

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 16-6738

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Aug 01, 2018
DEBORAH S. HUNT, Clerk

CYNTOIA BROWN,)
)
) Petitioner-Appellant,)
)
 v.)
)
) CAROLYN JORDAN,)
)
) Respondent-Appellee.)
)
)

ORDER CERTIFYING QUESTION
OF LAW TO THE SUPREME
COURT OF TENNESSEE

BEFORE: GIBBONS, THAPAR, and LARSEN, Circuit Judges.

PER CURIAM. Cyntoia Brown shot and killed Johnny Allen when she was sixteen years old. The state of Tennessee tried her as an adult, and a jury convicted her of first-degree murder, felony murder, and aggravated robbery. Under Tennessee law, when a juvenile is convicted of first-degree murder, a trial judge can impose one of two sentences: (1) life in prison without the possibility of parole, or (2) life in prison. Tenn. Code Ann. § 39-13-202(c)(3); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (holding that juveniles cannot be sentenced to death). The judge chose the lesser of the two options and sentenced Brown to life.

Brown now seeks a writ of habeas corpus. She claims, among other things, that her sentence is unconstitutional in light of the Supreme Court’s decision in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the Court held that states cannot sentence juvenile offenders to life without the possibility of parole unless they first consider whether the individual’s youth and

its attendant characteristics warrant a lesser sentence. *Id.* at 479, 483. Brown acknowledges that she was not formally sentenced to life without the possibility of parole, but she nevertheless contends that *Miller* applies to her case because it remains unclear whether she will ever become eligible for release.

Understanding why requires some background on Tennessee’s sentencing law. Prior to 1995, Tennessee Code Annotated § 40-35-501(h)(1) governed release eligibility for defendants convicted of first-degree murder and sentenced to life in prison. That subsection provides that a life sentence for first-degree murder amounts to sixty years and that a defendant will become eligible for release after serving sixty percent of that sixty-year term, less any sentence credits earned and retained. *Id.* Accordingly, a defendant like Brown would become eligible after thirty-six years’ time. In 1995, however, the Tennessee legislature amended the statute. It added a new subsection—Tennessee Code Annotated § 40-35-501(i)—which provides that “[t]here shall be *no release eligibility* for a person” sentenced for “[m]urder in the first degree.” *Id.* (emphasis added). The provision makes clear that such a person “shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained” and that “no sentence reduction credits . . . shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%).” *Id.*

When the state legislature added the second subsection (§ 40-35-501(i), “no release eligibility”), it did not repeal or make any changes to the first one (§ 40-35-501(h)(1), release eligibility after thirty-six years). Both are currently in effect and appear to conflict regarding whether a person sentenced to life for first-degree murder will ever become eligible for release. Brown argues that the Tennessee appellate courts have not consistently interpreted § 40-35-501(i). *Compare State v. Polochak*, No. M2013-02712-CCA-R3-CD, 2015 WL 226566, at *34 (Tenn.

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Crim. App. Jan. 16, 2015), with *Myrick v. State*, No. M2013-02352-COA-R3-CV, 2014 WL 5089347, at *3 (Tenn. Ct. App. Oct. 8, 2014) (involving second-degree murder). As such, Brown asks that we certify the question to the Tennessee Supreme Court before determining whether she is entitled to relief under *Miller*.

The state does not object to certification but maintains that the law is not as unclear as Brown suggests. Tennessee argues that we should read the two provisions together, and that after we do, it becomes clear that a defendant sentenced to life in prison for first-degree murder will become eligible for release after serving one-hundred percent of a sixty-year life term, less any credits earned and retained. For its part, the state cites the Tennessee Attorney General's opinion from 1997, which reached the same conclusion, and the Tennessee Supreme Court's decision in *Vaughn v. State*, which endorsed the Attorney General's opinion in the context of an ineffective-assistance-of-counsel claim. 202 S.W.3d 106, 118–19 (Tenn. 2006). Based on these sources, the state argues that Brown will become eligible for release in sixty years and in perhaps as early as fifty-one.

While the state's position is a reasonable one, the Tennessee Supreme Court has never squarely held that it is correct. And because *Miller* would entitle Brown to relief if she will never become eligible for release, *see* 567 U.S. at 489, we believe the proper course is to **CERTIFY** the following question to the Tennessee Supreme Court before we issue a ruling in Brown's case. The panel **STAYS** consideration of the remaining issues on appeal pending a response.

* * *

CERTIFICATION TO THE SUPREME COURT OF TENNESSEE

A.

Having set out in detail the factual and legal basis for Brown's claim on appeal and demonstrated that it is governed by rules of Tennessee state law, we respectfully certify to the Supreme Court of Tennessee the following question:

Will a defendant convicted of first-degree murder committed on or after July 1, 1995, and sentenced to life in prison under Tennessee Code Annotated § 39-13-202(c)(3) become eligible for release and, if so, after how many years?

B.

In accordance with Rule 23 of the Supreme Court of Tennessee, we provide the following required information:

(A) Style of the Case: *Brown v. Jordan*, No. 16-6738

(B) Facts and Questions of Law: The facts out of which the questions of Tennessee state law arise and the questions themselves are discussed above.

(C) Names of Each Party: Cyntoia Brown and Carolyn Jordan, Warden

(D) Names, Addresses, and Telephone Numbers of Counsel:

a. Counsel for Cyntoia Brown:

Charles Mark Pickrell
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b. Counsel for Carolyn Jordan:

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(E) Designation of One of the Parties as the Moving Party:

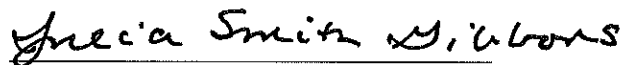
- a. Moving party (Petitioner): Cyntoia Brown
- b. Adverse party (Respondent): Carolyn Jordan

C.

Accordingly, it is **ORDERED** that the above question be certified to the Supreme Court of Tennessee. In accordance with Rule 23, we instruct Ms. Deborah S. Hunt, Clerk of the United States Court of Appeals for the Sixth Circuit, to serve copies of this certification order upon counsel for the parties and to file this certification order under the seal of this Court with the clerk of the Supreme Court of Tennessee, along with appropriate proof of service.

This Order of Certification is entered by Judge Julia Smith Gibbons, as the Judge presiding in this Court.

FOR THE COURT:



Julia Smith Gibbons
United States Circuit Judge