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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 BRIEF OF PETITIONER REBECCA LEE FALCON

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

Elliot H. Scherker
Florida Bar No. 202304
Greenberg Traurig, P.A.
Wells Fargo Center
333 S.E. Second Avenue
Suite 4400
Miami, FL 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

Paolo G. Annino
Florida Bar No. 379166
Co-Director, Public
Interest Law Center
Florida State College of
Law
425 West Jefferson Street
Tallahassee, FL 32306
Telephone: 850.644.9930
Facsimile: 850.644.0879

Karen M. Gottlieb
Florida Bar No. 199303
Post Office Box 1388
Coconut Grove, FL 33233
Telephone: 305.648.3172
Facsimile: 305.648.0465

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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

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[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.

Respectfully submitted,

Elliot H. Scherker
Florida Bar No. 202304
Greenberg Traurig, P.A.
Wells Fargo Center
333 Southeast Second Avenue
Suite 4400
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717
scherkere@gtlaw.com
miamiappellateservice@gtlaw.com

Karen M. Gottlieb
Florida Bar No. 199303
Post Office Box 1388
Coconut Grove, Florida 33233
Telephone: 305.648.3172
Facsimile: 305.648.0465
Karen.m.gottlieb@gmail.com

Paolo G. Annino
Florida Bar No. 379166
Co-Director,
Public Interest Law Center
Florida State College of Law
425 West Jefferson Street
Tallahassee, Florida 32306
Telephone: 850.644.9930
Facsimile: 850.644.0879
pannino@law.fsu.edu

By: /s/Elliot H. Scherker
Elliot H. Scherker

Counsel for Petitioner Rebecca Lee Falcon

CERTIFICATE OF SERVICE

I certify that a copy of this supplemental brief was sent via Registered e-mail on April 28, 2014, to:

The Honorable Pamela Jo Bondi
Attorney General
Trisha Meggs Pate
Assistant Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399
Trisha.pate@myfloridalegal.com
crimapptlh@myfloridalegal.com

Marsha L. Levick
Juvenile Law Center
1315 Walnut Street, Fourth Floor
Philadelphia, Pennsylvania 19107
mlevick@jlc.org

George E. Schulz, Jr.
Holland & Knight
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202
Buddy.schulz@hklaw.com

/s/ Elliot H. Scherker
Elliot H. Scherker

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.

/s/ Elliot H. Scherker
Elliot H. Scherker