SCWC-13-0005233

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

DAT MINH TRAN, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0005233; CR. NO. 95-0-002471)

DISSENT BY WILSON, J.

I respectfully dissent to the decision of the majority rejecting Petitioner Tran's application for a writ of certiorari. Although I recognize that the petitioner has not challenged the guidelines of the Hawaii Paroling Authority in conjunction with his appeal of his sentence, I would

nevertheless grant his application for the reasons set forth herein.

To sentence all juveniles to life in prison who have committed the offense of murder in the first degree, murder in the second degree, or attempted murder in the first or second degree, regardless of any mitigating circumstances is cruel and unusual punishment violative of Article 1, Section 12, of the Hawai‘i Constitution and the Eighth Amendment to the United States Constitution—notwithstanding the possibility of parole. The Intermediate Court of Appeals found the subjection of all juveniles who commit these offenses to life in prison to be constitutional under Hawai‘i Revised Statutes (HRS) section 706-656(1) because the statute provides for consideration of mitigating factors by the Hawai‘i Paroling Authority after the life sentence is imposed. Such a conclusion condones the imposition of a life sentence for a juvenile such as Petitioner Tran, who, according to the paroling authority, should not receive a life sentence for attempted murder. Petitioner Tran was granted parole at his first parole hearing, after being incarcerated for more than twenty years.

While our court has not addressed this issue, guidance is provided by the United States Supreme Court. In Miller v. Alabama, 567 U.S. __, 132 S.Ct. 2455 (2012), the Court found

unconstitutionally cruel and unusual the mandatory sentencing of a juvenile to life imprisonment without the possibility of parole for murder because the sentence was without the necessary informed judgment arising from consideration of the individualized factors applying to the vulnerability, lack of maturity, and likelihood of rehabilitation of children. The Court recently affirmed the significance of the "Miller factors" in Montgomery v. Louisiana:

> Miller took as its starting premise the principle established in Roper and Graham that "children are constitutionally different from adults for purposes of sentencing." (citations omitted). These differences result from children's "diminished culpability and greater prospects for reform," and are apparent in three primary ways:
>
> > "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'control over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" (citations omitted).
>
> As a corollary to a child's lesser culpability, Miller recognized that "the distinctive attributes of youth diminish the penological justifications" for imposing life without parole on juvenile offenders. (citation

> omitted). Because retribution "relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." (citation omitted). The deterrence rationale likewise does not suffice, since "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." (citation omitted). The need for incapacitation is lessened, too, because ordinary adolescent development diminishes the likelihood that a juvenile offender "'forever will be a danger to society.'" (citation omitted). Rehabilitation is not a satisfactory rationale, either. Rehabilitation cannot justify the sentence, as life without parole "forswears altogether the rehabilitative ideal." (citation omitted).
>
> These considerations underlay the Court's holding in Miller that mandatory life-without-parole sentences for children "pos[e] too great a risk of disproportionate punishment." (citation omitted). Miller requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (citation omitted). The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," Miller made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

Montgomery, 577 U.S. __, 136 S.Ct. 718, 733-34 (2016).

Miller and Montgomery place beyond question that at the time of sentencing, a juvenile facing life in prison without parole is constitutionally entitled to have the court consider

his or her individual circumstances in order to decide whether life without parole is justified. The United States Supreme Court has not considered the constitutionality of depriving a juvenile facing mandatory life imprisonment of the opportunity to present his or her individual circumstances at sentencing where an administrative agency such as a paroling authority has discretion to alter the life sentence by granting parole. The Court's analysis in Miller, however, contains language suggesting that consideration of the Miller factors must precede imposition of life imprisonment with the possibility of parole for the sentence to be other than cruel and unusual. In Miller, Justice Kagan noted with approval a statutory scheme that would permit imposition of life with the possibility of parole, but only after consideration of the Miller factors:

> The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," Graham v. Florida, 560 U.S. 48, [68], [74], 130 S.Ct. 2011, 2026-2027, 2029-2030 (2010), and runs afoul of our cases'

> requirement of individualized sentencing for defendants facing the most serious penalties.

Miller, 567 U.S. at __, 132 S.Ct. at 2460 (emphases added).

Thus, the court appeared to posit that the imposition of a life sentence upon a juvenile offender with the possibility of parole would be constitutional if imposed after consideration of "youth and its attendant characteristics, along with the nature of his crime." Under this analysis, Petitioner Tran's sentence would be constitutional if imposed after consideration of the Miller factors. The sentencing court would thus also be free to consider in its proportionality determination that Petitioner Tran committed attempted murder, rather than murder. In the instant case the issue of first impression is thus whether it is cruel and unusual to potentially take a lifetime of freedom from all juveniles charged with murder in the first degree, murder in the second degree, or attempted murder in the first or second degree, without permitting them to present to the sentencing judge the mitigation factors discussed in Miller—and thereafter give the paroling authority the discretion to grant parole to the sentenced child. The untoward consequences of consigning children to the mandatory life imprisonment scheme in this case constitutes ample warning of the disproportionate, cruel and unusual sentence that is made possible by HRS section 706-656(1). A juvenile of any age is eligible to be tried as an adult for murder in the first degree or second degree or

attempted murder in the first degree or second degree pursuant to HRS section 571-22(d).[1] Once convicted of murder in the first degree or attempted murder in the first degree, all children must be sentenced to life in prison with the possibility of parole: "Persons under the age of eighteen years at the time of the offense who are convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment with the possibility of parole." HRS § 706-656(1) (2014). The child convicted of first degree murder or second degree murder is precluded from sentencing as a juvenile under the Hawaii Youth Offender Act. HRS § 706-667(4). It is a mandatory sentence; the Court cannot exercise discretion based on the Miller factors before imposing a life sentence. It is not a conditional sentence.[2] HRS section 706-656 does not state that a

---

[1] HRS § 571-22(d) (Supp. 2011) provides:

> The court may waive jurisdiction and order a minor or adult held for criminal proceedings if, after a full investigation and hearing, the court finds that:
>
> (1) The person during the person's minority is alleged to have committed an act that would constitute murder in the first degree or second degree or attempted murder in the first degree or second degree if committed by an adult; and
>
> (2) There is no evidence the person is committable to an institution for individuals with intellectual disabilities or the mentally ill.

[2] The record here provides no evidence that Petitioner, or other juveniles subject to the mandatory sentencing scheme, are precluded from being treated any differently than an adult once incarcerated. There appears to be no provision allowing the court to, for example, condition sentencing upon the maximum number of cellmates for the juvenile or to restrict the use (. . . continued)

life sentence will be imposed if the paroling authority so decides after consideration of the individual circumstances of the child. Indeed, the instant record contains no evidence that the paroling authority is required to consider the unique individual circumstances of the child constituting the Miller factors.[3]

Once waived from family court jurisdiction as an adult, the convicted child is eligible to be incarcerated with the adult prison population. Given the absence of discretion available to the court to design a sentence other than life with the possibility of parole, there is no opportunity for the court to prescribe conditions for girls or boys convicted of murder in the first degree, murder in the second degree or attempted murder in the first or second degree to receive additional

---

(continued . . .)
of solitary confinement for the juvenile incarcerated in an adult facility. See *Do Hawai'i Prisons Overuse Solitary Confinement?*, Rui Kaneya, CIVIL BEAT (December 22, 2016), http://www.civilbeat.org/2016/12/do-hawaii-prisons-overuse-solitary-confinement/ (contrasting Hawaii's continued use of solitary confinement with the national trend to decrease the use solitary confinement, even at federal "supermax" prisons). HRS § 352-10 gives discretion to a circuit court to commit offenders under 18 years of age to the Hawai'i youth correctional facilities but there is no evidence in the record that the court gave consideration to this statute.

[3] The parole guidelines do not include a requirement that the paroling authority consider whether the convicted person is a juvenile; accordingly there is no mention of the mitigating factors to be considered that are unique to a child. See HPA's Guidelines for Establishing Minimum Terms of Imprisonment (1989), available at http://dps.hawaii.gov/wp-content/uploads/2012/09/HPA-Guidelines-for-Establishing-Minimum-Terms-of-Imprisonment.pdf.

protections when they are sentenced to life in prison with the possibility of parole.[4]

The plight of the child to be sentenced under HRS section 706-656(1) as though he or she is an adult who has committed murder or attempted murder bespeaks cruel and unusual treatment that is striking. The assumption of adulthood underlying this sentencing statute can often be false. It is evident the individual being sentenced is not an adult by age. And often, for reasons of immaturity, misperception, or vulnerability, the sentenced boy or girl does not match the notion of adulthood commensurate with life in prison. To preclude the child defendant from presenting facts establishing the falsity of this assumption of adulthood is inconsistent with the basic tenet of due process protecting juveniles from sentences potentially derived entirely from the false assumption that, though underage, the child in fact bears the indicia of an adult murderer or attempted murderer. See Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or

[4] The circuit court "may commit all offenders under eighteen years of age, duly convicted before the court, to the Hawai‘i youth correctional facilities in all cases where the court deems the sentence to be more suitable than the punishment otherwise authorized by law." HRS § 352-10. In light of the HRS § 706-667(4) prohibition of youth offender sentencing for a child convicted as a murderer or attempted murderer, it is likely that the court would not deem it advisable to place the convicted child in a facility with other children.

blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). The instant case provides the court with the opportunity to determine whether such a sentencing scheme for children is consistent with contemporary norms of society. I respectfully submit we are compelled to consider whether this treatment of children comports with the elevated level of concern the people of Hawai‘i have for our children—including those children who are convicted of murder or attempted murder. There is a great likelihood that after acceptance of the instant case for certiorari review, this Court would conclude that the cultural norms of our state would compel the conclusion that the elimination of a child's opportunity to present to a judge their child-centered individual circumstances in mitigation of a potential life sentence with the possibility of parole is strikingly cruel and unusual.[5]

[5] The legislative history of HRS § 706-656 notes that the court should consider the "mitigating qualities of youth" before imposing a sentence. Based in part on the United States Supreme Court's decision in Miller, the Committee on Judiciary and Labor specifically encouraged "the sentencing judge to take into account and consider any mitigating factors for cases involving a juvenile offender":

> Your Committee recognizes that mitigating factors may exist for cases involving a juvenile offender. The United States Supreme Court held in *Miller* that subsequent decisions have elaborated on the requirement that defendants have an opportunity to advance, and the judge or jury have an opportunity to assess, any mitigating factors. Therefore, for cases involving a juvenile offender, the sentence should have the ability to consider the "mitigating qualities of youth" because "youth is more than a chronological fact," it is a time of immaturity,

(. . . continued)

Faced with the potentially disproportionate outcome posed by Hawaii's mandatory life sentence for Petitioner Tran who committed attempted murder in the first degree, a conclusion by our federal colleagues that, under the Eighth Amendment to the United States Constitution, HRS section 706-656(1) is cruel and unusual would be reasonable. However, regardless of the view of the federal courts, citizens of Hawai‘i enjoy greater constitutional protections under the Hawai‘i Constitution than the United States Constitution. See, e.g., State v. McKnight, 131 Hawai‘i 379, 407, 319 P.3d 298, 326 (2013) ("[W]hen the United States Supreme Court's interpretation of a provision present in both the United States and Hawai‘i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate

---

(continued . . .)

> irresponsibility, impetuousness, and recklessness. The Supreme Court in *Miller* stated that youth is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage." Accordingly, your Committee encourages the sentencing judge to take into account and consider any mitigating factors for cases involving a juvenile offender.
>
> Your Committee further recognizes the language suggested by the advocates for this measure regarding certain factors that the sentencing judge and Hawaii Paroling Authority should consider in determining the appropriate sentence for a juvenile offender. However, your Committee notes that these factors are already included in the considerations that the Court may consider in sentencing and the Hawaii Paroling Authority may consider in determining minimum terms of imprisonment.

S. Stand. Comm. Rep. No. 3248, in 2014 Senate Journal.

protections as a matter of state constitutional law.") (quoting State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994)). Given the gravity of the determination of the Intermediate Court of Appeals that, as a matter of first impression, the children of Hawai'i are not entitled under their state constitution to present to a sentencing judge for his or her consideration their relevant life history before being sentenced pursuant to HRS section 706-656(1) to life in prison with the possibility of parole, this application for writ of certiorari should be accepted.

DATED: Honolulu, Hawai'i, December 23, 2016.

/s/ Michael D. Wilson