IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

Case No[s]: CF81-2362
CF81-2503

ROBERT EARL HOWARD,
Defendant.
_____/

MOTION TO CORRECT ILLEGAL SENTENCE

COMES NOW the Defendant, Robert Earl Howard, *pro se*, pursuant to Rules 3.850(b)(2) and 3.800(a), ***Fla. R. Crim. P.***, and moves this Honorable Court to vacate his multiple life sentences in the above-styled cause and remand for resentencing consistent with the Supreme Court's holding in ***Miller v. Alabama***, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In support of his motion, Mr. Howard respectfully states as follows:

I. CASE HISTORY

On August 21, 1981, Howard was indicted in Case No. CF81-2362 with first degree murder (Count I), burglary/assault (Count II) and robbery (Count III). Subsequently, on August 26, 1981, Howard was charged by information in Case No. CF81-2503 with burglary/battery (Count I) and aggravated battery (Count II).

On January 19, 1982, a jury found Howard guilty as charged in Case No. CF81-2362. Following his conviction, Howard was sentenced to life with the possibility of parole after 25 years as to Count I, 15 years as to Count II, and 15 years as to Count III. All sentences were imposed to run concurrent.

On February 8, 1982, a jury found Howard guilty as charged in Case No. CF81-2503. Thereafter, he was sentenced to life as to Count I, and 1 year as to Count II. The sentences in this

case were imposed to run concurrent with one another and concurrent with the sentence imposed in Case No. CF81-2362.

Howard appealed both convictions, which were consolidated by the Second District Court of Appeal. The Second District affirmed his convictions and sentences without a published opinion. ***Howard v. State***, 422 So.2d 850 (Fla. 2 DCA 1982).

On January 16, 1987, Howard sought post-conviction relief in the trial court through Rule 3.850. On January 27, 1987, the court denied the motion. Howard appealed, and on March 11, 1987, the Second District Court of appeal affirmed the trial court's order. ***Howard v. State***, 529 So.2d 698 (Fla. 2 DCA 1987).

On June 8, 1988, Howard filed a petition for writ of habeas corpus in the trial court through retained counsel. On January 20, 1989, the court denied the petition. Howard appealed, and the Second District Court of Appeal affirmed the court's order. [Citation unknown]

On March 8, 2012, Howard filed a *pro se* petition for a writ of habeas corpus in the trial court. On April 23, 2012, the court dismissed the petition. Howard appealed, and on February 6, 2013, the Second district Court of Appeal affirmed the trial court's order. ***Howard v. State***, 111 So.3d 888 (Fla. 2 DCA 2013).

Howard has filed no other motions or petitions for relief in this cause. No motions or petitions are otherwise pending in either state or federal court.

Successiveness of Motion

This is Howard's second motion filed pursuant to Rule 3.850. The issue raised herein, however, has never before been raised by Howard and thus never before been addressed by this Honorable Court.

II. ISSUE PRESENTED

WHETHER HOWARD'S LIFE SENTENCES ARE ILLEGAL UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN ***Miller v. Alabama***, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)

Introduction

In ***Miller***, the Supreme Court held that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. Although Howard was sentenced to life with the possibility of parole after 25 years, he contends ***Miller*** should be extended to him for two reasons:

For one, while parole is possible, it is highly unlikely that Howard will ever receive it, which means he may die in prison after serving almost his entire life behind bars as a juvenile offender. And two, if given the chance, Howard could offer mitigating facts at a resentencing hearing, as contemplated by ***Miller***, which were never considered by the original sentencing court and are not being considered by the Florida Parole Commission.

For these reasons, Howard maintains that his life sentences are illegal under ***Miller*** and that to deny him relief simply because he has a possibility of obtaining parole is to deny him due process and equal protection of the law. He asks this Court to grant him a resentencing hearing consistent with the ***Miller*** decision.

Factual Basis

As a result of both cases, Howard was sentenced to two life sentences with the possibility of parole after 25 years. Before imposing the life sentence in case CF81-2362, Judge Dowell made it clear that life was mandatory under the circumstances and that no PSI would be required.

[TR-563][1] The offenses in both cases were committed when Howard was a juvenile. He is now 50 years old and has been incarcerated for 33 straight years.

During his incarceration, Howard has earned his high school diploma, obtained several vocational certificates, received on-the-job training, and attended numerous self-betterment programs. And perhaps more significant, he has not received a disciplinary report in almost 30 years, specifically, since 1985.

Nevertheless, in spite of his exemplary prison record, Howard has been denied parole three times since completing the 25-year mandatory portion of his sentence. His current Presumptive Parole Release Date ("PPRD") is 2054, and he is interviewed by the Parole Commission within every 7 years. At which time the Commission may or may not lower his PPRD. With these numbers in mind, Howard could be anywhere from 70 to 80 years old when he finally reaches his PPRD, after having served anywhere from 50 to 60 straight years in prison. The Commission will then exercise its discretion and decide whether to grant him parole. If they decide not to, Howard will die in prison after having served almost his entire life behind bars, as a juvenile offender.

Howard contends this would be cruel and unusual punishment since there are facts and circumstances in this case that militate in favor of a lesser sentence, which were never considered by the original sentencing court and are not being considered by the Florida Parole Commission. If Howard is granted a resentencing hearing under ***Miller***, *e.g.*, he could show: (1) that he was only 17 years old when the crime occurred and had no criminal record at that time; (2) that he had an unstable, dysfunctional, and abusive home environment, along with a learning disability; (3) that the murder was effected not by a premeditated design but by chance during a botched

[1]In this motion, "TR" denotes the trial transcripts from the Record on Appeal.

burglary; and (4) that his culpability in the murder was a great deal less than that of his older, more experienced codefendant, who did have a criminal record.[2]

As it stands, in spite of the mitigating facts and circumstances in this case, Howard has served more than three decades in prison and will serve the rest of his life there as well if he is not granted parole. In considering Howard's position, and that of those who are similarly situated, an inevitable question arises, one which must be answered at some point:

> **Under *Miller*, how many years must a juvenile homicide offender serve on a life-*with*-the-possibility-of-parole sentence, where the offender is otherwise eligible for a lesser sentence based on the attendant facts and circumstances of the case, before the sentence rises to the level of an Eighth Amendment violation?**

If there was no number of years that would constitute cruel and unusual punishment in such a situation, then ***Miller*** would be meaningless. Indeed, the mere existence of ***Miller*** suggests that it is unconstitutional to sentence any juvenile homicide offender to die in prison without considering certain attendant circumstances: (1) the juvenile's age; (2) the juvenile's family and home environment; (3) the circumstances of the homicide; and (4) the extent of the juvenile's participation in the homicide. And the same is true *even if* that juvenile offender was sentenced to life *with* a possibility of parole.

In sum, if Howard dies in prison after having served almost his entire life behind bars, then certainly such punishment would be cruel and unusual under ***Miller***, given the weight of the

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[2]As a brief example, Mr. Howard's culpability in the murder can be evaluated by considering two things. First, Howard's co-defendant entered a plea of guilty in this case, essentially admitting to the murder. And second, during Howard's statement to detectives soon after the incident, he admitted to being present and committing the burglary, but adamantly and consistently denied participating in the actual killing:

> DETECTIVE: Who put the pillow over her?
>
> HOWARD: David. He was holding the pillow over her mouth when I was looking through the house. [TR-492]

mitigating factors in this case that have been ignored thus far. A mandatory life-with-the-possibility-of-parole sentence is still a life sentence, and because Howard was never afforded a thorough *judicial* review prior to being handed such a sentence, his life sentences are contrary to the dictates of ***Miller***.

Accordingly, Howard maintains that his life sentences are illegal under ***Miller*** and that to deny him relief simply because he has a possibility of obtaining parole is to deny him due process and equal protection of the law.

III. MEMORANDUM OF LAW

The *Miller* Holding

In 2012, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Miller v. Alabama***, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 415 (2012). The Court explained that "children are constitutionally different from adults for purposes of sentencing." ***Id.,*** 183 L.Ed.2d at 418. And the Court reasoned that because they have "diminished culpability and greater prospects for reform… [juveniles] are less deserving of the most severe punishments." ***Id***.

Incarcerating a juvenile for his entire lifetime is an "especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." ***Id.*** Therefore, under ***Miller***, 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 424.

Very recently, the Second District Court of Appeal held that "***Miller*** applies retroactively to provide post-conviction relief for juvenile homicide offenders sentenced to mandatory terms

of life in prison without the possibility of parole." ***Toye v. State***, 39 Fla.L.Weekly D187 (Fla. 2 DCA January 22, 2014). The Second District recognized the fundamental significance of ***Miller***, in that ***Miller*** now requires a sentencing court to consider several factors before it can impose a life sentence upon a juvenile homicide offender. Those factors include, but are not limited to: "(1) the juvenile's age, (2) the juvenile's family and home environment, (3) the circumstances of the homicide, and (4) the extent of the juvenile's participation in the homicide." ***Id.***, at D188. *See also* ***Landrum v. State***, 39 Fla. L. Weekly D466 (Fla. 2 DCA February 28, 2014) (citing ***Toye*** and holding that ***Miller*** applies retroactively); ***Cotto v. State***, 39 Fla. L. Weekly D1176 (Fla. 4th DCA June 4, 2014) (holding that ***Miller*** applies retroactively and expressly noting that the Supreme Court of the United States has already given the holding in ***Miller*** retroactive effect).

The Florida Parole System

Because this claim hinges on Howard's possibility of ever obtaining release through parole, it is necessary to examine the laws that govern the Florida Parole Commission, the principles the Commission adheres to, and some very telling statistical information garnered from the Commission's website.

First of all, in Florida "the decision to parole an inmate… is an act of grace of the state and shall not be considered a right." **§** 947.002(5), **Fla. Stat.** (2013). Florida Court's have long held that "[t]he ultimate discretion to grant parole lies with the Florida Parole Commission." ***Thomas v. Florida Parole Comm'n***, 107 So.3d 517, 518 (Fla. 1 DCA 2013) (citing ***Florida Parole & Probation Comm'n v. Paige***, 462 So.2d 817 (Fla. 1985)). The Commission's duty, according to Commissioner Tena M. Pate, Chair person of the Commission, is "to hold offenders

accountable, while also providing through careful selection, the opportunity for deserving offenders to become contributing, law abiding members of society."[3]

Once an inmate becomes eligible for parole, the Florida Parole Commission is charged with the responsibility of conducting an Initial Interview Procedure and establishing a Presumptive Parole Release Date ("PPRD"). § 23-21.006, **F.A.C.** In establishing a PPRD, the Commission considers several factors they refer to as the "salient factors." Ch. 23-21.007, **F.A.C.** These factors include: (1) the number of prior criminal convictions; (2) the number of prior incarcerations; (3) the total time served in years; (4) *the age at the time of the offense which led to the first incarceration*; (5) the number of probation, parole or MCR revocations; and (6) the number of prior escape convictions. ***Id***.

Interestingly enough, if the offender was 17 years of age or younger at the time of the offense that led to his or her first incarceration, then the maximum of 2 points is added to the total score. § 23-21.007(4), **F.A.C.** Equally interesting is the fact that the Parole Commission does not consider a juvenile homicide offender's family and home environment at the time of the crime, nor do they consider a juvenile's actual participation in the crime, as ***Miller*** now requires a sentencing court to do prior to imposing a life sentence upon a juvenile homicide offender. *See* § 23-21.006-011, **F.A.C.**

Incredibly, the only time youth is even considered by the Florida Parole Commission is when they are using it as an aggravating, not a mitigating factor.

As a final point, statistics show that in FY 2012-13, of the 5,107 inmates who were eligible for parole in Florida, only 22 actually received it.[4] Sadly, that is less than half a percent. Parole in Florida, therefore, while possible, is highly unlikely for *any* eligible inmate. As the

[3]2013 Annual Report, Chair's Message, @ https://fpc.state.fl.us.
[4]These statistics can also be viewed on the Commission's website @ https://fpc.state.fl.us.

Florida Legislature has made clear, parole is neither a right nor a promise, but merely "an act of grace of the state…" **§** 947.002(5), **Fla. Stat.** (2013).

The Parole System as it Relates to Howard

Howard has been incarcerated for more than three decades and his current PPRD is the year 2054. Under Florida's current parole system, it is highly unlikely that Howard will ever obtain release through parole. Following his latest interview, the Commission again advised him, for the third consecutive time, that it was not reasonable to expect parole in the near future simply because of the nature of the crimes for which he was convicted—a factor that Howard has no control over and cannot change no matter what he does.[5]

Howard's conduct in prison, on the other hand, he does have control over, and it has been exceptional thus far. He has demonstrated not only good conduct and maturity but also rehabilitation, and the institutional classification officers who have been assigned to him over the years can and will confirm this.[6]

But under Florida's current parole system, his institutional behavior and achievements are simply not enough, because "[n]o person shall be placed on parole merely as a reward for good conduct or efficient performance of duties assigned in prison." **§** 947.18, **Fla. Stat.** (2013).[7] Under Florida's current parole system, Howard has been and will continue to be denied a

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[5]*See* Exhibit A (the results of Howard's latest review by the Florida Parole Commission, dated August 22, 2012).

[6]*See* Exhibit B, *e.g.* (letter of commendation addressed to the Parole Commission from Mr. T. Smith, Howard's current Classification Officer at South Bay Correctional Facility, dated March 10, 2010).

[7]Interestingly, this language stands in stark contrast to ***Miller***, where the Supreme Court reaffirmed the unquestioned principle set forth in ***Graham*** that every state must give a juvenile defendant a "meaningful opportunity to obtain release *based on demonstrated maturity and rehabilitation*." ***Id.***, at 424 (emphasis added) (quoting ***Graham v. Florida***, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010)). Therefore, a corollary to this argument is that ***Miller*** appears to have invalidated **§** 947.18 insofar as it applies to juvenile homicide offenders.

meaningful opportunity to obtain release, despite the mitigating facts of this case and despite his good conduct, demonstrated maturity, and rehabilitation. And because the Commission is continually relying on unchangeable factors to deny him parole, it is highly unlikely, if not wholly impossible, for Howard to ever obtain release through parole, and he may die in prison after having served almost his entire life behind bars as a juvenile offender.

Thus, Howard's only means of obtaining relief from his multiple life sentences, for the offenses that he committed when he was a juvenile, is through ***Miller v. Alabama***, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), not through the Florida Parole Commission.

CS/HB 7035

Most recently, the Florida Legislature unanimously passed CS/HB 7035, which requires a sentencing court to now consider a vast number of factors before imposing a sentence upon a juvenile homicide offender, most of which appear to be derived directly from the ***Miller*** decision. CS/HB 7035 does not categorically bar a life sentence for a juvenile homicide offender but rather requires the judiciary to take into consideration mitigating versus aggravating factors *before* a life sentence can be imposed. CS/HB 7035 includes a term of years sentencing option of at least 40 years if the facts of the case do not necessitate a life sentence.

The passing of this bill indicates that the Legislature has indeed recognized the significance and the necessity of a thorough *judicial* review prior to imposing a life sentence upon a juvenile homicide offender. Although Howard was sentenced to life with the possibility of parole after 25 years, he was sentenced pursuant to a statutory scheme which mandates life in prison without considering *any* of the factors contemplated by ***Miller*** and now by CS/HB 7035.

A mandatory life-with-the-possibility-of-parole sentence is still a life sentence, and because Howard was never afforded a thorough *judicial* review prior to being handed such a sentence, his life sentences are contrary to the dictates of ***Miller*** and to CS/HB 7035.

Consequences

Ultimately, if this Court denies Howard relief under ***Miller*** it will deny him due process and equal protection of the law. Indeed, because if, under ***Miller***, one juvenile homicide offender cannot be sentenced to die in prison without being afforded an opportunity to present mitigating facts to the sentencing court, then Howard should not have to die in prison without being afforded that very same opportunity—even if he has a slender, although highly unlikely, possibility of obtaining parole. This is especially true given the fact that the Florida Parole Commission, in assessing Howard for parole, has not and will not consider any of the factors which are now mandated by the ***Miller*** decision and by CS/HB 7035.

If, on the other hand, this Court grants Howard relief, it would eliminate all possibility of Howard dying in prison—after having served almost his entire life behind bars as a juvenile offender—with the mitigating facts of this case being forever buried in the grave with him.

IV. CONCLUSION

Mr. Howard is not seeking to shun responsibility for what happened. On the contrary, an innocent person was killed and that person's family has suffered a grievous loss, and for that he deserves some form of punishment. But how much is enough—40, 50, 60 years? Or should he have to die in prison, after having served almost his entire life behind bars, simply because he has a slender, although highly unlikely, *possibility* of obtaining parole?

At the time of the offense Howard was just 17 years old and had no criminal record. He was not only immature but also impressionable, and when the crime occurred, he was merely following the lead of his older, more experienced codefendant. Not to mention, Howard was forced throughout his entire childhood to live in an unstable, dysfunctional and abusive home environment from which he could not readily extract himself and on top of that he suffered from a hampering learning disability for which he was never treated.

Howard is now 50 years old and is, indeed, a changed man. Commendably, he has overcome his learning disability and obtained his high school diploma, along with numerous other self-betterment certificates. He is an all around better human being, and he is ready to re-enter society as a contributing, law-abiding member. He just needs a second chance.

Today, this Court can give Howard that chance pursuant to ***Miller v. Alabama***, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). This court can bestow grace upon Howard, which the Florida Parole Commission has thus far withheld from him and will likely continue to withhold from him despite the mitigating facts and circumstances in this case.

For the reasons set forth herein, Howard implores this Court to grant him a second chance—he implores this Court to grant him a resentencing hearing consistent with the ***Miller*** decision.

WHEREFORE, based upon the foregoing facts, argument, and citations of authority, Howard respectfully moves this Honorable Court to vacate his life sentences and remand for resentencing consistent with the United States Supreme Court's holding in ***Miller v. Alabama***, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

It is so prayed.

UNNOTARIZED OATH

UNDER PENALTIES OF PERJURY, I declare that I read and understand the English language; that I have read the instant motion or that it has been read to me and that I understand its content; that the motion is filed in good faith and with a reasonable belief that it is timely and has potential merit, and does not duplicate previous motions that have been disposed of by this court; and, that the facts contained in the motion are true and correct.

_____
Robert Earl Howard, DC# 082581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Correct Illegal Sentence has been placed in the hands of institutional staff for mailing on this ____ day of _____, 2014, to: Clerk of the Circuit Court, 255 N. Broadway Ave., P.O. Box 9000—Drawer CC-1, Bartow, Florida 33831; State Attorney's Office, 255 N. Broadway Ave., P.O. Box 9000—Drawer SA, Bartow, Florida 33831.

_____
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