No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

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DEFENDANT-APPELLEE'S NEW BRIEF

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ISSUE PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT N.C.G.S. § 15A-1340.19A, *ET SEQ.*, CONTAINED A PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE? EVEN IF IT DID NOT CONTAIN SUCH A PRESUMPTION, WOULD A NEUTRAL SENTENCING SCHEME BE UNCONSTITUTIONAL UNDER *MILLER* AND *MONTGOMERY*?

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT N.C.G.S. § 15A-1340.19A, *ET SEQ.*, CONTAINED A PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE, BUT EVEN IF IT DID NOT CONTAIN SUCH A PRESUMPTION, A NEUTRAL SENTENCING SCHEME WOULD STILL BE UNCONSTITUTIONAL UNDER *MILLER* AND *MONTGOMERY*.

Although the Court of Appeals concluded that N.C.G.S. § 15A-1340.19A, *et seq.*, contained a presumption of life without parole, the State asserts that the sentencing scheme contains no such presumption. However, the limited procedures outlined in the sentencing scheme only involve a decision of whether to reduce the sentence to life with parole – not whether the sentence should be increased to life without parole. Thus, the sentencing scheme begins with a presumption that the juvenile should be sentenced to life without parole. Even assuming the sentencing scheme did not contain a presumption in favor of life without parole, a neutral sentencing scheme would not suffice. Under *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. ___, 193 L. Ed. 2d 599 (2016), a sentencing scheme must operate with a presumption in favor of life with parole. As the sentencing scheme in N.C.G.S. § 15A-1340.19A, *et seq.*, does not contain a presumption in favor of life with parole, it does not comply with *Miller* and *Montgomery*. Therefore, as Mr. James was sentenced under an unconstitutional sentencing scheme, his sentence must be vacated and

remanded for resentencing.

A. The Court of Appeals correctly understood how N.C.G.S. § 15A-1340.19A, *et seq.*, operated.

As part of its argument, the State acknowledges that a presumption in favor of life without parole would be "injurious to *Miller's* intent . . . ." State's Brief, p. 10. However, the State asserts that the Court of Appeals wrongly concluded that N.C.G.S. § 15A-1340.19A, *et seq.*, contained a presumption in favor of life without parole. As support, the State asserts that the General Assembly intended to comply with *Miller v. Alabama*, 567 U.S. ___, ___, 183 L. Ed. 2d 407, 424 (2012), and, thus, it is "inconceivable" that the General Assembly would have enacted a provision that would contradict the holding of *Miller*. State's Brief, pp. 10, 13. The State is mistaken.

First, the State incorrectly relies on the intent of the General Assembly to conclude that there is no presumption in favor of life without parole under the sentencing scheme. It is true that legislative intent is an important component of statutory analysis. But legislative intent alone cannot salvage an otherwise unconstitutional statute. "[I]n effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009). Put another way, "[t]he duty of a court is to construe a statute as it is written." *Campbell v. First*

Baptist Church of the City of Durham, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979). Additionally, saving a constitutionally defective statute while at the same time complying with constitutional mandates would require courts to "perform a complete statutory rewrite, which is a legislative and not a judicial function." *United States v. Sampson*, 486 F.3d 13, 23 (1st Cir. 2007). Ultimately, "[t]he intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." *Burnham v. Adm'r, Unemployment Comp. Act*, 184 Conn. 317, 325, 439 A.2d 1008, 1012 (1981).

According to the session law that gave rise to N.C.G.S. § 15A-1340.19A, *et seq.*, the General Assembly intended to comply with *Miller*. 2012 N.C. Sess. Laws Ch. 148 (S 635). Nevertheless, the resulting sentencing scheme did not accomplish that goal. The two sentencing options available under the sentencing scheme are not equal alternatives. A court's decision under N.C.G.S. § 15A-1340.19C(a) is to determine whether the juvenile should be sentenced to life with parole "instead of" the default sentence of life without parole. By using the phrase "instead of," the General Assembly created a procedure in which the sentencing court's decision to impose life with parole is dependent upon the court first rejecting life without parole. The General Assembly also created a procedure in which the court's decision hinges on the

existence of mitigating factors, which only serve to reduce the juvenile's sentence from a higher alternative. Consequently, although the General Assembly intended to comply with *Miller*, it nevertheless created a sentencing scheme with a presumption in favor of life without parole, which violates the requirement in *Miller* that courts only impose sentences of life without parole for the "rare" juvenile who exhibits "irreparable corruption."

Second, the General Assembly's intent was undoubtedly influenced by its understanding of *Miller* when the opinion in *Miller* was first issued. At the time, many in the legal community construed *Miller* as largely procedural. For example, the Supreme Court of Georgia explained in *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016), that it initially believed *Miller* established a procedural rule mandating consideration of mitigating factors, but that trial courts retained "fairly broad" discretion to impose life without parole sentences. "But then came *Montgomery*." *Id*. at 410. According to the Court, *Montgomery* "undermine[d]" its precedent indicating that trial courts had "significant discretion" in deciding whether juvenile offenders should be sentenced to life in prison for life without parole. *Id*. at 411. As a result of *Montgomery*, the Court acknowledged that its previous understanding of *Miller* was wrong. *Id*. at 410.

It is within this context that N.C.G.S. § 15A-1340.19A, *et seq*. was

enacted. Specifically, our General Assembly enacted the new sentencing scheme before the full scope of *Miller* was widely understood and without the deliberation necessary to properly implement a transformative constitutional rule. For example, when the Supreme Court of the United States issued its decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), requiring juries to find aggravating factors beyond a reasonable doubt, the General Assembly waited a full 12 months to enact a reform bill. *See* 2005 Sess. Laws Ch. 145 (H 822).

By contrast, the General Assembly enacted N.C.G.S. § 15A-1340.19A, *et seq.*, with remarkable speed – only 17 days after the opinion in *Miller* was issued. *See* 2012 N.C. Sess. Laws Ch. 148 (S 635). By any measure, this was a short period of time to create an entirely new sentencing scheme for juvenile defendants. Further, the General Assembly enacted the new sentencing scheme three and a half years before the opinion in *Montgomery* was issued and, thus, it lacked the additional guidance provided by the Supreme Court in that case. Consequently, although the General Assembly intended to comply with *Miller*, it is entirely possible that the presumption in favor of life without parole under the statutory scheme was the result of misapprehension over the holding in *Miller* and the speed with which the statutes were created.

The State also asserts that a presumption in favor of life without parole cannot be based on the absence of any aggravating factors because the Supreme Court was aware of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and could have easily made aggravating factors a requirement if it believed they were necessary. State-Appellant's Brief, p. 14. However, the Supreme Court does not "decide issues outside the questions presented by the petition for certiorari." *Glover v. United States*, 531 U.S. 198, 205, 148 L. Ed. 604, 612 (2001). *Apprendi* and *Blakely* both involved distinct questions under the Sixth and Fourteenth Amendments to the United States Constitution. By contrast, *Miller* and *Montgomery* involved an entirely separate constitutional provision, the Eighth Amendment. As the Supreme Court was not asked in *Miller* or *Montgomery* to specify whether a certain procedure would satisfy the Due Process Clause or the Sixth Amendment, the lack of any discussion of aggravating factors in either case does not support a conclusion that aggravating factors are not required for a court to determine whether a life without parole sentence is warranted.

B. Even without a presumption in favor of life without parole, the sentencing scheme would still violate *Miller*.

Even assuming N.C.G.S. § 15A-1340.19A, *et seq.*, did not have a presumption in favor of life without parole, a neutral sentencing scheme

would still violate *Miller*. When the Supreme Court issued its decision in *Miller*, it stated that life without parole sentences would be "uncommon" and that the differences between children and adults "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424. When the Court revisited life without parole sentences for juvenile defendants in *Montgomery*, it reiterated that a discretionary life without parole sentence would violate the Eighth Amendment for a juvenile who was not one of the rare juveniles whose crime reflected "permanent incorrigibility" or "irreparable corruption." *Id.* (*quoting Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424).

After *Montgomery*, the Supreme Court continued to rule on cases involving juvenile defendants convicted of first-degree murder. On May 23, 2016, the Court issued an order granting, vacating, and remanding the appeal in *Adams v. Alabama*, No. 15-6289, slip op. (U.S. May 23, 2016) in light of *Montgomery*. In a concurring opinion joined by Justice Ginsburg, Justice Sotomayor asserted that when a court sentences a juvenile convicted of first-degree murder, it must ask the "difficult but essential question" of whether the defendant is among the very "'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams v. Alabama*, ___ U.S. ___, ___, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring) (*quoting*

Montgomery, 577 U. S., at ___, 193 L. Ed. 2d at 620). The Court then issued an order on October 31, 2016 granting, vacating, and remanding the appeal in *Tatum v. Arizona*, ___ U.S. ___, 137 S. Ct. 11 (2016), also in light of *Montgomery*. Again, Justice Sotomayor reiterated in a concurring opinion that *Miller* and *Montgomery* require sentencing courts to determine whether the juvenile "was among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id*. at ___, 137 S. Ct. at 12 (*quoting Montgomery*, 577 U. S., at ___, 193 L. Ed. 2d at 620).

Given the repeated statements by the Supreme Court that the differences between juveniles and adults "counsel against" sentencing juveniles to life in prison without parole, that life without parole sentences will be "uncommon," and that such sentences are only appropriate for the "very rarest" of juvenile defendants who are irreparably corrupt or permanently incorrigible, it is clear that a sentencing scheme lacking a presumption in favor of life with parole cannot survive constitutional scrutiny. Indeed, the State itself agrees that *Miller* created a presumption in favor of life with parole, which "can only be changed with the requisite hearing." State-Appellant's Brief, p. 10. Thus, even assuming that N.C.G.S. § 15A-1340.19A, *et seq*. were neutral, it would still be unconstitutional. To satisfy *Miller* and *Montgomery*, a sentencing scheme must begin with a

presumption in favor of life with parole.

Here, nothing in N.C.G.S. § 15A-1340.19A, *et seq*., can be construed as creating a presumption in favor of life with parole. The default sentence under the statute is life without parole. As described above, the trial court's decision under the sentencing scheme is whether it will depart from the higher sentence of life without parole. Further, the sentencing scheme does not require the State to justify a higher sentence through evidence of aggravating factors. Instead, the juvenile bears the burden of proving mitigating factors in order to justify the lesser sentence of life with parole. Thus, if the juvenile did not present any evidence under this sentencing scheme, there would be no mitigating factors to support a decision to impose the lesser sentence of life with parole. Ultimately, as the sentencing scheme does not contain a presumption in favor of life with parole, it cannot be upheld under *Miller* and *Montgomery*.

C. Conclusion.

Under *Miller* and *Montgomery*, life without parole sentences are only allowed in a "very small category of cases" in which the juvenile is irreparably corrupt or permanently incorrigible. *State v. Sweet*, 879 N.W.2d 811, 834 (Iowa 2016). N.C.G.S. § 15A-1340.19A, *et seq*., unconstitutionally expands the categories of cases in which life without parole sentences will be

imposed because it contains a presumption in favor of life without parole. Even without such a presumption, the statute would remain unconstitutional because a neutral statute is not sufficient under *Miller* and *Montgomery*. As Mr. James was sentenced under a sentencing scheme that did not contain a presumption in favor of life with parole, his sentence must be vacated and remanded for resentencing.

CONCLUSION

For the foregoing reasons, Mr. James respectfully requests that this Court reverse the Court of Appeals' opinion in this case, vacate his sentence, and remand this case to superior court for resentencing.

Respectfully submitted this the 17th day of May, 2017.

(Electronic Submission)
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief has been duly served pursuant to Appellate Rule 26 upon 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 17th day of May, 2017.

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