

Judgment rendered May 17, 2017.
Application for rehearing may be filed
within the delay allowed by Art. 992,
La. C. Cr. P.

No. 51,337-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

FIELD CALHOUN

Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Lower Court Case No. 136,984

Honorable Brady D. O'Callaghan, Judge

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LOUISIANA APPELLATE PROJECT
By: Carey J. Ellis, III

Counsel for Appellant

FIELD CALHOUN

JAMES E. STEWART, SR.
District Attorney

Counsel for Appellee

SUZANNE MORELOCK WILLIAMS
LAURA OWEN WINGATE FULCO
Assistant District Attorneys

* * * * *

Before WILLIAMS, DREW, and COX, JJ.

DREW, J.

After his 1989 conviction for first degree murder, Field Calhoun was sentenced to life at hard labor without benefit of probation, parole, or suspension of sentence. We affirmed his conviction and sentence in *State v. Calhoun*, 554 So. 2d 127 (La. App. 2 Cir. 1989), *writ denied*, 558 So. 2d 601 (La. 1990). The defendant was 17 when he committed this gruesome crime.

Because of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), the trial court in 2016 amended the sentence to allow him the benefit of parole eligibility.

The defendant now appeals. His appellate counsel has filed a motion to withdraw, together with a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), alleging that there are no nonfrivolous issues upon which to base an appeal. We agree with counsel.

The defendant filed a *pro se* brief, assigning four errors. None have merit.

We affirm the defendant's life sentence with parole eligibility. We also grant counsel's request to withdraw from this case.

FACTS

On August 9, 2012, the defendant filed a *pro se* motion to correct an illegal sentence, arguing that mandatory life without parole was unconstitutional under *Miller v. Alabama*, *supra*, because he was 17 years old when he killed the victim.

After *Montgomery* held that *Miller* was to be applied retroactively to cases on collateral review, defense counsel filed a motion to vacate this

sentence, arguing that he should be sentenced to the next lesser included offense of manslaughter.

At the 2016 sentencing hearing, no witnesses were called. The trial court:

- rejected defendant's arguments regarding the *ex post facto* application of La. C. Cr. P. art. 878.1 and La. R.S. 15:574.4(E);
- declined to resentence under the manslaughter statute; and
- granted to the defendant the possibility of parole consideration.

The trial court denied defendant's *pro se* motion to reconsider sentence.

DISCUSSION

The defendant's appellate counsel has filed a motion to withdraw, alleging that he could find no nonfrivolous issues to appeal, as per *Anders, supra*; *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So. 2d 241; *State v. Mouton*, 95-0981 (La. 4/28/95), 653 So. 2d 1176; and *State v. Benjamin*, 573 So. 2d 528 (La. App. 4 Cir. 1990). The state agrees that no nonfrivolous issues exist on appeal.

This Court issued an order, pending this appeal, to hold defense counsel's motion to withdraw in abeyance; and rescind the previous deadline for filing a *pro se* brief.

Defendant's Four Pro Se Assignments of Error:

1. The sentence violates the Fifth Amendment protection of "fair notice."
2. This sentence under La. R.S. 15:574.4 (E) is an *ex post facto* violation.
3. The assessed sentence was not allowed at the time of conviction.
4. This sentence is not individualized.

The defendant argues:

- the trial court's retroactive application of La. R.S. 15:574.4(E) violated his right to fair notice and the prohibition against *ex post facto* laws;
- at the time of the offense, in 1986, Louisiana's jurisprudence provided that if a sentence was found to be unconstitutional, the defendant would be resentenced to the penalty provision for the next lesser included offense;
- because his sentence of life imprisonment without parole is unconstitutional, he should have been resentenced under the 1986 manslaughter statute;
- in that year, manslaughter carried a maximum of 21 years;
- the application of La. R.S. 15:574.4(E), providing for parole consideration only after 35 years, results in a longer period of incarceration than he would have received for a conviction of manslaughter as it read in 1986;
- his sentence is illegal because the legislature has not amended the first degree murder statute to provide for sentencing of juveniles;
- he did not receive an individualized sentence as required by *Miller, supra*, because the trial court simply granted him parole eligibility;
- the 35 years before parole consideration in La. R.S. 15:574.4(E) vitiates the sentencing court's ability to craft a lesser sentence that it deems appropriate after consideration of the factors set forth in La. C. Cr. P. art. 878.1; and
- because he has no realistic right to parole, his sentence violates *Miller*.

Applicable Law

For those offenders convicted of first degree murder in Louisiana, La. R.S. 14:30 provides for a sentence of death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. However, in *Miller, supra*, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The *Miller* court did not establish a categorical prohibition against life imprisonment without

parole for juvenile homicide offenders; instead, the case requires the sentencing court to consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest penalty for juveniles convicted of a homicide offense. *State v. Williams*, 12-1766 (La. 3/8/13), 108 So. 3d 1169; *Montgomery v. Louisiana, supra*. *Miller* drew a line between children whose crimes reflect transient immaturity and those few whose crimes reflect irreparable corruption. Life without parole is the correct sentence for the latter group. In response to *Miller*, our legislature enacted La. C. Cr. P. art. 878.1.¹

If the trial court imposes a life sentence with parole eligibility, La. R.S. 15:574.4(E) was added to require many conditions, such as serving 35 years of the sentence before making application to the parole board.

In *Montgomery, supra*, retroactivity was added to the holding in *Miller, supra*. The court alleviated concerns that the retroactive application of *Miller* would place an undue hardship on states.²

¹ Art. 878.1. Sentencing hearing for juvenile offenders

A. In any case where an offender is to be sentenced to life imprisonment for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) where the offender was under the age of eighteen years at the time of the commission of the offense, a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility pursuant to the provisions of R.S. 15:574.4(E).

B. At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant. Sentences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.

² "Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the

On remand, the Louisiana Supreme Court in *Montgomery, supra*, held that courts should utilize La. C. Cr. P. art. 878.1 and La. R.S. 15:574.4(E) when reviewing sentences for juvenile homicide defendants sentenced before Miller.

Constitutionality of La. C. Cr. P. art. 878.1 and La. R.S. 15:574.4(E)

This Court and the Louisiana Third Circuit Court of Appeal have addressed and rejected claims that La. C. Cr. P. art. 878.1 and La. R.S. 15:574.4(E) are unconstitutional in light of the requirements of *Miller*.³

As the Louisiana Supreme Court held in *State v. Shaffer*, 11-1756 (La. 11/23/11), 77 So. 3d 939, the mere access to the Board of Parole’s consideration satisfies the mandates of *Miller*, as opposed to any requirement for resentencing for a lesser offense. Further, resentencing under the manslaughter statute has been rejected soundly in our state appellate courts.⁴

Eighth Amendment. Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of Miller’s central intuition—that children who commit even heinous crimes are capable of change.” 577 U.S. at ___, 136 S. Ct. at 736.

³ See *State v. Fletcher*, 49,303 (La. App. 2 Cir. 10/1/14), 149 So. 3d 934, writ denied, 14-2205 (La. 6/5/15), 171 So. 3d 945, cert. denied, ___ U.S. ___, 136 S. Ct. 254, 193 L. Ed. 2d 189 (2015); and *State v. Doise*, 15-713 (La. App. 3 Cir. 2/24/16), 185 So. 3d 335, writ denied, 2016-0547 (La. 3/13/17), ___ So. 3d ___.

⁴ See *State v. Williams*, 50,060 (La. App. 2 Cir. 9/30/15), 178 So. 3d 1069, writ denied, 15-2048 (La. 11/15/16), ___ So. 3d ___, 2016 WL 6917259; *State v. Graham*, 14-1769 (La. App. 1 Cir. 4/24/15), 171 So. 3d 272, writ denied, 15-1028 (La. 4/8/16), 191 So. 3d 583; *State v. Jones*, 15-157 (La. App. 5 Cir. 9/23/15), 176 So. 3d 713; *State v. Williams*, 15-0866 (La. App. 4 Cir. 1/20/16), 186 So. 3d 242, writ denied, 2016-0332 (La. 3/31/17), ___ So. 3d ___.

Ex Post Facto Laws

The law in effect at the time of the crime determines the penalty to be suffered by the criminal. *State v. Sugasti*, 01-3407 (La. 6/21/02), 820 So. 2d 518. Article I § 10 of the United States Constitution and La. Const. art. I, § 23 prohibit *ex post facto* application of the criminal law by the state. The focus of the *ex post facto* inquiry is whether a new law *redefines criminal conduct* or *increases the penalty* by which the crime is punishable. *State v. Williams*, 00-1725 (La. 11/28/01), 800 So. 2d 790; *State ex rel. Olivieri v. State*, 00-0172 (La. 2/21/01), 779 So. 2d 735, *cert. denied*, 533 U.S. 936, 121 S. Ct. 2566, 150 L. Ed. 2d 730 (2001). Clearly, the instant situation does neither. The trial court scrupulously awarded this defendant all to which he was entitled in parole consideration under the guidelines in La. R.S. 15:574.4(E).

This sentence is not illegal. He received the mandatory minimum sentence available under *Miller*, La. R.S. 14:30, and La. C. Cr. P. art. 878.1. As this Court noted in *Fletcher, supra*, the legislature was not required to amend the murder statutes to provide for sentencing of juvenile homicide defendants. The legislature designed an adequate solution to *Miller* by creating statutes relating to parole eligibility for juvenile homicide defendants which are to be read in conjunction with the murder statutes. He has a chance at parole, but he will have to earn it. This scheme is reasonable and satisfies *Miller, supra*.

To the extent the defendant argues that he was entitled to a hearing and the imposition of an individualized sentence, *Miller* imposed no such requirement in cases where parole eligibility was permitted. In *Miller*, the

Supreme Court explained that the Eighth Amendment does not prohibit a court from imposing a sentence of life imprisonment with the opportunity for parole for a juvenile homicide offender, nor does it require the court to consider the mitigating factors of youth before imposing such a sentence. Instead, a sentencing court's obligation to consider youth-related mitigating factors is limited to cases in which the court imposes a sentence of life, or its equivalent, without parole. See *Miller, supra*, 132 S. Ct. at 2463-69. The sole question to be answered in a *Miller* hearing is whether the defendant should have a chance for parole. The trial court granted defendant all to which he was entitled. The rest is up to him.

DECREE

We affirm the sentence allowing the defendant potential parole eligibility. Counsel's motion to withdraw is granted.

SENTENCE AFFIRMED; COUNSEL'S MOTION TO WITHDRAW GRANTED.