IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

ROBERT HOWARD,
Appellant.

Provided to South Bay Corr. and Rehab. Facility
on Robt Howard for mailing.
10-22-20

v.

STATE OF FLORIDA,
Appellee.

FILED
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CLERK DISTRICT COURT OF APPEAL
SECOND DISTRICT

Appeal Case.: 2D19-3299

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court in and for Polk County,

State of Florida

L.T. Case No[s]: CF81-2362; CF81-2503

Robert Howard DC# 082581
Appellant, pro Se
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ARGUMENT

POINT ONE

THE POST-CONVICTION COURT ERRED IN RESCINDING ITS DECEMBER 2016 ORDER GRANTING HOWARD POST-CONVICTION RELIEF IN THE FORM OF A NEW SENTENCING HEARING

The stakes in this case could not be higher: This court can either afford Howard the same opportunity for relief from his life sentence as that afforded to virtually every other similarly situated juvenile homicide offender in this state, or it can condemn Howard to spend the remainder of his life in prison with no hope of future release under Florida's current parole system.

The state urges this court to do the latter. But the state's position is premised entirely upon the trial court's error in construing Howard's motion as a rule 3.800(a) motion instead of a rule 3.850(b)(2) motion. Interestingly enough, the state actually concedes that Howard cited rule 3.850(b)(2) in his motion. Yet the state asks this court to not only ignore Howard's invocation of rule 3.850(b)(2), but also reward the state for the trial court's blunder by

affirming the order at issue in this appeal.

Perhaps this would be acceptable if Howard had made a generic reference to rule 3.850 in his motion or cited rule 3.800 (a) first. But this is simply not the case.

In the opening paragraph of his motion, Howard cited subsection (b)(2) of rule 3.850 followed by a citation to Miller v. Alabama, 567 U.S. 460 (2012). R. 36. And he did so For a reason. Subsection (b)(2) of rule 3.850 provides an exception to the two-year time limit where "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity."

In light of this court's 2014 decision in Toye v. State, 133 So. 3d 540, 548 (Fla. 2d DCA 2014), coupled with the obvious constitutional significance of Miller, Howard anticipated universal retroactive application of Miller. Thus he invoked rule 3.850(b)(2).

Howard even cited Toye in his memorandum of Law consistent with his citation to rule 3.850(b)(2). R. 41-42. The state, however, would have this court hold that Howards citation to rule 3.850(b)(2) means nothing and that the trial courts erroneous construction of Howard's motion means everything.

Although Howard may have cited 3.800(a) in his motion, it was a secondary citation, and his citation to rule 3.800(a) is not dispositive. Howard cited rule 3.850(b)(2) first to convey to the reader that the motion was intended to be filed pursuant to rule 3.850(b)(2), not rule 3.800(a). The secondary citation to rule 3.800(a) was merely a precautionary measure because at the time he filed the motion, the Supreme Court had yet to officially apply Miller retroactively. But regardless of Howard's secondary citation to rule 3.800(a), it simply can not be ignored that Howard invoked rule 3.850(b)(2) first in his motion. And this is especially true given what's at stake here: Howard's freedom, Howard's life.

So while the state may be correct that the trial court "treated Mr. Howard's motion as a motion to correct illegal sentence filed under rule 3.800 (a)," AB at 1, the trial court's decision to do so was clearly erroneous, and the State should not now be made the beneficiary of that error. Such a holding would allow — in fact, it might encourage - trial courts in this state to purposely construe a pro se litigant's rule 3.850 motion as a rule 3.800 motion, or vice versa, if such construction would harm the movant yet later benefit the state.

This court has held that a trial court must always convert an improperly styled pro se post-conviction motion where such conversion would benefit the movant. See Gill v. State, 829 So. 2d 299, 300 (Fla. 2d DCA 2002) ("where a movant files a properly pleaded claim but incorrectly styles the post conviction motion in which it was raised, the trial court must treat the claim as if it had been filed in a properly

styled motion."). But this Court has yet to hold that a trial court should convert a properly styled pro se post-conviction motion where such conversion would be detrimental for the movant yet beneficial for the state.

Accordingly, the trial court erred in construing Howard's rule 3.850(b)(2) motion as a motion filed pursuant to rule 3.800(a). And because the trial court erred in this regard, its December 2016 order granting Howard a new sentencing hearing was a final appealable order in a rule 3.850 proceeding. Thus, as in Croft v. State, 2018-5109, 45 Fla. L. Weekly D711 (Fla. 2d DCA 2020), the trial court lacked authority to rescind its December 2016 order, and this court should reverse this case with instructions for the trial court to reinstate Howard's Miller-compliant resentencing hearing. Not only would such a holding be in line with this court's prior precedent; it would also ensure that Howard is afforded equal protection of the law and due process.

Following the Florida Supreme Court's reversal of

Howard's case, see Howard v. State, 2016 Fla. LEXIS 2380; 41 Fla. L. Weekly S578 (Fla. 2016) (citing Atwell v. State, 197 So. 3d 1040 (Fla. 2016), R. 89, countless similarly situated offenders received Miller-compliant resentencing hearings and were released. In fact, at the time he filed his initial brief, a total of 66 offenders had been released under Atwell.

But that number has just increased to 67. see State v. Nelms, Palm Beach County Circuit Court Case No. 84CF000304B (emergency release order, dated October 1, 2020). Yet Howard remains behind bars with a presumptive parole release date of 2054 - a date well beyond his life expectancy. Certainly this violates bedrock equal protection and due process principles and warrants relief under the manifest injustice doctrine. Stephens v. State, 974 So. 2d 455 (Fla. 2d DCA 2008); see also Hagar v. State, 36 So. 3d 883, 884 (Fla. 2d DCA 2010) (Finding a manifest injustice and remanding for resentencing where a codefendant and others received relief on the same claim);

Johnson v. State, 9 So. 3d 640, 642 (Fla. 4th DCA 2009).

Conclusion

Because the trial court lacked authority to rescind its December 2016 order granting Howard a new sentencing hearing, this court should reverse this case with instructions for the trial court to reinstate Howard's resentencing Hearing.

Respectfully Submitted,

Robt Howard

Robert Howard #082581

Certificate of Compliance

I hereby certify that I complied with the requirements of FLA. R. APP. P. 9.210 (9)(2) (Double-Spaced, Hand written).

Robt Howard

Robert Howard #082581

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Foregang reply brief has been hand-delivered to institutional staff for mailing on this 22 day of October, 2020, to: Second District Court of Appeal, P. O. Box 327, Lakeland, FL. 33802-0327; and Attorney General's Office, 3507 Frontage Rd., Ste. 200, Tampa, FL. 33607-7013

Robert Howard

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