No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Mecklenburg County
v.	)	No. COA15-684
	)	06 CRS 222499-500
HARRY SHAROD JAMES	)	

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DEFENDANT'S RESPONSE TO THE STATE'S CONDITIONAL REQUEST FOR PRESENTATION OF AN ADDITIONAL ISSUE

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES Harry Sharod James, through undersigned counsel, and respectfully requests that this Court deny the State's conditional request for presentation of an additional issue.

In support of this response, Mr. James shows the following:

REASONS WHY THE STATE'S CONDITIONAL REQUEST SHOULD BE DENIED

The State argues that if this Court certifies this case for review, it should also grant review on the issue that the Court of Appeals erred by holding that N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, created a presumption in favor of life without parole. State's Response, p. 19. This Court should decline the State's request to review the additional issue because the Court of Appeals correctly recognized that the statutory scheme contains such a presumption. Specifically, two aspects of

N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, demonstrate that the default sentence under the statutory scheme is life in prison without parole.

First, N.C. Gen. Stat. § 15A-1340.19B provides factors that can only reduce the sentence to life in prison with parole. Under subsection (c), the defendant "may submit mitigating factors to the court" during the sentencing hearing. Subsection (c) then lists eight mitigating factors plus a catchall factor. The purpose of mitigating factors is to demonstrate circumstances that warrant a less severe sentence. *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). By listing only mitigating factors, the statutory scheme contemplates that the only decision at sentencing is whether the court should issue a downward departure from the default sentence of life in prison with parole -- not whether the court should move to the higher sentence of life in prison without parole.

Second, the wording of N.C. Gen. Stat. § 15A-1340.19C(a) demonstrates that the sentences of life in prison with parole and life in prison without parole are not equal alternatives under the statute. The statute does not state that sentencing courts must choose "either" or "between" life in prison with parole or life in prison without parole. Rather, according to N.C. Gen. Stat. § 15A-1340.19C(a), a sentencing court must determine whether the defendant should be sentenced to life in prison with parole "instead of" life in prison without parole. The phrase "instead of" means "'a substitute for or alternative to.'" *Duer v. Hoover &*

Bracken Energies, Inc., 753 P.2d 395, 398 (Okla. Ct. App. 1986) (*quoting* Webster's Seventh New Collegiate Dictionary 438 (1971)); *see also The American Heritage Dictionary of the English Language* 909 (5th ed. 2011) (defining "instead" in part as "[i]n the place of something previously mentioned…."). Consequently, the use of the phrase "instead of" sets the sentence of life in prison without parole as the default sentence under the statute.

Despite these two aspects of the statutory scheme, the State nevertheless argues that N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, does not contain a presumption in favor of life without parole because N.C. Gen. Stat. § 15A-1340.19B(a)(2) presents the choice of sentences through the use of the word "or." State's Response, p. 20. The State's reliance on N.C. Gen. Stat. § 15A-1340.19B(a)(2) violates well-settled principles of statutory construction. Specifically, this Court has long held that where one statute deals with a subject in general terms and another statute deals with the same subject in a more "minute and definite way," the two statutes should be read together and harmonized. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (*quoting* 82 C.J.S. Statutes § 369, at 839-43 (1953)). However, if there is any inconsistency between the statutes, the specific statute "prevail[s] over the general statute . . . ." *Id.* Viewed from this perspective, N.C. Gen. Stat. § 15A-1340.19B(a)(2) is a general provision that describes the court's sentencing decision

in general terms, whereas N.C. Gen. Stat. § 15A-1340.19C(a) provides more specific directives that the court must follow in choosing a sentence. Therefore, contrary to the State's assertion, the relevant provision for determining whether the statutory scheme contains a presumption in favor of life without parole is N.C. Gen. Stat. § 15A-1340.19C(a).

The State also argues that this Court should construe N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, in the same way the Supreme Court of California construed its sentencing statute in *People v. Gutierrez*, 58 Cal. 4th 1354, 1379, 324 P.3d 245, 262 (2014). In *Gutierrez*, the Supreme Court of California relied on the doctrine of constitutional doubt to hold that Cal. Penal Code § 190.5 did not contain any presumption. *Id*. According to the Supreme Court of California, Cal. Penal Code § 190.5 required sentencing courts to consider both aggravating and mitigating factors, and then to choose between "life without the possibility of parole or, at the discretion of the court, 25 years to life." *Id*. at 1369, 1387, 324 P.3d at 255, 267.

North Carolina's statutory scheme is distinguishable from the statutory scheme in California and, thus, cannot be construed in the same way. Unlike the statutory scheme in California, N.C. Gen. Stat. § 15A-1340.19, *et. seq.*, does not require courts to consider aggravating factors. Additionally, as described above, the two sentences of life in prison with parole and life in prison without parole are not equal alternatives. The use of the phrase "instead of" in N.C. Gen. Stat. § 15A-

1340.19C(a) demonstrates that the sentence of life in prison with parole is only a substitute for the default sentence life in prison without parole. This Court will only apply the doctrine of constitutional doubt "if it is possible to reasonably construe a statute so as to avoid constitutional doubts . . . ." *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981). In this case, it is not possible to reasonably construe N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, in a manner that would strip it of the presumption in favor of life in prison without parole. Consequently, the doctrine of constitutional doubt is not applicable in this case.

Even assuming North Carolina had a sentencing scheme that operated without a presumption in favor of life without parole, such an interpretation would not render the scheme constitutional because an equal chance at receiving a sentence of life in prison with parole or life in prison without parole does not comport with the mandate that sentences of life without parole must be rare. Specifically, the Supreme Court of the United States held in *Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012), that the differences between adults and juveniles "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." The Court then held in *Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 619 (2016), that a sentence of life without parole is "excessive" for all but the rare juvenile whose crime reflects irreparable corruption. Finally, when the Court remanded the appeal in *Adams v. Alabama*,

No. 15-6289, slip op. (U.S. May 23, 2016) in light of *Montgomery*, Justice Sotomayor stated in a concurring opinion that a sentence of life without parole is only appropriate for the "very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id.* at 4 (*citing Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 620). In light of the Supreme Court's repeated statements that a sentence of life without parole is only appropriate in very limited circumstances, statutes should actually contain a presumption in favor of life with parole.

Finally, the State asserts that it is "inconceivable" that the General Assembly would have enacted legislation that contradicted *Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012). State's Response, pp. 21. While it is laudable that the General Assembly acted in response to *Miller*, that does not mean that the resulting statutory scheme is devoid of defects. *See, e.g., State v. Bishop*, No. 223PA15, slip op. at 14 (N.C. Jun. 10, 2016) (holding unconstitutional the North Carolina cyber-bullying law on First Amendment grounds even though the statute addressed a compelling interest in protecting children). The statutory scheme under N.C. Gen. Stat. § 15A-1340.19A, *et. seq.*, was enacted only seventeen days after *Miller* was issued. North Carolina Session Law 2012-148. Laws written in haste are sometimes written with insufficient care. *McMunn v. Hertz Equipment Rental Corp.*, 791 F.2d 88, 93 (1986). Further, the statutory scheme was enacted long before the Supreme Court issued its follow-up decisions in *Montgomery* and

Adams. The General Assembly thus lacked the additional guidance that the Court provided in *Montgomery* and *Adams*. Ultimately, as the statutory scheme contains an unconstitutional presumption in favor of life without parole, this Court should deny the State's request to review the State's additional issue in this case.

CONCLUSION

WHEREFORE, Harry James respectfully requests that this Court deny the State's conditional request for presentation of an additional issue.

This the 23rd day of June, 2016.

(Electronic Submission)
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Response to the State's Conditional Request for Presentation of an Additional Issue has been duly served upon Ms. Sandra Wallace-Smith, Special Deputy Attorney General, North Carolina Department of Justice, Appellate Section, Post Office Box 629, Raleigh, North Carolina, 27602, by sending it in an email to: swsmith@ncdoj.gov.

This the 23rd day of June, 2016.

(Electronic Submission)
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