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SUPREME COURT OF ARKANSAS

No. CR-17-703

	Opinion Delivered: March 7, 2019
MARLON DONTE HOWELL APPELLANT	APPEAL FROM THE HEMPSTEAD COUNTY CIRCUIT COURT
V.	[NO. 29CR-00-108]
STATE OF ARKANSAS APPELLEE	HONORABLE DUNCAN CULPEPPER, JUDGE
	REVERSED AND REMANDED.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Marlon Donte Howell appeals from the Hempstead County Circuit Court's order denying him a resentencing hearing and imposing a life sentence with parole eligibility pursuant to the Fair Sentencing of Minors Act of 2017 (FSMA). For reversal, Howell argues that he is entitled to a new sentencing hearing based on our recent decision in *Harris v. State*, 2018 Ark. 179, 547 S.W.3d 64, and as a matter of fundamental fairness and equal protection. We reverse and remand for resentencing in accordance with *Harris*.

On December 11, 2000, a jury convicted Howell of capital murder in connection with the shooting of Daryl Allen, Sr., on April 29, 2000. Howell was seventeen years old at the time of the crime. He received a mandatory sentence of life imprisonment without parole after the State waived the death penalty. *See* Ark. Code Ann. § 5-10-101(c) (Repl. 1997). We

affirmed Howell's conviction and sentence on direct appeal. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002), *overruled in part by Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

In 2012, the Supreme Court held in *Miller v. Alabama*, 567 U.S. 460 (2012), that the Eighth Amendment forbids a mandatory sentence of life without parole for a juvenile offender and that a juvenile facing a life-without-parole sentence is entitled to a sentencing hearing at which a judge or jury may consider the individual characteristics of the defendant and the circumstances of the crime. In *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906, this court decided a companion case to *Miller* on remand from the Supreme Court. We granted habeas relief and remanded to the circuit court for a sentencing hearing where Jackson could present *Miller* evidence for consideration. *Id.* We further held that Jackson's sentence must fall within the statutory discretionary sentencing range for a Class Y felony, which is ten to forty years or life. *Id.* Subsequent to *Jackson*, we held in *Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842, that *Miller* was to be applied retroactively to other cases on collateral review.[1]

Relying on the above precedent, Howell filed a petition for a writ of habeas corpus in the Lincoln County Circuit Court. On June 27, 2016, the circuit court entered an order granting the writ, vacating Howell's life-without-parole sentence, and remanding his case to the Hempstead County Circuit Court for resentencing. Before Howell's resentencing hearing was held, however, the Arkansas General Assembly passed the FSMA (Act 539 of 2017), which

[1] In *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), the Supreme Court confirmed that its decision in *Miller* must be given retroactive effect and indicated that states could remedy *Miller* violations by extending parole eligibility to juvenile offenders serving unconstitutional sentences.

became effective on March 20, 2017. The FSMA eliminated life without parole as a sentencing option for juvenile offenders and extended parole eligibility to juvenile offenders.

On March 31, 2017, the State filed a motion to resentence Howell, requesting that the circuit court not hold the previously scheduled resentencing hearing and that Howell instead be sentenced to life imprisonment with the possibility of parole after thirty years pursuant to the FSMA. Howell responded to the motion, arguing that he should not be sentenced under the FSMA because he was entitled to a resentencing hearing as a matter of fundamental fairness and equal protection under *Kelley v. Gordon*, *supra*. He further contended that the FMSA was unconstitutional because it was *ex post facto* legislation and a bill of attainder.

At the hearing on the motion, the State asserted that the FMSA applied retroactively to Howell and that the circuit court had a duty to sentence him under that Act. The circuit court agreed and sentenced Howell to life imprisonment with the possibility of parole after thirty years pursuant to the new penalty provisions of the FSMA.[2] An order to this effect, along with a new sentencing order, was entered on May 4, 2017. Before entering these orders, the circuit court left the record open for Howell to supplement his prior response with a motion for postconviction relief, to which he attached copies of sentencing orders pertaining to fourteen similarly situated *Miller* defendants who had already been resentenced following either negotiated pleas or resentencing hearings. The circuit court denied this motion on May 24, 2017. Howell filed a timely notice of appeal from the circuit court's orders.

[2] *See* FSMA, No. 539, § 3, 2017 Ark. Acts at 2617 (codified at Ark. Code Ann. § 5-4-104(b) (Supp. 2017)); § 6, 2017 Ark. Acts at 2618–19 (codified at Ark. Code Ann. § 5-10-101(c)(1)(B) (Supp. 2017)).

On appeal, Howell contends that he is entitled to a resentencing hearing in accordance with this court's recent opinion in *Harris v. State*, *supra*, wherein we held that the FSMA was not applicable to a similarly situated juvenile offender, and we ordered a new sentencing hearing. Howell also argues that he is entitled to a resentencing hearing because denying him the relief granted to other similarly situated *Miller* defendants violates constitutional guarantees of equal protection and fundamental fairness.

In response to Howell's contention that he is entitled to a new sentencing hearing pursuant to *Harris*, the State asserts that this argument is not preserved for appellate review because he did not raise the issue of whether the FSMA's revised penalty could be applied retroactively to him either in his response to the State's motion to discontinue resentencing or at the hearing. Howell contends that this issue was adequately preserved under the circumstances in this case. We agree.

Here, the State filed a motion to discontinue Howell's resentencing hearing and to sentence him pursuant to the FSMA. Howell responded to this motion, stating that he "should not be resentenced" under that Act and that he was instead entitled to a new sentencing hearing. At the hearing, the State argued that the FSMA applied retroactively to Howell and that the circuit court was required to sentence him under its provisions. The circuit court agreed with this argument and sentenced him accordingly. Thus, the application of the FSMA was clearly at issue in the circuit court and was ruled upon. Furthermore, as Howell argues, *Harris* was issued after the circuit court's decision in this case, and he did not have an opportunity to rely on it below. A limited exception to preservation has been noted when "there have been judicial interpretations of existing law after decision below and

pending appeal—interpretations which if applied might have materially altered the result." *Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941). *See also Johnson v. United States*, 434 F.2d 340 (8th Cir. 1970). The Supreme Court explained that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them" and that "rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel*, 312 U.S. at 557.

Accordingly, we agree with Howell that the issues decided in *Harris* are properly before us and are controlling in this appeal. In *Harris*, this court concluded that the revised punishment provided under the FSMA for capital murder committed by a juvenile, which is life imprisonment with the possibility of parole after serving a minimum of thirty years' imprisonment, is not retroactive and applies only to crimes committed on or after March 20, 2017, the effective date of the Act. *Id.* at 11–13, 547 S.W.3d at 70–71 (citing §§ 3, 6 of the FSMA, codified at Ark. Code Ann. §§ 5-4-104(b), 5-10-101(c)(1)(B) (Supp. 2017)). Furthermore, we concluded that the FSMA's parole-eligibility provisions did not apply to Harris at the time of his resentencing hearing because his sentence had been vacated, and he was no longer serving a sentence to which parole eligibility could attach. *Id.* We held that Harris was in the same situation as the defendant in *Jackson* and that he was entitled to a hearing at which he could present *Miller* evidence and to sentencing within the discretionary range for a Class Y felony, which is ten to forty years or life. *Id.*

Because Howell, like Harris, committed his crime before the effective date of the FSMA, the penalty provisions of the Act do not apply to him. Further, because Howell's sentence had already been vacated by the Lincoln County Circuit Court, he was no longer

serving a sentence to which parole eligibility could attach. Thus, the parole-eligibility provision of the FSMA also did not apply to Howell at the time of the circuit court's decision in this case. We therefore hold that the circuit court erred by sentencing Howell under the FSMA.[3] We reverse and remand for a resentencing hearing where Howell is entitled to present *Miller* evidence for consideration and where he is subject to the discretionary sentencing range for a Class Y felony, which is ten to forty years or life. As in *Harris*, because we are holding that the penalty provisions of the FSMA do not apply to Howell, we do not need to address his remaining constitutional arguments. *See id.* at 14.

Reversed and remanded.

WYNNE, J., concurs.

WOOD and WOMACK, JJ., dissent.

ROBIN F. WYNNE, Justice, concurring. I concur for the reasons set out in my concurring opinion in *Harris v. State*, 2018 Ark. 179, 547 S.W.3d 64.

SHAWN A. WOMACK, Justice, dissenting. I dissent for the reasons set forth in my dissenting opinion in *Harris v. State*, 2018 Ark. 179, 547 S.W.3d 64.

Short Law Firm, by: *Lee D. Short*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Darnisa Evans Johnson*, Deputy Att'y Gen., and *Christian Harris*, Ass't Att'y Gen., for appellee.

[3] Relying on our decision in *Harris*, we have reached the same conclusion in several other recent cases involving similarly situated *Miller* defendants. *See, e.g.*, *Ray v. State*, 2019 Ark. 46; *Segerstrom v. State*, 2019 Ark. 36; *Robinson v. State*, 2018 Ark. 353, 563 S.W.3d 530.