

IN THE SUPREME COURT OF FLORIDA

AMER ALI EJAK, :
 :
 Petitioner, :
 :
 vs. : Case No. SC16-2061
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MAUREEN E. SURBER
Assistant Public Defender
FLORIDA BAR NUMBER 0153958

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

RECEIVED, 11/28/2016 02:43:26 PM, Clerk, Supreme Court

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>SUMMARY OF THE ARGUMENT</u>	4
<u>ARGUMENT</u>	6
<u>ISSUE I</u>	6
<u>EJAK V. STATE</u> , 41 L. WEEKLY D2371 (FLA. 2D DCA OCT. 19, 2016) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN <u>HORSLEY V.</u> <u>STATE</u> , 160 SO. 3D 393 (FLA. 2015)	6
<u>CONCLUSION</u>	10
<u>CERTIFICATE OF SERVICE</u>	12
<u>APPENDIX</u>	11

TABLE OF CITATIONS

	<u>PAGE NO.</u>
Cases	
<u>Graham v. Florida,</u> 560 U.S. 48 (2010)	8
<u>Miller v. Alabama,</u> 132 S. Ct. 2455 (2012)	passim
<u>Ejak v. State,</u> 41 Fla. L. Weekly (Fla. 2d DCA Oct. 19, 2016)	6
<u>Horsley v. State,</u> 130 So. 3d 393 (Fla. 2015)	passim
<u>Kelsey v. State,</u> 183 So. 3d 439 (Fla. 1st DCA 2015)	7, 8
<u>Thomas v. State,</u> 135 So. 3d 590 (Fla. 1st DCA 2014)	7

STATEMENT OF THE CASE AND FACTS

The Petitioner, AMER ALI EJAK, was 16 years old when he participated in the murder of a man; the co-defendant was a 23-year old male. The general verdict form listed guilty of first-degree murder, as charged, as an option and this was chosen by the jury. Although the principal instruction was read to the jury, the general verdict form did not give the jury the option to specify whether Mr. Ejak actually killed, attempted to kill, or intended to kill the victim.

The crime was committed in 2009 and Mr. Ejak was sentenced to life without parole on September 3, 2013. Notably, Mr. Ejak was sentenced after the United States Supreme Court decided Miller v. Alabama, 132 S. Ct. 2455 (2012) but before the Florida Legislature enacted section 921.1401 (2), Florida Statutes (2014). The trial court gave some "individual consideration" to Mr. Ejak, meaning some mitigation was provided at sentencing. However, because chapter 2014-220, Laws of Florida, codified in sections 775.082, 921.1401, and 921.1402, Florida Statutes (2014), had not yet been enacted, the trial court did not consider all the factors outlined in section 921.1401.

At sentencing, the trial court reasoned the crime was not one which reflected transient immaturity. (V4/T785-90) Instead, the trial court found "this is an offender whose crime reflects what can only be called irreparable corruption, and life without parole is not a disproportionate sentence for this defendant." (V4/T785-90)

While the direct appeal was pending, this Court decided Horsley v. State, 160 So. 3d 393 (Fla. 2015), which held that chapter 2014-220, Laws of Florida, applied to all juvenile offenders whose sentences are unconstitutional under Miller. Mr. Ejak filed a motion to correct sentencing error requesting resentencing under the new legislation. Mr. Ejak argued the trial court was without the benefit of the new legislation, including the sentencing options available, and that he was entitled to a judicial review. Regarding the request for resentencing, the trial court denied the motion, finding the individualized consideration entertained at sentencing was sufficiently compliant with Miller. The trial court noted even if given the option for a term of years sentence, it would still sentence Mr. Ejak to a life sentence. Although the general verdict form evidenced Mr. Ejak was guilty of first-degree murder, as charged, the trial court found Mr. Ejak "actually killed" the victim and did permit a judicial review

after 25 years. (Supp/R1337-1497)

Mr. Ejak raised the issue on direct appeal. The Second District initially issued a per curiam affirmance but after a motion for rehearing issued a written opinion. The Second District affirmed Mr. Ejak's life without parole sentence, distinguishing Mr. Ejak from Horsley. The Second District stated, "Unlike Horsely, Ejak was sentenced after Miller was decided. The trial court recognized Miller required individual consideration, and it conducted a sentencing hearing specifically intended to comport with the requirements of Miller."

The Second District held Mr. Ejak's life sentence was not unconstitutional under Miller because unlike Horsley he received "individual consideration" as required by Miller and because it concluded the trial court "fully and carefully set out its findings." The Second District held the trial court addressed all the factors in section 921.1401(2) "to the extent each of those factors was applicable." Finding Mr. Ejak's situation distinguishable from Horsley and finding his life without parole sentence was constitutional, the Second District held Mr. Ejak was not entitled to a new sentencing hearing.

A Notice to Invoke Discretionary Jurisdiction was filed on November 14, 2016.

SUMMARY OF THE ARGUMENT

Relying on inaccurate Horsley facts, the Second District improperly and incorrectly distinguished Mr. Ejak from Horsley. Procedurally, Horsley and Mr. Ejak are identical however the Second District overlooked key procedural facts in Horsley. The Second District overlooked the fact that Horsley, like Mr. Ejak, was resentenced after Miller and before chapter 2014-220, Laws of Florida, was enacted. Horsley, like Mr. Ejak, was given "individual consideration" under Miller. Moreover the Horsley trial court, like the trial court in this case, found Horsley "could be the definition of irreparable corruption."

But in Horsley, this Court held that even though he was resentenced after Miller, was given individual consideration at resentencing, and found to be "irreparably corrupt," Horsley's sentence was still unconstitutional; Horsley was entitled to be resentenced pursuant to the new legislation.

The trial court's blatant disregard for this Court's binding Horsley ruling, compounded by the Second District's reliance on inaccurate Horsley facts, has resulted in Mr. Ejak's continued unconstitutional life sentence. Discretionary review is warranted. Because the facts of this case are indistinguishable from Horsley,

the Second District's opinion expressly and directly conflicts with this Court's Horsley ruling. Like Horsley, Mr. Ejak is entitled to be resentenced under the new legislation. The Petitioner respectfully requests this Court accept discretionary jurisdiction, quash the Second District's opinion, and remand for resentencing in conformance with Horsley and sections 775.082, 921.1401, and 921.1402, Florida Statutes (2014).

ARGUMENT
ISSUE I

EJAK V. STATE, 41 L. WEEKLY D2371 (FLA. 2D DCA OCT. 19, 2016) EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN HORSLEY V. STATE, 160 SO. 3D 393 (FLA. 2015).

The Second District's opinion in this case expressly and directly conflicts with this Court's ruling in Horsley v. State, 130 So. 3d 393 (Fla. 2015). The Second District overlooked key Horsley facts, therefore its analysis was wholly incorrect. Because this case is identical to Horsley, this Court should accept jurisdiction, quash the Second District's opinion, and remand for resentencing.

In Horsley, the appellant received a life without parole sentence for a first-degree felony murder he committed before he was eighteen years old. 130 So. 3d at 395. After Miller v. Alabama, 132 S. Ct. 2455 (2012) was issued, Horsley was resentenced. Id. at 396. At resentencing, the trial court gave individualized consideration based on Miller but again sentenced him to life without the possibility of parole. Id. at 397. The trial court said Horsley "could be the definition of irreparable corruption, as referenced in Miller." Id. In Miller, the Supreme

Court instructed it would only be the "rare juvenile offender whose crime reflects irreparable corruption" that would be subject to the "uncommon" sentence of life imprisonment without the possibility of parole. 132 S. Ct at 2469.

But even under these circumstances, this Court held Horsley's life sentence was unconstitutional and remanded for another individualized sentencing hearing pursuant to chapter 2014-220, Laws of Florida, "to consider the enumerated and any other pertinent factors 'relevant to the offense and [Horsley's] youth and attendant circumstances.'" Id. at 408.

Horsley is indistinguishable from Mr. Ejak's case. Like Horsley, Mr. Ejak was sentenced after Miller but before the new legislation and before Horsley was decided. Like Horsley, the trial court in this case gave individual consideration under Miller. Like Horsley, the trial court found Mr. Ejak irreparably corrupt under Miller. See also Thomas v. State, 135 So. 3d 590 (Fla. 1st DCA 2014), review granted, decision quashed, 40 Fla. L. Weekly S479f (Fla. Sept. 4, 2015). The facts of Thomas are found in Kelsey v. State, 183 So. 3d 439, 441 (Fla. 1st DCA 2015): Thomas was convicted of a homicide and sentenced to life without parole. After Miller, Thomas was resentenced to thirty and forty-year sentences. Id. The First District upheld these sentences, but

this Court cited Horsley and "remanded for resentencing in conformity with the framework established in chapter 2014-220, Laws of Florida, which has been codified in sections 775.082, 921.1401, and 921.1402, of the Florida Statutes." The Kelsey court concluded, "[i]n effect, the supreme court appears to require that any juvenile initially sentenced to mandatory life without parole for a homicide in violation of Miller be sentenced under the new framework regardless of what sentence may have been imposed in the interim." Id. (Emphasis added). Similarly, in Kelsey, the issue is whether a defendant is entitled to be resentenced for a nonhomicide crime under Graham v. Florida, 560 U.S. 48 (2010) and pursuant to chapter 2014-220, Laws of Florida, even if he was already resentenced prior to the enactment of the new legislation. 183 So. 3d 439 (Fla. 1st DCA 2015), review granted, No. SC15-2079 (Fla. Nov. 19, 2015).

The Second District should have followed Horsley and remanded for resentencing in compliance with Horsley, and it might have if it had not overlooked key procedural similarities. The Second District inaccurately stated that Horsley was not sentenced after Miller and that Horsley had not received individual consideration. Relying on these incorrect facts, the Second District incorrectly found Mr. Ejak distinguishable from Horsley and concluded his

sentence remained constitutional.

Moreover, in this case, a general verdict form was used. The form did not provide an opportunity for the jury to weigh in on whether it thought Mr. Ejak "actually killed, attempted to kill, or intended to kill" the victim. Although Mr. Ejak was convicted of first-degree murder, there was an adult co-defendant and the jury may have found Mr. Ejak was guilty under the principal theory. There is no evidence that Mr. Ejak admitted to actually killing the victim or evidence showing he did kill the victim, therefore, there is no support for the trial court's sua sponte finding that Mr. Ejak "actually killed" the victim in order to justify a review after 25 years. Cf. Horsley, 130 So. 3d at 408 (the jury's conclusion Horsley actually possessed and discharged a firearm during the crime establishes that he would be classified as a juvenile offender "who actually killed, intended to kill, or attempted to kill.")). See also § 775.082, Fla. Stat. (2014). Without a jury finding or evidence supporting Mr. Ejak "actually killed, intended to kill, or attempted to kill," the judicial review should be held at 15 years, not 25. Id.

Because this case is identical to Horsley, Mr. Ejak is entitled to be resentenced under the new legislation and for entry of a judicial review term after 15 years.

CONCLUSION

In light of the foregoing arguments, the Petitioner respectfully requests this Court accept jurisdiction and review this matter.

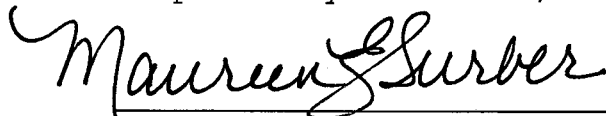
CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 28th day of November, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,



HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

MAUREEN E. SURBER
Assistant Public Defender
Florida Bar Number 0153958
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
msurber@pd10.state.fl.us
jingoglia@pd10.state.fl.us

APPENDIX

PAGE NO.

1. Ejak v. State, 41 Fla. L. Weekly D2371
(Fla. 2d DCA Oct. 19, 2016)

A1-A5

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

October 19, 2016

AMER ALI EJAK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

)
)
)
)
)
)
)
)
)
)

Case No. 2D13-5332

BY ORDER OF THE COURT:

Appellant's motion for rehearing, written opinion and/or certification is granted to the extent that we substitute the following opinion for the per curiam affirmance issued April 29, 2016. The motion is denied in all other respects. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

AMER ALI EJAK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D13-5332

Opinion filed October 19, 2016.

Appeal from the Circuit Court for
Hillsborough County; Emmett Lamar
Battles, Judge.

Howard L. Dimmig, II, Public Defender,
and Ivy R. Ginsberg, Special Assistant
Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Ceresse Crawford
Taylor, Assistant Attorney General,
Tampa, for Appellee.

KELLY, Judge.

Amer Ali Ejak was seventeen years old when a jury found him guilty of first-degree murder. The trial court sentenced Ejak to life in prison without the possibility of parole on September 3, 2013. The date is significant because Ejak's sentence was imposed after the United States Supreme Court decided Miller v.

Alabama¹—which held that it was unconstitutional to sentence a juvenile convicted of homicide to a mandatory life sentence without the possibility of parole—but before the Florida Legislature enacted section 921.1401(2), Florida Statutes (2014), to bring Florida's sentencing scheme in line with Miller. Faced with sentencing Ejak at a time when Florida had no valid sentencing statute for juveniles convicted of first-degree murder, the trial court conducted a sentencing hearing designed to comport with the dictates of Miller and then sentenced Ejak to life without the possibility of parole.

While this appeal was pending, the Florida Supreme Court decided Horsley v. State, 160 So. 3d 393 (Fla. 2015), which held that chapter 2014-220, Laws of Florida, applies to all juvenile offenders whose sentences are unconstitutional under Miller. Id. at 409. Ejak filed a rule 3.800(b)(2) motion to correct sentencing error citing Horsley and arguing that he was entitled to a new sentencing hearing in accordance with the procedures outlined in chapter 2014-220, Laws of Florida, which are codified in sections 775.082, 921.1401, and 921.1402, Florida Statutes (2014). The trial court granted the motion in part. As required by section 775.082(1)(b)(3), it made a written finding that Ejak was eligible for a sentence review hearing under section 921.1402(2)(a). However, it denied the motion to the extent it requested a new sentencing hearing under section 921.1401(2). On appeal, Ejak argues the trial court erred in not conducting a new sentencing hearing. We disagree.²

¹Miller v. Alabama, 132 S. Ct. 2455 (2012).

²Ejak raises several issues in this appeal, none of which have merit. We originally issued a per curiam affirmance, but granted his motion for rehearing, written opinion, and/or certification in part to address his argument that he was entitled to be resentenced. In all other respects his motion was denied.

The question in Horsley was what remedy was appropriate for sentences that were unconstitutional under Miller but which were imposed for crimes committed before the effective date of the new sentencing scheme. The supreme court stated its choice of remedy was driven by a desire to fashion a remedy that was consistent with legislative intent and Miller. See Horsley, 160 So. 3d at 405-06. The remedy it chose—application of the new law—would provide juveniles with individualized consideration before sentencing and, for most juveniles, subsequent judicial review of their sentences. See id. at 408. Ejak received both.

Unlike Horsley, Ejak was sentenced after Miller was decided. The trial court recognized Miller required individualized consideration, and it conducted a sentencing hearing specifically intended to comport with the requirements of Miller. Its sentencing order addressed the factors spelled out in Miller, which were later incorporated into section 921.1401(2). Ejak argues the trial court did not consider all the statutory factors; however, a review of the transcript of the sentencing hearing and the trial court's sentencing order show otherwise.

The trial court's order fully and carefully set out its findings, and we conclude it addressed all the factors described in section 921.1401(2), to the extent each of those factors was applicable. At sentencing, Ejak—unlike Horsley—received the individual consideration required by Miller. Thus, his life sentence was not unconstitutional under Miller, and absent an unconstitutional sentence under Miller, he was not entitled to a new sentencing hearing under section 921.1401(2). We also note that to the extent Horsley can be read to say that the Constitution requires that juveniles sentenced to life must be afforded an opportunity for subsequent judicial review of their

sentences, the trial court recognized this and, as required by section 775.082(1)(b)(3), made a written finding that Ejak was eligible for sentence review under section 921.1402(2). Ejak received everything he was constitutionally or statutorily entitled to and, accordingly, we affirm the trial court's order denying his rule 3.800(b)(2) motion to correct sentencing error.

Affirmed.

WALLACE and BLACK, JJ., Concur.