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IN THE SUPREME COURT OF FLORIDA

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC13-865

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Rebecca Lee Falcon, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

SUMMARY OF ARGUMENT

The United States Supreme Court in Miller v. Alabama decision did not remove the State's authority or power to impose the penalty of life without parole for a juvenile homicide offender, but the Court instead, changed the procedures which are required in order to impose a life without parole sentence. Thus, even if Miller is applied retroactively, pursuant to Miller, a trial court may still impose a life without parole sentence if the trial court finds that the sentence would be appropriate after conducting an individualized hearing and considering the offender's youth and attendant characteristics. However, after considering the juvenile homicide offenders individual characteristics, if the trial court finds that a life without parole sentence is not appropriate for the individual, the State submits that statutory revival is the appropriate remedy. This Court, along with the District Courts, have repeatedly held that statutory revival is appropriate in the case of an unconstitutional statute, which creates an intolerable hiatus in the law. There is hardly a better example of such an

intolerable hiatus in the law as the absence of a legislatively-authorized penalty for an class of offenders who have committed first-degree murder.

The principle of statutory revival makes sense. First, statutory revival appears to make the common-sense acknowledgment that the Legislature would not have amended a statute if it had known that the amendment is unconstitutional. Second, statutory revival acknowledges what the Legislature would have done had it known that an amendment was unconstitutional by the best evidence of that intention: what the Legislature already enacted. Third, statutory revival keeps this Court from engaging in policy judgments that are properly relegated to the Legislature and tethers resolution of the invalidation of a statute to prior acts of the Legislature, the policy-making branch of government.

Petitioner contention that statutory revival is not available in this case because the immediate predecessor to the current statute has the same constitutional defect is incorrect. The determination of whether a statute is a continuation or a repeal is based upon its substance. It is not based on the artificial action of changing something in a statute, irrespective of whether the substance of the statute has changed. Because the substance of the penalty of first-degree murder did not change between 1994 and 1995, despite other changes to the statute, as it relates to first-degree murder the 1995 version is a continuation of 1994, and the 1993 statute is the immediate predecessor to the present version of the statute. Accordingly, because the 1995 statute is

not a repeal of the 1994 statute, as it relates to first-degree murder, the 1993 statute is the most recent prior version of the statute.

Petitioner also argues that statutory revival would be inappropriate because it would only apply to a subclass of juvenile when the statute does not distinguish between adults or juvenile offenders. However, this Court has previously applied statutory revival to a particular class of offender.

Petitioner further argues that statutory revival is not appropriate because the Legislature is no longer in support of parole, and petitioner purposes that instead this Court should impose a term of years sentence on all juvenile murderers who are ineligible for life without parole in Miller's wake. While the Legislature may not want to continue the parole system indefinitely, the parole system is in place and still operable. Furthermore, although the Legislature may not be fond of parole, the Legislature has always been adverse to judicial discretion in sentencing in homicide cases. Application of statutory revival does not require the judiciary into this realm of deciding which of the dueling policy considerations should be given precedence which is a function properly belonging to the Legislature. Applying statutory revival is not "judicial legislation"; rather, it looks to what the Legislature previously enacted to determine what would have been in effect had the Legislature known that its enactment was unconstitutional in that circumstance.

Accordingly, if this Court finds that Miller does apply retroactively, this Court should first remand for an individualized sentencing hearing in which the trial court can consider the offender's youth and attendant characteristics. After an individualized hearing, the trial court may find that a life without parole sentence is appropriate. If the trial court finds that a life without parole sentence is not appropriate for the particular juvenile murder offender, then State submits that statutory revival is the appropriate remedy and this trial court should look to the proceeding constitutional statute and impose a sentence of life with the possibility of parole as required Section 775.082(1), Florida Statute (1993).

Issue II:

This Court ask if Miller v. Alabama, is determined to apply retroactively, whether there are differences as to the remedy or re-sentencing options for post conviction cases as compared to cases pending on direct appeal. The State agrees with petitioner that there are no principled distinctions between the two.

ARGUMENT

ISSUE I

IF THIS COURT CONCLUDES THAT MILLER V. ALABAMA, 132 S.CT 2455 (2012), SHOULD BE APPLIED RETROACTIVELY, WHAT IS THE APPROPRIATE REMEDY OR THE AVAILABLE RE-SENTENCING OPTIONS FOR THE TRIAL COURT TO CONSIDER? (Restated)

Standard of Review

This is a question of law, and therefore is subject to de novo review.

Argument

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that the imposition of a mandatory life sentence without a parole for a juvenile homicide offender without consideration of the juvenile offender's individual characteristic violated the Eighth Amendment's prohibition on cruel and unusual punishment. Petitioner contends that her life without parole sentences for the 1997 first degree murder conviction is illegal in violation of Miller. The question before this Court was whether Miller applied retroactively to cases which were final prior to the issuance of Miller. However, in considering this issue this Court has asked the parties to address the question that if this Court concludes that Miller v. Alabama, 132 S.Ct 2455 (2012), should be applied retroactively, what is the appropriate remedy or the available re-sentencing options for the trial court to consider including whether making parole available to juvenile homicide offenders would satisfy the requirements of Miller.

The Miller decision did not remove the State's authority or power to impose the penalty of life without parole for a juvenile homicide offender. The United States Supreme Court specifically rejected Miller's argument that "the Eighth Amendment requires a categorical bar on life without parole for juveniles[.]" Miller, 132 S.Ct at 2469. The Court, instead, stated that "[b]ut given all we have said in Roper,[1] Graham,[2] and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. More specifically, the Court stated that "[**a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases**, we require it to 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 2455 (emphasis added; footnote omitted). Accordingly, the United States Supreme Court did not preclude a life sentence without parole, but the Court instead, changed the procedures which are required in order to impose a life without parole sentence.

The First District addressed this issue in Washington v. State, 103 So. 3d 917, 919 (Fla. 1st DCA 2012) finding that "far from categorically barring a penalty for a class of offenders as it did in Roper and Graham, the Supreme Court in Miller ruled its decision

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[1] Roper v. Simmons, 543 U.S. 551 (2005).

[2] Graham v. Florida, 130 S.Ct. 2011 (2010).

'mandates only that a sentencer follow a certain process - considering an offender's youth and attendant characteristics - before imposing a particular penalty,' emphasizing that 'youth matters for purposes of meting out the law's most serious punishments.'"• Id. at 919, citing, Miller at 2471. The First District recognized that "if the state again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence. **Under Miller, a sentence of life without the possibility of parole remains a constitutionally permissible sentencing option**." Id. at 920 (emphasis added). Neely v. State, 126 So.2d 342 (Fla. 3d DCA 2013)("Because Miller did not categorically bar a life sentence without parole for a juvenile, this decision does not preclude the trial court from again imposing a life term without possibility of parole should the trial court upon reconsideration deem such sentence justified."); Hernandez v. State, 117 So. 3d 778, 782 (Fla. 3d DCA 2013)("Although Miller does not bar a trial court from imposing a sentence of life without the possibility of parole, it requires the sentencer 'to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'").

In fact, completely foreclosing a sentencing judges ability to impose a life without parole sentence would violate the Eighth Amendment Conformity Clause of the Florida Constitution. "[I]n 2002, the Florida Constitution was amended to provide that

Florida's interpretation of the cruel and unusual punishment clause is be construed in conformity with the United States Supreme Court's decisions." Lightbourne v. McCollum, 969 So.2d 326, 334 (Fla. 2007). See Art. I § 17 Fla. Const. "This amendment has been applied to claims regarding the method and type of punishment (such as to electrocution), to claims involving a particular class of individuals (such as to minors or those who are mentally retarded), to claims of excessive punishment (such as to the death penalty per se), and to claims involving prison conditions." Lightbourne, at 335. Because the United States Supreme Court decided Miller on Eighth Amendment grounds, this Court is bound by the precedent of the United States Supreme Court. Valle v. State 70 So.3d 530, 538 (Fla. 2011). Thus, even if Miller is applied retroactively, pursuant to Miller, a trial court may still impose a life without parole sentence if the trial court finds that the sentence would be appropriate after conducting an individualized hearing and considering the offender's youth and attendant characteristics.

However, after considering the juvenile homicide offenders individual characteristics, if the trial court finds that a life without parole sentence is not appropriate, the State submits that statutory revial is the appropriate rememdy. This Court, along with the District Courts of Appeal, have repeatedly held that statutory revival is appropriate in the case of an unconstitutional statute. See State ex rel. Boyd v. Green, 355 So.2d 789, 795 (Fla. 1978)("Where a repealing act is adjudged unconstitutional, the statute (or in this case the rule) it attempts to repeal remains in

force."); Miffin v. State, 615 So.2d 745, 746 (Fla. 2d DCA 1993)("This is so because when an amendment to a statute is declared unconstitutional, the statute as it existed prior to amendment remains effective."); Brister v. State, 622 So.2d 552, 553 (Fla. 3d DCA 1993)("At the same time, when an amendment to a statute is declared unconstitutional, the statute as it existed prior to amendment remains effective.").

In B.H. v. State, 645 So. 2d 987 (Fla. 1994), this Court found that the 1990 version of the statute prohibiting the escape from a juvenile commitment facility in violation of Section 39.061, Florida Statutes, was an unconstitutional delegation of legislative authority to an administrative agency. Nevertheless, this Court applied the principle of statutory revival, finding that the "invalidity of the juvenile escape statute must work an automatic revival of the earlier escape statute. . . based on well established principles of statutory revival." Id. at 995. This Court recognized that "Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor . . . ." Id. at 995, 996. This Court indicated that statutory revival applies where "the loss of the invalid statutory language will result in a 'hiatus' in the law that would be intolerable to society." Id. (underline added). There is hardly a better example of such an intolerable hiatus in the law as the

absence of a legislatively-authorized penalty for an class of offenders who have committed first-degree murder.

In Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990), this Court found statutory revival was an appropriate for a specific group of offenders where a statute was held unconstitutional "as applied" to that class of offenders. In Waldrup, this Court determined that the 1983 changes to gain time operated in violation of the ex post facto clause of the federal constitution. This Court held that the appropriate remedy was statutory revival, and "upon this opinion becoming final, DOC shall be barred from applying the 1983 reduction in incentive gaintime to inmates convicted of offenses occurring before the effective date of the 1983 act." Id. at 692. (emphasis added). This Court made clear that its opinion was to revive the statute as applied to the class of inmates affected by the unconstitutionality. Waldrup, at 692(recognizing the effect of its holding was "to reinstate the incentive gain-time statutes in force at the time of offense, and to declare unconstitutional the 1983 incentive gain-time as applied to these inmates.") (underline added).

In Smith v. Smathers, 372 So. 2d 427 (Fla. 1979), this Court held that when the Florida Legislature revised the Florida Election Code and completely abolished the provisions allowing for write-in candidacies, it violated the constitutional right to vote for a candidate of one's choice. Id. at 428-29 (citing Art. VI, § 1, Fla. Const. (1968)). This Court expressly held that the remedy was to revive the portion of the repealed statute to remedy the

unconstitutionality, finding "Sections 13 and 66 of Chapter 77-175, Laws of Florida, are invalid only to the extent they repeal the write-in voting procedure contained in Sections 99.023, 101.011(2), and 101.151(5)(a), (b), Florida Statutes (1975). These repealed sections of the statute are hereby revived and shall remain in full force and effect to provide a procedure for write-in candidacies in future elections until properly changed by the legislature." Id. at 429 (citing Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952).

In State ex rel. Boyd v. Green, 355 So. 2d 789 (Fla. 1978), this Court found that a statute creating a bifurcated trial system in criminal trials for guilt and insanity, and the legislature's repeal of a court rule to the contrary, violated due process. Id. at 794. After determining that the provision of the law that repealed the court rule was not severable from the unconstitutional statute, this Court relied on principles of statutory revival to reinstate the court rule, holding:

> The question now arises whether or not, as a result of our holding, Fla. R. Crim. P. 3.210 is reinstated? We answer this question in the affirmative. Where a repealing act is adjudged unconstitutional, the statute (or in this case the rule) it attempts to repeal remains in force.

Id. at 795 (underline added).

In Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952), this Court also recognized the principles of statutory revival in a case involving Blue Laws and their applicability to used car dealerships. There, this Court recognized, that where a statute is "unconstitutional the sections of the statute as they existed before the [unconstitutional] amendments would by operation of law

become effective unless they too should in an appropriate action be declared unconstitutional." Id. at 7.

Moreover, this Court, along with the District Courts of Appeal have applied principles of statutory revival when addressing the unconstitutionality of habitual offender statutes. Burton v. State, 616 So. 2d 7 (Fla. 1993)(finding that even though the amendments to the habitual offender sentencing statute were in violation of the single subject requirement, Burton was not entitled to relief because he was capable of habitualization based on pre-amendment version of the statute); King v. State, 585 So. 2d 1199 (Fla. 1st DCA 1991)(holding that because King "would have been habitualized under the pre-amendment statute as well, we decline to consider his argument on this issue.") Wright v. State, 579 So. 2d 418 (Fla. 4th DCA 1991)(relying on statutory revival for its decision not to consider the appellant's constitutional attack on the Habitual Offender Statute because "appellant would have been habitualized under the pre-amended statute as well."); Rankin v. State, 620 So. 2d 1028, 1030 (Fla. 2d DCA 1993)(finding that a defendant would only be entitled to resentencing "if a different sentence would have been called for under the version in place before Chapter 89-280.").

The principle of statutory revival makes sense. First, statutory revival appears to make the common-sense acknowledgment that the Legislature would not have amended a statute if it had known that the amendment is unconstitutional. Second, statutory revival acknowledges what the Legislature would have done had it known that

an amendment was unconstitutional by the best evidence of that intention: what the Legislature already enacted. Third, statutory revival keeps this Court from engaging in policy judgments that are properly relegated to the Legislature and tethers resolution of the invalidation of a statute to prior acts of the Legislature, the policy-making branch of government.

Petitioner contends that statutory revival is not available in this case because the immediate predecessor to the current statute has the same constitutional defect. Petitioner supposition is based on a footnote in B.H. in which this Court stated that "[t]his necessarily means that there 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., at 995 n.5. First, the statement is dicta as B.H. did not deal with a statute that was anything other than the most recent version. Therefore, this Court had no occasion to hold that revival could only apply to the immediate predecessor and cited no authority for this notation.

More importantly, **as it relates to first-degree murder**, the 1995 version of Section 775.082(1), Florida Statutes is **not a repeal** of the 1994 version of the statute.

The 1994 version of Section 775.082(1), provides:

> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and;

> (**a) If convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole, or**
>
> (b) If convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

§ 775.082, Fla. Stat. (1994 Supp.)(emphasis added). The 1995 version of Section 775.082(1), provides:

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

§ 775.082, Fla. State (1995)(emphasis added). Thus, under the 1994 version of the statute, the penalty for first-degree murder was death or life without the possibility of parole. Under the 1995 version of the statute the penalty for first-degree murder was death or life without the possibility of parole. The only change in the statute between 1994 and 1995 was to remove the possibility for parole for other capital offenses. Accordingly, as related to first-degree murder, the 1995 statute is not a repeal of the 1994 statute. See Solloway v. Dep't of Prof. Reg., 421 So. 2d 573 (Fla. 3d DCA 1982) ("A statute that is simultaneously repealed and reenacted is regarded as continuously in force. Only provision omitted from the reenactment is considered repealed. . . . An amendment and re-enactment of a statute constitutes a continuation of those provisions which are carried into the new act and permits a prosecution under the original act irrespective of its nominal repeal."); McKibben v. Mallory, 293 So.2d 48, 53 (Fla.

1974)(holding that "where a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect."); see also 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:12 ("Those provisions of the original act that are reenacted in the amendment are considered a continuation of the original act."), § 23:13 ("Where the purpose of the enactment is the restatement of existing legislation, minor changes in the terminology of the former law will not, as a general rule, effect a repeal.").

A simple example demonstrates why this Court should look to the substance of the change and not the mere fact that there was an amendment. In 1997, the Florida Legislature enacted a complete reworking of the Florida Statues to eliminate any gender-specific references in the Laws of Florida. See ch. 97-102, Laws of Fla. (1997). However, this law did not change the substance of the vast majority of the statutes enacted by the Legislature, only eliminating gender-specific references to make them gender-neutral. Pursuant to the position taken by the petitioner as to the meaning of B.H., the 1997 change to eliminate gender-specific references is now the "immediate predecessor" of every statute that it changed, no matter how old or how unchanged the law, because the Legislature engaged in an "amendment" of the statute.

The determination of whether a statute is a continuation or a repeal is based upon its substance. It is not based on the artificial action of changing something in a statute, irrespective of whether the substance of the statute has changed. See Solloway, 421 So. 2d 573; see also 1A SUTHERLAND STATUTORY CONSTRUCTION § 23:12. Because the substance of the penalty of first-degree murder did not change between 1994 and 1995, despite other changes to the statute, as it relates to first-degree murder the 1995 version is a continuation of 1994, and the 1993 statute is the immediate predecessor to the present version of the statute. Accordingly, because the 1995 statute is not a repeal of the 1994 statute, as it relates to first-degree murder, the 1993 statute is the most recent prior version of the statute.

Petitioner also argues that statutory revival would be inappropriate because it would only apply to a subclass of juvenile when the statute does not distinguish between adults or juvenile offenders. However, this Court has explicitly applied statutory revival to a particular class of offender. See Waldrup v. Dugger, 562 So. 2d 687 (Fla. 1990) (specifically statutory revival as a remedy to a class of offenders where a statute was held unconstitutional "as applied" to that class of offenders and requiring DOC "recompute[] incentive gain-time for Waldrup and similarly situated inmates based on the formulas, and in light of the criteria, contained in the pre-1983 statute"). Furthermore, this Court and Districts Courts of Appeal have done the same with regard to the Habitual Offender Statute. See King v. State, 585 So.

2d 1199 (Fla. 1st DCA 1991) (finding that because King "would have been habitualized under the pre-amendment statute as well, we decline to consider his argument on this issue."); Wright v. State, 579 So. 2d 418 (Fla. 4th DCA 1991) (expressly relying on statutory revival and citing Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952), for its decision not to consider the appellant's constitutional attack on the Habitual Offender Statute because "appellant would have been habitualized under the pre-amended statute as well."); Brister v. State, 622 So. 2d 552 (Fla. 3d DCA 1993) (refusing to provide relief under Johnson to a "defendant [that] met the criteria for habitual offender status under the pre-amended version of the statute"); Miffin v. State, 615 So. 2d 745, 746 (Fla. 2d DCA 1993) (finding Johnson was only a basis of relief for "those defendants affected by the amendments to section 775.084 contained in chapter 89-280" because "when an amendment to a statute is declared unconstitutional, the statute as it existed prior to amendment remains effective.") (citing Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952)); Rankin v. State, 620 So. 2d 1028, 1030 (Fla. 2d DCA 1993)(finding that a defendant would only be entitled to resentencing "if a different sentence would have been called for under the version in place before Chapter 89-280" and expressly relying on statutory revival, "because when an amendment to a statute is declared unconstitutional, the statute as it existed

prior to the amendment remains effective.) (citing Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952)).[3]

Petitioner also relies on the concurrence in Washington v. State, 103 So.3d 917 (Fla. 1st DCA 2012), in which Judge Wolf stated that "if we were to reinstate parole, we would also have to strike as unconstitutional section 921.002(1)(e), Florida Statutes, which states, 'the provisions of chapter 947, relating to parole, shall not apply to person sentenced under the Criminal Punishment Code." Washington, at 921-22 (Wolf, J., concurring). The State respectfully disagrees with this assertion. It is well-established that a more specific statute controls over a statute of general application. See McKendry v. State, 681 So. 2d 45, 46 (Fla. 1994) ("a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms"); Gretz v. Fla. Unemployment Appeals Comm'n, 572 So. 2d 1384, 1386 (Fla. 1991) ("the more specific statute controls"); Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) ("It is well settled . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."). If the revived statute is more specific, which it would be here, since it addresses first-degree murder's punishment, a general statute about

[3] In fact, petitioner's own argument involves an "as applied" class as there is no question that adults may still receive a life without parole system. Thus, regardless of the remedy is a statutory revival or a term of years, the Court will still have to find the statute unconstitutional as applied to a class of offenders.

the availability of parole generally would be inapplicable. The concern voiced in the concurrence regarding the constitutionality of Section 921.002(1)(e), Florida Statutes, need never come to fruition.

Statutory revival does not inject the judiciary into the realm of policy considerations that properly belong to the Legislature. Applying statutory revival is not "judicial legislation"; rather, it looks to what the Legislature previously enacted to determine what would have been in effect had the Legislature known that its enactment was unconstitutional in that circumstance. As the Fifth District stated in Horsley v. State, 121 So.3d 1130, 1132 (Fla. 5th DCA 2013):

> In other words, the judiciary is attempting to fill a statutory gap while remaining as faithful as possible to expressed legislative intent, but also attempting to avoid judicial intermeddling by crafting our own statute to address the issue with original language. The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself—thereby avoiding the type of "legislating from the bench" that would be required if we were to essentially rewrite the existing statute with original language which we feel might better meet the policy goals of the current legislature.

Id. at 1132. Second, reviving a prior statute that applies only to first-degree murderers under the age of 18 who are not to receive life without parole after a Miller hearing conforms to Miller itself. As the Supreme Court recognized, "Indeed, it is the odd legal rule that does not have some form of exception for children." Miller, 132 S. Ct. at 2470 (emphasis in original).

Lastly, Petitioner states that statutory revival is not appropriate because the Legislature is no longer in support of

parole, and proposes a term of years sentence instead. While the Legislature may not be fond of parole, the parole system is in place and still operable. Furthermore, as the Fifth District stated in Horsely, "while we are certainly cognizant of the fact that the legislature of late appears to be less than enamored with the concept of parole, **we also note that the legislature has always been adverse to judicial discretion in sentencing in homicide cases, which could result in a perceived "lenient" term of years sentence in a case of this type**." Horsley, at 1132 (emphasis added).

Petitioner purposes that instead this Court should impose a term of years sentence on all juvenile murderers who are ineligible for life without parole in Miller's wake. Judge Osterhaus, in his concurrence Thomas v. State, 39 Fla. L. Weekly D799 (Fla. 1st DCA April 16 2014), makes a similar argument that in the wake of Miller the "first-degree murder offense can now only be considered an 'other ... life felony' for purposes of § 775.082(3) because federal caselaw has abrogated both possible 'capital felony' sentences for juvenile offenders-death and mandatory life without parole." This argument overlooks the fact that it is "the legislature has the power to define crimes and to set punishments." Rusaw v. State, 451 So.2d 469, 470(Fla. 1984). Addressing a similar issue as to whether capital sexual battery was still a capital offense when the death penalty was no longer a possible penalty, this Court stated that "the legislature intended that the penalties set out in subsection 775.082(1) be fully applied to the extent

that they are constitutionally permissible." Id. This Court realized that "[t]he legislature, by setting sexual battery of a child apart from other sexual batteries, has obviously found that crime to be of special concern." Id. The classification of an offense as a capital felony effects more than just the possible penalty. See State v. Hogan, 451 So.2d 844, 845 (Fla. 1984)("The degree of the crime is what the legislature says it is, and, just because a portion of a crime designated 'capital' cannot be carried out, the degree is not lessened, at least not for the purposes of setting penalties for 'attempt' crimes."). For example, the sentencing guidelines do not apply to capital felonies. Lawton v. State, 109 So.3d 825, 827 (Fla. 3 DCA 2013). The criminal punishment code does not apply to capital felonies. State v. Thompkins, 113 So.3d 95, 97 n2 (Fla. 5th DCA 2013). The reclassification of offenses for attempts, solicitation and conspiracy, as well as accessory after the fact, differ for capital felonies and life felonies. § 777.03, Florida Statute; § 777.04, Florida Statute. Accordingly, this Court may not simply reclassify capital first degree murder to a life felony.

In addition, petitioner's proposed solution also fails to take account of the proportionality of murder offenses as a cohesive whole. Under petitioner's proposed solution, the punishment for first-degree murder is functionally identical to the punishment for second-degree murder if imposed on a juvenile murderer. However, application of statutory revival preserves the graduated punishment scheme. If a juvenile murderer commits first-degree murder and is

eligible for life without parole under Miller, then the murderer may receive life without parole. If the first-degree murder is not eligible for life without parole under Miller, then the murderer receives life with the possibility of parole after 25 years. Accordingly, the murderer retains the life sentence, but is considered for parole after a specific period of time, at which time his prospect for rehabilitation and the severity of his offense will be reevaluated by the parole commission. However, if the murderer commits a second-degree murder, even if the murder is eligible for life without parole under Miller, the murderer may receive a term of years sentence. Furthermore, that term of years sentence guaranteeing eventual release may be less than the 25 years a first-degree juvenile murderer would be required to serve. Accordingly, the solution presented by petitioner of making first-degree murder effectively punished as second-degree murder, despite the Legislature's express indication that first-degree murder is deserving of more severe punishment, fails to preserve the graduated sentencing scheme created by the Legislature.

Finally, the petitioner’s argument that parole was abolished "long ago," is not really that long at all. Indeed, for capital felonies, parole was only eliminated sixteen years ago. Further, as recognized in the concurrence in Washington, "the parole commission still exists specifically for people sentenced when parole was still available . . . ." Washington at 921. Accordingly, applying statutory revival does not involve reinstalling a system that has "long ago" passed into memory. It

merely involves referring a class of offenders to the presently-existing Florida Parole Commission and apply presently existing law related to the opportunity for parole for those offenders.[4]

In conclusion, the United States Supreme Court in Miller did not remove the State's authority or power to impose the penalty of life without parole for a juvenile homicide offender, but the Court instead, changed the procedures which are required in order to impose a life without parole sentence. Thus, even if Miller is applied retroactively, pursuant to Miller, a trial court may still impose a life without parole sentence if the trial court finds that the sentence would be appropriate after conducting an individualized hearing and considering the offender's youth and attendant characteristics. However, after considering the juvenile homicide offenders individual characteristics, if the trial court finds that a life without parole sentence is not appropriate, the State submits that statutory revival is the appropriate remedy.

[4] The Legislature has passed a new law which if signed by the Governor will take effect on July 1, 2014. The engrossed bill still provides for the possibility of a life without parole sentence for certain juvenile murders after a proper hearing. It also provides for a manner for other juvenile offender to file a motion to modify his or her sentence at certain time intervals. However, this provision expressly would only apply to offenses occurring after July 1, 2014. See Fla. CS/HB 7035 (2014).

ISSUE II

WHETHER THERE ARE DIFFERENCES AS TO THE REMEDY OR RE-SENTENCING OPTIONS FOR POSTCONVICTION CASES THAN FOR THOSE CASES THAT ARE PENDING ON DIRECT APPEAL? (Restated)

Standard of Review

This is a question of law, and therefore is subject to de novo review.

Argument

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court held that the imposition of a mandatory life sentence without a parole for a juvenile homicide offender without consideration of the juvenile offender's individual characteristic violated the Eighth Amendment's prohibition on cruel and unusual punishment. This Court asked if Miller applies retroactively, whether there are differences as to the remedy or re-sentencing options for post conviction cases as compared to cases pending on direct appeal. The State agrees with petitioner that there are no principled distinctions between the two.

CONCLUSION

Based on the foregoing, the State respectfully submits the if this Court finds that Miller does apply retroactively, this Court should first remand for an individualized sentencing hearing in which the court can the offender's youth and attendant characteristics. After the individualized hearing the trial court may find that a life without parole sentence is appropriate. If the trial court finds that a life without parole sentence is not appropriate for the particular juvenile murder offender, then State submits that statutory revival is the appropriate remedy.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that on May 20, 2014, a copy hereof has been furnished by email to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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