opinion in *Toye*:

> If a statute has been amended in an unconstitutional manner, returning to the last properly enacted statute to assure that a statute exists for application to all persons makes sense to me. I am less convinced, however, that it is a good idea or even permissible to revive a statute for application to a very small population of persons for whom the existing statute is essentially unconstitutional as applied.

133 So. 3d at 549.

It strains revival too far to now redraft the current statute, picking and choosing what aspects should remain, and then resurrecting a statute prior to the prior statute to provide a remedy for a subclass never even identified in either statute. This is not revival; it is judicial rewriting.

As to the lack of propinquity between the current statute and the one sought to be revived, Judge Makar suggests, in his concurrence in part and dissent in part in *Partlow*, 2013 WL 45743, at *5-6, that revival is possible since both the 1993 and 1994 statutes are identical in their treatment for sentencing of defendants – notably, all defendants, not just juvenile offenders – convicted of first-degree murder. But that argument ignores the foundation for revival analysis. Even assuming that the immediate-antecedent requirement set forth in *B.H.* can be so readily dismissed, what the change in the statute accomplished must not be overlooked.

The statute was amended to exclude parole for a further list of felonies: no longer just for first-degree murder, but for all capital felonies. *See* § 775.082, Fla. Stat. (1995); *Partlow*, 2013 WL 45743, at *6 (Makar, J., concurring in part, dissenting in part). And as demonstrated in Section I.D.1 of this brief, the Legislature's gradual abolition of parole preceded this change and has continued in the years since. For approximately 20 years, the Legislature's disfavor for parole has been consistently evident. As Judge Wolf commented:

> [E]ven if [the statute sought to be revived] were the immediate predecessor, parole was permitted "so long ago in the past that it no longer reflects the consensus of society." The Legislature abolished

> parole long ago. Thus, parole is no longer the consensus of society, as expressed by its legislative representatives.

Washington, 103 So. 3d at 921 (Wolf, J., concurring) (quoting *B.H.*, 645 So. 2d at 995 n.5).

Since the rationale for "revival" is to adhere to separation-of-powers requirements by returning to the previous statute that best exhibits the Legislature's intent, resurrecting a statute that prescribes parole is patently the antithesis of a sanction that the Legislature would choose.[1] Indeed, the current bill under consideration averts parole, instead choosing to provide for judicial hearings to determine subsequent offender release. Fla. Legisl., An Act Relating to Juvenile Sentencing, 2014 Reg. Sess., CS for HB 7035.

Ultimately, revival is simply not the fluid and expansive concept that could justify the statutory reconstruction necessary to reintroduce life sentences with parole consideration after 25 years. As even those judges who have suggested it as a remedy have acknowledged, revival is appropriate when it shows the required respect for the legislative process. *See Toye*, 133 So. 3d at 548 (Villanti, J., concurring in part, dissenting in part) (advocating revival because, "rather than having courts essentially legislate from the bench by creating a new statutory scheme out of whole cloth, 'we simply revert to a solution that was duly adopted

---

[1] This across-the-board remedy would likewise ignore *Miller*'s call for an individualized sentencing of juveniles in order to prevent a constitutionally disproportionate sentence. *See Miller*, 132 S. Ct. at 2467-69; *see also Walling v. State*, 105 So. 3d 660, 664 (Fla. 1st DCA 2013) (Wright, Assoc. J., concurring) (revival would violate not only separation-of-powers provisions of the Florida Constitution, but also "the spirit of *Miller* due to *Miller*'s emphasis on the availability of discretion by the trial judge").

by the legislature itself'" (quoting *Horsley*, 121 So. 3d at 1132)); *Partlow*, 2013 WL 45743, at *4 (Makar, J., concurring in part, dissenting in part) (judicial revival "is based in large measure on separation of powers principles"). And as discussed in the previous section addressing why adding parole eligibility onto life sentences is not the appropriate remedy, revival suffers the same additional flaw: it requires the Court to declare unconstitutional yet another statute that is unaffected by *Miller* – section 921.002(1)(e), Florida Statues (2013), precluding parole eligibility for juveniles – and to revive a system that has long ago fallen into the Legislature's disfavor. For a multitude of reasons, then, revival is not an available remedy.

3. A term-of-years sentence is the most appropriate remedy.

The most principled remedy that shows respect for the Legislature's prerogative, as well as *Miller*'s teachings, is to permit courts to sentence a juvenile homicide offender to a term of years, up to and including life imprisonment. This remedy would require the Court to comply with *Miller* by invalidating only the statute mandating life without parole as applied to juvenile homicide offenders, permit the trial court to conduct an individualized sentencing proceeding at which the defendant's youth and attendant circumstances could be considered, afford the court the discretion to impose a sentence proportionate to the offense and the offender, and permit sentencing of life imprisonment without parole in the rare case that calls for the harshest of sentences.

This remedy was proposed by Judge Wolf in his concurring opinion in *Washington*, 103 So. 3d at 922, as most consistent with legislative intent and the dictates of *Miller*:

> The sentencing option which is the closest to the legislative expression of intent and involves the least rewriting of the statute is a sentence of a term of years without possibility of parole. This option also gives the trial court the discretion mandated by *Miller*.
>
> A life sentence is merely a term of years equaling the lifespan of a person. Any term of years is necessarily included within the purview of life. Thus, this alternative does not constitute a rewrite of the statute.

This remedy has been equally endorsed, under a slightly different theory, by Judge Osterhaus in a specially concurring opinion in *Thomas*, 2014 WL 1493192, at *1-2. Judge Osterhaus suggests that, since "federal caselaw has abrogated both possible 'capital felony' sentences for juvenile offenders – death and *mandatory* life without parole," *id.* at *2, a juvenile cannot be sentenced under the capital felony provisions of sections 775.082(1) and (2), Florida Statutes. *Thomas*, 2014 WL 1493192, at *1-2. Because the juvenile's offense is no longer "capital" within the meaning of the statute, "[w]hat is left of § 775.082 for juvenile offenders . . . is the provision addressing life felonies in § 775.082(3)." 2014 WL 1493192, at *2. Thus, a juvenile's offense may be punished under the "other . . . life felony" provision of section 775.082(3)(a)3., and he or she may be sentenced to the next highest penalty: imprisonment for life or imprisonment for a term of years not exceeding life. 2014 WL 1493192, at *2 & n.2.

What is most significant, is that under either theory, the remedy of a sentence of a term of years up to and including life without the possibility of parole best enforces the sanction choices of the recent Legislature. With this remedy, statutes proscribing parole eligibility remain in force. And there is no need for the Legislature to enact a new statute expanding the current three-person parole

commission, nor need for the Executive branch to consider necessary changes and amendments to what would be a greatly expanded parole system. Thus, with this least possible statutory revision, the requisite separation of powers will be respected.

As for the Legislature's response to *Miller*, as previously noted, the current proposed bill includes provisions for subsequent sentencing review by the court of original jurisdiction after the passage of a significant amount of time. Fla. Legisl., An Act Relating to Juvenile Sentencing, 2014 Reg. Sess., CS for HB 7035. Regardless of whether the bill becomes law, judicial review at a later point in time has features worthy of the Court's consideration, and the Court could choose, under its rule-making authority, to implement such review simply by augmenting Florida Rule of Criminal Procedure 3.800(c). *See* art. V, § 2(a), Fla. Const. ("[t]he supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts").

Rule 3.800(c), titled "Reduction and Modification," in essence provides a 60-day window after the last direct appeal or certiorari proceeding in state or federal court within which a court can reduce or modify a previously imposed criminal sentence. Enhancing that rule with a provision for reduction or modification of a juvenile's lifetime or term-of-years sentence after a substantial period of time would be consistent with *Miller* in two respects.

First, permitting modification or reduction at a later date would be in accordance with *Miller*'s recognition of the "great difficulty . . . of distinguishing

at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption." 131 S. Ct. at 2469 (citation and internal quotation marks omitted). Second, preserving the possibility of modification or reduction of a juvenile sentence beyond the current 60-day window would be consistent with the Court's acknowledgment that the "signature qualities [of youth] are all transient," *id.* at 2467 (citation and internal quotation marks omitted), and so later scrutiny would underscore "the possibility of rehabilitation," *id.* at 2468, a juvenile's "heightened capacity for change," *id.* at 2469, and provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2469 (quoting *Graham*, 560 U.S. at 75). Indeed, such a rule of procedure would provide an incentive for juveniles who in any case will face lengthy incarceration to participate in rehabilitative programs, and demonstrate model behavior while incarcerated.

II. BECAUSE *MILLER* IS RETROACTIVE UNDER *WITT V. STATE*, THERE CAN BE NO DISTINCTION IN REMEDY.

Miller is retroactive under Florida law because of the fundamental significance of its constitutional rule. *See Witt*, 387 So. 2d at 931. There is no principled distinction between the child who is sentenced to mandatory lifetime imprisonment before *Miller* and the child who is identically sentenced after *Miller*. Whenever a child receives a sentence so dictated by Florida law, that sentence violates the same Eighth Amendment requisite. The identical remedy, accordingly, must obtain.

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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-865

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER REBECCA LEE FALCON

ON DISCRETIONARY REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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ARGUMENT

I. BECAUSE SECTION 775.082(1), FLORIDA STATUTES (2013), IS UNCONSTITUTIONAL AS APPLIED TO JUVENILE DEFENDANTS, THE COURT, TO CONFORM TO BOTH *MILLER V. ALABAMA*'S EIGHTH AMENDMENT ANALYSIS AND THE FLORIDA LEGISLATURE'S INTENT, SHOULD ORDER THAT TRIAL COURTS MAY IMPOSE A TERM OF YEARS, UP TO AND INCLUDING LIFE IMPRISONMENT, ON JUVENILE DEFENDANTS CONVICTED OF FIRST-DEGREE MURDER.

A. The Florida Legislature's New Remedy Statute is Consistent with the Remedy Suggested by Petitioner and Inconsistent with the Remedy Suggested by the State.

The state fails to acknowledge that the landscape for remedy analysis has changed. Buried in a footnote at the conclusion of its argument is a brief reference to the newly engrossed bill for *Graham/Miller* sentencing, Fla. Legisl., An Act Relating to Juvenile Sentencing, 2014 Reg. Sess., CS for HB 7035 [hereinafter Appendix ("A")], that has now been unanimously passed by the Florida Legislature (amending section 775.082, Florida Statutes (2013), and creating sections 921.1401 and 921.1402, Florida Statutes) and awaits the Governor's signature. (Supplemental Answer Brief ("SAB") at 23, n.4). The significance of the act is patent, for if statutory revival is, as the state asserts, a vehicle to enforce legislative intent, we now have "the best evidence of that intention." (See SAB at 13). And that intention is in no way tethered to the 21-year-old 1993 statute that the state would have this Court "revive."

In keeping with the sentencing parameters of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), as discussed in Ms. Falcon's Supplemental Brief ("SB") at 8-11, the Legislature has rejected the one-size-fits-all approach when considering the

sentencing of juveniles. Accordingly, the state's argument that legislative intent supports mandatory lifetime sentences, either with or without parole consideration (SAB at 8-19), is directly refuted by the individualized sentencing that the Legislature has prescribed as the best method for complying with *Miller*.

Indeed, there are three key aspects of the act that conflict with the state's suggested remedy, but align with the remedy proposed by Ms. Falcon: 1) the Legislature's authorization of term-of-years sentences up to, and including, life imprisonment; 2) the grant of judicial discretion in choosing the term of years; and 3) the provision for judicial modification of the sentence to probation after a significant period of time.

Turning to the specifics of CS/HB 7035, section one provides for a term-of-years sentence, up to and including life imprisonment, with the precise contours of the sentencing options dependent on the circumstances of the homicide. (A:2-3). While a sentence of life imprisonment is authorized, it can be imposed only if that sentence is found appropriate after a sentencing hearing in accordance with the provisions in the recently passed section 921.1401, Florida Statutes. (A:8-9). Specific factors to be considered by the court at the hearing are enumerated therein, and focus on the circumstances of the offense, as well as the youth and attendant circumstances of the offender, and the possibility of rehabilitation. *Id.* If the court determines that a life sentence is not appropriate, a range of term-of-years

sentences are available, dependent on the juvenile's participation in the homicide. (A:2-3).[1]

There is no longer any question as to the "policy considerations that properly belong to the Legislature." (SAB at 19). It is manifest that the Legislature does not support the remedy proposed by the state that would mandate a life sentence for all juveniles convicted of capital homicide – either life imprisonment without the possibility of parole, or, by "reviving" the 1993 statute, life imprisonment without the possibility of parole for 25 years. To the contrary, the Legislature has chosen to comply with *Miller*'s teachings by providing for judicial discretion and term-of-years sentences as suggested by Ms. Falcon in her Supplemental Brief. (SB at 18-20).

The new legislative scheme similarly defeats the state's assertion that the Legislature would prefer to expand parole rather than to permit judicial discretion in sentencing. (See SAB at 19-20). The Legislature has made clear that it has no interest in rebuilding the commission that it has been increasingly diminishing in both size and caseload since 1983. (See SB at 11-12). No doubt in response to *Miller*'s recognition of the "great difficulty" in distinguishing at an early age

[1] Specifically, the Legislature has divided juvenile capital-homicide offenders into those who killed, or intended or attempted to kill, and those who did not. For the former, the sentencing range is 40 years to life, while for the latter, there remains the possibility of a life sentence but there is no minimum sentence. (A:2-3). Regardless of the apposite category, no juvenile can be sentenced to life imprisonment without a sentencing hearing at which his or her youth and factors attendant to the offense and the offender may be considered, and the determination made that a life sentence is appropriate. (A:7-9).

between the rare irredeemable juvenile and those amenable to rehabilitation whose crimes reflect transient immaturity, 132 S. Ct. at 2469, the Legislature has provided an avenue for subsequent modification of the juvenile's sentence, but not through the parole system.

Instead, section three of CS/HB 7035 establishes section 921.1402, Florida Statutes, requiring sentencing review by the court of original jurisdiction for virtually all juveniles.[2] (A:9-13). Dependent on the nature of the capital homicide – whether or not the juvenile killed or attempted or intended to kill – this review is afforded after either 15 or 25 years. (A:9-10). And this review before the court differs significantly from that provided by the parole commission. The juvenile must receive notification of his or her eligibility for sentencing modification 18 months before the time for the hearing, and is entitled to representation by private counsel or a public defender if the juvenile cannot afford counsel. (A:11). Additionally, the Legislature has not left it to the trial court to establish the criteria for modification, as it has done for parole by the Parole Commission under section 947.165(1), Florida Statutes (2013). Rather, the Legislature has enumerated a nonexclusive list of nine factors to be considered by the sentence-review court (A:11-13), with an overriding emphasis on whether the juvenile has been

[2] The only juvenile who is not entitled to sentencing review after conviction of a capital homicide is one who has killed or intended or attempted to kill, and who has a prior conviction of one of the serious felony offenses specified in the statute. (A:9-10). Otherwise, even a child convicted of a capital homicide and for whom a life sentence has been deemed appropriate after a sentencing hearing, is eligible for subsequent sentencing review. *Id.*

rehabilitated, in accordance with *Miller*'s acknowledgment of a child's "diminished culpability and heightened capacity for change." *Miller*, 132 S. Ct. at 2469.

At the conclusion of the sentence-review hearing, the court must determine if the juvenile "has been rehabilitated and is reasonably believed to be fit to reenter society." (A:13). If the court so concludes, "the court shall modify the sentence and impose a term of probation of at least 5 years." *Id.* If the court does not so conclude, the court must enter a written order explaining why the sentence is not being modified. *Id.*

The Legislature thus has recognized that sentences for juveniles convicted of capital homicide should be revisited at a later point in time. But the Legislature did not choose to turn back the clock by decades and reinstitute parole as the means for sentence review, as the state now urges this Court to do. Instead, the Legislature has made clear its preference for judicial review, and its continued opposition to extending parole. Because the state is correct that "policy judgments ... are properly relegated to the Legislature" (SAB at 13), the state's revival-of-parole remedy, which contravenes the Legislature's manifest intent, completely misses its mark. The judicial sentence reduction and modification authorized by the new statute is, however, in perfect accord with the remedy of augmenting Rule 3.800(c) of the Florida Rules of Criminal Procedure, as suggested by Ms. Falcon in her Supplemental Brief. (SB at 20-21).

B. Upon Declaring *Miller* Retroactive, This Court Should Order a Remedy Consistent with Legislative Intent.

The Legislature's *Miller* remedy is expressly applicable to offenses committed on or after July 1, 2014. (A:16). It has been suggested that the Legislature would be constrained by the Florida Constitution to provide otherwise. *Partlow v. State*, 134 So. 3d 1027, 1032 n. 7 (Fla. 1st DCA 2013) (Makar, J., concurring in part and dissenting in part) ("To the extent a legislative solution exists, it faces hurdles including the state constitutional constraint that the '[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.' Art. X, § 9, Fla. Const.") (citations omitted); *see also Witt v. State*, 387 So. 2d 922 (Fla. 1980) (providing for the Court to declare that a fundamental constitutional right is retroactive). Irrespective of any legislative limitation, this Court has the responsibility and inherent power to enforce *Miller*'s constitutional jurisprudence (SB at 6-8), and can now do so informed by legislative action.

The state does not and cannot quarrel with Ms. Falcon's argument that this Court must require an individualized sentencing hearing before a juvenile may be sentenced to lifetime incarceration. (SB at 8-10, 18; SAB at 6-8). The state does, however, contest the term-of-years sentences that Ms. Falcon proposes (SB at 18-20; SAB at 20-22) – and that the Legislature has prescribed – where lifetime sentences are deemed inappropriate. As to Ms. Falcon's suggestion for modification of Rule 3.800(c) to permit subsequent judicial modification and reduction of a juvenile's lifetime or term-of-years sentence, the state is notably silent. (SB at 20-21).

Both parties thus concur that this Court should require an individualized sentencing hearing before a juvenile may be resentenced to life imprisonment, which is also in accordance with the hearing mandated by the Legislature in its new legislation. This Court, in reliance on either its inherent power to enforce constitutional guarantees (see SB at 6-8), or the all-writs provision of Article V, Section 3(b)(7) of the Florida Constitution, should implement the hearing prerequisite that all agree is required by *Miller* and the Eighth Amendment.[3]

Regarding Ms. Falcon's suggestion that the Court provide for subsequent judicial reduction and modification of a juvenile's lifetime or term-of-years sentence, as an addition to the current Florida Rule of Criminal Procedure 3.800 that provides a vehicle for reduction and modification (SB at 20-21), the state's silence is loud. This remedy should be adopted because it is consistent both with *Miller*, and the legislative response to *Miller*.

As for the term-of-years sentencing, the state is simply wrong that this remedy would be opposed by the Legislature. (See SAB at 19-22). Indeed, as discussed above, this is precisely the remedy that the Legislature has chosen. The Court could adopt this remedy under one of the two theories that has been advanced by Judges Wolf or Osterhaus, as discussed in Ms. Falcon's Supplemental Brief. (SB at 18-19).

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[3] This Court has used its all-writs authority to address and remedy the illegality of a criminal sentence where, as here, there is an independent basis of jurisdiction. *Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994); *see Williams v. State*, 913 So. 2d 541, 543-44 (Fla. 2005).

The state's proportionality concerns (SAB at 21-22) could be addressed by the Court ordering, again through its inherent power or by its all-writs authority, that sentencing courts abide by the legislative sentencing construct in choosing term-of-years sentences. Following the Legislature's lead in this manner would be consistent with the separation-of-powers doctrine that is the centerpiece of the state's revival argument, and certainly, far more consistent than returning to a decades-old statute that the Legislature has no interest in sustaining.

The Court should thus adopt the remedy proposed by Ms. Falcon that implements legislative will. By doing so, the Eighth Amendment proscription as interpreted in *Miller,* as well as the interests of equal justice hailed in *Witt*, 387 So. 2d at 925, will best be served.

II. BECAUSE *MILLER* IS RETROACTIVE UNDER *WITT V. STATE*, THERE CAN BE NO DISTINCTION IN REMEDY.

The state rightly concedes that "there are no principled distinctions between the two" types of cases, those pending on direct appeal and those seeking post-conviction relief, in terms of the proper remedy. (SAB at 24).

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APPENDIX

An act relating to juvenile sentencing; amending s. 775.082, F.S.; providing criminal penalties applicable to a juvenile offender for certain serious felonies; requiring a judge to consider specified factors before determining if life imprisonment is an appropriate sentence for a juvenile offender convicted of certain offenses; providing review of sentences for specified juvenile offenders; creating s. 921.1401, F.S.; providing sentencing proceedings for determining if life imprisonment is an appropriate sentence for a juvenile offender convicted of certain offenses; providing certain factors a judge shall consider when determining if life imprisonment is appropriate for a juvenile offender; creating s. 921.1402, F.S.; defining the term "juvenile offender"; providing sentence review proceedings to be conducted after a specified period of time by the original sentencing court for juvenile offenders convicted of certain offenses; providing for subsequent reviews; requiring the Department of Corrections to notify a juvenile offender of his or her eligibility to participate in sentence review hearings; entitling a juvenile offender to be represented by counsel; providing factors that must be considered by the court in the

sentence review; requiring the court to modify a juvenile offender's sentence if certain factors are found; requiring the court to impose a term of probation for any sentence modified; requiring the court to make written findings if the court declines to modify a juvenile offender's sentence; amending ss. 316.3026, 373.430, 403.161, and 648.571, F.S.; conforming cross-references; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (3) of section 775.082, Florida Statutes, are amended to read:

775.082 Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.—

(1)(a) Except as provided in paragraph (b), a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(b)1. A person who actually killed, intended to kill, or

attempted to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).

2. A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

3. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s.

921.1402(2)(a) or (2)(c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

(3) A person who has been convicted of any other designated felony may be punished as follows:

(a)1. For a life felony committed before ~~prior to~~ October 1, 1983, by a term of imprisonment for life or for a term of at least ~~years not less than~~ 30 years.

2. For a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

3. Except as provided in subparagraph 4., for a life felony committed on or after July 1, 1995, by a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment.

4.a. Except as provided in sub-subparagraph b., for a life felony committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by:

(I) A term of imprisonment for life; or

(II) A split sentence that is a term of at least ~~not less than~~ 25 years' imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person's natural life, as provided in s. 948.012(4).

b. For a life felony committed on or after July 1, 2008, which is a person's second or subsequent violation of s. 800.04(5)(b), by a term of imprisonment for life.

5. Notwithstanding subparagraphs 1.-4., a person who is convicted under s. 782.04 of an offense that was reclassified as a life felony which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(b) or (2)(c). Such a finding shall be based upon whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the

victim.

(b)1. For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.

2. Notwithstanding subparagraph 1., a person convicted under s. 782.04 of a first-degree felony punishable by a term of years not exceeding life imprisonment, or an offense that was reclassified as a first degree felony punishable by a term of years not exceeding life, which was committed before the person attained 18 years of age may be punished by a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that a term of years equal to life imprisonment is an appropriate sentence.

a. A person who actually killed, intended to kill, or attempted to kill the victim and is sentenced to a term of imprisonment of more than 25 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(b).

b. A person who did not actually kill, intend to kill, or attempt to kill the victim and is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

c. The court shall make a written finding as to whether a person is eligible for a sentence review hearing under s. 921.1402(2)(b) or (2)(c). Such a finding shall be based upon

whether the person actually killed, intended to kill, or attempted to kill the victim. The court may find that multiple defendants killed, intended to kill, or attempted to kill the victim.

(c) Notwithstanding paragraphs (a) and (b), a person convicted of an offense that is not included in s. 782.04 but that is an offense that is a life felony or is punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, or an offense that was reclassified as a life felony or an offense punishable by a term of imprisonment for life or by a term of years not exceeding life imprisonment, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or a term of years equal to life imprisonment if the judge conducts a sentencing hearing in accordance with s. 921.1401 and finds that life imprisonment or a term of years equal to life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(d).

(d) ~~(c)~~ For a felony of the second degree, by a term of imprisonment not exceeding 15 years.

(e) ~~(d)~~ For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

Section 2. Section 921.1401, Florida Statutes, is created

to read:

921.1401 Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings.—

(1) Upon conviction or adjudication of guilt of an offense described in s. 775.082(1)(b), s. 775.082(3)(a)5., s. 775.082(3)(b)2., or s. 775.082(3)(c) which was committed on or after July 1, 2014, the court may conduct a separate sentencing hearing to determine if a term of imprisonment for life or a term of years equal to life imprisonment is an appropriate sentence.

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.

(b) The effect of the crime on the victim's family and on the community.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

(d) The defendant's background, including his or her family, home, and community environment.

(e) The effect, if any, of immaturity, impetuosity, or

failure to appreciate risks and consequences on the defendant's participation in the offense.

(f) The extent of the defendant's participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

(h) The nature and extent of the defendant's prior criminal history.

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

Section 3. Section 921.1402, Florida Statutes, is created to read:

921.1402 Review of sentences for persons convicted of specified offenses committed while under the age of 18 years.—

(1) For purposes of this section, the term "juvenile offender" means a person sentenced to imprisonment in the custody of the Department of Corrections for an offense committed on or after July 1, 2014, and committed before he or she attained 18 years of age.

(2)(a) A juvenile offender sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence after 25 years. However, a juvenile offender is not entitled to review if he or she has previously been convicted of one of the following offenses, or conspiracy to commit one of the following

offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence under s. 775.082(1)(b)1.:

1. Murder;

2. Manslaughter;

3. Sexual battery;

4. Armed burglary;

5. Armed robbery;

6. Armed carjacking;

7. Home-invasion robbery;

8. Human trafficking for commercial sexual activity with a child under 18 years of age;

9. False imprisonment under s. 787.02(3)(a); or

10. Kidnapping.

(b) A juvenile offender sentenced to a term of more than 25 years under s. 775.082(3)(a)5.a. or s. 775.082(3)(b)2.a. is entitled to a review of his or her sentence after 25 years.

(c) A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2., s. 775.082(3)(a)5.b., or s. 775.082(3)(b)2.b. is entitled to a review of his or her sentence after 15 years.

(d) A juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) is entitled to a review of his or her sentence after 20 years. If the juvenile offender is not

resentenced at the initial review hearing, he or she is eligible for one subsequent review hearing 10 years after the initial review hearing.

(3) The Department of Corrections shall notify a juvenile offender of his or her eligibility to request a sentence review hearing 18 months before the juvenile offender is entitled to a sentence review hearing under this section.

(4) A juvenile offender seeking sentence review pursuant to subsection (2) must submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The juvenile offender must submit a new application to the court of original jurisdiction to request subsequent sentence review hearings pursuant to paragraph (2)(d). The sentencing court shall retain original jurisdiction for the duration of the sentence for this purpose.

(5) A juvenile offender who is eligible for a sentence review hearing under this section is entitled to be represented by counsel, and the court shall appoint a public defender to represent the juvenile offender if the juvenile offender cannot afford an attorney.

(6) Upon receiving an application from an eligible juvenile offender, the court of original sentencing jurisdiction shall hold a sentence review hearing to determine whether the juvenile offender's sentence should be modified. When determining if it is appropriate to modify the juvenile

offender's sentence, the court shall consider any factor it deems appropriate, including all of the following:

(a) Whether the juvenile offender demonstrates maturity and rehabilitation.

(b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.

(c) The opinion of the victim or the victim's next of kin. The absence of the victim or the victim's next of kin from the sentence review hearing may not be a factor in the determination of the court under this section. The court shall permit the victim or victim's next of kin to be heard, in person, in writing, or by electronic means. If the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.

(d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person.

(e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.

(f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.

(g) Whether the juvenile offender has successfully obtained a general educational development certificate or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.

(h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.

(i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

(7) If the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years. If the court determines that the 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.

Section 4. Subsection (2) of section 316.3026, Florida Statutes, is amended to read:

316.3026 Unlawful operation of motor carriers.—

(2) Any motor carrier enjoined or prohibited from operating by an out-of-service order by this state, any other state, or the Federal Motor Carrier Safety Administration may not operate on the roadways of this state until the motor

carrier has been authorized to resume operations by the originating enforcement jurisdiction. Commercial motor vehicles owned or operated by any motor carrier prohibited from operation found on the roadways of this state shall be placed out of service by law enforcement officers of the Department of Highway Safety and Motor Vehicles, and the motor carrier assessed a $10,000 civil penalty pursuant to 49 C.F.R. s. 383.53, in addition to any other penalties imposed on the driver or other responsible person. Any person who knowingly drives, operates, or causes to be operated any commercial motor vehicle in violation of an out-of-service order issued by the department in accordance with this section commits a felony of the third degree, punishable as provided in s. 775.082(3)(e) ~~775.082(3)(d)~~. Any costs associated with the impoundment or storage of such vehicles are the responsibility of the motor carrier. Vehicle out-of-service orders may be rescinded when the department receives proof of authorization for the motor carrier to resume operation.

Section 5. Subsection (3) of section 373.430, Florida Statutes, is amended to read:

373.430 Prohibitions, violation, penalty, intent.—

(3) Any person who willfully commits a violation specified in paragraph (1)(a) is guilty of a felony of the third degree, punishable as provided in ss. 775.082(3)(e) ~~775.082(3)(d)~~ and 775.083(1)(g), by a fine of not more than $50,000 or by

imprisonment for 5 years, or by both, for each offense. Each day during any portion of which such violation occurs constitutes a separate offense.

Section 6. Subsection (3) of section 403.161, Florida Statutes, is amended to read:

403.161 Prohibitions, violation, penalty, intent.—

(3) Any person who willfully commits a violation specified in paragraph (1)(a) is guilty of a felony of the third degree punishable as provided in ss. 775.082(3)(e) ~~775.082(3)(d)~~ and 775.083(1)(g) by a fine of not more than $50,000 or by imprisonment for 5 years, or by both, for each offense. Each day during any portion of which such violation occurs constitutes a separate offense.

Section 7. Paragraph (c) of subsection (3) of section 648.571, Florida Statutes, is amended to read:

648.571 Failure to return collateral; penalty.—

(3)

(c) Allowable expenses incurred in apprehending a defendant because of a bond forfeiture or judgment under s. 903.29 may be deducted if such expenses are accounted for. The failure to return collateral under these terms is punishable as follows:

1. If the collateral is of a value less than $100, as provided in s. 775.082(4)(a).

2. If the collateral is of a value of $100 or more, as

provided in s. 775.082(3)(e) ~~775.082(3)(d)~~.

3. If the collateral is of a value of $1,500 or more, as provided in s. 775.082(3)(d) ~~775.082(3)(c)~~.

4. If the collateral is of a value of $10,000 or more, as provided in s. 775.082(3)(b).

Section 8. This act shall take effect July 1, 2014.