qNOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ASHLEY M. TOYE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D12-5605

Opinion filed January 22, 2014.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Lee County; Bruce Kyle, Judge.

Stuart M. Pepper, Cape Coral, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Ashley Toye appeals the summary denial of her motion filed pursuant to Florida Rules of Criminal Procedure 3.800(a) and 3.850, in which she claimed that the decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), rendered her mandatory sentence of life in prison without the possibility of parole illegal because she was a juvenile when

she committed her offenses. The postconviction court dismissed her motion as untimely, relying on the Third District's decision in Geter v. State, 115 So. 3d 375, 385 (Fla. 3d DCA 2012) (en banc), which held that the Miller decision does not apply retroactively. The First District reached the same conclusion in Gonzalez v. State, 101 So. 3d 886, 888 (Fla. 1st DCA 2012). However for the reasons that follow, we conclude that Miller applies retroactively, certify conflict with Geter and Gonzalez, and reverse the postconviction court's order.[1]

Background

A jury found Toye guilty of two counts of first-degree felony murder, two counts of kidnapping, two counts of aggravated assault, and one count of tampering with evidence based on events that occurred when Toye was seventeen years old. The trial court sentenced Toye to the required sentence of life in prison without the possibility of parole for the felony murders, see § 775.082(1), Fla. Stat. (2006), and to concurrent sentences totaling a term of twenty-five years for the other charges. In 2008, before the Supreme Court issued its decision in Miller, this court affirmed Toye's judgments and sentences per curiam. Toye v. State, 988 So. 2d 1104 (Fla. 2d DCA 2008) (table decision).

After the Miller decision was issued, Toye filed her postconviction motion claiming that her life sentence was illegal. The postconviction court denied the motion because it was filed more than two years after Toye's judgment and sentence became

[1]We note that the First District recently certified the issue to the Florida Supreme Court as a question of great public importance, and review has been granted in Falcon v. State, 111 So. 3d 973 (Fla. 1st DCA), review granted, No. SC13-865 (Fla. June 3, 2013). See also Smith v. State, 113 So. 3d 1058 (Fla. 1st DCA 2013).

final. It also found that Miller did not apply retroactively and so did not constitute an exception to the two-year window of rule 3.850. We reverse, however, because we hold that the rule established in Miller—that a mandatory sentence of life imprisonment without the possibility of parole imposed on a juvenile homicide offender violates the Eighth Amendment—should be given retroactive effect.

Miller v. Alabama

In Miller, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469. Miller focused heavily on the concept of proportionality and relied on two lines of Eighth Amendment cases: (1) those that categorically banned "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty," such as Graham v. Florida, 560 U.S. 48 (2010) (barring life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses), and Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for all juvenile offenders); and (2) those that prohibited the mandatory imposition of the death penalty and demanded individualized sentencing considerations before imposing the death penalty, such as Lockett v. Ohio, 438 U.S. 586 (1978) (requiring that sentencing authorities not be precluded from considering the defendant's character and circumstances of the offense as mitigating circumstances for imposing the death penalty). Miller, 132 S. Ct. at 2463-64. As these cases demonstrate, the idea that "death is different" and the concept of proportionality are particularly applicable to juvenile offenders vis-à-vis sentencing.

In fact, the Miller Court acknowledged that juveniles are "constitutionally different from adults." Id. at 2464. They are less mature, less responsible, and concomitantly more reckless and impulsive. Furthermore, juveniles sentenced to life in prison will serve a greater percentage of their lives in confinement than will an adult. These factors must be taken into account when sentencing juveniles, and they serve to bar mandatory sentences that would absolutely require juveniles to spend the remainder of their lives in prison. Id. at 2464-69. Hence, a juvenile who commits a homicide after Miller is entitled to have the court consider potentially mitigating factors before it may impose a life sentence without parole. However, only if Miller applies retroactively can Toye's sentence be revisited.

Retroactivity in Florida: The *Witt* Analysis

In determining whether a Supreme Court decision applies retroactively, Florida courts first look to the content and language of the opinion itself. Barrios-Cruz v. State, 63 So. 3d 868, 871 (Fla. 2d DCA 2011). Because the Miller opinion is silent on retroactivity,[2] we must apply the three-prong test set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980), to determine whether to apply Miller retroactively. See Johnson v. State, 904 So. 2d 400, 408-09 (Fla. 2005).[3]

[2]In our view, Miller does not explicitly hold that its decision applies retroactively. Thus, we cannot accept Chief Judge Benton's theory in his concurring opinion in Falcon v. State, 111 So. 3d 973, 975 (Fla. 1st DCA 2013), that reading both Miller and the companion case of Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011), rev'd, Miller, 132 S. Ct. 2455, together makes it clear that the Court intended Miller to apply retroactively because the Court remanded Jackson's case for resentencing even though his judgment and sentence were final.

[3]In contrast, the federal courts and most state courts apply the retroactivity test articulated in Teague v. Lane, 489 U.S. 288, 311-13 (1989) (plurality opinion) (adopted by Penry v. Lynaugh, 492 U.S. 302 (1989), abrogated on separate grounds by

Witt held that a change in decisional law that requires reversing a once-valid conviction and sentence applies retroactively only if it "(a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." Witt, 387 So. 2d at 931. There is no question that the first two prongs of the Witt analysis are satisfied in this case; we must focus solely on whether the Miller decision constitutes a development of fundamental significance.

Developments of Fundamental Significance

Under Witt, decisional developments of fundamental significance fall within two broad categories: (1) those that " 'place beyond the authority of the state the power to regulate certain conduct or impose certain penalties,' and (2) 'those . . . which are of sufficient magnitude to necessitate retroactive application.' " Barrios-Cruz, 63 So. 3d at 871 (quoting Witt, 387 So. 2d at 929). In one sense, Miller would not seem to fall within the first category because it does not affect the State's power to impose certain penalties, i.e., a sentence of life without parole, because juvenile homicide offenders can still receive such a sentence under a discretionary sentencing scheme that takes into consideration the offender's "youth and attendant characteristics." Miller, 132 S. Ct. at 2471. But the decisions in Miller and Roper effectively invalidated section 775.082(1), Florida Statutes (2012), as applied to juveniles convicted of a capital felony, such as Toye who was sentenced in 2006 under the identical statute. Hence, Miller invalidated the only statutory means for imposing a sentence of life without the

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Atkins v. Virginia, 536 U.S. 304 (2002)). See also Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (holding that state courts may "give broader effect to new rules of criminal procedure than is required by [Teague]").

possibility of parole on juveniles convicted of a capital felony. Cf. Chambers v. State, 831 N.W.2d 311, 343 (Minn. 2013) (Page, J. dissenting) (arguing that since the Minnesota legislature made the sentences mandatory, sentencing authorities did not have authority from the legislature to conduct individualized determinations or exercise discretion of any kind). Arguably, Miller has dramatically disturbed the power of the State of Florida to impose a nondiscretionary sentence of life without parole on a juvenile convicted of a capital felony, and thus the decision falls within this first category of developments of fundamental significance.

Stovall-Linkletter Test

It is even more apparent that Miller falls within the second category of developments of fundamental significance—those "which are of sufficient magnitude to necessitate retroactive application" under the three-part Stovall-Linkletter[4] test. Witt, 387 So. 2d at 929. That three-fold test considers: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Id. at 926.

In developing the second category, the Florida Supreme Court adapted the then-current ABA Standards Relating to Post-Conviction Remedies. See id. at 929 n.25. Under the ABA standards, Miller would apply retroactively because it is a significant change in the law that forbids sentencing authorities from ignoring a juvenile's "diminished culpability and heightened capacity for change," thereby lessening the risk of disproportionate punishment. 132 S. Ct. at 2469. But because the sentencing authority cannot consider a juvenile's youth and attendant circumstances

[4]Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965).

without an evidentiary hearing, Miller not only changed rules of procedure but also afforded a class of offenders the right to individualized sentencing determinations in accordance with the proportionality doctrine undergirding the Eighth Amendment's prohibition against cruel and unusual punishment. Therefore, Miller is inarguably "a significant change in law, whether substantive or procedural, applied in the process leading to [the] applicant's conviction or sentence." Witt, 387 So. 2d at 929 n.25 (quoting ABA Standards Relating to Post-Conviction Remedies § 2.1(a)(vi) (Approv. Draft 1968)). In addition, each part of the Stovall-Linkletter test supports this conclusion.

a. The Purpose to be Served

First, the purpose to be served by Miller weighs heavily in favor of applying it retroactively. Miller's discussion of individualized attendant circumstances, such as the juvenile's age, the juvenile's family and home environment, the circumstances of the homicide, and the extent of the juvenile's participation in the homicide, makes clear that these particular considerations could not be generically predetermined by the legislature. 123 S. Ct. at 2469. The Court guaranteed this right by requiring courts to consider—when they previously were not required to do so—each specific offender's youth and attendant circumstances before imposing a sentence of life without the possibility of parole so as to avoid cruel and unusual punishment under the Eighth Amendment. Thus, Miller does far more than "cast serious doubt on the veracity or integrity of the original trial proceeding," Witt, 387 So. 2d at 929, because no original constitutionally meaningful sentencing hearing was held in the first place. Accordingly, we must reject the State's argument in this case, as well as the conclusions in Geter

and Gonzalez, that Miller should be characterized as a mere evolutionary refinement in criminal procedure that should not be applied retroactively.

In our view, the State and the First and Third Districts fail to recognize that either procedural or substantive developments in the law can be of a fundamental significance, and either can apply retroactively.[5] In developing its retroactivity analysis, Witt acknowledged the competing interests in "ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of post-conviction relief from a sentence of death." 387 So. 3d at 925. In this balance, Witt recognized that changes in the law that "drastically alter the substantive or procedural underpinnings of a final conviction and sentence" outweigh the State's interest in finality of litigation. Id. Without question, Miller is just such a change in the law because it requires consideration of the nature of the offense committed and the juvenile's individual attendant circumstances as part of the application of the Eighth Amendment's prohibition against cruel and unusual punishment. Although Miller may have described its holding as a requirement that sentencing authorities follow a certain process, 132 S. Ct. at 2471, the "process" that the Supreme Court described flows from

[5]In reaching its conclusion that Miller is a mere procedural change in the law that should not apply retroactively, Geter relied on other Third District cases which incorrectly applied the "purpose to be served" requirement. 115 So. 3d at 378-79. Geter quoted the Third District's previous retroactivity analysis of Padilla v. Kentucky, 559 U.S. 356 (2010), but added the requirement that miscarriages of justice requiring retroactive application can only apply to "substantive criminal law." 115 So. 3d at 378-79 (quoting Hernandez v. State, 61 So. 3d 1144, 1150 (Fla. 3d DCA 2011)). However, the Florida Supreme Court decision relied on in Hernandez did not limit retroactivity to substantive changes in the law. See Hughes v. State, 901 So. 2d 837 (Fla. 2005) (holding that Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively). Further, the Florida Supreme Court did not create this distinction when affirming the Third District's decision in Hernandez and holding that Padilla does not apply retroactively. See Hernandez v. State, 124 So. 3d 757 (Fla. 2012).

Roper, Graham, and the Supreme Court's death penalty jurisprudence, and it is necessary to uphold the Eighth Amendment's proportionality requirement. Miller, 132 S. Ct. at 2471. In this context, the word "process" clearly referenced the creation of a new substantive right for juvenile offenders that did not previously exist.

The Third District's comparison of the purpose served by Miller to the purposes discussed in Hughes v. State, 901 So. 2d 837 (Fla. 2005) (holding that Apprendi v. New Jersey, 530 U.S. 466 (2000), does not apply retroactively), and Hernandez v. State, 61 So. 3d 1144 (Fla. 3d DCA 2011) (holding that Padilla v. Kentucky, 559 U.S. 356 (2010), does not apply retroactively), is misplaced because Hughes and Hernandez both concern a defendant's Sixth Amendment rights. See Geter v. State, 115 So. 3d 385, 394-97 (Fla. 3d DCA 2013) (en banc) (Emas, J., dissenting) (distinguishing the retroactivity of Apprendi's holding that the Sixth Amendment guarantees that the jury, rather than the judge, determine any fact that would expose the defendant to a sentence beyond the statutory maximum); Chambers, 831 N.W.2d at 336 (Anderson, J., dissenting) (distinguishing the retroactivity of Eighth Amendment rights from Sixth Amendment rights, such as Padilla). Padilla concerned counsel's duty to inform defendants of the potential effect of a conviction upon their immigration status, Hernandez v. State, 124 So. 3d 757, 759 (Fla. 2012), a matter unrelated to the veracity and integrity of the judgment in the case in which counsel represented the defendant. See Witt, 387 So. 2d at 929. And unlike Apprendi, Miller does not simply shift the fact-finding determination from the judge to the jury. See Apprendi, 530 U.S. at 483. Rather, Miller creates a new right to present mitigating circumstances when no such right previously existed. Chambers, 831 N.W.2d at 336-

37 (Anderson, J., dissenting). The creation of this new right militates in favor of applying Miller retroactively.

b. Reliance on the Old Rule

Second, retroactive application of Miller does not cast a large cloud of uncertainty over the finality of judgments as have other decisions retroactively affecting a defendant's trial or conviction. The law that can no longer be enforced after Miller, section 775.082(1), Florida Statutes (2012), had been in effect since May 25, 1994. Ch. 94-228, § 1, Laws of Fla. (1994). As recognized in Judge Emas' dissent in Geter, only 266 juvenile homicide offenders are serving mandatory sentences of life in prison without the possibility of parole. 115 So. 3d at 398 (citing Human Rights Watch, State Distribution of Youth Offenders Serving Juvenile Life Without Parole (2009), available at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole)). Thus, the number of cases relying on the old rule is relatively small.

Additionally, the rule at issue concerns only the juvenile's sentence and the conditions under which the court may impose a sentence of life without the possibility of parole. Id. The juvenile's conviction remains intact. Hence, on remand, courts are limited to resentencing the juvenile after applying the appropriate considerations. Cf. Witt, 387 So. 2d at 926 ("[F]inality will be illusory if each convicted defendant is allowed the right to relitigate his first trial upon a subsequent change of law." (emphasis added)). Moreover, Miller's retroactive application would comport with prior Florida decisions that applied the Supreme Court's prohibition of the mandatory imposition of the death penalty retroactively, because sentences of death and life

without the possibility of parole are the harshest sentences that can be imposed. Geter, 115 So. 3d at 393 (Emas, J., dissenting).[6]

There is currently some debate among the district courts regarding the appropriate sentence for juveniles whose life without parole sentence did not become final until after the Supreme Court decided Miller. Compare Washington v. State, 103 So. 3d 917, 922 (Fla. 1st DCA 2012) (Wolf, J., concurring) (suggesting the trial court "impose a sentence of a term of years up to life without [the] possibility of parole") with Horsley v. State, 121 So. 3d 1130, 1132 (Fla. 5th DCA) (reviving the previous version of the statute, section 775.082(1), Florida Statutes (1993), and imposing a sentence of life with the possibility of parole after twenty-five years), review granted, No. SC13-1938, 2013 WL 6224657 (Fla. Nov. 14, 2013). However, this single consideration, applied retroactively to a small number of sentences, would not "destroy the stability of the law, [or] render punishments uncertain and therefore ineffectual." Witt, 387 So. 2d at 929. This is especially true because the district courts are already addressing this issue for juveniles sentenced to life without the possibility of parole after Miller issued. Thus, this factor likewise militates in favor of retroactivity.

[6]In accordance with our view, we note that some individual district judges have also suggested that Miller should apply retroactively because the precedent upon which the Supreme Court relied in Miller applied retroactively. See, e.g., Geter, 115 So. 3d at 394 (Emas, J., dissenting); Chambers, 831 N.W.2d at 338 (Anderson, J., dissenting) (same); see also State v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013) ("If a substantial portion of the authority used in Miller has been applied retroactively, Miller should logically receive the same treatment."). Miller "flows straightforwardly from our precedents: specifically, the principle of Roper, Graham, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments." 132 S. Ct. at 2471.

c. Effect on the Administration of Justice

Third, applying Miller retroactively would have little effect on the administration of justice. Judge Emas' dissent points out that the 266 defendants to whom Miller could retroactively apply constitutes only 0.26% of Florida's inmate population. Geter, 115 So. 3d at 398-99. And as noted above, the only additional burden on the judicial system would be resentencing these 266 juveniles upon receipt of a postconviction motion. Moreover, this burden will not be onerous in terms of determining what sentence to impose as the appellate courts are already addressing this issue for defendants whose sentences were pending when Miller issued. See Horsley, 121 So. 3d at 1132.

The Third District's concern about the burden upon the courts, which is echoed by the State in its response in this case, is overstated and overlooks the distinction between disturbing a longstanding conviction and revisiting the sentence imposed upon a juvenile who, even if convicted years ago, remains imprisoned. Thus, this third factor also militates in favor of retroactivity.

Conclusion

In sum, the Supreme Court's decision in Miller constitutes a development of fundamental significance because it removes the authority of the State to impose a mandatory sentence of life in prison without the possibility of parole on juvenile homicide offenders and because it is a change in the law of sufficient magnitude under the Stovall-Linkletter test. Therefore, we hold that Miller applies retroactively to provide postconviction relief for juvenile homicide offenders sentenced to mandatory terms of life in prison without the possibility of parole. Accordingly, we reverse the postconviction

court's order denying Toye's motion, remand for the circuit court to resentence Toye on counts one and two in accordance with the requirements of Miller, and certify conflict with Geter and Gonzalez. Since the parties have not argued—either below or in this appeal—what the proper range of sentencing options on remand should be, we decline to do so on our own in this appeal. See, e.g., Anheuser-Busch Cos. v. Staples, 125 So. 3d 309, 312 (Fla. 1st DCA 2013) (noting that an appellate court is "not at liberty to address issues that were not raised by the parties"). At the resentencing hearing, the postconviction court should entertain argument from the parties on this issue.

Reversed and remanded; conflict certified.

LaROSE, J., Concurs.
VILLANTI, J., Concurs in part and dissents in part.
ALTENBERND, J., Concurs with opinion.

VILLANTI, Judge, Concurring in part and dissenting in part.

I fully concur in the majority's decision to reverse the summary denial of Toye's motion for postconviction relief based on the retroactivity of Miller v. Alabama, 132 S. Ct. 2455 (2012), and to remand for resentencing. However, I disagree with the majority's decision to refuse to provide any guidance to the postconviction court concerning the sentencing options available to it on remand. While "[p]rudence dictates that issues such as the constitutionality of a statute's application to specific facts should normally be considered at the trial level[,] . . . [o]nce this Court has jurisdiction, . . . it may, at its discretion, consider any issue affecting the case." Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986). Hence, in my view, this court should address the issue and specifically should utilize the doctrine of statutory revival to authorize the postconviction court to impose a legal sentence on Toye pursuant to the 1993 version of section 775.082(1).

No one disagrees that the effect of the decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Miller is to invalidate the current version of section 775.082(1). The majority believes that the parties should be permitted to explore the sentencing possibilities on remand and make arguments to the court concerning the range of available sentencing options. However, the simple fact is that given the unconstitutionality of section 775.082(1), a statutory gap now exists under which there is no legal sentence available to the sentencing court for a juvenile convicted of a homicide offense. Hence, while the postconviction court will certainly hold the required Miller hearing at which the parties will argue their respective positions concerning the appropriate sentence for Toye, the hearing will in fact be an entirely Sisyphean

endeavor because there is simply no legal sentence that can be imposed at its conclusion. I believe that putting the postconviction court in such a rudderless position is, at best, improvident. Pragmatically speaking, rather than remanding for an illusory resentencing hearing, this court should exercise its discretion and apply the doctrine of statutory revival to fill the untenable gap that has arisen in the wake of the Miller decision.[7]

Under the doctrine of statutory revival, "when the judicial branch invalidates an act of the legislature, the prior statute is brought back to life to avoid an unintended gap in the law." Partlow v. State, 38 Fla. L. Weekly D94, D96 (Fla. 1st DCA Jan. 4, 2013) (Makar, J., concurring in part and dissenting in part). Hence, 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 by the legislature itself." Horsley v. State, 121 So. 3d 1130, 1132 (Fla. 5th DCA), review granted, 2013 WL 6224657 (Fla. Nov. 14, 2013). This is not an unprecedented act. See, e.g., B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) ("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 unless it, too, would be unconstitutional."); Smith v. Smathers, 372 So. 2d 427, 429 (Fla. 1979) (explaining in

[7]I would also note that, even when the legislature does act on this issue, "it faces hurdles including the state constitutional constraint that the '[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.' " Partlow v. State, 38 Fla. L. Weekly D94, D96 n.7 (Fla. 1st DCA Jan. 4, 2013) (Makar, J., concurring in part and dissenting in part) (quoting Art. X, § 9, Fla. Const.). Thus, even if the legislature enacts a new sentencing statute this term, such statute will not fill the gap created by Miller.

the context of an election law that the "repealed sections of the statute are hereby revived and shall remain in force and effect to provide a procedure for write-in candidacies in future elections until properly changed by the legislature"). Because statutory revival requires the court to apply a previously duly enacted statute, it respects the legislature's authority to prescribe criminal penalties and is the antithesis of judicial activism.

Reviving the last constitutional version of the statute would fill the Miller gap and provide the postconviction court with the legal authority to exercise the sentencing discretion that the Miller Court clearly envisioned would be afforded to juvenile homicide defendants until such time as a legal statute is properly enacted by the legislature. And, like the Fifth District in Horsley and Judge Makar's concurring opinion in Partlow, I would certify the following question to the supreme court:

> WHETHER THE SUPREME COURT'S DECISION IN MILLER V. ALABAMA, 132 S.CT. 2455 (2012), WHICH INVALIDATED SECTION 775.082(1)'S MANDATORY IMPOSITION OF LIFE WITHOUT PAROLE SENTENCES FOR JUVENILES CONVICTED OF FIRST-DEGREE MURDER, OPERATES TO REVIVE THE PRIOR SENTENCE OF LIFE WITH PAROLE ELIGIBILITY AFTER 25 YEARS PREVIOUSLY CONTAINED IN THAT STATUTE?

ALTENBERND, Judge, Concurring.

I concur in our decision to give Ashley M. Toye retroactive relief from her life sentence without possibility of parole. I comment that I am not entirely convinced that this case is a "homicide" case governed by Miller rather than a "non-homicide" case governed by Graham. Relying on the briefs in Ms. Toye's direct appeal to this court, it appears that she was a principal to a felony murder and not the person who actually killed the victim. The facts in this case are horrific, but it is not clear to me that the United States Supreme Court has decided whether principals to felony murder fall within the purview of the Graham holding or the Miller holding. See generally Arrington v. State, 113 So. 3d 20 (Fla. 2d DCA 2012).

Judge Villanti in this case, and Judge Makar in his dissent in Partlow v. State, 38 Fla. L. Weekly D94 (Fla. 1st DCA Jan. 4, 2013), both present a reasonable argument for application of the doctrine of statutory revival on remand for resentencing. 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. I do not join in Judge Villanti's proposed certified question but only because I believe that the parties should have an opportunity to conduct a resentencing hearing at which that issue can be fully explored before the issue is sent to the supreme court.

Given the very difficult and time-consuming legal issues that have arisen since the decisions were announced in Graham and Miller—not only in the several

hundred earlier cases but also in all similar pending and future cases—a prospective statute allowing for life with the possibility of parole for defendants under the age of eighteen and maybe even under the age of twenty-one or twenty-four would be a cost-effective solution in Florida that would allow for long but measured sentences for young persons who commit serious crimes, in part, because of their immaturity. If prisoners who received life sentences without possibility of parole in the past for crimes committed during their minority were permitted by statute to elect resentencing under the new law, we could quickly address the 300 or so cases that are currently creating a constitutional quagmire in Florida.

The Florida Legislature should understand that there is at least a small risk, especially for new offenses controlled by Graham and Miller, that a court would conclude that no statutory provision for punishment exists for this small group of defendants. If that is the case, then they either cannot receive a sentence or the sentence cannot exceed one year in prison. This state has long had a statute that provides:

> When there exists no such provision by statute, the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed $500, nor the imprisonment 12 months.

§ 775.02, Fla. Stat. (2013).

There is little case law addressing this statute. The First District has held that it applies only to common law crimes. See Holmes v. State, 342 So. 2d 134, 135 (Fla. 1st DCA 1977), receded from on other grounds by Stanfill v. State, 360 So. 2d 128 (Fla. 1st DCA 1978). The offenses involved in the Graham and Miller cases are not common law crimes. However, in so holding, the court in Holmes concluded that no

punishment existed for a statutory crime for which the legislature had provided no penalty. The supreme court has never determined whether section 775.02 applies only to common law crimes. The title to the section suggests this is the case, but the body of the statute does not state this directly and, strictly construed, it might apply in this instance.[8] See § 775.021(1), Fla. Stat. (2013). The Florida Legislature could eliminate this risk if it addresses this sentencing issue during the next session.

[8]In earlier codifications, it appears that the context of what is now section 775.02 was immediately preceded by the statutory provision that is now found at section 775.01. See § 775.01; Hepburn v. Chapman, 149 So. 196, 203 (Fla. 1933). Section 775.01 states: "The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject." Sections 775.01 and 775.02 are now separated by other statutory provisions. But when the two sections are read back to back, the words "no such provision" in section 775.02 appear to refer to common law crimes for which there are no existing provisions by statute.