No. 442P20 DISTRICT 12

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
JAMES RYAN KELLIHER	)	No. COA 19-530

* *

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

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Appellate Rule 15(d), James Kelliher respectfully asks that this Court deny the State's Petition for Discretionary Review, or in the alternative that this Court affirm the decision below. The Court of Appeals issued a thorough and thoughtful opinion on whether a juvenile offender convicted of more than one murder can be held in prison until at least age 67 before even the possibility of release. Chief Judge McGee correctly applied precedent of this Court in *State v. James* and *State v. Young* and the United States

Supreme Court in *Graham v. Florida*, *Miller v. Alabama* and *Montgomery v. Louisiana* in determining that such a sentence does not provide meaningful opportunity for a life outside prison, and is therefore inconsistent with the Eighth Amendment and Article I Section 27 of the North Carolina Constitution.

This Court should endorse that ruling, either by letting the Court of Appeals opinion stand or affirming it. The State's legal arguments are incorrect, for the reasons in the panel opinion. The State's policy arguments are unpersuasive; essentially they are fretting over the possibility of release for juvenile offenders who have committed more than one offense. It is difficult to understand why our Attorney General's Office continues to fight against a humane approach to sentencing for juvenile offenders when the Courts require it and the majority of Americans approve of it.[1] The sky is not falling; rather, our State is beginning to do the necessary, moral, constitutionally required work of treating children justly, rather than reflexively throwing them away.

In support of his response, Mr. Kelliher shows the following:

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[11] See, e.g., https://www.nokidsinprison.org/solutions/what-the-public-says ("National and state polls show that across the country, Americans overwhelmingly support youth rehabilitation over incarceration.")

STATEMENT OF THE CASE

The State presented the procedural history and the facts of the crime. Evidence from the resentencing hearing is described below.

Evidence at resentencing

The fathers of both victims testified about the grief of losing their children. The State did not call any other witnesses.

The defense introduced a stipulation that Mr. Kelliher was 17 at the time of the offense and had no prior record. The defense introduced Mr. Kelliher's prison records, which outline his work and educational accomplishments, and show he had only two non-violent infractions (unauthorized location) from the time of his admission in 2004 until the hearing in 2018.

The defense presented additional mitigating evidence. As a child, Mr. Kelliher had a "difficult" relationship with his father, who was physically abusive. Mr. Kelliher dropped out of school after the ninth grade. Achievement tests he took at age 17 showed he functioned at a sixth grade level. Mr. Kelliher began using drugs and alcohol at age 13. By age 17 he reported being "under the influence all day" from substances including ecstasy, acid, psilocybin, cocaine, marijuana and alcohol. Mr. Kelliher has a history of three suicide attempts: an attempted overdose at age 10; another on the night after the murder; and a third at age 18 while awaiting trial.

Mr. Kelliher was diagnosed with PTSD in prison due to nightmares and persistent thoughts related to these shootings. The defense psychologist conducted multiple tests relevant to future dangerousness, and concluded Mr. Kelliher "had a low risk of future violence." He testified that the Department of Public Safety had made the same determination.

The psychologist testified to Mr. Kelliher's efforts to better himself in prison. He had no "negative behaviors" since being incarcerated. He earned his GED, taught himself Spanish, and took college courses. At the time of the resentencing hearing he was working on a bachelor's degree in ministry.

Dr. Seth Bible, director of prison programs at Southeastern Baptist Theological Seminary, testified about the program Mr. Kelliher had been participating in. The seminary developed this new program to train prisoners to serve their fellow offenders as "field ministers" – they might end up as peer mentors, or working in hospice or with juveniles. Mr. Kelliher was one of 26 students selected from a field of 1300, based on interviews, essays and references. The seminary sought people who had a "desire to see the culture of the prison system changed." Mr. Kelliher was chosen because he demonstrated in his interview and his writing a clear vision of his own goals which matched the goals of the program. Mr. Kelliher was earning As and Bs, had taken on leadership roles, and volunteered for additional programs.

Tonya Newman, the student resource coordinator for the field ministry program, also testified. She was a writing instructor at the prison, and Mr. Kelliher was chosen for an internship to help in the writing center. He worked with other students, giving feedback, tutoring and guidance. He went beyond what she requested, for example helping Spanish-speaking students; helping students others might not associate with due to the nature of their offenses; and writing English grammar guides for other students. She testified Mr. Kelliher demonstrated leadership and integrity.

Pastor Todd Rappe testified he had been visiting Mr. Kelliher once a week for 17 years. He began at the request of Mr. Kelliher's parents, but the relationship deepened over the years. At the visits, he and Mr. Kelliher hold a small religious service and often discuss theology. Pastor Rappe testified he is grateful to Mr. Kelliher, and that Mr. Kelliher in fact consoles him. When asked if he saw something in Mr. Kelliher that is redeemable, the Pastor said, "Oh, good grief, yes, of course."

Mr. Kelliher gave a statement at the close of the hearing:

> I think about Eric, Kelsea, and the child every day wondering who they might be today; the memories that they made, their brotherly love, the raising – the joy of raising their son and the pride felt in his accomplishment. … I failed to do anything resembling the right thing. … The depth of my sorrow and regret cannot … alter the finality … nor … alleviate the past pain that their absence has caused. … Daily I strive to change, to make the right decisions, to promote positive pro social actions in others . ...

> I wish more than anything that I could somehow do something to change the events from August 7, 2001.

REASONS REVIEW SHOULD BE DENIED

Excessive punishment of youthful offenders is a substantial constitutional question.[2] The Court of Appeals correctly decided this case in an opinion that carefully follows United States Supreme Court precedent as well as principles established in this Court's opinions in *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018) and *State v. Young*, 369 N.C. 118, 794 S.E.2d 274 (2016). This Court should allow the panel opinion to stand, or affirm it.

For reasons thoroughly discussed in the panel opinion, the State's arguments in its petition – essentially the same as those rejected in the lower court – are unpersuasive. (See slip op. at 25-32) The panel concludes: "Our decision simply upholds the Eighth Amendment's constitutional requirement that Defendant, as a juvenile who is neither incorrigible nor irredeemable, have his 'hope for some years of life outside prison walls . . . restored.'" (Slip op. at 41) (quoting *Montgomery v. Louisiana*).

The panel's ruling is in line with this Court's precedent. This Court requires that irreparable corruption be shown before imposition of a life without parole sentence. *James,* 371 N.C. at 93, 813 S.E.2d at 206-07. This

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[2] In the experience of the undersigned, grants of appeal based on a constitutional question have been exceedingly rare; this Court generally instead accepts review on a party's petition under G.S. 7A-31.

Court recognizes the federal constitutional requirements that a juvenile offender's capacity for change be considered. *Young*, 369 N.C. at 121, 794 S.E.2d at 277. And this Court recognizes the "foundational concern that at some point during the minor offender's term of imprisonment, a reviewing body will consider the possibility that he or she has matured." *Id.*, 369 N.C. at 125, 794 S.E.2d at 279. The panel opinion appropriately applied this law to the situation of two life with parole sentences that preclude the chance of release until age 67.

The State contends that cases about lengthy sentences for juvenile offenders apply only to a sentence denominated 'life without parole.' The panel rejected this "simple formalism": "the court in *Graham* was not barring a terminology – 'life without parole' – but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." (Slip op. at 28-29) (quoting *State v. Moore*, 76 N.E.3d 1127, 1139-40 (Ohio 2016)).

The State quarrels with the panel's characterization of *de facto* life rulings in other jurisdictions. Whether other jurisdictions' decisions on this issue form a majority, a minority, or something in between, North Carolina must make its own decision. The right decision is to allow juvenile offenders a meaningful opportunity for release before most of their life has passed by. A minimum of twenty-five years of incarceration, with only a possibility of

parole afterward, is a sufficiently severe sentence for any child offender. This is not radical relief; it is reasonable, constitutional relief.

The State fears a flood of other juvenile offenders filing claims. Should new hearings be required for other incarcerated juvenile offenders who are being excessively punished, so be it. Further, "dire warnings are just that, and not a license for us to disregard the law." *McGirt v. Oklahoma,* 207 L.Ed.2d 985, 1015 (2020). The purpose of the court system is to administer justice for every person, and our courts should embrace the opportunity to do so.

The State contends we must maintain the ability of a trial court to impose severe punishments on juvenile offenders at the time of sentencing. Given what we know about young offenders' capacity for change, it is far more sensible to leave this determination to a body, such as the parole commission, that can evaluate the offender's maturity and ability to be law-abiding when his time for potential release nears, rather than when he is a teenager. The panel held, "The applicability and scope of protection found in the Eighth Amendment [under *Graham* and *Miller*] turned on the identity of the defendant, *not* on the crimes perpetrated." (Slip op. at 35, emphasis original) As is recognized in the LWOP jurisprudence, it is nearly impossible to foresee decades into the future to know whether a person will change.

Leaving that determination to a trial court is unwise, and it is poor policy that should not be maintained, but replaced.

Mr. Kelliher's two consecutive life sentences were disproportionate and unconstitutionally harsh and excessive. There is no cause to overturn the panel's decision, nor to deny any other child the relief afforded to Mr. Kelliher – a chance for redemption and release.

CONDITIONAL REQUEST FOR ADDITIONAL ISSUE

Mr. Kelliher argued below that the North Carolina Constitution provides additional protection against cruel or unusual punishment. The panel did not address this argument except to state: "Our Supreme Court 'historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.' *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). Our analysis therefore applies equally to both." (Slip op. at 25, n.10) Should this Court accept review, Mr. Kelliher would ask the Court to revisit *Green* and hold that the State Constitution provides broader protection in sentencing juvenile offenders. *See, e.g., Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Whether Article I Section 27 of the North Carolina Constitution provides greater protection than the Eighth Amendment in the context of sentencing juvenile offenders?

Respectfully submitted this 16th day of November, 2020.

Electronically submitted
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CERTIFICATE OF SERVICE

I certify that I am serving this response today by electronic mail to counsel of record at the following address:

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This 16th day of November, 2020.

Electronically submitted
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