IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CT-00716-SCT

STEPHEN VIRGIL McGILBERRY a/k/a STEPHEN McGILBERRY

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	04/25/2017
TRIAL JUDGE:	HON. ROBERT P. KREBS
TRIAL COURT ATTORNEYS:	MARVIN L. WHITE, JR. JAMES FRANK GIDDY LARRY GUS BAKER MICHAEL ADELMAN DAVID PAUL VOISIN ROBERT MICHAEL CUNNINGHAM, II THOMAS M. FORTNER DAVID MICHAEL ISHEE LESLIE S. LEE
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES STACY L. FERRARO
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
DISTRICT ATTORNEY:	ANGEL MYERS McILRATH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED - 01/23/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. In 1994, sixteen-and-a-half-year-old Stephen McGilberry brutally murdered four family members, including his three-year-old nephew. McGilberry premeditated and planned his crime, enlisting a younger neighbor's help. A jury found McGilberry guilty of four counts of capital murder and sentenced him to death. But in 2005, the United States Supreme Court invalidated the death penalty for offenders who committed their capital crimes before reaching the age of eighteen.[1] So McGilberry's death sentence was vacated. And this Court directed the trial court to resentence McGilberry to four terms of life in prison without parole.

¶2. In 2012, the Supreme Court held that the mandatory imposition of life without parole for crimes committed before the offender turned eighteen violated the constitutional prohibition against cruel and unusual punishment. ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Instead, before imposing a life-without-parole sentence on a juvenile homicide offender, the sentencer must take into account and consider certain youth-related mitigating factors. Based on ***Miller***, we granted McGilberry permission to seek post-conviction relief from his sentence.

¶3. McGilberry filed two motions with the trial court relevant to this appeal—a motion to have a jury resentence him and a motion to impose life-*with*-parole sentences. The trial court rejected both motions. First, the trial court ruled McGilberry had no right to a jury for his ***Miller*** hearing. Second, following the ***Miller*** hearing, the trial court weighed McGilberry's home environment and immaturity against the premeditated and calculated

[1] ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

nature of his heinous crimes and his continued lack of remorse. The court determined McGilberry was one of those "rare juvenile offender[s] whose crime reflects irreparable corruption"[2] and for whom life without parole was an appropriate and proportional sentence. The trial court resentenced McGilberry to four consecutive terms of life in prison without parole.

¶4. We find no error. Originally, we assigned this appeal to the Court of Appeals. That court reversed McGilberry's sentence, finding McGilberry had a statutory right to be resentenced by a jury. But this is not so. McGilberry had a statutory right to be sentenced by a jury upon his conviction in 1996[3]—and was in fact sentenced by a jury to death. But this statute is silent about and thus extends no rights to the scenario we face here—post-conviction review of McGilberry's life-without-parole sentence following a new substantive rule of constitutional law. Importantly, ***Miller*** did not create a constitutional right to a jury in sentencing. So the trial court did not err by ruling it was the proper sentencing authority.

¶5. Because the record supports the trial court's determination McGilberry should be sentenced to life without parole based on his irreparably corrupt nature, we find no abuse of discretion in the court's sentencing decision. We therefore reverse the Court of Appeals' judgment and reinstate and affirm the trial court's judgment.

Background Facts and Procedural History

I. McGilberry's Crimes

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[2] ***Miller***, 567 U.S. at 479-90.

[3] Miss. Code Ann. § 99-19-101 (Rev. 2015).

¶6. While gruesome, the details of McGilberry's participation in the murders are necessary to understanding the trial court's sentencing decision.

¶7. Sixteen-year-old McGilberry lived with his mother, stepfather, half-sister, and three-year-old nephew. He and a friend decided to steal his half-sister's car and sell it for cash or drugs in New Orleans. But the plan changed when McGilberry got mad at his parents for taking away his car because he had skipped school. This punishment prompted McGilberry to decide not only to steal his half-sister's car but also to murder his family. Two days before the murder, his friend backed out because "things didn't sound right." Undeterred, McGilberry enlisted his fourteen-year-old neighbor as an accomplice.

¶8. The morning of the murder, McGilberry and the neighbor retrieved baseball bats and placed them outside McGilberry's window. To avoid suspicion, they entered his house through the front door without the bats. Both had gloves in their pockets, and McGilberry had a knife. Once inside, they went to McGilberry's room to open the window and get the bats. Next, they went to the bedroom where McGilberry stepfather was lying in bed. McGilberry originally attempted to slash his stepfather's throat. But he could not do so because of the way his stepfather was positioned in bed. So McGilberry instead smashed his stepfather's head with a baseball bat, driving his skull into his brain.

¶9. McGilberry then went to his sister's room. He hit her four times with the bat. The pathologist found defensive wounds on her arms. One blow was directed at her eyes, causing her eyeballs to rupture and her bones to penetrate her brain.

¶10. McGilberry was not yet done. He walked to the living room where his mother sat in a recliner and his nephew sat on a sofa. He struck his three-year-old nephew with what the pathologist described as a "very, very hard, crushing blow." And he hit his mother directly across the eyes, imprinting the bat on her skull. Because of their proximity, either McGilberry's mother witnessed her son murder her grandson or the toddler watched his uncle bludgeon his grandmother to death. None of the four victims died immediately from the blows. Instead, they slowly asphyxiated from their own blood.

¶11. While his family lay dying, McGilberry stole his mother's license and money from her purse. After hiding the murder weapons and knife and trying to clean the scene, McGilberry and his neighbor stole the car. But they never made it to New Orleans. It had gotten late, so they decided to spend the night at a friend's house before leaving town the next day. McGilberry's plan was to make it look like he had been kidnapped as part of the murders. But his plan was thwarted when his friend's mother heard something bad had happened at his house and insisted she take McGilberry back home.

¶12. On the way home, McGilberry asked to stop at a convenience store, where he threw away his mother's license and money order. Police were at the house when McGilberry arrived. McGilberry was charged, indicted, convicted, and sentenced to death on four counts of capital murder. This Court affirmed his convictions and sentence on direct appeal. ***McGilberry v. State***, 741 So. 2d 894 (Miss. 1999).

II. McGilberry's PCR Motion

¶13. McGilberry's death sentence was vacated following ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). So we directed the trial court to resentence him to four terms of life without parole. In 2013, McGilberry asked this Court, based on ***Miller***, to vacate his sentences or, alternatively, grant him leave to file a motion for post-conviction relief with the trial court. We granted only his request for leave to file a PCR motion in the trial court. Order, ***McGilberry v. State***, No. 2013-M-00884 (Miss. Dec. 10, 2014). Apparently the trial court misinterpreted this Court's order,[4] because on August 6, 2015, the trial judge entered an order vacating McGilberry's life-without-parole sentences *before* considering McGilberry's PCR motion.[5]

¶14. In 2016, McGilberry filed two motions with the trial court relevant to this appeal—(1) a motion to impose sentences of life with parole and (2) a motion for jury

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[4] We recognize this Court has been inconsistent in how it has addressed post-conviction motions based on the retroactive application of ***Miller***. For example, in ***Dycus v. State***, a panel of this Court vacated Dycus's mandatory life-without-parole sentence and remanded for a jury to resentence him. Order, ***Dycus v. State***, No. 2012-M-02014 (Miss. Sept. 17, 2014). So it is understandable that there has been confusion among our trial courts on how to proceed, especially in the wake of this Court's application of ***Miller*** based on the clarifications made in the Supreme Court's follow-up opinion in ***Montgomery v. Louisiana***, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). *See* ***Montgomery***, 136 S. Ct. at 735-36 ("***Miller*** . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole," but rather requires "a procedure through which [an affected prisoner] can show that he belongs to the protected class.").

[5] The order vacating McGilberry's sentence is not in the record. The record contains only the trial court's reference to the fact it had already vacated McGilberry's sentence. This reference is made in the trial judge's November 23, 2015 order denying in part and deferring in part McGilberry's supplemental motion to vacate his sentence.

sentencing under ***Miller***. The trial court denied the second motion for a jury. And it held the first motion in abeyance until after an evidentiary hearing.

III. Trial Court's Ruling

¶15. At the hearing, the State tendered the entire trial court record and called two of the victims' family members. McGilberry presented three expert witnesses. After the hearing, the trial court denied McGilberry's motion for life-*with*-parole sentences and instead resentenced him to four consecutive terms of life in prison without parole. The trial court cited its reasons for the sentences.

¶16. First, the trial court considered McGilberry's family and home environment. McGilberry's home life was neither ideal nor horrific. His mother abused alcohol and there had been accusations—albeit unsubstantiated—that she had left McGilberry and his sister unattended. There had also been accusations that McGilberry's sister had sexually abused him by asking him to touch her body and take pictures of her naked. McGilberry had a reputation as a problem student in elementary school. His uncontrolled anger led to fights, and at age ten he was accused of burglarizing the school. But when McGilberry was eight, his mother remarried. McGilberry's stepfather stepped into the role of father figure, and the two often engaged in father-son activities. When McGilberry was accused of molesting a three-year-old neighbor, his stepfather fiercely defended him. But McGilberry complained to his therapist that his stepfather's methods of discipline were abusive. Family and friends described McGilberry's family as "normal." The trial court concluded McGilberry's childhood "was not idyllic but it also was not hopeless," with two parents who provided for

him not only with life's necessities—food, medical care, and counseling—but also luxuries—name-brand clothes, his own room, video games, and a car.

¶17. Second, the trial court considered the expert testimony. One expert who interviewed McGilberry in 2016 testified McGilberry would have been significantly more immature at sixteen than his peers. Another expert, who interviewed McGilberry in both 2001 and 2016, testified McGilberry had better insight into his behavior fifteen years later, because at the time of the murder he thought he was justified in killing all but his nephew. But McGilberry still did not express any sorrow. A third expert testified the structure and limitations of prison life had led to McGilberry's improvement. But this expert admitted that releasing McGilberry from this structure would involve "tak[ing] a little bit of a risk." Balanced against these experts were the experts who interviewed McGilberry for his trial. These experts indicated McGilberry was sociopathic—a psychiatric condition that traditionally does not respond well to treatment but instead gets worse over time. One expert explained McGilberry's condition was not amenable to treatment. Another opined that McGilberry was a likely risk to re-offend and needed close follow up.

¶18. Third, the trial court considered the circumstances of the murders and McGilberry's participation. In stark contrast to ***Miller***, the murders here were brutal and premeditated. In ***Miller***, the Supreme Court emphasized that one of the juvenile offenders had been high on drugs and alcohol consumed with the adult victim and the other did not fire the fatal bullet or intend anyone's death. ***Miller***, 567 U.S. at 478-79. But McGilberry was the ringleader in both the murderous plot and its execution. He planned his crime a week ahead. And when

his friend refused to help, he found a younger, more amenable accomplice. McGilberry had a plan to hide the murder weapons before and after the murders. He wore gloves. And he disposed of evidence on the way back to his house. Although, "[w]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability,"[6] here, there was no doubt McGilberry's primary intent was to kill.

¶19. Finally, the trial court considered McGilberry's age at the time of his crimes and attendant characteristics. McGilberry was nearing seventeen when he murdered his family. The court found no evidence McGilberry had been incapable of dealing with police officers or prosecutors. He knew what would happen if all went according to plan, as evidenced by hiding the bats so he could walk through the house, his attempt to clean the scene and hide the weapons, and his kidnapping alibi. The court found these actions to be the product of entrenched personality traits and not immaturity. As further evidence, the court noted that the ability to accept responsibility for one's actions is a direct measure of maturity. But even as an adult, McGilberry was unwilling to accept blame for his multiple prison-rules violations, demonstrating a flawed character that refuses to follow directions even in the most structured environment.

¶20. Taking into account all these factors, the trial court concluded McGilberry was one of those rare juveniles who is irreparably corrupt. According to the trial court, "[t]he heinousness of his crime, the expert testimony from his trial and resentencing hearing, and his lack of remorse reveal an individual with a broken moral compass," whose "prison

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[6] ***Graham v. Florida***, 560 U.S. 48, 69, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010).

records confirm his unwavering contempt for authority and discipline in even the most restricted environments." Unwilling to the take the risk that McGilberry's expert admitted would be involved in allowing him parole, the trial court resentenced to McGilberry to four consecutive terms of life in prison without parole.

IV. McGilberry's Appeal

¶21. McGilberry appealed raising six issues:

(1) McGilberry's sentences must be vacated and he must be resentenced to life with parole because the practice of sentencing children to life without parole violates the federal and state constitutional prohibitions against cruel and unusual punishment;

(2) McGilberry's sentence must be vacated because it was imposed in violation of his federal and state constitutional rights to due process and trial by jury, which require that any fact that exposes a defendant to a punishment greater than that authorized by the guilty verdict be submitted to a jury;

(3) McGilberry's sentence must be vacated because it was imposed in violation of Mississippi Code Section 99-19-101, which specifies that a capital murder charge requires sentencing by a jury;

(4) McGilberry's sentences must be vacated because they were imposed in violation of Article 3, Section 28 of the Mississippi Constitution of 1890, which entitles a person charged with capital murder to a jury determination;

(5) McGilberry's sentences must be vacated because the circuit court applied the wrong legal standard and failed to consider some of the ***Miller*** factors while giving inappropriate weight and improper consideration to the mitigating aspects of other factors; and

(6) McGilberry's sentences must be vacated and he must be resentenced to life with parole because he is not "[t]he rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible," and thus his life without parole sentence is unconstitutionally

> disproportionate in violation of the state and federal constitutional prohibitions against cruel and unusual punishment.

¶22. We assigned McGilberry's appeal to the Court of Appeals. That court focused solely on McGilberry's claims he was entitled to resentencing by a jury. While the appellate court confirmed its prior holding that there is no state or federal constitutional right to a jury for a ***Miller*** hearing, the Court of Appeals made an about face and rejected as dicta its prior determination that there is likewise no statutory right to a jury. ***McGilberry v. State***, No. 2017-KA-00716-COA, 2019 WL 192345 (Miss. Ct. App. Jan. 1, 2019) (applying in part and distinguishing in part ***Cook v. State***, 242 So. 3d 865, 876 (Miss. Ct. App. 2017)). Instead, the Court of Appeals held that Mississippi Code Section 99-19-101 (Rev. 2015), which deals with sentencing "[u]pon conviction or adjudication of guilt of a defendant of capital murder," entitled McGilberry to be resentenced by a jury. ***McGilberry***, 2019 WL 192345, at *3. The court reversed and remanded the case to the trial court for resentencing by a jury. ***Id.*** at *4.

¶23. Because Section 99-19-101 does address the procedural posture of McGilberry's case—a PCR hearing to consider the ***Miller*** factors—we granted the State's petition for writ of certiorari. Simply put, while McGilberry was entitled to a ***Miller*** hearing, he was not entitled to a ***Miller*** hearing in front of a jury. *See* ***Wharton v. State***, No. 2017-CT-00441-SCT, 2019 WL 6605871 (Miss. Dec. 5, 2019), *reh'g filed*, Dec. 18, 2019.

¶24. Because we reverse the Court of Appeals and reinstate and affirm the trial court's judgment, we proceed to address all issues raised by McGilberry on appeal.

Discussion

I. *Miller* does not prohibit life-without-parole sentences for juvenile offenders.

¶25. McGilberry asserts this Court "should answer the question left open in ***Miller***" and hold that sentencing a juvenile homicide offender to life without parole violates both the Eighth Amendment of the United States Constitution and article 3, section 28, of the Mississippi Constitution, which both prohibit cruel and unusual punishment. But ***Miller*** did not leave this question open. Instead, the ***Miller*** Court answered this question by holding that the prohibition against cruel and unusual punishment does not "foreclose a sentencer's ability to impose life without parole on a juvenile." ***Montgomery v. Louisiana***, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016) (citing ***Miller***, 567 U.S. at 480). And this Court has adopted the same position. ***Parker v. State***, 119 So. 3d 987, 995 (Miss. 2013).

¶26. ***Miller*** drew a clear distinction between mandatory life-without-parole sentences and life-without-parole sentences based on the sentencer's judgment. ***Miller***, 567 U.S. at 479. What the Eighth Amendment "forbids [is] a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." ***Id.*** (emphasis added). It does not foreclose a sentencer's ability to impose life without parole on a juvenile offender. ***Id.***; ***Montgomery***, 136 S. Ct. at 726; ***Parker***, 119 So. 3d at 995. Rather, to ensure a life-without-parole sentence imposed on a juvenile is proportional and thus constitutional, the sentencer must "take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" ***Montgomery***, 136 S. Ct. at 733 (quoting ***Miller***, 567 U.S. at 480). But ***Miller*** "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." ***Id.***

¶27. So the fact McGilberry was sixteen at the time he killed his family does not constitutionally preclude him from being sentenced to life without parole, if the "***Miller*** factors" are considered. ***Chandler v. State***, 242 So. 3d 65, 68 (Miss. 2018); ***Parker***, 119 So. 3d at 995-96.

II. McGilberry has no constitutional or statutory right to be resentenced by a jury.

¶28. Next, McGilberry argues his sentence must be vacated because he was entitled to be resentenced by a jury.

¶29. We must first point out that McGilberry should have never been *re*-sentenced by the trial court. Our order granted McGilberry leave to file a PCR motion. We did not grant his motion to vacate his sentence. *See* Order, ***McGilberry v. State***, No. 2013-M-00884 (Miss. Dec. 10, 2014). So the trial court should not have vacated McGilberry's sentence *before* considering his PCR motion—especially when, as we discuss in the next section, McGilberry failed to demonstrate that his life-without-parole sentences are unconstitutional under ***Miller***. *See* ***Wharton***, 2019 WL 6605871, at *5 ("Consistent with ***Miller*** and ***Montgomery***, prisoners . . . are entitled to relief under the PCR Act, *if* they can demonstrate that their life-without-parole sentence is unconstitutional under the Eighth Amendment."). What should have occurred was the simple denial of McGilberry's PCR motion, not resentencing him to life

without parole based on the denial of McGilberry's PCR motion.[7] Still, we proceed to address, as the Court of Appeals did, McGilberry's argument that he was entitled to be resentenced by a jury.

¶30. The Court of Appeals rejected McGilberry's claim to a *constitutional* right to have a jury in a ***Miller*** hearing. ***McGilberry***, 2019 WL 192345, at *4 (citing ***Cook***, 242 So. 3d at 876). And we do too. In making his federal constitutional argument, McGilberry asks us to read ***Miller*** and ***Montgomery*** in light of ***Apprendi v. New Jersey***, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In ***Apprendi***, the Supreme Court "held that any fact that 'exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." ***Hurst v. Florida***, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016) (quoting ***Apprendi***, 530 U.S. at 494). As McGilberry sees it, ***Miller*** and ***Montgomery*** impose additional fact-finding before a juvenile offender may receive the greater punishment of life without parole. But this argument runs counter to ***Montgomery***, which "confirmed that ***Miller*** does not require trial courts to make a finding of fact regarding a child's incorrigibility." ***Chandler***, 242 So. 3d at 69 (citing ***Montgomery***, 136 S. Ct. at 735). Instead, "***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.'" ***Montgomery***, 136 S. Ct. at 733 (quoting ***Miller***, 567 U.S. at 480).

[7] While the trial court erred, we understand, based on this Court's prior treatment of ***Miller***-based motions for leave, how such an error could have occurred. *See supra* note 4.

¶31. Stated differently, the ***Miller*** factors are not elements of the crime that the sentencer must find beyond a reasonable doubt to impose a life-without-parole sentence. Under Mississippi law, the jury's finding McGilberry guilty of four counts of capital murder authorized the possible sentences of death, life without parole, and life with parole. Miss. Code Ann. § 97-3-21(3) (Rev. 2014). So there is no Sixth Amendment ***Apprendi*** issue.

¶32. Turning to the Eighth Amendment, while both ***Miller*** and ***Montgomery*** require a "sentencer" to consider the juvenile offender's individual circumstances—as opposed to a mandated sentence—there is no constitutional requirement that the "sentencer" be a jury. ***Miller***, 567 U.S. at 479 ("[A] sentencer need[s] to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."); ***Montgomery***, 136 S. Ct. at 734 ("***Miller*** requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.").

¶33. Still, the Court of Appeals reversed McGilberry's judge-determined sentence, finding McGilberry had a *statutory* right to have a jury resentence him. The appellate court broadly interpreted Mississippi Code Section 99-19-101, which governs sentencing following a capital-murder conviction, to include "the right to be resentenced by a jury" following the retroactive application of ***Miller***. ***McGilberry***, 2019 WL 192345, at *6. But, with respect to the Court of Appeals, Section 99-19-101 does not address the scenario before us—the resentencing of a juvenile offender based on the constitutional requirements of ***Miller***.

¶34. To be sure, as a capital offender, McGilberry had a statutory right to be sentenced by a jury. *See* ***Moore v. State***, 2017-KA-00379-SCT, 2019 WL 4316161, at *10 (Miss. May 30, 2019) (clarifying that Section 99-19-101 "requires all capital offenders—without exception—to be sentenced by a jury"), *reh'g denied and opinion modified*, (Miss. Sept. 12, 2019). And this right was indeed provided to him. In compliance with Section 99-19-101, upon his conviction of four counts of capital murder, the trial court conducted a separate sentencing hearing before a jury, which sentenced McGilberry to death. *See* ***McGilberry***, 741 So. 2d 894 (affirming McGilberry's death sentence). So in contrast to ***Moore***, Section 99-19-101 has not been violated.

¶35. McGilberry also urges this Court to find he has a *state* constitutional right to a jury for his ***Miller*** hearing. As McGilberry sees it, because the United States Supreme Court has "likened life without parole for juveniles to the death penalty itself," ***Miller***, 567 U.S. at 470, and because this Court has recognized a "substantial substantive right" to a jury determination of the death penalty, ***King v. State***, 656 So. 2d 1168, 1183 (Miss. 1995), the Mississippi Constitution must require that only a jury can decide that a juvenile offender should be sentenced to life without parole.

¶36. But there are two problems with this argument. First, in ***Chandler***, this Court rejected a juvenile offender's contention that his life-without-parole sentence was the functional equivalent of a death sentence. ***Chandler***, 242 So. 2d at 67-68. Second, the Court recognized the "substantial substantive right" to a jury determination of the death penalty is rooted in Mississippi *statute*—namely, Section 99-19-101. ***King***, 656 So. 2d at 1173. In

King, this Court recognized that, while "criminal defendants in this State generally have no right to be sentenced by the jury, where a specific statute provides such a guarantee, such as § 99-19-101," Mississippi's constitutional rights to a trial by jury and due process "operate together to elevate the statutory right to one of constitutional significance . . . ." ***King***, 656 So. 2d at 1173 (quoting ***Wilcher v. State***, 635 So. 2d 789, 791 (Miss. 1993)). Because Section 99-19-101 provides no statutory right to a jury for a retroactive ***Miller*** hearing, it likewise provides no statutory right "elevate[d] . . . to one of constitutional significance." ***King***, 656 So. 2d at 1173 (quoting ***Wilcher***, 635 So. 2d at 791).

¶37. While ***Miller*** requires an individualized sentencing hearing, there is no constitutional or statutory right to a jury for that hearing. Therefore, the trial court did not err by denying McGilberry's motion to be resentenced by a jury. *See* ***Wharton***, 2019 WL 6605871. We thus reverse the Court of Appeals' decision and reinstate the trial court's judgment.

III. The trial court did not abuse its discretion by resentencing McGilberry to life in prison without parole.

¶38. We now turn to the merits of the trial court's sentencing decision.

¶39. McGilberry asserts that this Court must apply the heightened-scrutiny standard of review that we apply to death-penalty cases because his life-without-parole sentences, as the harshest penalty he could receive, are akin to the death penalty. But we have already rejected this same argument in ***Chandler***, 242 So. 3d at 67-68. "Heightened scrutiny is reserved for death-penalty cases due to the unique and irreversible nature of that punishment." ***Id.*** at 68. So the standard of review we apply in a ***Miller*** sentencing case is two-fold. We review de novo whether the trial court applied the correct legal standard. And if the court did apply the

correct legal standard, we review its sentencing decision for an abuse of discretion. ***Chandler***, 242 So. 3d at 68. With this standard in mind, we find the trial court's sentencing decision reflects neither a misapplication of law nor an abuse of discretion.

¶40. McGilberry first argues the trial court applied the wrong legal standard by failing to consider some of the ***Miller*** factors. ***Miller*** "'require[s] [the sentencing authority] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" ***Parker***, 119 So. 3d at 995 (alterations in original) (quoting ***Miller***, 567 U.S. at 480). The ***Miller*** Court identified several factors to consider, which we adopted in ***Parker***:

> (1) the juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,"
>
> (2) "the family and home environment that surrounds [the juvenile offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional,"
>
> (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and
>
> (4) whether "he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."

Parker, 119 So. 3d at 995-96 (quoting ***Miller***, 567 U.S. at 477-78).

¶41. The trial court's order clearly demonstrates that each of the above factors were taken into account. So the correct legal standard was applied. The trial judge considered evidence of McGilberry's chronological age and immaturity but found his crime was not the result of

childish impetuosity. The trial judge also considered McGilberry's home life, acknowledging it was "not idyllic but it also was not hopeless." Compared with the two juveniles in ***Miller***, McGilberry's crimes were not the product of peer pressure or finding himself in the wrong place at the wrong time. Rather, he carefully planned the murders for a week and persisted in his plan even when his friend backed out. Finally, the judge found no evidence McGilberry, due to his age, had been unable to deal with police, prosecutors, and defense attorneys.

¶42. McGilberry challenges these findings. He asserts they were not supported by his experts' testimony, which he claims was not rebutted at the ***Miller*** hearing. But at the hearing, the State submitted the entire trial record as evidence, which included the testimony of the experts who interviewed McGilberry at the time of his trial. So the trial court was presented with expert testimony that contradicted McGilberry's experts. And it was the role of the trial judge as sentencer—and not this Court on review—to assess the weight and credibility of each expert's testimony. *Cf.* ***State v. Scott***, 233 So. 3d 253, 264 (Miss. 2017) (deferring, in a battle-of-experts case, to the trial judge's weight and credibility findings).

¶43. The same is true for McGilberry's claim the trial judge gave "inappropriate weight and improper consideration to the mitigating aspects of other factors." ***Miller*** requires the juvenile-related factors be "considered" and "tak[en] into account." ***Miller***, 567 U.S. at 477. It does not mandate certain considerations hold more sway than others. So it was up to the sentencer to assess what weight should be given each mitigating factor. Because the trial

judge clearly took into account the ***Miller*** factors and supported his conclusions with record evidence, we will not disturb his sentencing decision.

¶44. Finally, McGilberry argues he is not "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." ***Montgomery***, 136 S. Ct. at 733. To support this argument, he again points to the testimony of his experts, who testified that, as of 2016, he had matured and exhibited good behavior in prison. McGilberry argues this evidence belies the expert testimony from his 1996 trial that he suffered from an untreatable personality disorder. But, again, it was the sentencer's role to assess the weight and credibility of opposing expert testimony.

¶45. Morever, the trial court found reason beyond the trial expert testimony not to adopt McGilberry's expert's views on rehabilitation. As the judge noted, even McGilberry's own expert attributed McGilberry's behavior to the structure and strictures of prison and acknowledged that taking him out of that structure would involve risk. And the judge found McGilberry's prison record revealed someone other than a model prisoner. It showed someone who still excuses or refuses to accept blame for even minor misconduct. While McGilberry finally admitted to one expert that he now sees murdering his entire family was unjustified, the trial court emphasized that McGilberry has yet to express any sorrow or regret over his crimes, which showed, in the judge's view, he lacks a "fundamental component[] of an individual's humanity."

¶46. The trial judge based its conclusion that McGilberry was irreparably corrupt on "[t]he heinousness of his crime, the expert testimony from his trial and resentencing, and his lack

of remorse," which in the trial court's view "reveal[ed] an individual with a broken moral compass." Because the trial judge took into consideration the ***Miller*** factors and based its decision on the entire trial court record and McGilberry's expert testimony regarding his maturity and rehabilitation, we find no abuse of discretion in his decision to resentence McGilberry to life without parole for each of his four convictions of capitol murder. We therefore affirm the denial of McGilberry's motion to impose life-with-parole sentences.

¶47. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED.**

RANDOLPH, C.J., BEAM AND CHAMBERLIN, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.; COLEMAN, J., JOINS IN PART. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J.; COLEMAN, J., JOINS IN PART. COLEMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, P.JJ. ISHEE AND GRIFFIS, JJ., NOT PARTICIPATING.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶48. For the reasons set forth in Presiding Justice King's dissent in this case and in my dissent in ***Wharton v. State***, No. 2017-CT-00441-SCT, 2019 WL 6605871 (Miss. Dec. 5, 2019) (Kitchens, P.J., dissenting), *reh'g filed*, Dec. 18, 2019, I respectfully disagree with the majority's reversal of the well-reasoned decision of the Court of Appeals. I would affirm the trial court's vacation of McGilberry's sentence, reverse the trial court's imposition of a life without parole sentence, and remand for resentencing by a jury under Mississippi Code Section 99-19-101(1) (Rev. 2015).

KING, P.J., JOINS THIS OPINION. COLEMAN, J., JOINS THIS OPINION IN PART.

KING, PRESIDING JUSTICE, DISSENTING:

¶49. I respectfully dissent. I would find that this Court must adhere to the statutory mandates of Mississippi Code Section 99-19-101(1) (Rev. 2015) and remand Stephen Virgil McGilberry's case for sentencing by a jury. Thus, I would reverse the decision of the trial court, and I would affirm the judgment of the Court of Appeals.

¶50. McGilberry was convicted of capital murder under Section 99-19-101. Section 99-19-101(1) states, in relevant part, that

> Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree thereto in writing.

Miss. Code. Ann. § 99-19-101(1). McGilberry originally was sentenced by a jury to death. McGilberry's death sentence was vacated after ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). This Court then directed the trial court to resentence McGilberry to four terms of life imprisonment without eligibility for parole. However, under ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its holding that mandatory life-imprisonment-without-parole sentences for juveniles are unlawful, McGilberry received a new sentencing hearing. Yet, despite the clear language of Section

99-19-101(1), the trial court, not a jury, again sentenced McGilberry to life imprisonment without the possibility of parole.

¶51. I disagree with the majority's contention that "McGilberry should have never been resentenced by the trial court." Maj. Op. ¶ 29 (emphasis omitted). As I stated in ***Wharton***,

> The United States Supreme Court, in ***Miller***, specifically required that "a sentencer follow a certain process—considering an offender's youth and attendant characteristics—*before* imposing a particular penalty." ***Miller***, 567 U.S. at 483 (emphasis added). The ***Miller*** Court again stated in its conclusion that a sentencer "must have the opportunity to consider mitigating circumstances *before* imposing the harshest possible penalty for juveniles." ***Id.*** at 489 (emphasis added). This Court granted Wharton leave to proceed in the trial court with a motion for post-conviction relief (PCR). Thus, the proper relief was for Wharton's sentence to be vacated and for a new sentencing hearing to occur in which a jury considered Wharton's youth and attendant characteristics before imposing a particular penalty. Placing the burden on Wharton, the juvenile offender, to prove that a sentence of life without parole was inappropriate under ***Miller*** does not comport with ***Miller***'s mandate that Wharton's mitigating circumstances be considered before imposing a sentence.

Wharton v. State, No. 2017-CT-00441-SCT, 2019 WL 6605871, at *10 (Miss. Dec. 5, 2019) (King, P.J., dissenting), *reh'g filed*, Dec. 18, 2019.[8] I would therefore find that the trial court was required to vacate McGilberry's life-without-parole sentenced prior to considering his PCR motion.

¶52. In addition, McGilberry was convicted of capital murder and sentenced under Section 99-19-101; thus, that statute continues to control his case. As the Court of Appeals stated, "[u]nder section 99-19-101, the Legislature has vested sentencing authority of a capital defendant solely with the jury, except in cases where the defendant pleads guilty."

[8]The mandate has not issued in this case because a motion for rehearing was filed on December 18, 2019.

McGilberry v. State, No. 2017-KA-00716-COA, 2019 WL 192345, at *4 (Miss. Ct. App. Jan. 15, 2019), *reh'g denied,* (Miss. Ct. App. May 21, 2019), *cert. granted*, 276 So. 3d 659 (Miss. Aug. 29, 2019). Section 99-19-101(1) directs a trial judge to conduct a sentencing hearing before a trial jury or separate sentencing jury unless the defendant has waived the right. Miss. Code Ann. § 99-19-101(1). McGilberry did not waive his right to a sentencing jury. Therefore, Section 99-19-101 requires that he be resentenced by a jury and not a trial judge.

¶53. Accordingly, I would remand McGilberry's case for resentencing by a jury, I would reverse the trial court's judgment, and I would affirm the decision of the Court of Appeals.

KITCHENS, P.J., JOINS THIS OPINION. COLEMAN, J., JOINS THIS OPINION IN PART.

COLEMAN, JUSTICE, DISSENTING:

¶54. As I wrote in my dissent in ***Wharton v. State***, No. 2017-CT-00441-SCT, 2019 WL 6605871, at * 13 (Miss. Dec. 5, 2019) (Coleman, J., dissenting), *reh'g filed*, Dec. 18, 2019, "[t]he wording of Section 99-19-101 bears no exceptions, other than waiver by both the State and the defendant, to the statutory directive that a jury must decide the sentence following a conviction for capital murder." Indeed, in the sentencing statute the Legislature foresaw situations such as the one presented by the case *sub judice* wherein the jury from the guilt phase became unavailable for sentencing.

¶55. "'[C]ourts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature.'" ***Election Comm'n of Edwards v. Wallace***, 143 So. 3d 557 (¶ 12) (Miss. 2014) (internal

quotation marks omitted) (quoting ***Miss. Ethics Comm'n v. Grisham***, 957 So. 2d 997, 1001 (¶12) (Miss. 2007)). The majority creates an exception to the statutory right of sentencing by a jury inconsistent with the statute the majority purports to interpret. Accordingly, and with respect, I dissent.

KITCHENS AND KING, P.JJ., JOIN THIS OPINION.