NO. 267P21 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Cumberland**
	)	
FRANCISCO EDGAR TIRADO	)	

****

STATE'S MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL AND STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by and through Kimberly N. Callahan, Special Deputy Attorney General, moves this Court to dismiss defendant's Notice of Appeal under N.C.G.S. § 7A-30(1) and deny his petition for discretionary review under N.C.G.S. § 7A-31(c). In support of this motion and response, the State shows the following.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this case is fully set forth in the unpublished decision of the Court of Appeals. State v. Tirado, 2021-NCCOA-291, ¶ 2-15 (unpublished). To briefly summarize, defendant's multiple convictions, including two counts of first-degree premeditated and deliberate murder, arose out of two separate criminal episodes occurring in the early morning hours of 17 August 1998. During the first episode, Debra Cheeseborough was kidnapped at gun point by members of defendant's gang, she was robbed, forced into the trunk of her car, driven to a secluded field, shot nine times, and left for dead on the side of the road. Later that morning, defendant and other members of his gang kidnapped two more innocent women, Susan Moore and Tracy Lambert, and shot them, execution-style, in a pea field after they pleaded for their lives. These crimes were motivated by nothing more than the senseless objective of initiating new members into the gang.

Defendant was tried capitally for these crimes and was initially sentenced to death for both of his first-degree murder convictions. The trial court also sentenced defendant to consecutive terms for his other twelve felony convictions. Those death sentences were subsequently vacated and mandatory life without parole was imposed at a resentencing hearing. In 2016, following

issuance of the decision Miller v. Alabama, 567 U.S. 460 (2012), defendant filed a motion for appropriate relief alleging that the imposition of mandatory life without parole sentences for first-degree murder violated the Eighth Amendment because he was under the age of eighteen when the crimes were committed. The trial court held a resentencing hearing in compliance with section 15A-1340.19A, et seq. and Miller, supra. After careful consideration of all the circumstances of the offense and the particular circumstances of defendant, including evidence of the relevant statutory mitigating factors, the trial court determined that the appropriate sentences to impose for each of his two first-degree murder convictions was life without parole. Defendant appealed.

On 15 June 2021, the Court of Appeals issued a unanimous, unpublished opinion affirming the trial court's judgments upon resentencing. Tirado, 2021-NCCOA-291, ¶ 30. The Court of Appeals addressed and rejected each of the four arguments advanced in defendant's brief. The Court held (1) the trial court's findings of fact were supported by competent evidence, Id. at ¶ 19-20; (2) the trial court properly considered and weighed the evidence concerning the statutory factors in N.C.G.S. § 15A-1340.19B(c) and that the trial judge's balancing of competing evidence regarding those factors was not an abuse of discretion, Id. at ¶ 23; (3) defendant's sentence was not unconstitutional under

the Eighth Amendment or Article I, section 27 of the North Carolina Constitution because the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth, Id. at ¶ 27; and (4) the trial court applied the correct legal standard as set out in N.C.G.S. § 15A-1340.19C(a) and adhered to binding North Carolina and federal precedent in making its sentencing determination, Id. at ¶ 29.

On 29 June 2021, defendant filed a motion entitled, "Motion to Stay the Mandate and Withdraw the Opinion, or, in the alternative, for En Banc Consideration." On 1 July 2021, the Court of Appeals entered an order denying defendant's motion to withdraw the opinion. (See Docket No. COA20-213) That same day, the Court entered a temporary stay of the mandate pending resolution of defendant's motion for en banc rehearing. (Id.) On 15 July 2021, the Court entered an order denying the motion and dissolving the temporary stay. (Id.)

On 28 July 2021, defendant filed in this Court a notice of appeal based upon an alleged constitutional question and a petition for discretionary review of the unpublished decision of the Court of Appeals.

REASONS WHY THIS COURT SHOULD DISMISS DEFENDANT'S APPEAL AND DENY HIS PETITION FOR DISCRETIONARY REVIEW

I. Defendant's appeal should be dismissed on the basis that the issues presented do not involve substantial constitutional questions.

Defendant has filed a notice of appeal based on a constitutional question pursuant to section 7A-30(1) of the General Statutes. "[A]n appeal may be taken as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case which directly involves a substantial question arising under the Constitution of the United States or of this State." State v. Colson, 274 N.C. 295, 300-01, 163 S.E.2d 376, 380 (1968), cert. denied, 393 U.S. 1087 (1969). This Court has addressed the defendant's burden in showing entitlement to such:

> [A]n appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal.

Id. at 305, 163 S.E.2d at 383 (emphasis added). Defendant has not meet this burden.

The Court of Appeals applied the appropriate standards of review when reviewing the trial court's resentencing order and held that because the trial court complied with the statutory requirements of section 15A-1340.19A et seq. in determining that life without parole was warranted for each of defendant's first-degree murder convictions, his sentences did not violate the Eighth Amendment. Defendant's mere allegations to the contrary does not turn the issues presented into substantial constitutional questions. Moreover, the two issues he sets forth in his petition assert that the Court of Appeals erred by purportedly failing to consider certain arguments he alleged in his brief. These are not questions of constitutional import.

And, as will be argued further infra, defendant failed to assert an "as applied" Eighth Amendment challenge to his sentences so the Court of Appeals certainly could not have erred by not addressing such. See State v. Cumber, 280 N.C. 127, 132, 185 S.E.2d 141, 144 (1971) (holding a constitutional question must have been raised and passed upon by the trial court, and properly brought forward for consideration by the Court of Appeals or the appeal must be dismissed).

Defendant's appeal below simply presented several procedural questions, i.e. whether the trial court properly applied our statute and existing caselaw when sentencing a defendant who was under the age of eighteen when

he committed multiple counts of first-degree murder. The Court of Appeals adequately addressed all of these arguments. For these reasons, defendant's notice of appeal under N.C.G.S. § 7A-30(1) should be dismissed for failure to involve a substantial constitutional question.

II. Defendant's petition for discretionary review should be denied because the decision of the Court of Appeals does not involve a matter of significant public interest or legal principles of major significance to the jurisprudence of our state. Indeed, the opinion is unpublished and defendant has not challenged any of the Court of Appeals' actual substantive holdings.

The Court of Appeals addressed each of the four arguments advanced in defendant's appellant brief and correctly held that the trial court complied with requirements for sentencing defendants under the age of eighteen convicted of multiple counts of murder in compliance with North Carolina's sentencing statute and the applicable standard articulated in this Court's decision in State v. James, 371 N.C. 77, 813 S.E.2d 195 (2018). Defendant does not argue that any of the substantive holdings in the opinion are erroneous as a matter of law. Rather, he contends that the Court of Appeals failed to address his "as-applied" Eighth Amendment challenge to his sentences and his argument under the North Carolina Constitution. His contentions are misplaced.

Furthermore, this case is an unpublished decision with no precedential value for cases in the future. See N.C. R. App. P. 30(e)(1) (2021) (stating that

"[i]f the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.").

Discretionary review is not necessary or warranted.

A. The Court of Appeals correctly construed the recent decision in Jones v. Mississippi, and could not have erred by failing to address any "as-applied" Eighth Amendment challenge to his sentences because defendant did not make such an assertion in his brief.

Defendant first contends that this Court misapplied the recent decision in Jones v. Mississippi, 141 S. Ct. 1307 (April 22, 2021), and failed to consider his "as-applied Eighth Amendment challenge" to his sentences. Such assertions are incorrect.

In Jones, the Supreme Court of the United States reiterated under prevailing Eighth Amendment jurisprudence that "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." Id. at 1313 (emphasis added). The Court then rejected the defendant's various arguments that its previous decision in Miller required the trial court to make an explicit or implicit finding of "permanent incorrigibility" prior to sentencing a juvenile to life without parole for a conviction of first-degree murder. Id. at 1315-21. It stated that the key

assumption of the decision in Miller "was that discretionary sentencing allows the sentencer to consider the defendant's youth, and thereby helps ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age." Id. at 1318. And that this sentencing procedure alone would ensure that life without parole sentences were "relatively rare" for those juveniles who committed murder before their eighteenth birthday. Id.

The Court of Appeals reviewed the decision in Jones and correctly concluded that this appeal was "undisturbed by its holding." Tirado, 2021-NCCOA-291, at ¶ 26. The Court noted that defendant did not challenge his sentences on the grounds that the trial court failed to make a finding of permanent incorrigibility and Jones had no effect on defendant's sentences. Id. The Court finally held that defendant's sentence of life without parole for each count of first-degree murder was not unconstitutional under the Eighth Amendment because it was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth. Id.

Miller told us the same thing. Compare Jones, 141 S. Ct. at 1322 (noting state sentencing judges "determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender."); with Miller, 567 U.S. at 479 (holding a sentencing court must

examine all the circumstances before concluding that life without any possibility of parole is the appropriate penalty). There is no misstatement or misapplication of Jones in the decision of the Court of Appeals.

Defendant's primary contention is that the Court of Appeals refused to consider his "as applied" Eighth Amendment challenge to his sentences. However, he included no such argument below in his brief. When a defendant challenges his particular sentence under the Eighth Amendment, the analysis is limited to determination of whether the sentence was "grossly disproportionate" to his crime under Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). See, e.g., Jones, 141 S. Ct. at 1322 ("[T]his case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones's sentence." (citing Harmelin, 501 U.S. at 996-1009)); Graham v. Florida, 560 U.S. 48, 61 (2010) ("The approach in cases such as Harmelin and Ewing is suited for considering a gross proportionality challenge to a particular defendant's sentence[.]"); State v. Seam, 263 N.C. App. 355, 361, 823 S.E.2d 605, 610 (2018) ("Based on our thorough review of the relevant Eighth Amendment caselaw, it is clear that the type of 'as applied' challenge Defendant seeks to bring in this case is not legally available to him. Instead, he is limited solely to a review of

whether his sentence was grossly disproportionate to his crime."), per curiam aff'd, 373 N.C. 529, 837 S.E.2d 870 (2020).

Defendant made no such claim in his appeal. Instead, he contended that his sentences were unconstitutional because the evidence did not show that he was one of the rare juveniles whose crimes reflected irreparable corruption. Defendant essentially invited the Court of Appeals to weigh the evidence presented at the resentencing hearing differently than the lower tribunal. It properly rejected that invitation and disagreed with his assertion, stating that the evidence did in fact show that defendant was one of the rare juvenile homicide offenders whose crimes warranted life without parole sentences. Tirado, 2021-NCCOA-291, at ¶ 26.

More specifically, the Court of Appeals noted the evidence presented at the resentencing hearing showed that defendant had above-average intelligence and lacked any remorse for his crimes. Id. at ¶ 20. Defendant unsympathetically testified to shooting Ms. Moore in the head because a fellow gang member kept dropping the gun and defendant did not like sand in his gun. Id. Defendant had committed roughly twenty-eight infractions while he incarcerated, including "disobeying orders, assault on the staff, profane language, misuse of medicine, selling medicine, theft, possession of a weapon, threats, escape, possession of a dead animal, gang involvement, fighting,

bribery, and so on." Id. Just prior to the resentencing hearing, defendant was found guilty of assault with a deadly weapon in a gang-related stabbing in the confinement facility. Id. Defendant also threatened to escape, become a terrorist, and kill military personnel. Id. The infraction summary stated that it was "apparent that [defendant] had no concern for life of a person, violating any NC laws, etc." Id. Moreover, the trial court's finding of fact that defendant was still a danger to society was unchallenged.

In this case, the trial court conducted a resentencing hearing pursuant to Miller and its progeny and proceeded under the applicable statutory guidelines set out in N.C. Gen. Stat. § 15A-1340.19A et seq. The trial court properly applied "North Carolina's discretionary sentencing procedure and considered all relevant mitigating circumstances and evidence before deciding whether to impose the LWOP sentences." Tirado, 2021-NCCOA-291, at ¶ 26. The Court of Appeals properly concluded that this was all that was required under our juvenile sentence scheme to ensure that defendant's sentences were constitutionally permitted. See James, 371 N.C. at 89, 813 S.E.2d at 204 (selection between the two sentencing options must be made on the basis of an analysis of all of the relevant facts and circumstances in light of the substantive standard enunciated in Miller).

The Court of Appeals squarely addressed each of the four arguments advanced in defendant's appellant brief. It correctly held that the trial court's findings of fact were supported by competent evidence; the trial court properly considered and weighed the evidence submitted during the resentencing hearing; the evidence did in fact show that defendant was one of the rare juveniles whose crimes reflected irreparable corruption; and that the trial court applied the correct legal standard in making its sentencing determination. There was no argument presented by defendant that the Court of Appeals refused to consider. And, again, defendant has not argued that any of the above holdings are erroneous as a matter of law.

B. The Court of Appeals summarily addressed whether defendant's sentences violated Article I, Section 27 of the North Carolina Constitution.

The Court of Appeals specifically rejected the defendant's argument that "the imposition of his consecutive LWOP sentences violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution[.]" Tirado, 2021-NCCOA-291, at ¶ 24 (emphasis added). It read those two provisions in parallel and applied the same analysis as it was required to do under this Court's precedent. See State v. Green, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998) (holding that despite the slight difference in the language of each constitutional provision, this Court

has "historically analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions."), cert. denied, 525 U.S. 1111 (1999). The Court of Appeals was bound by the holding in Green. Cannon v. Miller, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985). It did not err by refusing to engage in a lengthy argument regarding Article I, section 27 of the North Carolina Constitution.

CONCLUSION

The State respectfully requests this Court dismiss defendant's notice of appeal and deny his petition for discretionary review.

Electronically submitted this the 10th day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing STATE'S MOTION TO DISMISS DEFENDANT'S NOTICE OF APPEAL AND STATE'S RESPONSE TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

Kellie Mannette
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Electronically submitted this the 10th day of August, 2021.

Electronically Submitted
Kimberly N. Callahan
Special Deputy Attorney General