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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 REPLY BRIEF OF PETITIONER REBECCA LEE FALCON

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

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SUMMARY OF ARGUMENT

The state's argument that Chapter 2014-220, Laws of Florida, is of no consequence to this case, or to any case in which the offense pre-dated July 1, 2014, ignores the role of the Court in enforcing rules of constitutional law. That the argument is fundamentally flawed is evidenced by the state's inconsistent positions on *Miller v. Alabama*'s requirement of an individualized sentencing hearing for a juvenile facing lifetime incarceration. On the one hand, the state argues that the Legislature's new statutory provision for such a hearing cannot be applied to Ms. Falcon or any child whose offense occurred before July 1, 2014. On the other, the state argues, as it has in prior briefs, that the same remedy is required once *Miller* is declared retroactive.

Ms. Falcon has not asserted that the *statute* should be applied retroactively. Rather, it is *Miller* that is retroactive. And once that is recognized, this Court must formulate a remedy, as the state also acknowledges. Ms. Falcon maintains that the Eighth Amendment remedy that is ultimately chosen by the Court should be informed by the Legislature's response to *Miller* as reflected in Chapter 2014-220.

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.

The fallacy in the state's argument – that Chapter 2014-220, Laws of Florida, has no bearing on cases in which the offense predates July 1, 2014 – is elucidated by the state's own supplemental briefs. For in both supplemental briefs, the state points out that an essential remedy to comply with *Miller v. Alabama*, 132 S. Ct. 2455 (2012), is an individualized sentencing hearing at which youth and attendant circumstances can be considered and a determination made as to the propriety of a lifetime sentence. (Respondent's Supplemental Answer Brief ("RSAB") at 8, 23, 25; Respondent's Second Supplemental Answer Brief ("RSSAB") at 3-4). Indeed, the state requests, in concluding its first supplemental brief, that the Court, if it holds *Miller* retroactive, "should first remand for an individualized sentencing hearing in which the court can [consider] the offender's youth and attendant characteristics." (RSAB at 25).

Yet, in its second supplemental brief, the state now insists that this precise remedy cannot be granted to any juvenile whose offense predated July 1, 2014. (RSSAB at 2). The justification for this new position is that the Legislature has

now provided for that remedy in section 921.1401, Florida Statutes (2014), and that statute, by its terms, does not apply to pre-July 1, 2014 offenses. *Id.*[1]

The fact that the Legislature has finally responded to *Miller* with a sentencing remedy cannot eviscerate this Court's inherent power and obligation, once it is determined that *Miller* is indeed retroactive, to enforce the Supreme Court's Eighth Amendment holding.[2] The state all but concedes that this Court must fashion a *Miller* remedy when, later in this same second supplemental brief, the state explains that, should this Court find *Miller* retroactive, "pursuant to *Miller*, a trial court may still impose a life without parole sentence if the trial court

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[1] If this argument were to be accepted, even children who are to be tried in the near future will be denied the sentencing hearing that heretofore all have agreed is required under *Miller*, because the Legislature, as it was arguably required to do under Article X, Section 9 of the Florida Constitution, made the statute effective only to crimes committed after its effective date. But just as there is no principled distinction between those seeking Eighth Amendment relief under *Miller* in post-conviction and those doing so on direct review, as the state concedes (RSAB at 24), there is no such distinction between those whose crimes occurred prior to July 1, 2014, and those whose crimes occurred thereafter.

[2] The state's argument to the contrary conflates decisional retroactivity with statutory retroactivity. But the two concepts are distinct. *See Smiley v. State*, 966 So. 2d 330, 333 (Fla. 2007) ("[T]he first distinction with regard to retroactive application of changes in the law is that between decisional law and statutory law. In Florida, the *Witt* analysis determines whether a change in the decisional law will receive retroactive application[.]") (footnote omitted). The issue raised by Ms. Falcon concerns *decisional* retroactivity – that *Miller* is fundamentally significant and thus retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The retroactivity of the decision requires a remedy, as this Court implicitly recognized in directing the parties to file the initial supplemental briefs. See Order dated March 7, 2014.

finds that the sentence would be appropriate after conducting an individualized hearing and considering the offender's youth and attendant characteristics." (RSSAB at 3-4). The state thus acknowledges that any retrospective remedy will require an individualized sentencing proceeding. And that is the very remedy now required under the new statute, the provisions of which the state, on the preceding pages of its brief, suggests must be ignored. (RSSAB at 2-3).

The parties concur that, quite irrespective of legislative action, it is for the Court to decide *Miller's* retroactivity, a fact which the Legislature also apparently understood, as it has been basic to Florida retroactivity jurisprudence since *Witt v. State*, 387 So. 2d 922 (Fla. 1980). And once it is agreed that *Miller* is retroactive and that the mandatory lifetime incarceration required by the statute under which Ms. Falcon was sentenced is unconstitutional, this Court has the obligation, pursuant to its inherent authority and all-writs power, to provide a remedy for the federal constitutional violation.

But this does not mean that the legislative action is of no consequence. Because a remedy for the constitutional violation must be formulated, the remedy chosen by the Court can properly be informed by legislative intent, as manifested in Chapter 2014-220, Laws of Florida. *See State ex rel. Atwood v. Baker*, 250 So. 2d 869, 871 (Fla. 1971) (where speedy trial statute was repealed and replaced by Fla. R. Crim. P. 1.191 and defendant's motion for discharge was filed after the repeal, defendant was entitled to discharge where time allotted by Legislature had elapsed, the Court explaining "[w]ith the repeal, and prior to the announcement of

Rule 1.191, the only surviving speedy trial right was that guaranteed to petitioner by the Constitution. We think that it is appropriate to consider the legislative determination of the maximum delay as a valid measurement of the constitutional rights of a defendant") (internal quotation marks omitted). That Chapter 2014-220's statutory scheme coincides with Ms. Falcon's proposed remedy – judicial discretion to impose a term-of-years sentence, up to and including life imprisonment if deemed appropriate after an individualized sentencing hearing, with subsequent judicial sentence review – demonstrates that, unlike the state's argument for statutory revival of the 1993 statute, Ms. Falcon's proposed remedy is consistent with the current Legislature's policy determinations.

Indeed, the state fails even to mention the newly enacted section 921.1402, Florida Statutes (2014), which is also set forth in Chapter 2014-220, and which provides for judicial modification and reduction of sentences. Instead, the state reiterates its argument that, if the sentencing court rejects a sentence of lifetime incarceration, the court should revive a 20-year-old statute that provided for life imprisonment with parole eligibility after 25 years. (SSAB at 4). But it is beyond question that that argument has lost any legitimacy in light of the recent statutory scheme, which reflects the legislative determination to entrust the subsequent modification of a child's sentence to a judge, not a parole commission. A modest addition to the modification and reduction provision of Fla. R. Crim. P. 3.800(c), which would provide for judicial modification and reduction of a juvenile's

sentence after passage of a significant period of time, would provide a remedy consistent with *Miller*'s holding and the remedy chosen by the Legislature.

At bottom, the state's rigid submission that the Court close its eyes to the Legislature's response to *Miller* ignores the legislative prerogative essential to the separation-of-powers dictates. But even more significant is the state's denigration of the fundamental fairness and equal protection of the laws enshrined in the Constitution. As this Court underscored in *Witt*, "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" 387 So. 2d at 925 (footnote omitted). Ms. Falcon requests that the Court announce a remedy that respects both the determination made by the Legislature and her right to an individualized and proportional sentence as required by the Eighth Amendment.

CONCLUSION

Based upon the foregoing, Ms. Falcon respectfully requests that the Court hold *Miller v. Alabama*, 132 S. Ct. 2455 (2012), retroactive and provide a just remedy for the Eighth Amendment violation after due consideration of the Legislature's new statutory scheme.

Respectfully submitted,

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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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