

NO. 267P21

TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Cumberland</u>
)	
FRANCISCO EDGAR TIRADO)	

STATE’S RESPONSE TO MOTION TO AMEND
DEFENDANTS PETITION FOR DISCRETIONARY REVIEW

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 deny the alternative relief sought in defendant’s motion to amend his petition for discretionary review. In support of this response, the State shows the following.

1. Defendant has submitted this Court’s recent decisions in *State v. Kelliher*, 2022-NCSC-77, and *State v. Conner*, 2022-NCSC-79, as additional authorities to support his petition for discretionary review. Under Rule 28(g) of the North Carolina Rules of Appellate Procedure, it appears he is authorized

to do so at this time; however, it should be noted that these decisions were filed on 17 June 2022 and are not final until the mandates issue on 7 July 2022.

2. Defendant also seeks alternative relief in addition to that requested in his original petition. He asks for this Court to remand his case to the Court of Appeals for merits review of his “as applied” Eighth Amendment and Article I, section 27 challenges in light of the above-referenced decisions. This is unnecessary and the Court should deny his request.

3. First, as argued in the State’s original responsive pleadings, defendant did not make any “as applied” constitutional arguments as to his life without parole sentences on appeal. (State’s Resp. pp 10-11) The Court of Appeals squarely addressed and rejected each of the four arguments advanced in defendant’s appellant brief below. He has not challenged these rulings.

4. Second, neither the holdings nor the reasoning of *Kelliher* and *Conner* are applicable to defendant’s appeal. Those decisions addressed which sentences are constitutionally permissible for juvenile offenders who commit multiple violent crimes, including premeditated and deliberate murder, but are not deemed to be the rare offender for which a sentence of life imprisonment without the possibility of parole is appropriate.

This Court held that a lengthy term of years prior to parole eligibility could amount to a *de facto* life without parole sentence under Article I, section

27 of the North Carolina Constitution. It further held that any juvenile offender who was found to be redeemable and capable of rehabilitation by the trial court during their sentencing hearing could receive no more than forty years imprisonment prior to parole eligibility or it would constitute an unconstitutional *de facto* life without parole sentence under our state Constitution. *Kelliher*, 2022-NCSC-77, ¶ 68; *Conner*, 2022-NCSC-79, ¶ 64. These decisions are inapposite here.

Defendant was not sentenced to a lengthy term of years prior to parole eligibility for his two counts of first-degree premeditated murder; rather, the trial court imposed consecutive life without parole sentences for his crimes. It did so based on the totality of the evidence presented at the resentencing hearing. The trial court found, among other things, that defendant was an active participant in the murders and personally shot one of the victims in the head, execution style; he lacked any remorse for his crimes; he had an escalating pattern of violent and criminal behavior persisting into adulthood; he had numerous infractions while incarcerated and the most recent involved gang activity and assault on a person with a weapon; and that he was still a “danger to society” after almost two decades of incarceration. (R Supp pp 6-9)

Most importantly, the trial court explicitly found that defendant was “unable to benefit from rehabilitation” and concluded that his crimes reflected

“irreparable corruption.” (R Supp pp 9-10) In other words, the trial court concluded that defendant was the rare juvenile offender for which life without parole was appropriate under *Miller* and its progeny, and our sentencing statute set forth in section 15A-1340.19A *et seq.* of the General Statutes.

5. Finally, to the extent defendant’s motion can be read to submit the above-referenced authorities solely for the purpose of this Court’s interpretation of the decision in *Jones v. Mississippi*, 141 S. Ct. 137 (2021), remand is still unwarranted. The Court of Appeals correctly stated that in *Jones* the Supreme Court of the United States held “*Miller* and its progeny do not require the sentencing judge to make a separate factual finding of permanent incorrigibility before sentencing a juvenile defendant to LWOP.” *State v. Tirado*, 2021-NCCOA-291, ¶ 25; *see Jones*, 141 S. Ct. at 1318-19 (“[T]he Court has unequivocally stated that a separate factual finding of permanent incorrigibility is not required before a sentencer imposes a life-without-parole sentence on a murderer under 18.”). The Court also correctly held that defendant’s appeal was “undisturbed by its holding.” *Tirado*, 2021-NCCOA-291, at ¶ 26.

6. *Kelliher* and *Conner* are not relevant to any of the issues presented in defendant’s appeal and remand to the Court of Appeals for consideration of these decisions is not needed.

CONCLUSION

The State respectfully requests this Court deny the alternative relief sought in defendant's motion to amend his petition for discretionary review.

Electronically submitted this the 24th day of June, 2022.

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

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

Ms. Kellie Mannette
Email: mannette@tfblawyers.com

Electronically submitted this the 24th day of June, 2022.

Electronically Submitted
Kimberly N. Callahan
Special Deputy Attorney General