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NOVEMBER 29, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

BARRY GARCIA,	)	
	)	
Petitioner / Appellant,	)	**Supreme Court No. 20170030**
	)	
vs.	)	**District Court No. 09-2016-CV-00309**
	)	
STATE OF NORTH DAKOTA,	)	
	)	
Respondent / Appellee.	)	
	)	

APPELLANT'S PETITION FOR REHEARING

On Appeal from Order Entered on January 17, 2017, Denying Petitioner's Request for Post-Conviction Relief, by the Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Wade L. Webb, Presiding

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[¶ 2] TABLE OF AUTHORITIES

Cases **¶ No.**

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[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether this Court should amend its decision to avoid having offered an advisory opinion where recently enacted legislation is substantially likely to moot the claim it addressed?

[¶ 5] Whether the sentencing court's weighing youth as a mitigating circumstance is adequate to assess whether a juvenile is categorically exempt from life without possibility of parole (JLWOP) based on a categorical standard unavailable to the sentencing court?

[¶ 6] STATEMENT OF THE CASE

[¶ 7] Appellant Barry Garcia incorporates by reference the statement of the case included in the prior appeal to this Court. See Appellant's Opening Brief at ¶¶8-24.

[¶ 8] Oral arguments before this Court were held on September 14, 2017. Docket, Garcia v. North Dakota, No. 20170030. On November 16, 2017, this Court filed an opinion affirming the district court's denial of Appellant's Petition for Post-Conviction.

[¶ 9] STATEMENT OF THE FACTS

[¶ 10] Appellant incorporates by reference the statement of facts included in the prior appeal to this Court. See Appellant's Opening Brief at ¶¶ 26-33. This case concerns the juvenile life without parole sentence Appellant Garcia received after being convicted of killing Cherryl Tendeland and injuring her husband, Pat Tendelend. Appellant presented no evidence at the sentencing proceeding and, on the advice of trial counsel, did not offer a statement on his own behalf.

[¶ 11] ARGUMENT

[¶ 12] I. The Court's Decision Is Advisory Because There Is a Substantial Likelihood that HB 1195 Moots Mr. Garcia's Appeal.

[¶ 13] If Appellant is not subject to a sentence to life without possibility of parole by virtue of HB 1195's application, then his appeal is moot and should be dismissed. See N.D.C.C. §12.1-32-13.1; In re E.T., 617 N.W.2d 470, 471 (N.D. 2000) ("An appeal will be dismissed if the issues become moot or academic such that no actual controversy is left to be determined."). Even if the sentence would still technically be titled "life without possibility of parole," the availability of relief under HB 1195 would functionally render his sentence life *with* possibility of parole, mooting his claims for relief under Miller v. Alabama, 567 U.S. 460 (2012) and Montgomery v. Louisiana, 136 S.Ct. 178 (2016).[1] Therefore, if HB 1195 does provide Appellant with an opportunity for release, then this Court's opinion addressing his Miller/Montgomery claim is advisory.

[¶ 14] The "law is well established that courts cannot give advisory opinions, and appeals will be dismissed if the issues become moot or academic, such that no actual controversy is left to be determined." Gosbee v. Bendish, 512 N.W.2d 450, 452 (1994). Where there is a substantial likelihood that resolution of a claim will have no impact on the outcome of the dispute, any opinion on that claim is advisory. See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman Corp., 333 U.S. 103, 113 (1948) (holding the lower court's decision advisory where it could later be subject to modification by co-equal branch of government); In re E.T., 617 N.W.2d at 471.

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[1] So holding would be in keeping with the principle that "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the [sentence and statute] must be tested by its operation and effect." See Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 708 (1931).

[¶ 15] If his case is moot, then the Court should have dismissed the appeal. See Gosbee, 512 N.W.2d at 452; In re E.T., 617 N.W.2d at 471. The Court's opinion, by its own terms, held out the substantial possibility of HB 1195's application to Appellant. Op. at 14-15 ("we leave for the district court to determine in the first instance whether Garcia comes within [HB 1195's] scope."). This Court should either clarify its opinion to issue a ruling on the applicability of HB 1195 or withdraw its opinion on Miller and Montgomery and remand for proceedings to address the issue in the first instance. Put another way, if the Court does not address the applicability of HB 1195, it should withdraw its advisory opinion regarding the applicability of Miller and Montgomery to the case. The applicability of HB 1195 was a threshold question the Court should have ensured was addressed.

[¶ 16] II. Miller Provided a Categorical Exemption that the Sentencing Court Could Not Have Considered.

[¶ 17] The Court's opinion proceeds from the assumption that Miller merely requires consideration of mitigating "factors" associated with the transient immaturity of youth. Op. at 4. This is not so. As explained in Montgomery, Miller represents a categorical exemption "render[ing] life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth[.]" Montgomery, 136 S.Ct. at 734 (internal quotation omitted). Miller's categorical rule requires meaningful consideration of youth as a means to determine whether a juvenile offender's crime is a product of "transient immaturity." Op. at 7.

[¶ 18] However, such consideration is merely a means to an end: The sentencing court must consider those factors to assess whether the juvenile is categorically excluded

from JLWOP. "Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the distinctive attributes of youth." Montgomery, 136 S.Ct. at 734 (internal quotations omitted). The sentencing court necessarily could not have considered the categorical exemption of all but the irreparably corrupt juveniles because this category did not exist when it sentenced Appellant.[2]

[¶ 19] The change in youth from merely a mitigating factor to the basis for a categorical bar to punishment is at the crux of the Court's error. The Court distinguishes Bobby v. Bies, 556 U.S. 825 (2009) on the grounds that intellectual disability, prior to Atkins v. Virginia, 536 U.S. 304 (2002) "may support the aggravating factor of future dangerousness." Op. at 13. This distinction misses the import of those cases. Bies and Atkins are similar to Miller and this case because both Atkins and Miller create categorical bars to a punishment. For that reason, both Atkins and Miller "completely changed the incentives" for presenting related evidence of categorical exemption. In fact, Miller presents a stronger case for resentencing because the relevant categorical exemption – all but the irreparably corrupt – did not exist (unlike the category of intellectual disability at the time of Atkins) at the time of Mr. Garcia's sentence.

[¶ 20] The difference between a mitigating factor and a categorical exemption also highlights the fundamental problem with the only nonbinding case cited by the Court

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[2] Without further explication, the Court excerpts a law review article, apparently suggesting that a sentence constitutionally imposed cannot later become unconstitutional. Op. at 4. Such a position is squarely contrary to state and federal law. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987); N.D.C.C. §29-32.1-01(f).

in its opinion: Johnson v. State, 395 P.3d 1246, 1258-59 (Idaho 2017) *cert. denied* No. 17-236, 2017 U.S. LEXIS 6962 (U.S. Nov. 27, 2017).[3] Op. at 13. Considering youth "and all its attendant characteristics" in weighing them as a mitigating circumstance against other aggravating factors, as the court in Johnson purportedly did, is fundamentally different than assessing whether those characteristics place a juvenile in a category that is exempt from punishment, regardless of the extent of aggravating circumstances present. Joining Idaho in finding that such a determination could have been made, even though the relevant standard did not exist at the time, places North Dakota in a distinct minority. See, e.g., In re Kirchner, 393 P.3d 364, 375 (Cal. 2017) (resentencing for pre-Miller discretionary sentence of JLWOP); Landrum v. State, 192 So.3d 459, 470 (Fla. 2016) (same); State v. Seats, 865 N.W.2d 545, 558 (Iowa 2015) (same); State v. Riley, 110 A.3d 1205, 1219 (Conn. 2015); State v. Long, 8 N.E.3d 890, 899 (Ohio 2014) (same); Aiken v. Byars, 765 S.E.2d 572, 578 (S.C. 2014).[4]

[¶ 21] Moreover, the distinction the Court makes, that youth before Miller was not considered aggravating is simply wrong. For example, in Roper v. Simmons, the prosecutor argued youth was aggravating: "Age, he says. Think about age. Seventeen

[3] This is the first opportunity Appellant has had to discuss and distinguish this authority. Undersigned counsel Mr. Mills represented Ms. Johnson in her Petition for Writ of Certiorari at the United States Supreme Court.

[4] The Idaho Court requires more than occurred here. In another JLWOP case, that Court distinguished Johnson, holding that a "retrospective analysis [of irreparable corruption] does not comply with Miller and Montgomery where the evidence of the required characteristics and factors was not presented during the sentencing hearing." Windom v. State, 398 P.3d 150, 157 (Idaho 2017). Because, like here, the sentencing court lacked substantial evidence of the effects of youth on Mr. Windom, the Idaho court held that a retrospective analysis was not possible. The Windom court contrasted Johnson, where the defense presented multiple medical professionals and hundreds of pages of testimony on the effect of Ms. Johnson's youth. Id. at 158. Nothing of the sort is in the record here.

years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit." 543 U.S. 551, 558 (2005). Here, the sentencing court also repeatedly used Mr. Garcia's youth as an aggravating factor. Senseless, irrational offenses are a hallmark of youthful offenses. Miller, 567 U.S. at 477. Yet, in finding Appellant's offenses aggravated, the sentencing court and the prosecution repeatedly emphasized the "senselessness" of the offense. Doc. ID #25 5:3-6, 12-20, 22:5-7. The sentencing court, when addressing defense counsel's argument that youth was mitigating, noted that Appellant had an "unresolved anger problem" and "some sort of explosive personality." Id. at 22:8-17. Improved decision-making and changes in personality, including developing impulse control, are inherent to maturing. Miller, 567 U.S. at 471-72. The sentencing court's failure to appreciate as much was understandable, but after Miller and Montgomery, it is not constitutional.

[¶ 22] After Miller and Montgomery it is necessary to determine whether Appellant is categorically exempt from the sentence he currently faces. Because the standard for that exemption did not exist at the time of his sentencing, it has never been (and could not have meaningfully) addressed. On the advice of his counsel, Appellant stood silently at sentencing and trial counsel presented no evidence. More is required to fairly assess whether a juvenile is irreparably corrupt.

[¶ 23] CONCLUSION

[¶ 24] For the foregoing reasons, the Court should grant this Petition.

November 29, 2017

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CERTIFICATE OF SERVICE

[¶23] A true and correct copy of the foregoing document was sent by e-mail on November 29, 2017 to Samuel A Gereszek (sam@egflawyer.com) and Birch P. Burdick (BurdickB@casscountynd.gov).

/s/ John R. Mills
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