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	)	

****

BRIEF OF AMICI CURIAE

SENATOR ANGELA BRYANT, SENATOR ERICA SMITH-INGRAM, REPRESENTATIVE KELLY ALEXANDER, REPRESENTATIVE LARRY BELL, REPRESENTATIVE JEAN FARMER-BUTTERFIELD, REPRESENTATIVE ROSA GILL, REPRESENTATIVE GEORGE GRAHAM, REPRESENTATIVE MICKEY MICHAUX, REPRESENTATIVE AMOS QUICK III, REPRESENTATIVE EVELYN TERRY, REPRESENTATIVE SHELLY WILLINGHAM, PROFESSOR THEODORE M. SHAW, AND GREAT EXPECTIONS

IN SUPPORT OF DEFENDANT-APPELLANT

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IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Amicus Curiae adopt by reference Defendant-Appellant's Statement of the Case. N.C. R. App. P. 28(f).

STATEMENT OF THE FACTS

Amicus Curiae adopt by reference Defendant-Appellant's Statement of the Facts. N.C. R. App. P. 28(f).

ARGUMENT

A. THE EIGHTH AMENDMENT DEMANDS THAT JUVENILE OFFENDERS BE SENTENCED IN A MANNER THAT ACCOUNTS FOR THE UNIQUE CHARACTERISTICS OF YOUTH AND RESERVES LIFE WITHOUT PAROLE SENTENCES FOR ONLY THE MOST EXTREME HOMICIDE CASES

Since 2005, the Supreme Court of the United States has decided four juvenile punishment cases that are guided by one foundational principle: the unique characteristics of youth must be considered when the criminal justice system punishes juvenile offenders. Through this set of juvenile punishment cases, the Court has recognized fundamental and constitutionally relevant differences between juveniles and adults; most significantly, that the transitory nature of youth leaves children more vulnerable to rash decision making and negative influences, but also provides them with a greater ability to change, and decreases the culpability of their actions. *See Roper v.*

Simmons, 543 U.S. 551, 569–71, 125 S. Ct. 1183, 1195–96 (2005) (further recognizing that punishment "should be graduated and proportioned according to the offense and the offender," *id*. at 560, 125 S. Ct. at 1190 (internal citation omitted)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026 (2010) (attributing children's greater capacity for change and lessened culpability to "fundamental differences between juvenile and adult minds"); *Miller v. Alabama*, 567 U.S. 460, 471-72, 132 S. Ct. 2455, 2464 (2012) (these differences make children "constitutionally different" for the purposes of sentencing); *Montgomery v. Louisiana*, __ U.S. __, __, 136 S. Ct. 718, 734 (2016) (emphasizing that the unique characteristics of youth will prove irrelevant only with "the rarest of juvenile [homicide] offenders").

Given the fundamental and constitutional relevance of youth's unique characteristics, the Court held the Eighth Amendment prohibits death sentences for all juvenile offenders, *Roper*, 543 U.S. at 551, 125 S. Ct. at 1184, life without parole sentences for all juvenile offenders convicted of non-homicide crimes, *Graham*, 560 U.S. at 48, 130 S. Ct. at 2011, and mandatory life without parole sentences for all juvenile homicide offenders. *Miller*, 567 U.S. at 489, 132 S. Ct. at 2475. In a sentencing determination between life with parole and life without parole, the *Miller* Court reasoned that trial

courts must carefully consider a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id*. at 477, 132 S. Ct. at 2468.

Following *Miller*, North Carolina adopted N.C.G.S. §§ 15A-1340.19A-D (2016) to provide guidelines for future sentencing of juvenile homicide offenders and resentencing hearings for juvenile offenders previously sentenced to life without the possibility of parole. In January 2016, the Court affirmed that *Miller* announced a substantive constitutional rule and must be applied retroactively, concluding that all juvenile homicide offenders must be afforded a sentencing process that considers the fact they were children when they committed their crimes. *Montgomery*, __ U.S. at __, 136 S. Ct. at 718.

B. NORTH CAROLINA'S CONSTITUTIONALLY INSUFFICIENT STATUTORY SCHEME REGARDING THE SENTENCING OF JUVENILE HOMICIDE OFFENDERS REINFORCES EXISTING RACIAL DISPARITIES IN THE STATE'S TREATMENT OF JUVENILE OFFENDERS

N.C.G.S. §§ 15A-1340.19A-D formally adhered to the rule of *Miller* and provided resentencing hearings well in advance of *Montgomery*. However, as fully argued in Mr. James' primary brief, *Miller* requires that state law reflect a presumption *against* sentencing juvenile offenders to life without

the possibility of parole, limiting the application of such a sentence to only the most extreme cases. The absence of clear statutory guidance on this foundational constitutional principle, as well as on assessing the necessary procedural safeguards to be included in the sentencing process, allows for the over-application of life without parole sentences to juvenile offenders. It also fails to sufficiently limit judicial discretion, which can allow implicit bias to infect the judicial process and produce racial disparities at this pivotal decision point in the criminal justice system. *See* Alyson A. Grine & Emily Coward, UNC-Chapel Hill School of Government, *Raising Issues of Race in North Carolina Criminal Cases* 9-6 (2014) ("Studies have shown that bias tends to arise when actors are making discretionary decisions.").

Research has consistently shown that implicit bias—the "assortment of stereotypical beliefs and attitudes" that individuals hold about various social groups—impacts both internal decision making and interpersonal interactions. Siri Carpenter, *Buried Prejudice*, Sci. Am. Mind, Apr.-May 2008, at 33. Implicit racial bias has been widely documented through use of the Implicit Association Test (IAT), which measures participants' unconscious association of certain concepts with specific racial groups. Using the IAT model, researchers have documented the pervasive nature of implicit racial

bias: phenotypically non-white facial features are more easily associated with negative concepts, and exposure to negative concepts can be unconsciously associated with non-white faces. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 877 (2004). Significant implicit racial bias has been documented even among individuals who are personally and professionally committed to notions of equality. *See* Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 Psychol. Rev. 101, 121 (2000) (concluding that implicit attitudes are difficult to fully replace, even when in direct conflict with one's explicit beliefs). Today, implicit racial bias significantly outpaces explicit racial prejudice, as approximately two-thirds of white individuals exhibit some implicit preference for whites over African Americans when administered the IAT. Carpenter, *supra* at 33.

Implicit bias negatively impacts non-white individuals who come into contact with the criminal justice system. Research consistently underscores the role that implicit racial bias plays in influencing the range of discretionary decisions made from the moment that police initiate contact with an individual to the moment that an individual is sentenced. For example, in North Carolina, analysis of statewide traffic stop data reveals

that African Americans and Latinos are searched and arrested at consistently higher rates compared to similarly situated whites. Frank R. Baumgartner & Derek Epp, *North Carolina Traffic Stop Statistics Analysis: Final Report to the North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias* 2 (2012), *available at* https://www.unc.edu/~fbaum/papers /Baumgartner-Traffic-Stops-Statistics-1-Feb-2012.pdf (noting that these racial disparities "appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues."). Following arrest, one study found that judges set bail at amounts 25% higher for African American defendants compared to similarly situated white defendants. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987, 992 (1994). These disparities continue post-conviction, as African Americans are the predominant racial/ethnic group of sentenced prisoners in state and federal prisons. E. Ann Carson & Elizabeth Anderson, U.S. Dep't of Justice, *Prisoners in 2015* tbl. 8 (2016).[1] Additional research has shown that federal judges impose sentences that are 12% longer on African Americans than on similarly situated whites, David B. Mustard, *Racial,*

[1] African Americans accounted for 523,000 (35.4%) of the nation's 1,476,847 sentenced prisoners at the end of 2015. *Id.*

Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts, 44 J.L. & Econ. 285, 300 (2001), and even that darker-skinned non-white individuals are sentenced more harshly than lighter-skinned non-whites. Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. Empirical Legal Stud. 395, 396 (2015). *See also* Jill Viglione et al., *The Impact of Light Skin on Prison Time for Black Female Offenders*, 48 Soc. Sci. J. 250, 255 (2011) (finding that, among African American women serving time in North Carolina state prisons between 1995 and mid-2009, lighter skin corresponded to 12% shorter sentences and an 11% reduction in actual time served). In capital punishment cases, African American defendants are more likely to receive the death penalty than white defendants, as are defendants who killed white victims rather than African American victims. R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 Cal. L. Rev. 1169, 1175 (2009).

Many of the above racial disparities track key decision points at which judges and other state actors exhibit significant discretion. Studies show that implicit racial bias affects judges at levels similar to the general public. In fact, one study that administered the IAT to judges found that 87.1% of

white judges exhibited a preference for whites. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210 (2009). This impact comes despite judges' professional commitment to equal application of the law, *id*. at 1222, and even though 97% of judges surveyed believe they have an above-average ability to "avoid racial prejudice in decision-making" as compared to other judges. *Id*. at 1225–26. *See also* Cheryl Staats & Charles Patton, Kirwan Institute for the Study of Race and Ethnicity, *State of the Science: Implicit Bias Review* 75 (2013), *available at* http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf (summarizing this "illusion of objectivity" as "a bias that makes us think we are not actually biased."). Although judges can mediate their own implicit racial bias when motivated to do so, Rachlinski, *supra* at 1230–31 (noting, for example, that auditing judges' discretionary determinations could motivate judges to mediate their own implicit biases), there is a "sizeable risk" that implicit bias can still impact judicial decision making. *Id*. at 1226.

The risk that implicit racial bias may impact a judge's decision to sentence a juvenile homicide offender to either life with or without the possibility of parole underscores a troubling consequence of the constitutional infirmities that Mr. James' primary brief has identified in

N.C.G.S. §§ 15A-1340.19A-D. *See* Brief of Defendant-Appellant at 10-35, *State v. James*, No. COA15-684 (N.C. May 17, 2017). In order to both satisfy the constitutional mandate under *Miller* that life without parole be reserved only for the rare juvenile who is irreparably without possibility of rehabilitation, and avoid racially disparate results in sentencing for juveniles convicted of first-degree murder, these statutes must operate with a clear presumption in favor of life with parole. They must also offer more guidance to trial courts tasked with imposing sentences on children. Absent such guidance, our state courts will not only fall short of the constitutional demands of *Miller*, but also retain a level of discretion that invites implicit racial bias to influence sentencing and therefore contribute to further racial disparities in North Carolina's treatment of juvenile offenders.

This concern is reflected by the stark racial disparities that already exist among juvenile offenders currently serving life sentences in North Carolina. As of 2016, this narrow class of individuals, which includes Harry James, consists of 78 juvenile offenders serving life without the possibility of parole. North Carolina Dep't of Public Safety, Division of Adult Correction and Juvenile Justice, 30 January 2016 Statistical Report (provided in response to 05 January 2016 request for information). 76.9% of these juvenile

offenders are African American,[2] while another 7.7% are Latino. *Id*. In total, 89.7% of juvenile offenders serving life without the possibility of parole in North Carolina are non-white. *Id*. Similar racial disparities exist among juvenile offenders serving life with the possibility of parole in North Carolina, as 73.3% of such juvenile offenders are African American. *Id*. These disparities are also seen in *Miller* cases that have reached or are pending in the appellate division. In five of those cases, the convicted child was African-American. *See State v. Antone*, 240 N.C. App. 408, 770 S.E.2d 128 (2015); *State v. Lovette*, 233 N.C. App. 706, 758 S.E.2d 399 (2014); *State v. Sims*, No. COA17-45; *State v. May*, No. COA16-1121; *State v. Williams*, No. COA16-178. In a sixth case, Latino. *State v. Santillan*, No. COA17-251.

C. NORTH CAROLINA'S SENTENCING SCHEME FOR JUVENILE OFFENDERS IS UNCONSTITUTIONALLY VAGUE AND A DEPARTURE FROM THE GROWING NATIONAL CONSENSUS

The United States is the only country in the world that sentences juveniles to life without parole. Josh Rovner, The Sentencing Project, *Juvenile Life Without Parole: An Overview*, *available at* http://www.sentencingproject.org/ publications/juvenile-life-without-

[2] African Americans account for just 21.5% of North Carolina's total population. U.S. Census Bureau, 2011-2015 American Community Survey Five-Year Estimates.

parole/. As noted in Section A *supra*, the Supreme Court of the United States has recognized a fundamental change in juvenile justice public policy over the last 12 years. Such a fundamental shift in the criminal adjudication of children mandates that every jurisdiction in the nation revisit their juvenile justice statutes to ensure they meet the constitutional benchmark established by *Miller*.

At a minimum, a State must provide a meaningful opportunity for the defendant to demonstrate how a child's unique characteristics apply in the case and therefore mandate a sentence of life with the possibility of parole. *See Montgomery v. Louisiana*, __ U.S. at __, 136 S. Ct. at 736 (2016). The controlling U.S. Supreme Court decisions, combined with an emerging majority of state juvenile justice policies, recognize that sentences of life without parole for juvenile offenders are constitutionally suspect under the Eighth Amendment's prohibition on cruel and unusual punishment. There is a building national consensus on abolishing sentences of life without the possibility of parole for juvenile offenders. Nineteen states and the District of Columbia have banned life sentences without the possibility of parole for

juveniles, including Texas, Arkansas, Kentucky and West Virginia.[3] Rovner, *supra*. Six more states do not have anyone serving juvenile sentences of life without the possibility of parole.[4] *Id*.

Various state supreme courts and federal appellate courts have also embraced the *Roper*, *Graham* and *Miller* holdings. The California Supreme Court held that a statutory presumption of life without the possibility of parole for a juvenile homicide offender violates the Eighth Amendment. *State v. Gutierrez*, 58 Cal. 4th 1354, 1381, 171 Cal.Rptr.3d 421, 442 (2014). The Supreme Court of Connecticut held that trial courts must consider a juvenile homicide offender's age at the time of their offense and the hallmark features of adolescence before sentencing them to a term of years that is the functional equivalent of a sentence to life without the possibility of parole. *State v. Riley,* 315 Conn. 637, 659, 110 A.3d 1205, 1217 (2015). The United States Court of Appeals for the Fourth Circuit rejected the argument that a "Geriatric Release" program—which allowed parole to be denied for any

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[3] The other states that have banned life sentences without parole for juvenile offenders are Utah, Nebraska, North Dakota, South Dakota, Hawaii, Nevada, Montana, Wyoming, Kansas, Iowa, Vermont, Massachusetts, Connecticut, Rhode Island, and Alaska.

[4] States that do not have any juvenile offenders serving life without parole are New Mexico, Missouri, Indiana, New York, New Jersey, Maine.

reason—provided a non-homicide juvenile offender with a meaningful opportunity to obtain parole. *LeBlanc v. Mathena*, 841 F.3d 256, 271 (2016), petition for cert. filed, No. 16-1177 (U.S. Mar. 30, 2017).

This growing national consensus also includes the American Medical Association, the American Psychological Association and the American Academy of Child and Adolescent Psychiatry. There is consensus that fundamental differences exist between the adolescent and adult brain with respect to maturity, an underdeveloped sense of responsibility, lessened appreciation of risks and consequences, and susceptibility to negative outside pressures such as family and peer pressure. Brief for the American Medical Association et al. as Amici Curiae Supporting Petitioners at 5-6, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647). Scientific research has established that regions of adolescent brains associated with risky, impulsive and sensation-seeking behavior are more active than in adult brains, while the regions of the adolescent brain corresponding with the ability to control behavior are less active than in adult brains. *Id*. The American Psychological Association and the Missouri Psychological Association concluded, "the same person who engages in risky or even criminal behavior as an adolescent may moderate or desist from

these behaviors as an adult. Indeed, most do." Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 7, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

North Carolina's sentencing scheme for juvenile offenders is unconstitutionally vague and lacks clear and objective standards for sentencing. It provides that a sentencing court must: (1) sentence the defendant to life with parole if a count or each count of first-degree murder was under the felony-murder rule or (2) if the situation does not fall under the felony-murder rule, then the court must conduct a hearing to determine a life without parole sentence or a life with parole sentence. At the hearing, the defendant can submit evidence of mitigating circumstances, including: age at the time of the offense, immaturity, ability to appreciate risks and consequences of conduct, intellectual capacity, prior sentencing recommendation, mental health, familial or peer pressure exerted upon the defendant, likelihood that the defendant could benefit from rehabilitation in confinement, and any other mitigating factor. N.C.G.S. § 15A-1340.19B. Under the current sentencing structure, however, although this evidence may be introduced, there is no statutory guidance on how the court should

evaluate, assess, or weigh the mitigating circumstances.[5] Instead, defendants are left with a juvenile sentencing process that is vague, ambiguous and subject to the overly broad discretion of the sentencing judge. *See* Brief of Defendant-Appellant at 34-36, *State v. James*, No. COA15-684 (N.C. May 17, 2017).

In stark contradiction of *Miller's* admonition that "sentencing juveniles to this harshest possible penalty will be uncommon," *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 2469 (2012), North Carolina's unconstitutionally vague statute means that judges are left with broad discretion that facilitates the sentencing of large numbers of children to life without parole. These numbers are substantially higher than in other southern states, including Tennessee, Georgia, South Carolina, Oklahoma and Texas. *See* The Phillips Black Project, *Juvenile Life Without Parole After* Miller v. Alabama (2015). North Carolina makes it too easy for the imposition of "the second most severe penalty permitted by law," without clear standards for assessing the unique characteristics of a juvenile as

[5] In this case, for example, the trial court did not make findings of fact on each of the mitigating circumstances. *State v. James*, __ N.C. App. __, __, 786 S.E.2d 73, 83 (2016).

mandated by *Miller*. *See Harmelin v. Michigan*, 501 U.S. 957, 960, 111 S. Ct. 2680, 2683 (1991).

Fortunately, appellate courts in North Carolina have been ahead of the legislature in moving the state toward conformance with the constitutional mandates of *Miller* and its progeny. This Court recently recognized that "a sentencing court cannot treat minors like adults when imposing a sentence of life imprisonment without the possibility of parole." *State v. Young*, __ N.C. __, __, 794 S.E.2d 274, 279 (2016) (citing *Miller v. Alabama*, __ U.S. __, __, 132 S.Ct. at 2466 (2012)). It demanded that North Carolina judges consider the fundamental, unique characteristics of juveniles when making sentencing determinations, and that sentencing courts must afford juvenile offenders a "*meaningful* opportunity to reduce the severity of the sentence to constitute something less than life imprisonment without the possibility of parole." *Id*. (emphasis added).

Earlier this year, the North Carolina Court of Appeals recognized that other state courts have extended *Miller*'s prohibition on mandatory juvenile life sentences without parole to sentences with the possibility of parole that involve very long periods of time. *State v. Jefferson*, __ N.C. App. __, __, 798 S.E.2d 121, 125 (2017) (citing *State v. Null*, __ Iowa __, __, 836 N.W.2d 41, 71

(2013)). The Court of Appeals suggested that such an extension could also apply in North Carolina, recognizing such long sentences *de facto* life sentences without parole. *See id*. __ N.C. App. at __, 798 S.E.2d at 125 (2017). In *Hayden v. Keller*, the U.S. District Court for the Eastern District of North Carolina found that North Carolina's parole process violated the Eighth Amendment because its parole review of juvenile offenders did not in fact ensure a meaningful opportunity for the consideration of the mitigating factors related to youth. 134 F.Supp.3d 1000, 1010 (E.D.N.C. 2015), *appeal dismissed sub nom. Hayden v. Butler*, 667 Fed. App'x 416 (4th Cir. 2016). The Parole Review Board's procedure for reviewing the cases of juvenile offenders had several deficiencies, all related to the lack of consideration given to the age of the offender at the time the crime was committed and to the offender's maturity and efforts at rehabilitation. *Id*. at 1009-10.

North Carolina's juvenile sentencing statutes do not meet the constitutional floor set by *Miller*. The Constitution requires the State to give its courts clear guidance on the consideration of the unique qualities of children before its sentencing determination of life with or without parole. The Supreme Court of the United States and courts in North Carolina have repeatedly affirmed that sentences of life without parole should only be

imposed on juvenile homicide offenders in the rarest and most egregious circumstances. Other states have abolished this penalty altogether. Yet, North Carolina's current juvenile sentencing guidelines under N.C.G.S. §§ 15A-1340.19A-D remains unconstitutionally vague and leaves North Carolina well behind other states and the Constitution.

CONCLUSION

North Carolina's statutory scheme for the sentencing of juvenile homicide offenders is unconstitutionally vague, and as a result creates and reinforces discriminatory racial disparities in the treatment of juvenile offenders. Additionally, processes and policies currently in place fail to meet established constitutional minimums, and leave the state woefully trailing the growing national consensus. For the foregoing reasons, amici respectfully request 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.

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N.C. R. App. P. 33(b) Certification: I certify that

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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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