IN THE SUPREME COURT OF FLORIDA

LAISHA L. LANDRUM, :

Petitioner, :

vs. : Case No. SC15-1071

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case comes before the Court on discretionary review of the Second District's opinion in Landrum v. State, 163 So. 3d 1261 (Fla. 2d DCA 2015), which affirmed the juvenile Petitioner's non-mandatory sentence of life imprisonment but certified a question of great public importance.

The Petitioner, LAISHA L. LANDRUM, was convicted of second-degree murder with a weapon in violation of sections 782.04 and 775.087(1)(a), Florida Statutes (2003). The crime occurred on June 9, 2004, and at that time the Petitioner was a 16 year old juvenile. (V1/R1-9) Second-degree murder is a felony of the first degree but in this case was reclassified to a life felony because a weapon was used during the crime. § 775.087(1)(a), Fla. Stat. (2003). A life felony is punishable "by 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. (2003).

The sentencing hearing was held on February 20, 2006. (V3/R10-34) Some mitigation was presented. Defense counsel explained that Ms. Landrum had "minimal contact" with law enforcement prior to these charges. Defense counsel noted she had one prior burglary of a conveyance and grand theft, but she successfully completed a diversion program and the case was dismissed. (V3/R12) Ms. Landrum earned her GED. Ms. Landrum had a

two year old daughter, and had maintained employment before her arrest. (V3/R11-12)

Defense counsel argued that the "horrible pictures" presented during the trial were not the result of Ms. Landrum's hands, and that compared to her co-defendant boyfriend, Ms. Landrum had "relative culpability" and should receive a disparate sentence from that of the co-defendant. The co-defendant received a life sentence. (V3/R13) The prosecutor argued Ms. Landrum was the more culpable defendant. (V3/R31) Defense counsel reminded the trial court of the jury's question, "If assumed the defendant is a principal to acts committed by a third party, is it feasible to convict a second degree murder even if unable to prove defendant caused fatal wounds?" as the jury's indication that Ms. Landrum's participation in the crime was less than the co-defendant's. This question also indicated that the jury believed Ms. Landrum did not cause the victim's fatal wounds. (V3/R14)

Ms. Landrum's parents and aunt spoke at the sentencing hearing, and the victim's father addressed the effect of the crime on his family. (V3/R15-21; R25-30) Ms. Landrum also addressed the court, apologizing for what had happened. (V3/R24; R33-34)

Defense counsel argued for a downward departure based on two statutory mitigators that were present in this case: 1) that the victim was an initiator, willing participant, or aggressor of the incident; and 2) that the crime was committed in an unsophisticated manner, was an isolated incident, and Ms. Landrum

showed remorse. See § 921.0026(f) and (j), Fla. Stat. (2003). (V3/R22) Defense counsel maintained that Ms. Landrum should get a light at the end of the tunnel and not be a "throw-away" defendant. (V3/R23) Ms. Landrum's scoresheet calculation yielded a minimum state prison sentence of 26.5 years. (V3/R21) The trial court sentenced Ms. Landrum to life imprisonment without the possibility of parole. (V2/R5; V3/R34)

Following the decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), Ms. Landrum filed a pro se motion pursuant to Florida Rule of Criminal Procedure 3.800(a) requesting to be resentenced in light of Miller. (V1/R1-7) The trial court denied the motion, finding Miller was not retroactive. The Second District reversed, finding Miller to be retroactive and remanding the case to the trial court for consideration consistent with Miller and Toye v. State, 133 So. 3d 540 (Fla. 2d DCA 2014). See Landrum v. State, 133 So. 3d 601 (Fla. 2d DCA 2014).

On remand, the State argued that because Ms. Landrum was convicted of a life felony and not a capital felony she was not sentenced to mandatory life imprisonment without the possibility of parole but instead received a discretionary life imprisonment sentence. The State maintained her sentence was not unconstitutional under Miller and she was not entitled to be resentenced in accordance with Miller. (V2/R1-4) The trial court agreed and denied her motion to correct illegal sentence, relying on the Second District's opinion in Starks v. State, 128 So. 3d 91

(Fla. 2d DCA 2013)[1]. (V2/R5-7) In Starks, the Second District held that Miller is inapplicable in instances where the sentencing scheme did not mandate a life without parole sentence. Id. Starks, like Landrum, was convicted of second-degree murder with a weapon, a life felony punishable by life or a term of years not exceeding life. See §§ 775.082(3), 775.087(1)(a), 782.04(2), Fla. Stat. (2003). The Second District held that Starks's sentence was not unconstitutional under Miller and he was not entitled to resentencing under Miller because the statute under which Starks was sentenced did not mandate a life sentence but instead provided the trial court with a choice of a life sentence or a sentence of a term of years. Id. at 92.

Ms. Landrum appealed the order summarily denying her motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a), and the Second District issued an opinion in Landrum v. State, 163 So. 3d 1261 (Fla. 2d DCA 2015). The Second District affirmed, but issued a written opinion in order to discuss "an apparent sentencing incongruity that now exists in the district." Id. The Second District affirmed Ms. Landrum's sentence based on its precedent in Starks, but noted that since Starks issued, "the legislature enacted chapter 2014-220, Laws of Florida, and the Florida Supreme Court decided Horsley v. State, 160 So. 3d 393 (Fla. 2015)." Id. at 1262.

[1] Starks was disapproved on other grounds by this Court in Lawton v. State, 40

The Second District explained the sentencing anomaly:

> The concurrence of the Florida Supreme Court's holding in Horsley with our holding in Starks has created an apparent sentencing anomaly in this district- a juvenile convicted of first-degree murder enjoys the right to eventual review of his or her sentence without regard to the date of his or her offense while a juvenile convicted of second-degree murder and sentenced to life before the effective date of the new legislation does not. This circumstance also raises the question whether those juveniles convicted of second-degree murder and sentenced to life imprisonment before July 1, 2014, are entitled to the individualized sentencing hearing called for in Miller.

Id. at 1263. The Second District acknowledged that Miller did not preclude a sentencing court's ability to impose a life-without-parole sentence on a juvenile, but before doing so the trial court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 1263 (quoting Miller, 132 S.Ct. at 2469). The Second District noted Miller's anticipated result in requiring an individualized sentencing "would render the imposition of 'this harshest possible penalty [on juveniles]' uncommon." Id. (quoting Miller, 132 S.Ct. at 2469).

The Second District recognized Ms. Landrum has received "this harshest possible penalty" even though she was not convicted of the highest possible degree of murder, leading the district court to question whether the logic of Horsley applies to juveniles in Ms. Landrum's situation and whether the same remedy should also be applied to children like Ms. Landrum who received a discretionary

(..continued)
Fla. L. Weekly S195 (Fla. Apr. 9, 2015).

life without the possibility of parole sentence before the date of the effective legislation. Id. at 1263 ("This circumstance raises the question whether the logic of the Horsley court's application of the procedures outlined in chapter 2014-220 to address the Eighth Amendment violation identified in Miller requires the application of that same remedy to persons such as Ms. Landrum, who have been found guilty of second-degree murder and sentenced to life in prison without the possibility of parole before the effective date of the new legislation.").

In Landrum, the Second District held it was "compelled" to follow its precedent in Starks, but certified the following question as one of great public importance:

> BECAUSE THERE IS NO PAROLE FROM A LIFE SENTENCE IN FLORIDA, DOES MILLER V. ALABAMA, 132 S.CT. 2455 (2012) REQUIRE THE APPLICATION OF THE PROCEDURES OUTLINED IN SECTIONS 775.082, 921.1401, AND 921.1402, FLORIDA STATUTES (2014), TO JUVENILES CONVICTED OF SECOND-DEGREE MURDER AND SENTENCED TO A NON-MANDATORY SENTENCE OF LIFE IN PRISON BEFORETHE EFFECTIVE DATE OF CHAPTER 2014-220, LAWS OF FLORIDA?

Ms. Landrum filed a notice to invoke the jurisdiction of this Court and this Court accepted jurisdiction on June 18, 2015.

SUMMARY OF THE ARGUMENT

The Second District erred in affirming Ms. Landrum's discretionary life without the possibility of parole sentence. The recent decisions of the United States Supreme Court and this Court mandate that a trial court consider the distinctive attributes of youth before sentencing a juvenile to this harshest possible penalty. Minimal mitigation was presented at Ms. Landrum's sentencing, and because the trial court was without the benefit of Miller, there was no presentation of mitigation which addressed Ms. Landrum's youth and attendant circumstances or her ability to be rehabilitated. Ms. Landrum was tried as an adult and her sentencing was conducted as though she were an adult. Ms. Landrum's life-without-parole sentence is unconstitutional under Miller because the trial court did not consider the characteristics of youth and other individualized sentencing considerations set forth in Miller, Horsley, and chapter 2014-220, Laws of Florida. Because she is currently in a class of juveniles who are left behind, this Court should extend these rulings to apply to her.

Moreover, Ms. Landrum's sentence is unconstitutional because it is grossly disproportionate to her crime. In the wake of Miller, Falcon, and Horsley, juvenile defendants who committed more serious crimes than Ms. Landrum will receive individualized

sentencing hearings and a written determination of whether or not they will qualify for a judicial review of their sentences after a term of years. The maximum penalty for Ms. Landrum's life felony is now harsher than the penalty for another juvenile's capital felony. Ms. Landrum, who committed a less serious crime, now has an unconstitutional cruel and unusual sentence because her sentence is grossly disproportionate to the crime. In order to cure her unconstitutional sentence, this Court should extend the ruling of Miller to her sentence and apply Horsley and the new legislation to her. Ms. Landrum respectfully requests this Court answer the certified question in the affirmative, quash the decision of the Second District, and remand for resentencing in light of Horsley.

ARGUMENT

ISSUE I

BECAUSE THERE IS NO PAROLE FROM A LIFE SENTENCE IN FLORIDA, DOES MILLER V. ALABAMA, 132 S.CT. 2455 (2012) REQUIRE THE APPLICATION OF THE PROCEDURES OUTLINED IN SECTIONS 775.082, 921.1401, AND 921.1402, FLORIDA STATUTES (2014), TO JUVENILES CONVICTED OF SECOND-DEGREE MURDER AND SENTENCED TO A NON-MANDATORY SENTENCE OF LIFE IN PRISON BEFORE THE EFFECTIVE DATE OF CHAPTER 2014-220, LAWS OF FLORIDA?

Ms. Landrum, a juvenile, was convicted of second-degree murder and sentenced to life imprisonment without the possibility of parole, the harshest possible penalty, without being afforded a sentencing hearing where the trial court could consider her characteristics of youth and other individualized sentencing considerations under Miller. After being convicted of second-degree murder, Ms. Landrum received a discretionary sentence of life imprisonment. Because the trial court was without the benefit of Miller and the new sentencing legislation, there was no presentation of mitigation, and therefore no consideration by the trial court, of the youthful distinctive attributes of Ms. Landrum. Nor was there any presentation of Ms. Landrum's ability to be rehabilitated. In the wake of Miller, Falcon, and Horsley, juvenile defendants who committed more serious crimes than Ms. Landrum will receive individualized sentencing hearings and a written determination of whether or not they will qualify for a judicial review of their sentences after a term of years. Ms.

Landrum's sentencing is unconstitutional under Miller and Horsley. Moreover, Ms. Landrum, who committed a less serious crime, now has a grossly disproportionate sentence that amounts to cruel and unusual punishment. In order to cure her unconstitutional sentence, this Court should extend the ruling of Miller to her sentence and apply Horsley and the new legislation to her. Ms. Landrum respectfully requests this Court answer the certified question in the affirmative, quash the decision of the Second District, and remand for resentencing.

A. Children are different.

In Miller v. Alabama, 132 U.S. 2455, 2469 (2012), the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." As this Court noted in Horsley v. State, 160 So. 3d 383, 398 (Fla. 2015), this is the third in a line of Supreme Court cases to recognize that juveniles are different from adults for sentencing purposes: "Over the past decade, the United States Supreme Court has issued a line of decisions establishing the legal principle that juveniles 'are constitutionally different from adults for purposes of sentencing.'" (quoting Miller, 132 S. Ct. at 2464.) The Supreme Court first emphasized juvenile offenders' "diminished culpability and greater prospects for reform" in Roper v. Simmons, 543 U.S. 551, 568 (2005), which held the Eighth Amendment prohibits the death penalty for juveniles.

In Graham v. Florida, 560 U.S. 48, 74 (2010), the Supreme Court held the Eighth Amendment precludes a juvenile to be sentenced to life in prison without parole for a nonhomicide crime. In Graham, the Supreme Court established a "clear line" that "is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently capable to merit that punishment." Id. As explained in Miller, Graham stands for the proposition that the Eighth Amendment prohibits certain punishments without "considering a juvenile's 'lessened culpability' and greater 'capacity for change.'" 132 S. Ct. at 2460 (quoting Graham, 560 U.S. at 68, 74). "What the State must do . . . is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. As Graham stressed, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole" because "the characteristics of youth" serve to "weaken rationales for punishment." Miller, 132 S. Ct. at 2465-66; see Graham, 560 U.S. at 71-74.

In Miller, the Supreme Court envisioned that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 2469. The Supreme Court's requiring of an individualized sentencing hearing for juvenile offenders led the Court to conclude it would only be the "rare" juvenile offender "whose crime reflects irreparable corruption"

that would be subject to the "uncommon" sentence of life imprisonment without the possibility of parole. Id. While the Supreme Court in Miller did "not foreclose a sentencer's ability to make that judgment in homicide cases," it did "require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," specifically noting that its holding "requires factfinders ... to take into account the differences among defendants and crimes." Id. at 2469 n.8. In Horsley, this Court summarized the Supreme Court's conclusions regarding sentencing juveniles to life without the possibility of parole:

> Taken together, Graham and Miller establish that "children are different"; that "youth matters for purposes of meting out the law's most serious punishments"; and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Under Miller, a "mandatory sentencing scheme[]" that requires life imprisonment without the possibility of parole for a juvenile offender-as did the version of section 775.082(1), Florida Statutes, in effect from May 25, 1994 until July 1, 2014-violates the Eighth Amendment.

Horsley, 160 So. 3d at 399 (internal citations omitted).

In Falcon v. State, 162 So. 3d 954 (Fla. 2015), this Court found the Miller ruling applied retroactively to juvenile offenders whose convictions and sentences were already final at the time Miller was decided. In doing so, this Court recognized that the Miller decision "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and

(c) constitutes a development of fundamental significance." Id. at 960-63; see also Witt v. State, 387 So. 2d 922 (Fla. 1980). As this Court stated 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.'" Witt, 387 So. 2d at 925 (quoting ABA Standards Relating to Postconviction Remedies 37 (Approved Draft 1968)). In support of applying Miller retroactively, this Court explained in Falcon:

> Here, if Miller is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the Miller decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in Miller retroactively.

Falcon, 162 So. 3d at 962. Similarly, in Henry v. State, 40 Fla. L. Weekly S147, *5 (Fla. Mar. 19, 2015), this Court held a juvenile's aggregate 90-year sentence for a nonhomicide crime violated Graham and the Eighth Amendment: "In light of Graham, and other Supreme Court precedent, we conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of imprisonment for a juvenile is qualitatively different than a comparable period of incarceration for an adult." See also Gridine

v. State, 40 Fla. L. Weekly S149, *3 (Fla. Mar. 19, 2015) (finding Graham applicable to a nonhomicide offense, and ruling that the juvenile's 70-year sentence was unconstitutional because it failed to provide him with a meaningful opportunity for early release based on a demonstration of his maturity and rehabilitation).

In Horsley, this Court instructed the lower courts that the appropriate remedy for all juvenile offenders whose sentences are unconstitutional under Miller is to apply chapter 2014-220, Laws of Florida. Florida's legislation enacted on July 1, 2014, provides for a new sentencing scheme and is codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. Horsley, 160 So. 3d at 401 ("Section one provides the new statutory penalties for juvenile offenders; section two sets forth the procedures for the mandatory individualized sentencing hearing that is now required before sentencing a juvenile to life imprisonment; and section three relates to subsequent judicial review of a juvenile offender's sentence."). The new statutory penalties for juvenile offenders separate offenders into a system of graduated penalty classes including those juveniles convicted of capital felonies or offenses reclassified as a capital felony, juveniles convicted of life or first-degree felony homicide offenses, and juveniles convicted of nonhomicide offenses, and provide for a review mechanism after a period of years as determined by the class. See §§ 775.082(1), Fla. Stat. (2014); 775.082(3)(a)5, Fla. Stat. (2014); 775.082(3)(b), Fla. Stat.

(2014). The sentencing scheme provides for different sentencing options based on whether the juvenile convicted of a capital felony "actually killed, intended to kill, or attempted to kill the victim" or "did not actually kill, intend to kill, or attempt to kill the victim." See § 775.082(1)(b), Fla. Stat. (2014).

This Court explained that sentencing under the 2014 legislation is appropriate even if the juvenile's offense was committed prior to the July 1, 2014, effective date of the legislation. Horsley, 160 So. 3d at 405-7; see also Falcon, 162 So. 3d at 963; Henry v. State, 40 Fla. L. Weekly S147, *5 (Fla. Mar. 19, 2015)(appropriate remedy for an unconstitutional sentence under Graham is remanding for resentencing in light of the new juvenile sentencing legislation enacted by the Florida Legislature in 2014, chapter 2014-220, Laws. Of Fla.); Gridine v. State, 40 Fla. L. Weekly S149, *3 (Fla. Mar. 19, 2015)(same).

B. The effect of Miller, Falcon, and Horsley.

Since the issuance of the Miller, Falcon, and Horsley opinions, the district courts have been reversing and remanding the sentences of several juveniles who received mandatory life without the possibility of parole sentences. See Mackey v. State, 162 So. 3d 48 (Fla. 4th DCA 2014)(reversed and remanded with instructions to conduct an individualized sentencing hearing); Williams v. State, No. 5D14-306 (Fla. 5th DCA July 10, 2015)(reversed and remanded for resentencing under Horsley). The district courts are following this Court's guidance in instructing

the trial courts to conduct individualized sentencing hearings to determine whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence by considering the factors relevant to the offense and the defendant's youth and attendant circumstances as codified in section 921.1041, Florida Statutes (2014), 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.

In the Second District, the court has reversed the mandatory life without possibility of parole sentences for several juveniles and remanded for resentencing in light of Miller, Falcon, and Horsley. See Bartel v. State, 163 So. 3d 1224 (Fla. 2d DCA 2015); Cruz v. State, 164 So. 3d 117 (Fla. 2d DCA 2015); Moran v. State, 164 So. 3d 68 (Fla. 2d DCA 2015); Davis v. State, 164 So. 3d 67 (Fla. 2d DCA 2015); Maize v. State, 164 So. 3d 66 (Fla. 2d DCA 2015); Mares v. State, 164 So. 3d 65 (Fla. 2d DCA 2015); Torres v. State, 159 So. 3d 164 (Fla. 2d DCA 2015); Burton v. State, 148 So. 3d 541 (Fla. 2d DCA 2014). All of these juvenile defendants were convicted of first-degree murder and received mandatory life without the possibility of parole sentences. Cf. McPherson v. State, 138 So. 3d 1201 (Fla. 2d DCA 2014)(holding Graham and Miller do not involve life sentences with parole eligibility after a term of years); Atwell v. State, 128 So. 3d 167, 169 (Fla. 4th DCA 2013)(holding Miller does not affect a sentence of life imprisonment with parole eligibility after twenty-five years).

In Blake v. State, No. 2D10-5700 (Fla. 2d DCA July 10, 2015), the defendant received a life without the possibility of parole sentence following an individualized sentencing hearing as discussed in Horsley and codified in section 921.1401, Florida Statutes (2014). The Second District affirmed Blake's sentence of life imprisonment but reversed and remanded in order for the trial court to determine whether Blake is entitled to judicial review of his sentence after twenty-five years. Id. See also Copeland v.

State, 129 So. 3d 508 (Fla. 1st DCA 2014)(affirming life without the possibility of parole sentence after trial court conducted an "individualized mitigation inquiry"); Lane v. State, 151 So. 3d 20 (Fla. 1st DCA 2014)(same).

C. Children left behind.

In Chapter 2014-220, Laws of Florida, the Florida Legislature has created a post-Miller sentencing scheme for all juveniles who commit their offenses after its July 1, 2014, enactment. The new statutes provide a specific sentencing scheme for juveniles that includes taking into account their "characteristics of youth," "diminished capacity" and "lessened culpability" before imposing a life without the possibility of parole sentence. Falcon has extended the legislation retroactively, granting juvenile defendants who committed their offenses prior to the 2014 legislation who received a mandatory life imprisonment sentences to be resentenced with an individualized sentencing hearing and to include a determination if they qualify for a judicial review after a period of years. See § 921.1402, Fla. Stat. (2014). Juveniles with lengthy aggregate sentences violating Graham are entitled to resentencing in light of Henry and Horsley. See Streeter v. State, 163 So. 3d 1281 (Fla. 2d DCA 2015).

But there remains one class of juveniles who is not entitled to be resentenced with an individualized sentencing hearing and with a determination if they qualify for a judicial review after a period of years; this is Ms. Landrum's class. Ms. Landrum was

convicted of second-degree murder for a crime she committed on June 9, 2004. Second-degree murder is a felony of the first degree but in this case was reclassified to a life felony because a weapon was used during the crime. § 775.087(1)(a), Fla. Stat. (2003). A life felony is punishable "by 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. (2003). Because this gave the trial court the choice between sentencing Ms. Landrum to life in prison without the possibility of parole or to a term of years, Ms. Landrum did not receive a mandatory life without the possibility of parole sentence. Instead, following a sentencing hearing with minimal mitigation, she received a discretionary life without the possibility of parole sentence. However, this is the same resulting sentence. For persons convicted on or after October 1, 1983, there is no parole from a life sentence in Florida. See § 921.001(10)(b), Fla. Stat. (2003); Lewis v. State, 625 So. 2d 102, 103 (Fla. 1st DCA 1993). Therefore, Ms. Landrum will spend the rest of her life in prison even though she committed a less serious crime than those defendants who qualify for a Miller and Horsley resentencing. Other similarly situated juveniles convicted of second-degree murder who received discretionary life sentences have also been denied relief based on the same reasoning, that because their sentences are not "mandatory" they are not unconstitutional under Miller. See Starks v. State, 128 So. 3d 91, 92 (Fla. 2d DCA 2013)("[B]ecause the

statute under which Starks was sentenced did not mandate a life sentence but provided the trial court with a choice of a life sentence or a sentence of a term of years, Starks was not sentenced under a sentencing scheme condemned in Miller."); Mazer v. State, 152 So. 3d 20 (Fla. 2d DCA 2014)(same); Mason v. State, 134 So. 3d 499 (Fla. 4th DCA 2014)(same); Lindsey v. State, 40 Fla. L. Weekly D1464 (Fla. 2d DCA June 24, 2015)(same).

The Second District relied on the authority of its precedent in Starks in affirming Ms. Landrum's sentence. Landrum, 163 So. 3d at 1263. But the Second District recognized the sentencing anomaly this ruling created:

> The concurrence of the Florida Supreme Court's holding in Horsley with our holding in Starks has created an apparent sentencing anomaly in this district- a juvenile convicted of first-degree murder enjoys the right to eventual review of his or her sentence without regard to the date of his or her offense while a juvenile convicted of second-degree murder and sentenced to life before the effective date of the new legislation does not. This circumstance also raises the question whether those juveniles convicted of second-degree murder and sentenced to life imprisonment before July 1, 2014, are entitled to the individualized sentencing hearing called for in Miller.

Id. at 1263. In order to cure the incongruity, the Miller characteristics and individualized sentencing factors found in the new legislation should be uniformly applied to all juveniles before they receive a sentence of life imprisonment, even if they committed their crimes before the enacted legislation.

Ms. Landrum's sentence is unconstitutional under Miller even though she received discretionary, and not mandatory, life

sentence. Ms. Landrum did receive a sentencing hearing with some mitigation; however, it is obvious that the trial court was without the benefit of Miller at that time. Ms. Landrum was tried as an adult and she received an adult sentencing hearing. Some of the Miller and section 921.1401 sentencing factors were briefly addressed including: the nature and circumstances of the offense committed by the Ms. Landrum; the effect of the crime on the victim's family and on the community; Ms. Landrum's background, including her family, home, and community environment; the extent of her participation in the offense; and the nature and extent of her prior criminal history. What is most notable are the factors which were not addressed at the sentencing. There was no presentation, and therefore no consideration by the trial court, of these Miller and section 921.1401 factors: Ms. Landrum's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense; the effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on Ms. Landrum's participation in the offense; the effect, if any, of familial pressure on Ms. Landrum's actions; the effect, if any, of characteristics attributable to Ms. Landrum's youth on the her judgment; and the possibility of rehabilitating Ms. Landrum. See § 921.1401, Fla. Stat. (2014). None of the attributes of youth and distinctive characteristics of youth stressed by Miller, Roper, and Graham were addressed at Ms. Landrum's sentencing. Defense counsel mentioned Ms. Landrum's tender age and requested the trial

court not consider her a "throw away" defendant, but there was no testimony regarding her youth and her ability to be rehabilitated. It was an adult sentencing hearing.

D. The application of the Eighth Amendment in non-death penalty cases.

Both the Eighth Amendment to the United States Constitution and article I, section 17 of the Florida Constitution forbid "cruel and unusual punishment." Ms. Landrum's life without parole sentence is unconstitutional because it is grossly disproportionate to the sentences of juveniles who committed a more serious crime but who will benefit from Miller and the new legislation. The latter juveniles will automatically obtain a new individualized sentencing hearing and most will be entitled to eventual judicial reviews encompassing mitigation or possible release from their sentences. Ms. Landrum has received the "harshest penalty" possible for a juvenile even though she was convicted of a less serious crime than those who will benefit from Miller and Horsley.

"A review of a sentence in the context of a constitutional violation is subject to a de novo review." Dempsey v. State, 72 So. 3d 258, 262 (Fla. 4th DCA 2011)(citing Guzman v. State, 68 So. 3d 295, 296 (Fla. 4th DCA 2011)); see also Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004).

"Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime

should be graduated and proportioned to [the] offense.'" Graham, 130 S. Ct. at 2021 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). "For non-death penalty cases, a more "narrow" concept of proportionality applies." Peters v. State, 128 So. 3d 832, 850 (Fla. 4th DCA 2013). The Peters court noted that the Eighth Amendment provides "a guarantee of proportionality" that "acts as a minimum standard." Id. (quoting Hale v. State, 630 So. 2d 521, 525 (Fla. 1993)). The "minimum standard" requires that the "proportionality analysis focuses on the crime charged and the legislatively imposed punishment for the crime, not the specific acts of a particular case." Id. (quoting Edwards v. State, 885 So. 2d 1039, 1039 (Fla. 4th DCA 2004)).

A prison sentence can constitute cruel and unusual punishment solely because of its length if it is grossly disproportionate to the crime. See Andrews v. State, 82 So. 3d 979, 984 (Fla. 1st DCA 2011)(the "Florida Supreme Court has held that in order for a prison sentence to constitute cruel and unusual punishment solely because of its length, the sentence must be grossly disproportionate to the crime." (citing Adaway v. State, 902 So. 2d 746, 750 (Fla. 2005)); see also Lightbourne v. McCollum, 969 So. 2d 326, 336 (Fla. 2007)("A punishment [will be] excessive [only] if (1) the punishment involves the 'unncessary and wanton infliction of pain'; or (2) the punishment is grossly out of proportion to the severity of the crime." (quoting Gregg v. Georgia, 428 U.S. 153 (1976))). Non-death-penalty proportionality

review is necessary in order to determine whether a sentence may be stricken as "grossly disproportionate" to the crime. In Florida, a sentence can be held to be grossly disproportionate and therefore unconstitutional when a court finds the following three factors to be satisfied:

> First, a court must consider the "gravity of the offense and the harshness of the penalty." [Solem, 463 U.S. at 292] Second, a court may examine "the sentences imposed on other criminals in the same jurisdiction." Id. Third, a court may examine "the sentence imposed for the commission of the same crime in other jurisdictions." Id.

Wiley v. State, 125 So. 3d 235, 240 (Fla. 4th DCA 2013)(quoting Andrews, 82 So. 3d at 984.)

Notably, "[i]n applying this test, the Supreme Court has indicated that '[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.'" Peters v. State, 128 So. 3d 832 (Fla. 4th DCA 2013)(quoting Solem, 463 U.S. at 291). "As established by the legislature, sentencing in Florida centers around a graduated system, where criminals are placed into classes of potential punishment based on the seriousness of each offense." Peters, 128 So. 3d at 851 (citing Burdick v. State, 594 So. 2d 267, 268 (Fla. 1992)). "The legislature has created separate classes subject to increased levels of punishment: misdemeanor defendants are punished less harshly than felons; first, second, and third degree felons face less punishment than life felons, and only capital felons face the possibility of

death." Id.

In Peters, the appellant argued that in the wake of Graham his 99 year sentence for armed robbery under sections 775.082(3)(b), Florida Statutes (1989) and 812.13(2), Florida Statutes (1989) was unconstitutional as applied to him, a juvenile at the time of the offenses, because the maximum penalty for that aggravated first degree felony was harsher than the sentence faced by a juvenile convicted of a life felony, a more serious crime. Id. at 851. Peters was convicted of armed robbery under section 812.13(2), Florida Statutes (1989), a felony of the first degree "punishable by imprisonment for a term of years not exceeding life imprisonment." Id. However, for a life felony, the 1989 sentencing scheme instructed "for a life felony committed on or after October 1, 1983, by a term of a imprisonment for life or by a term of imprisonment not exceeding forty years." § 775.082(3)(a), Fla. Stat. (1989). The "statutory anomaly" arose after Graham held that "[t]he Constitution prohibits the imposing of a life without parole sentence on a juvenile offender who did not commit homicide." Id. at 852 (quoting Graham, 130 S. Ct. at 2034). For a juvenile who committed first degree felonies punishable "for a term of years not exceeding life imprisonment" when these statutes were in effect, from October 1, 1983 through July 1, 1995, the sentencing penalty is higher than a juvenile who commits a life felony during the same time period. "Because a juvenile facing a non-homicide life felony may not be sentenced to life without the

possibility of parole . . . a trial judge is limited to imposing any term of imprisonment up to forty years." Id. at 852. The Peters court recognized that juveniles who committed aggravated first degree felonies can receive a "term of years not exceeding life" "subjecting this "lesser" class to enhanced sentencing well beyond the forty-year cap." Id. The Peters court found Peters' 99 year sentence for armed robbery was unconstitutional because it was grossly disproportionate to the forty year maximum sentence he could have received if Peters had been convicted of a more serious life felony crime. Id. at 855 ("Under the current circumstance, Peters would have been better situated had he committed a life felony, a more serious crime under the legislative framework, than the crimes he committed. This is an affront to the Constitution and cannot stand."). The Peters court reversed and remanded for resentencing not to exceed forty years. Id.

E. In the wake of Miller, Falcon, Horsley, and Graham, Ms. Landrum's life-without-parole sentence is unconstitutional because it is grossly disproportionate to the crime.

Like the armed robbery sentence in Peters, Ms. Landrum's life without the possibility of parole sentence is unconstitutional because it is grossly disproportionate. Applying the Andrews test, the gravity of Ms. Landrum's second-degree murder offense is less grave offense than a first-degree murder conviction. Ms. Landrum was convicted of a life felony, not a capital felony, yet she was still sentenced to the "harshest penalty" a juvenile can

be sentenced to in Florida. Like Peters, Ms. Landrum's crime is in a lesser class; a life felony encompasses less serious crimes than capital felonies. See § 775.082, Fla. Stat. (2003). Although Miller does not preclude a life without the possibility of parole sentence for a juvenile convicted of a homicide crime, Miller mandates that a juvenile receive an individualized sentencing hearing which takes into account the attributes of youth, including their lessened culpability and their greater capacity for change and rehabilitation prior to receiving this harshest penalty. In enacting chapter 2014-220, Laws of Florida, the Florida legislature has expressed its intent to comply with Miller.

However, at this time Miller has been held to only apply to juveniles convicted of the capital crime of first-degree murder between May 24, 1994, through June 30, 2014, a period when the only statutory penalty for juveniles was a mandatory life sentence. § 775.082, Fla. Stat. Juveniles convicted of first-degree murder during that period are now receiving new individualized sentencing hearings and the majority will be given the opportunity for judicial review of their sentences after a period of years. But because Ms. Landrum's life sentence was discretionary, she is currently precluded from the benefit of a Miller and Horsley resentencing. She is precluded from having the trial court take into account the Miller requirements with respect to her circumstances. When a more serious criminal offender

receives a less serious penalty, this is an "indication that the punishment at issue may be excessive.'" Peters v. State, 128 So. 3d 832 (Fla. 4th DCA 2013)(quoting Solem, 463 U.S. at 291).

Moreover, the Miller court's prediction that the juvenile who receives a life-without-parole sentence will be "uncommon" and "rare" further illustrates the incongruity of Ms. Landrum's sentence. Logic dictates that the juvenile who receives the "uncommon" and "rare" life-without-parole sentence in Florida would be more often found in juveniles who are convicted of first-degree murder. And that the percentage of juveniles convicted of second-degree murder who receive a life-without-parole sentence would be even more uncommon and rarer than the juvenile with the more serious conviction. By definition, a second-degree murder conviction is less likely to be a crime that "reflects irreparable corruption." While the Supreme Court in Miller did "not foreclose a sentencer's ability to make that judgment in homicide cases," it did "require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," specifically noting that its holding "requires factfinders ... to take into account the differences among defendants and crimes." Id. at 2469 n.8. Lesser crimes should generate fewer life-without-parole sentences.

In analyzing the second Andrews factor, other juveniles in Florida who committed second-degree murder are in the same disadvantaged situation as Ms. Landrum. See Mason v. State, 134

So. 3d 499 (Fla. 4th DCA 2014)(finding Miller was not triggered because Mason received a discretionary life-without-parole sentence).

However, in Daugherty v. State, 96 So. 3d 1076 (Fla. 4th DCA 2012), the Fourth District did reverse and remand for resentencing. Like Landrum, Daugherty was convicted of second-degree murder and received a discretionary life-without-parole sentence. Id. Daugherty argued the trial court failed to adequately consider his age and culpability when sentencing him to life in prison without the possibility of parole. Id. at 1079. The Fourth District acknowledged Daugherty received a discretionary life-without-parole sentence, but realized that Miller was still implicated. Id. at 1079 ("Nevertheless, Miller contains language suggesting that sentencing juveniles to life-without-parole prison terms should be "uncommon" in light 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 offender whose crime reflects irreparable corruption.")(quoting Miller, 132 S. Ct. at 2469).

The Fourth District noted the trial court did consider Daugherty's remorse and his horrible and unfortunate upbringing at his sentencing hearing, but still reversed and remanded for a new sentencing hearing in light of Miller. Id. at 1079-80 ("[W]e remand this case to the trial court to conduct further sentencing proceedings and expressly consider whether any of the numerous

"distinctive attributes of youth" referenced in Miller apply in this case so as to diminish the "penological justifications" for imposing a life-without-parole sentence upon the appellant."). Notably, in Mason, the Fourth District denied that its Daugherty decision extended the holding of Miller, even though it clearly did. Mason, 134 So. 3d 499 at 500. ("That [Daugherty] decision did not extend the holding of Miller"). This Court granted review on Daugherty, No. SC14-860 (Fla. Dec. 17, 2014), on other grounds.

Like Daugherty, Ms. Landrum's sentence is unconstitutional and grossly disproportionate in spite of her sentence being a discretionary, and not mandatory, sentence. She remains in a class left behind because the trial court never considered any Miller characteristics of youth. The Daugherty court was correct in remanding for a new individualized sentencing hearing during which the trial court must consider the distinctive attributes of youth even when Daugherty had already received an adult sentencing hearing.

In analyzing the third Andrews factor, State v. Dayutis, 127 N.H. 101 (N.H. 1985) and Peters remain the most similar to this case. In Dayutis, the Supreme Court of New Hampshire "invalidated its state's second degree murder statute as disproportionate after finding the maximum penalty for the offense to exceed that of first degree murder." Peters, 128 So. 3d at 855. When Dayutis committed his offense, second degree murder was punishable by a term of imprisonment from thirty-five years to life. "At the same

time, the penalty for first degree murder was death or life imprisonment." Id. (citing Dayutis, 127 N.H. 101 at 328). Following the decision in Furman v. Georgia, 408 U.S. 238 (1972), "which invalidated New Hampshire's death penalty provision, the maximum sentence one could receive for first degree murder became 'life imprisonment with an eighteen year minimum term.'" Id. (citing Dayutis, 127 N.H. 101 at 328). In recognizing that the defendant's sentence was "clearly harsher than the maximum provided for first degree murder," the Dayutis court invalidated the statute on proportionality grounds. Id. (quoting Dayutis, 127 N.H. 101 at 328). In Peters, the Fourth District provided citations to several cases where courts have found the imposition of a greater punishment for a lesser included offense to be constitutionally impermissible:

> See Roberts v. Collins, 544 F.2d 168, 170 (4th Cir. 1976)("Exact balances may not be attainable between unrelated offenses, but the Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense."); Thomas v. State, 264 Ind. 581, 348 N.E.2d 4, 7 (1976)("The Eighth Amendment to the United States Constitution and Art. I, s16 of the Indiana Constitution have been interpreted by this Court as prohibiting the Legislature from providing punishments for lesser included offenses which are greater than those provided for the greater offenses." (citations omitted)); Application of Cannon, 203 Or. 629, 281 P.2d 233 (1955) (en banc) (invalidating, on proportionality grounds, statute conferring life imprisonment for an assault with intent to commit rape where the greater crime of rape authorized a sentence of not more than 20 years imprisonment).

Peters, 128 So. 3d at 855. Like Peters, Ms. Landrum would have

been better situated if she had committed a capital felony.

F. This Court should extend the application of Miller and Horsley to Ms. Landrum in order to cure her grossly disproportionate sentence.

Because Ms. Landrum's sentence is grossly disproportionate to the sentence of a juvenile who committed the more serious crime of first-degree murder, this Court should extend the ruling of Miller to include her discretionary life-without-parole sentence and should apply the benefits of Horsley and the new legislation to her. Ms. Landrum should be entitled to an individualized sentencing hearing where the trial court will consider all the factors included in section 921.1401, especially the factors focusing on her youth and ability to be rehabilitated. Ms. Landrum should also be entitled to an eventual judicial review of her sentence under section 921.1402.

In order to cure her unconstitutional sentence, Ms. Landrum should receive a new sentencing hearing like those juveniles who committed a first-degree murder at the same time she did are receiving. Moreover, if she had committed this crime after July 1, 2014, she would receive the benefit of the new legislation. This Court should not leave her class of juvenile, who received a discretionary life-without-parole sentence without the benefit of Miller, left behind. This Court's ruling in Falcon recognized that the Miller decision constituted "a development of fundamental significance." Falcon, 162 So. 3d at 960-63. In applying Falcon

retroactively, this Court emphasized the significance of unfairness which would result otherwise:

> Here, if Miller is not applied retroactively, it is beyond dispute that some juvenile offenders will spend their entire lives in prison while others with "indistinguishable cases" will serve lesser sentences merely because their convictions and sentences were not final when the Miller decision was issued. The patent unfairness of depriving indistinguishable juvenile offenders of their liberty for the rest of their lives, based solely on when their cases were decided, weighs heavily in favor of applying the Supreme Court's decision in Miller retroactively.

Falcon, 162 So. 3d at 962. This same reasoning also applies to Ms. Landrum and her sentence. This Court's quote from Miller in Horsley remains germane to Ms. Landrum's case:

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

Horsley, 160 So. 3d at 408. Ms. Landrum has received the harshest possible penalty without consideration of her youthful attributes. Miller and Horsley have rendered her sentence grossly disproportionate to the crime. Ms. Landrum respectfully requests this Court answer the certified question in the affirmative, quash the decision of the Second District, and remand for resentencing under Horsley.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests this Court answer the certified question in the affirmative, quash the decision of the Second District, and remand for resentencing under Horsley.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 20th day of July, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LAISHA L. LANDRUM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D14-2842

Opinion filed May 20, 2015.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hillsborough County; William Fuente, Judge.

Howard L. Dimmig, II, Public Defender, and Maureen E. Surber, Assistant Public Defendant, Bartow, for Appellee.

WALLACE, Judge.

Laisha L. Landrum timely appeals the order summarily denying her motion filed under Florida Rule of Criminal Procedure 3.800(a). We affirm, but we write to discuss an apparent sentencing incongruity that now exists in this district.

In 2005, a jury found Ms. Landrum guilty of second-degree murder with a weapon, a life felony, §§ 775.087(1)(a), 782.04(2), Fla. Stat. (2004), and tampering with physical evidence, and the trial court sentenced her to life in prison for the murder

charge and five years' imprisonment for the tampering charge.[1] After an unsuccessful appeal, Ms. Landrum, who was a juvenile at the time of the offenses, filed a rule 3.800(a) motion arguing that her sentence of life without the possibility of parole[2] for second-degree murder violated the holding in Miller v. Alabama, 132 S. Ct. 2455 (2012), that a mandatory life sentence without the possibility of parole for a juvenile who commits a homicide is unconstitutional. The postconviction court found that Miller did not apply retroactively and denied Landrum's motion. On appeal, this court reversed based on the then-recent decision in Toye v. State, 133 So. 3d 540 (Fla. 2d DCA 2014), that Miller does apply retroactively and remanded for further proceedings.[3]

On remand, the State filed a motion to strike Ms. Landrum's resentencing hearing. The State urged the postconviction court to deny her rule 3.800 motion, arguing that this court's opinion did not require resentencing and that Ms. Landrum was not sentenced to the mandatory life term condemned in Miller. The postconviction court granted the State's motion, relying on this court's opinion in Starks v. State, 128 So. 3d 91 (Fla. 2d DCA 2013),[4] as well as Mason v. State, 134 So. 3d 499 (Fla. 4th DCA 2014), review dismissed, No. SC14-1839, 2014 WL 7177470 (Fla. Dec. 16, 2014),

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[1]Ms. Landrum's sentence of life in prison was imposed on February 20, 2006.

[2]For persons convicted on or after October 1, 1983, there is no parole from a life sentence in Florida. See § 921.001(10), Fla. Stat. (2004); Lewis v. State, 625 So. 2d 102, 103 (Fla. 1st DCA 1993).

[3]Since this court decided Toye, the Florida Supreme Court has held that Miller must be given retroactive effect. Falcon v. State, 40 Fla. L. Weekly S151 (Fla. Mar. 19, 2015).

[4]Starks was recently disapproved on other grounds in Lawton v. State, 40 Fla. L. Weekly S195 (Fla. Apr. 9, 2015).

which relied on Starks. Starks, like Landrum, was convicted of second-degree murder with a weapon, a life felony punishable by life or a term of years not exceeding life. See §§ 775.082(3), 775.087(1)(a), 782.04(2), Fla. Stat. (2004). Because a life sentence was not mandatory, this court held that a juvenile's life sentence without the possibility of parole for second-degree murder with a firearm is not unconstitutional under Miller. 128 So. 3d at 92. On the authority of Starks, Ms. Landrum's sentence, like Starks', is not unconstitutional, and we affirm the postconviction court's order denying her rule 3.800(a) motion.

Since Starks issued, the legislature enacted chapter 2014-220, Laws of Florida, and the Florida Supreme Court decided Horsley v. State, 40 Fla. L. Weekly S155 (Fla. Mar. 19, 2015). The portions of the legislation pertinent here are sections 1, 2, and 3, which have been codified as an amendment and as new statutes at sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. "Section one provides the new statutory penalties for juvenile offenders; section two sets forth the procedures for the mandatory individualized sentencing hearing that is now required before sentencing a juvenile to life imprisonment; and section three relates to subsequent judicial review of a juvenile offender's sentence." Horsley, 40 Fla. L. Weekly at S158. The effective date of the new legislation is July 1, 2014. Ch. 2014-220, § 8, at 2877, Laws of Fla. In Horsley, the Florida Supreme Court held that the appropriate remedy for juvenile offenders whose sentences violate the Eighth Amendment based on Miller is to apply the provisions of chapter 2014-220 to such juvenile offenders without regard to the date that the offenses were committed. 40 Fla. L. Weekly at S160.

The concurrence of the Florida Supreme Court's holding in Horsley with our holding in Starks has created an apparent sentencing anomaly in this district—a juvenile convicted of first-degree murder enjoys the right to eventual review of his or her sentence without regard to the date of his or her offense while a juvenile convicted of second-degree murder and sentenced to life before the effective date of the new legislation does not. This circumstance also raises the question whether those juveniles convicted of second-degree murder and sentenced to life imprisonment before July 1, 2014, are entitled to the individualized sentencing hearing called for in Miller.[5]

Miller, who was fourteen years of age at the time he committed murder, was sentenced to a mandatory life sentence without the possibility of parole. The Supreme Court found that its holdings in Roper v. Simmons, 543 U.S. 551 (2005)—that the Eighth Amendment bars the death penalty for all juvenile offenders under the age of eighteen—and Graham v. Florida, 560 U.S. 48 (2010)—that the Eighth Amendment bars a sentence of life without the possibility of parole for juveniles convicted of nonhomicide offenses—led to the conclusion that the Eighth Amendment bars a mandatory sentence of life without parole for juveniles convicted of homicide. While the Court did not foreclose a sentencing court's ability to impose a life-without-parole sentence on a juvenile, it required that before doing so, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Miller, 132 S. Ct. at 2469. This is because the characteristics of youth, "transient rashness, proclivity for risk, and inability

[5]In Daugherty v. State, 96 So. 3d 1076 (Fla. 4th DCA 2012), review granted, No. SC14-860, 2014 WL 7251739 (Fla. Dec. 17, 2014), the Fourth District reversed a juvenile's life sentence for second-degree murder and remanded for an individualized sentencing hearing in accordance with Miller.

to assess consequences—both lessen[ ] a child's 'moral culpability' and enhance[ ] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.' " Id. at 2465 (quoting Graham, 560 U.S. at 68). The Court anticipated that its decision to require "individualized sentencing," id. at 2466 n.6, would render the imposition of "this harshest possible penalty [on juveniles]" uncommon, id. at 2469.

"[T]his harshest possible penalty" has been imposed on Ms. Landrum even though she was not convicted of the highest possible degree of murder. This circumstance raises the question whether the logic of the Horsley court's application of the procedures outlined in chapter 2014-220 to address the Eighth Amendment violation identified in Miller requires the application of that same remedy to persons such as Ms. Landrum, who have been found guilty of second-degree murder and sentenced to life in prison without the possibility of parole before the effective date of the new legislation. On the authority of our decision in Starks, we are compelled to answer this question in the negative. However, we certify the following question to the Florida Supreme Court as one of great public importance:

> BECAUSE THERE IS NO PAROLE FROM A LIFE SENTENCE IN FLORIDA, DOES MILLER V. ALABAMA, 132 S.Ct. 2455 (2012), REQUIRE THE APPLICATION OF THE PROCEDURES OUTLINED IN SECTIONS 775.082, 921.1401, and 921.1402, FLORIDA STATUTES (2014), TO JUVENILES CONVICTED OF SECOND-DEGREE MURDER AND SENTENCED TO A NON-MANDATORY SENTENCE OF LIFE IN PRISON BEFORE THE EFFECTIVE DATE OF CHAPTER 2014-220, LAWS OF FLORIDA?
>
> Affirmed; question certified.

CASANUEVA and BLACK, JJ., Concur.