IN THE SUPREME COURT OF MISSISSIPPI

NO. 2017-CT-00441-SCT

DARREN LEE WHARTON

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	02/24/2017
TRIAL JUDGE:	HON. LAWRENCE PAUL BOURGEOIS, JR.
TRIAL COURT ATTORNEYS:	SCOTT HAROLD LUSK MICHAEL W. CROSBY DAVID WRIGHT CLARK MICHAEL JAMES BENTLEY
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MICHAEL W. CROSBY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED - 12/05/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

BEAM, JUSTICE, FOR THE COURT:

¶1. Darren Lee Wharton was granted leave by this Court to the proceed in the Harrison County Circuit Court with a motion for post-conviction relief (PCR) based on ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and ***Montgomery v.***

Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). The trial court vacated Wharton's life-without-parole sentence for capital murder and granted Wharton a ***Miller*** sentencing hearing. The trial court denied Wharton's request that a jury make the ***Miller*** determination, stating that "the sentencing authority is the trial court." Following the ***Miller*** hearing, the trial court resentenced Wharton to life in prison without parole.

¶2. The Court of Appeals reversed Wharton's sentence and remanded the case to the trial court, instructing that "Wharton's ***Miller*** resentencing should be decided by a jury, not the trial court, because Wharton was convicted and sentenced under [Mississippi Code Section] 99-19-101 that prescribes sentencing solely by a jury." ***Wharton v. State***, No. 2017-CA-00441-COA, 2018 WL 4708220, at *1 (Miss. Ct. App. Oct. 2, 2018).

¶3. The State petitioned for a writ of certiorari, which we granted. We find that Wharton is not entitled to have a ***Miller*** resentencing hearing in front of a new jury because Section 99-19-101 was complied with at the original sentencing proceeding. Accordingly, we reverse the Court of Appeals' decision.

¶4. Further, although the Court of Appeals did not reach the question, we find no abuse of discretion in the trial court's decision not to resentence Wharton to life in prison with the possibility of parole. Accordingly, we reinstate and affirm.

FACTS AND PROCEDURAL HISTORY

¶5. Wharton was found guilty by a jury of capital murder in 1995 for the shooting death of Danny McCugh during the commission of a robbery. The crime occurred on July 17,

1994, when Wharton was seventeen years of age. ***Wharton***, 2018 WL 4708220, at *1.

¶6. Following the trial's guilt phase, a sentencing hearing was conducted before the same jury that determined Wharton's guilt. The jury was presented aggravating and mitigating factors for its consideration, as required by Mississippi Code Section 99-19-101 (Rev. 2015). Afterwards, the jury was instructed to decide whether Wharton should be sentenced to "death, life imprisonment without parole, or life imprisonment." The jury decided that Wharton "should be sentenced to life imprisonment without parole."

¶7. This Court affirmed Wharton's conviction and sentence on direct appeal. ***Wharton v. State***, 734 So. 2d 985 (Miss. 1998).

¶8. In September 2014, a panel of this Court granted Wharton leave to proceed in the Harrison County Circuit Court with a PCR motion based on ***Miller***. As the Supreme Court later held in ***Montgomery***, the ***Miller*** Court had held that "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" ***Montgomery***, 136 S. Ct. at 734 (quoting ***Miller***, 567 U.S. at 479-80).

¶9. Wharton claimed in his PCR motion that he was entitled to a ***Miller*** sentencing hearing before a jury based on the language of Section 99-19-101. The State responded that the trial judge, not a jury, was the appropriate authority in ***Miller*** sentencing proceedings.

¶10. The trial court agreed with the State. The trial court concluded that the reason for Mississippi's enactment of Section 99-19-101 was the death penalty and its constitutional application. Because the death penalty is no longer a sentencing option for juveniles, the trial

court reasoned that the court acts as the sentencing authority on remand in ***Miller*** hearings.

¶11. The trial court then conducted a ***Miller*** sentencing hearing, during which it received evidence and testimony along with arguments from counsel for both parties. The trial court applied the ***Miller*** factors as interpreted and adopted by this Court in ***Parker v. State***, 119 So. 3d 987, 995 (Miss. 2013).[1] The trial court then determined that Wharton should be resentenced to life without parole.

¶12. Wharton appealed, and this Court assigned the case to the Court of Appeals. There,

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[1] ***Parker*** explained that the ***Miller*** Court identified several factors that must be considered by the sentencing authority before sentencing a juvenile to life in prison without parole:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects 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. Indeed, it ignores that 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. *See, e.g.*, ***Graham*** [***v. Florida***], 560 U.S. [46,] 48, 130 S. Ct. [2011,] 2032[, 176 L. Ed. 2d 825 (2010)] ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); ***J.D.B. v. North Carolina***, 564 U.S. [261, 269], 131 S. Ct. 2394, 2400-01, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

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

Wharton argued that he had a constitutional right to have a jury decide resentencing. ***Wharton***, 2018 WL 4708220, at *4.

¶13. The Court of Appeals disagreed with Wharton that he had a "constitutional right" to have a jury undertake consideration of the ***Miller*** factors, noting that both ***Miller*** and ***Montgomery*** refute that argument. ***Wharton***, 2018 WL 4708220, at *6 (citing ***Cook v. State***, 242 So. 3d 865, 876 (Miss. Ct. App. 2017)).

¶14. The Court of Appeals, however, reversed the trial court's ruling, holding that, "because Wharton was convicted of capital murder under [S]ection 99-19-101, and then sentenced by a jury as required under [S]ection 99-19-101, Wharton's ***Miller*** resentencing determination should be undertaken by a jury, not the trial judge." ***Wharton***, 2018 WL 4708220, at *4 (footnote omitted).

¶15. The Court of Appeals reasoned that, "under [S]ection 99-19-101's sentencing scheme, the Legislature has vested sentencing authority in the jury, and that authority only allows a sentencing proceeding to be conducted before a trial judge without a jury if the right to a jury was waived or the defendant pleaded guilty . . . ." ***Id.*** (citing Miss. Code Ann. § 99-19-101). Thus, because Wharton neither pleaded guilty nor waived his right to a sentencing jury, Wharton was entitled by statute to have a jury undertake consideration of the ***Miller*** factors.

¶16. The State petitioned for a writ of certiorari, claiming that the Court of Appeals' decision is incorrect because Section 99-19-101 is a death-penalty statute. As such, the State argued, Section 99-19-101 does not apply in the ***Miller*** context because juveniles are not

eligible for the death penalty.

¶17. Alternatively, the State acknowledges this Court's recent decision in ***Moore v. State***, No. 2017-KA-00379-SCT, 2019 WL 4316161 (Miss. May 30, 2019), which held that juveniles convicted of capital murder have a statutory right under Section 99-19-101 to be initially sentenced by a jury. The State contends, however, that ***Moore*** should not be applied in the PCR context, since ***Moore*** distinguishes between initial ***Miller*** sentencing and ***Miller*** resentencing proceedings. And Wharton already received his statutory right to jury sentencing under Section 99-19-101 in 1995.

DISCUSSION

¶18. As noted by the State, we recently held in ***Moore*** that the trial court erred by denying a request by a defendant convicted of capital murder post-***Miller*** to be sentenced by a jury. ***Moore***, 2019 WL 4316161, at *10. We construed Section 99-19-101(1) to "require[] all capital offenders—without exception—to be sentenced by a jury." ***Id.*** This Court based its interpretation on Section 99-19-101(1)'s language that, "[U]pon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding . . . before the trial jury as soon as practicable." ***Id.*** (internal quotation marks omitted) (quoting Miss. Code Ann. § 99-19-101(1) (Rev. 2015)).

¶19. As the State also points out, ***Moore*** limited its holding, stating that "our holding today is limited to the facts of this case: a minor convicted of capital murder post-***Miller*** who was denied sentencing by a jury." ***Id.*** What occurred in ***Moore*** was a statutory violation, not a

constitutional violation; there, the trial court had denied Moore's request to have a jury determine his sentence under Section 99-19-101(1). As the Court of Appeals rightly concluded, Wharton has no constitutional right to have a jury decide the ***Miller*** factors. ***Wharton***, 2018 WL 4708220, at *6.

¶20. Here, however, Wharton received a jury sentencing hearing as required by Section 99-19-101(1). Thus, unlike in ***Moore***, there was no statutory violation in this instance. And while we find that Wharton is entitled to a ***Miller*** hearing, we do not find that he is entitled to a ***Miller*** hearing in front of a new jury.

¶21. Also, this Court granted only Wharton's request for leave to file a PCR motion. *See* Order, ***Wharton v. State***, No. 2013-M-00905 (Miss. Sept. 4, 2014) ("[Wharton] asks us to vacate his life-without-parole sentence and remand the case for a new sentencing hearing or, alternatively, grant him leave to file a motion for post-conviction relief in the trial court."). The order did not grant Wharton's request to vacate his life-without-parole sentence. ***Id.***

¶22. As will be explained, we hold that the trial court erred by vacating Wharton's original sentence. Again, neither ***Miller*** nor ***Montgomery*** mandate a categorical bar on life without parole for juveniles. *See* ***Jones v. State***, 122 So. 3d 698, 702 (Miss. 2013) (speaking to ***Miller***). Rather, the Supreme Court—guided by its "evolving standards of decency"[2] test—has concluded that mandatory life without parole for juveniles, constitutes cruel and

[2] ***Miller***, 567 U.S. at 469-70 (quoting ***Estelle v. Gamble***, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

unusual punishment under the Eighth Amendment for all but "the rare juvenile offender whose crime reflects irreparable corruption." ***Montgomery***, 136 S. Ct. at 734.

¶23. This is a new substantive rule of constitutional law, required to be given retroactive effect by the states. ***Montgomery***, 136 S. Ct. at 734; *see also* ***Jones***, 122 So. 3d at 701-02. (concluding the same before ***Montgomery*** was decided). "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of the challenge." ***Montgomery***, 136 S. Ct. at 731-32.

¶24. The Supreme Court has left to the states the responsibility to determine how ***Miller*** is to be implemented in state-court proceedings and how to remedy a ***Miller*** violation or potential violation. ***Id.*** at 735-36. ***Montgomery*** reiterated that, "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." ***Id.*** at 735 (citing ***Ford v. Wainwright***, 477 U.S. 399, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)). "***Miller*** . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." ***Id.*** at 736. Rather, ***Miller*** requires

> a procedure through which [an affected prisoner] can show that he belongs to the protected class. *See, e.g.*, ***Atkins v. Virginia***, 536 U.S. 304, 317, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (requiring a procedure to determine whether a particular individual with an intellectual disability "falls within the range of

> intellectually disabled offenders about whom there is a national consensus" that execution is impermissible).

Montgomery, 136 S. Ct. at 735.

¶25. As this Court has concluded, ***Miller*** does not "require trial courts to make a finding of fact regarding a child's incorrigibility." ***Chandler v. State***, 242 So. 3d 65, 69 (Miss. 2018) (citing ***Montgomery***, 136 S. Ct. at 735); *see also* ***People v. Skinner***, 917 N.W.2d 292, 305 n.11 (Mich. 2018) (explaining that whether to sentence a juvenile to life without parole is ultimately a moral judgment, not a factual finding). Nor does ***Miller*** impose a "rebuttable presumption . . . in favor of parole eligibility for juvenile offenders." ***Chandler***, 242 So. 3d at 69. And as this Court held in ***Jones***, the burden rests with the juvenile offender "to convince the sentencing authority that ***Miller*** considerations are sufficient to prohibit" a sentence of life without parole. ***Jones***, 122 So. 3d at 702; *see also* ***Cook v. State***, 242 So. 3d 865, 873 (Miss. Ct. App. 2017) (construing ***Jones*** as "plac[ing] the burden on the offender to persuade the judge that he is entitled to relief under ***Miller***"). ***Montgomery***, likewise, implies as much with the admonition that "prisoners like Montgomery must be given *the opportunity to show* their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[3] ***Montgomery***, 136 S. Ct. at 736-37 (emphasis added).[4]

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[3] The petitioner in ***Montgomery*** was seventeen years old when he shot and killed a Louisiana sheriff's deputy in 1963. ***Montgomery***, 136 S. Ct. at 725.

[4] ***Montgomery*** also said that "[a] State may remedy a ***Miller*** violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."

¶26. Mississippi's PCR Act provides this opportunity to prisoners, such as Wharton, whose convictions and sentences were final when ***Miller*** was decided. *See* Miss. Code Ann. § 99-39-5(1) (Rev. 2015). Consistent with ***Miller*** and ***Montgomery***, prisoners such as Wharton are entitled to relief under the PCR Act, *if* they can demonstrate that their life-without-parole sentence is unconstitutional under the Eighth Amendment.

¶27. This requires showing that, under application of the ***Miller*** factors adopted in ***Parker***, the offender's life-without-parole sentence is unconstitutional. *See* ***Montgomery***, 136 S. Ct. at 736.

¶28. This is no different from what ***Jones*** mandated, requiring the juvenile offender "to convince the sentencing authority that ***Miller*** considerations are sufficient to prohibit" a sentence of life without parole. ***Jones***, 122 So. 3d at 702. As ***Montgomery*** explained,

> ***Miller*** . . . [does] more than require a sentencer to consider a juvenile offenders youth before imposing life without parole . . . . Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'" . . .
>
> . . . .
>
> To be sure, ***Miller***'s holding has a procedural component. ***Miller*** requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence. . . .

Id. (citing Wyo. Stat. Ann. § 6-10-301(c)). This though is a measure for our Legislature to decree, not this Court. "[T]he authority to say what constitutes a crime, and what punishment shall be inflicted is in its entirety a legislative question." ***Jones***, 122 So. 3d at 702 (internal quotation marks omitted) (quoting ***Parker***, 119 So. 3d at 998).

Montgomery, 136 S. Ct. at 734 (citations omitted).

¶29. We point out that, even though the ***Jones*** Court found it necessary to vacate the petitioner's original sentence and remand for a new sentencing hearing, it did so before ***Montgomery***.[5] Having examined ***Montgomery***, we conclude that it is error for our trial courts to vacate a juvenile's original life-without-parole sentence (or life sentence) before conducting a ***Miller*** hearing. Neither ***Miller*** nor ***Montgomery*** mandate this.

¶30. We also add that it is arguable whether ***Miller*** would apply to Section 99-19-101 were it not for Mississippi Code Section 47-3-7(e) (Rev. 2015).[6] By itself, Section 99-19-101 provides the option of life without parole. And we read ***Miller*** to prohibit only mandatory life-without-parole sentencing schemes. Section 47-3-7(e), however, implicates ***Miller***'s holding because it takes away parole eligibility for anyone sentenced to life imprisonment under Section 99-19-101.

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[5] We note that ***Jones*** was before this Court on writ of certiorari from the Court of Appeals. While the case was pending before us, ***Miller*** handed down. ***Jones***, 122 So. 3d at 700-01. Although we reversed the judgment of the Court of Appeals and the trial court, both courts had properly applied the law as it existed before ***Miller***. *See* ***Jones v. State***, 122 So. 3d 725 (Miss. Ct. App. 2011); *see also* ***Dycus v. State***, No. 2012-M-02014 (Sept. 17, 2014) (in which a panel of this Court vacated Dycus's mandatory life-without-parole sentence and remanded for a new sentencing hearing before a jury). As our Court of Appeals has correctly recognized, the ***Dycus*** order provided no explanation "as to why the hearing was to be 'before a jury' rather than a judge alone." ***Cook v. State***, 242 So. 3d 865, 877 (Miss. Ct. App. 2017). Moreover, ***Dycus*** is an unpublished panel order and has limited precedential authority. ***Cook***, 242 So. 3d at 877 (citing ***Westbrook v. City of Jackson***, 665 So. 2d 833, 837 n.2 (Miss. 1995)).

[6] Section 47-3-7(e) states, "No person shall be eligible for parole who is charged, tried, convicted and sentenced to life imprisonment under the provisions of Section 99-19-101." Miss. Code Ann. § 47-3-7(e).

¶31. It also bears mentioning that ***Montgomery***, while clarifying ***Miller***'s retroactiveness and scope, has created new uncertainty with some of its language, leading some courts to conclude or surmise that ***Montgomery*** expanded ***Miller*** to cover discretionary life-without-parole sentences.[7] The Supreme Court may soon clarify this, having granted certiorari in a case from the United States Court of Appeals for the Fourth Circuit, which held that ***Montgomery*** expanded ***Miller***'s scope to apply to discretionary life-without-parole sentences. ***Malvo v. Methana***, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317, 203 L. Ed. 2d 563 (2019). But that remains to be seen.

¶32. For our purposes here, we hold that Wharton made a colorable claim for relief in his PCR motion based on ***Miller***. This entitled him to an evidentiary hearing in the trial court, at which that court would consider and apply the ***Miller*** factors adopted by this Court in

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[7] *See, e.g.*, ***Malvo v. Mathena***, 893 F.3d 265, 274 (4th Cir. 2018), *cert. granted*, 139 S. Ct. 1317, 203 L. Ed. 2d 563 (2019) ("[A] sentencing judge *also* violates ***Miller***'s rule any time it imposes a discretionary life-without-parole sentence without first concluding that the offender's 'crimes reflect permanent incorrigibility,' as distinct from 'the transient immaturity of youth.'" (quoting ***Montgomery***, 136 S. Ct. at 734)); ***People v. Holman***, 91 N.E.3d 849, 861 (Ill. 2017) (construing ***Miller*** and ***Montgomery*** together to hold that, "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics"); ***Veal v. State***, 784 S.E.2d 403, 410 (Ga. 2016) ("We have explained that Georgia's murder sentencing scheme does not implicate the core holding of ***Miller*** . . . . But then came ***Montgomery***."); *see also* ***Mason v. State***, 235 So. 3d 129, 134 (Miss. Ct. App. 2017) (opining that ***Montgomery*** appears to have expanded ***Miller***'s holding). *But see* ***United States v. Sparks***, No. 18-50225, 2019 WL 5445897, at *4 (5th Cir. 2019) (reiterating that "[***Miller***] 'did not foreclose a sentencer's ability to impose life without parole' on a *discretionary* basis" (quoting ***Montgomery***, 136 S. Ct. at 726)).

Parker. That hearing having been conducted, the question that remains is whether the trial court erred by denying Wharton relief from his original sentence of life without parole.

¶33. Reviewing this question, we reiterate what we recently held in ***Chandler v. State***.

> [T]here are two applicable standards of review in a ***Miller*** case. First, whether the trial court applied the correct legal standard is a question of law subject to *de novo* review. If the trial court applied the proper legal standard, its sentencing decision is reviewed for an abuse of discretion.

Chandler v. State, 242 So. 3d 65, 68 (Miss. 2018) (citations omitted).

¶34. Here, the trial court considered the following ***Miller*** factors: (1) Wharton's chronological age and the hallmark features among that age—immaturity, impetuosity, and failure to appreciate risks and consequences; (2) Wharton's family and home environment; (3) the circumstances of Wharton's homicide offense, including the extent of Wharton's participation in the conduct and the way familial and peer pressures may have affected him; (4) whether Wharton might have been charged and convicted of a lesser offense if not for incompetencies associated with his youth; and (5) the possibility of rehabilitation.

1. Wharton's Chronological Age

¶35. Wharton was seventeen years and eighty days old at the time of the crime. Dr. Donald Matherne, a clinical psychologist, interviewed Wharton approximately eleven months later, before Wharton's 1995 trial. Dr. Matherne testified at Wharton's sentencing trial in 1995 that Wharton tested at below-average to average intelligence and that he was able to distinguish between right and wrong. Wharton dropped out of high school after the tenth grade. Dr. Matherne diagnosed Wharton with child attention-deficit/hyperactivity disorder

(ADHD), depression, and substance-abuse problems.

¶36. At Wharton's resentencing hearing in 2016, Dr. Simone Simone testified about Wharton's conditions, and she did not contradict Dr. Matherne's diagnoses. The trial court found that no evidence supported that these conditions or Wharton's underlying conditions diminished Wharton's ability to understand the consequences of his actions or his ability to distinguish between right and wrong.

¶37. The trial court noted that in ***Miller*** and its companion case, ***Jackson v. Hobbs***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the defendants were fourteen years old at the time of their crimes.[8] The trial court found a significant difference between Wharton's maturity and his ability to appreciate consequences at age seventeen and that of the ***Miller*** and ***Jackson*** defendants, who were fourteen years of age at the time of their crimes. ***Miller***, 567 U.S. at 465. The trial court also noted ***Hudspeth v. State***, 179 So. 3d 1226 (Miss. Ct. App. 2015), in which the Court of Appeals held that the defendant's age of seventeen was significantly different factually than the defendants' ages in ***Miller*** and ***Jackson***.

¶38. The trial court found no evidence to indicate that Wharton was intellectually or emotionally immature for his age. And the trial court concluded that the chronological-age ***Miller*** factor weighed in favor of Wharton's original sentence of life without parole.

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[8] ***Miller*** involved two companion cases: ***Miller v. Alabama***, which was on direct appeal of conviction and sentence, and ***Jackson v. Hobbs***, which involved a petition for habeas corpus in the Arkansas state court brought after a conviction had been affirmed on direct appeal. ***Miller***, 567 U.S. at 465-69.

2. Wharton's Family and Home Environment

¶39. From testimony at Wharton's 1995 trial, psychologist reports, and testimony at Wharton's ***Miller*** hearing, the trial court found apparent that Wharton had a difficult home life. Other than occasional visits, Wharton's biological father had not been present in Wharton's life since Wharton was four years old. Wharton's adoptive father was the primary father figure in Wharton's life. Wharton and his adoptive father had a contentious relationship; the difficulty in that relationship was made clear through testimony both at the 1995 trial and the 2016 ***Miller*** hearing.

¶40. Dr. Matherne testified that Wharton was reared in a dysfunctional family environment. Wharton's mother testified that physical and verbal altercations between Wharton and his adoptive father had occurred. Testimony at the ***Miller*** hearing clarified that Wharton had been living with his grandfather since the age of fifteen or sixteen. And Wharton's mother testified at the ***Miller*** hearing that Wharton had "free range" from the time he left her and his adoptive father's home.

¶41. The trial court found that even though Wharton was reared in a dysfunctional and abusive home, Wharton extricated himself from that situation. Accordingly, the trial court found that the family-and-home-environment ***Miller*** factor weighed in favor of Wharton's original sentence of life without parole.

3. Circumstances of Wharton's Homicide Offense

¶42. Testimony at Wharton's 1995 trial revealed that before the robbery, Wharton tried to

purchase a gun for the stated purpose of robbing a store. Following the robbery, Wharton confessed to certain individuals that he had shot the cashier.

¶43. Dr. Paul McGarry, a forensic pathologist, testified that the victim had been shot three times while on his knees. A detective involved in the case testified that the victim's wallet had been taken and was later found abandoned at a location away from the crime scene. Money also had been taken from the store's cash register.

¶44. According to the trial court, the evidence showed that Wharton had planned the robbery, had shot the clerk multiple times, and had absconded to New Orleans. Unlike in ***Miller*** and ***Jackson***, Wharton was the sole perpetrator of the crime. There was no peer pressure from others urging Wharton to commit the robbery and murder. Wharton's actions were planned and deliberate. The trial court found that the heinousness and deliberateness of Wharton's actions are "a marked contrast" to ***Miller*** and ***Jackson.*** Accordingly, the trial court found that the circumstances ***Miller*** factor weighed in favor of Wharton's original sentence.

4. Whether Wharton might have been charged and convicted of a lesser offense if not for incompetencies associated with his youth.

¶45. The trial court found that evidence showed that Wharton had prior experience with law enforcement and understood the charges he faced and the proceedings. Dr. Matherne's report also reflected that Wharton had experience with the legal system before his arrest for capital murder and was capable of assisting in his own defense. The court concluded that Wharton was familiar with the judicial system and that he had the capacity to interact with

law enforcement and to assist his counsel. Accordingly, the lesser-offense ***Miller*** factor weighed in favor of Wharton's original sentence.

5. Possibility of Rehabilitation

¶46. Citing ***Miller***, the trial court acknowledged that a mandatory life sentence "disregards the possibility of rehabilitation even when the circumstances most suggest it." ***Miller***, 567 U.S. at 478. Wharton testified that he felt remorse for the crime, and the trial court found that it "appear[s] that [Wharton] has made efforts to better himself without the motivation of possible parole." The testimony of Wharton's family members supported these assertions. The court said it is difficult "to predict whether Wharton's future behavior will conform to his behavior while incarcerated." The trial court noted also that Dr. Simone had testified at the ***Miller*** hearing that no future behavior is guaranteed. The trial court concluded that, "[w]hile Wharton's behavior while incarcerated is encouraging, it is not enough to overcome the other four factors that weigh so heavily against him."

¶47. In concluding its decision, the trial court acknowledged that ***Miller*** requires the sentencing authority to take into consideration factors of "an offender's youth and attendant characteristics" and to distinguish between "the juvenile offender whose crime reflects unfortunate, yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." ***Miller***, 567 U.S. at 479-83. In doing so, the trial court compared Wharton's background and culpability to that considered by the Supreme Court in ***Miller*** and ***Jackson***. After examining the testimony and evidence produced at both the original

proceedings and the ***Miller*** hearing, the trial court found that Wharton's case is distinguishable from the circumstances considered in ***Miller*** and ***Jackson***. The trial court ultimately concluded that Wharton should be sentenced to life in prison without the possibility of parole.

CONCLUSION

¶48. We find no abuse of discretion in the trial court's decision. The trial court took into consideration the characteristics and circumstances unique to juveniles as required by ***Miller***. Having satisfied its obligation under ***Miller*** and ***Parker***, we cannot say that the trial court abused its discretion by denying Wharton relief from his sentence of life in prison without parole. Therefore, we reverse the judgment of the Court of Appeals and reinstate and affirm the trial court's judgment.

¶49. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS REINSTATED AND AFFIRMED.**

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

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶50. In a purely semantic analysis with no apparent goal beyond denying Wharton and similarly situated prisoners their statutorily established right to be resentenced by a jury, the majority obliviates this state's settled procedures for retroactive application of ***Miller v.***

Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In ***Jones v. State***, 122 So. 3d 698, 702-03 (Miss. 2013), we held that ***Miller*** applies "retroactively to cases on collateral review," found that Jones had met his burden to show his entitlement to ***Miller*** resentencing, vacated Jones's sentence, and remanded the case for a new sentencing hearing in circuit court. In ***Moore v. State***, No. 2017-KA-00379-SCT, 2019 WL 4316161, at *10 (Miss. May 30, 2019), this Court determined that juveniles convicted of capital murder must be sentenced by a jury under Mississippi Code Section 99-19-101(1) (Rev. 2015). Now, in order to avoid the application of ***Moore*** to cases on collateral review, the majority declares that prisoners formerly eligible for ***Miller*** resentencing are not, in fact, so entitled. Now the remedy in cases on collateral review is not a new sentencing hearing, but an evidentiary hearing under the Uniform Post-Conviction Collateral Relief Act (UPCCRA). Because the majority's analysis is flawed, I respectfully dissent. I join the dissent of Presiding Justice King in full, and I join the dissent of Justice Coleman in part.

¶51. Under the UPCCRA, a post-conviction relief (PCR) petitioner has the burden to prove "by a preponderance of the evidence that he is entitled to . . . relief." Miss. Code Ann. § 99-39-23(7) (Rev. 2015). ***Jones*** held that a prisoner could meet this burden by showing that he was a juvenile at the time of the crime and that, before ***Miller***, he had received a mandatory life without parole sentence. ***Jones***, 122 So. 3d at 702. The remedy for PCR movants who made this showing was vacation of the life without parole sentence and remand to the circuit court for a new sentencing hearing at which "all circumstances required by ***Miller***" would

be considered. ***Id.*** at 703, 701 n.4.

¶52. The majority turns ***Jones*** on its head by finding that the showing this Court declared sufficient in ***Jones*** does not entitle the movant to post-conviction relief in the form of a new sentencing hearing at which his constitutionally guaranteed right to consideration of the ***Miller*** factors will be fulfilled. The majority declares that all such a prisoner gets is an evidentiary hearing at which he will bear the burden of showing by a preponderance of the evidence that his life sentence should include parole eligibility. The difficulty with this new scheme is that neither ***Miller*** nor ***Montgomery v. Louisiana***, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), contemplates that a prisoner bears a burden of proof. Those cases do not say that the defendant must adduce any particular level or quantum of proof to enable the sentencer to impose life with parole. Instead, the sentencer, applying the considerations outlined in ***Miller***, must "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." ***Montgomery***, 136 S. Ct. at 734. By imposing the burden requirement in Section 99-39-23(7) only on those raising ***Miller*** on PCR, the majority departs from the faithful retroactive application of ***Miller*** established by our decision in ***Jones***. After today's decision, a juvenile capital murderer who was sentenced before ***Miller*** not only will be foreclosed from obtaining the jury assessment of the ***Miller*** factors we declared mandatory in ***Moore***, but, by virtue of the UPCCRA, also will bear an additional burden of proving entitlement to a with-parole sentence by a preponderance of the evidence.

¶53. Another flaw in the majority's reasoning is apparent when one considers the example of a juvenile capital murderer who pleads guilty, but is, through the error of the trial court, never afforded the jury sentencing required by Section 99-19-101(1) and ***Moore***. For defendants who plead guilty, no direct appeal is available, and the sole avenue for relief would be a motion for post-conviction relief complaining that the trial court never held a sentencing hearing. Miss. Code Ann. § 99-39-7 (Rev. 2015). Because the majority holds that a defendant raising ***Miller*** on post-conviction relief is not entitled to resentencing before a jury but is entitled only to an evidentiary hearing at which the trial court will apply the ***Miller*** factors, such a defendant could never obtain the sentencing hearing before a jury this Court deemed mandatory in ***Moore***. That cannot be correct.

¶54. The sentencing question presented by this case should be a simple one. This Court should apply the remedy it adopted in ***Jones***. Because Wharton's sentence already has been vacated, he now must be resentenced. And resentencing must occur under an applicable sentencing statute. Because Wharton was convicted of capital murder, after the reversal of his original sentence, he must be resentenced under the penalty statute that applies to his crime, Section 99-19-101(1). The legislature has decreed that sentencing for capital murder "shall be conducted before a jury" unless the State and defendant agree to waive jury sentencing. Miss. Code Ann. § 99-19-101(1). Therefore, as the Court of Appeals rightly held, this case should be remanded for a new sentencing hearing before a jury.

KING, P.J., JOINS THIS OPINION.

KING, PRESIDING JUSTICE, DISSENTING:

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

¶56. Darren Lee Wharton 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). Wharton originally was sentenced by a jury to 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, Wharton received a new sentencing hearing. Yet, despite the clear language of Section 99-19-101(1), the trial court, not a jury, again sentenced Wharton to life imprisonment without the possibility of parole.

¶57. I disagree with the majority's contention that it was unnecessary to vacate Wharton's original sentence before conducting a ***Miller*** hearing. 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.

¶58. The majority relies on ***Montgomery v. Louisiana***, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), and its statement that "prisoners . . . must be given the opportunity to show their crime did not reflect irreparable corruption . . . ." However, the majority ignores that the ***Montgomery*** Court found that "***Miller*** announced a substantive rule of constitutional law." ***Id.*** As the Supreme Court stated, "[s]ubstantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond

the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." ***Id.*** at 729-30. Wharton's sentence, therefore, was an unlawful sentence. Accordingly, his sentence must be vacated and Wharton must be resentenced by a jury after an opportunity to present mitigating circumstances. The ***Montgomery*** opinion confirmed that procedure by stating that ***Teague v. Lane***

> warned against the intrusiveness of "*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose.

Montgomery, 136 S. Ct. at 732 (quoting ***Teague v. Lane***, 489 U.S. 288, 310, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)).

¶59. In addition, the majority holds that because Wharton originally was sentenced by a jury, no statutory violation occurred. I disagree. Wharton 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 reasoned, in determining the sentencing authority in ***Miller*** cases, this Court must "look to the statute under which the juvenile offender was convicted and sentenced, until and unless the Legislature prescribes otherwise." ***Wharton v. State***, No. 2017-CA-00441-COA, 2018 WL 4708220, at *7 (Miss. Ct. App. Oct. 2, 2018), *reh'g denied*, (Miss. Ct. App. Mar. 26, 2019), *cert. granted*, 272 So. 3d 131 (Miss. 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). Wharton 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.

¶60. The majority argues, as did the State, that, because juveniles are not eligible for the death penalty, Section 99-19-101 does not apply in the ***Miller*** context. This argument is unpersuasive. Sentencing a juvenile to life without parole is the most egregious sentencing allowed by law. And, as the United States Supreme Court has recognized, it shares similar characteristics with the death penalty that no other sentences share. ***Graham v. Florida***, 560 U.S. 48, 69–70, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010). The Supreme Court in ***Graham*** reasoned that

> It is true that a death sentence is "unique in its severity and irrevocability," yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

Id. (citations omitted). A sentence of life in prison without parole is the juvenile equivalent of the death penalty. In death-penalty cases, the burden to demonstrate that the death penalty should not be imposed never shifts to the defense. ***Simmons v. State***, 805 So. 2d 452, 500 (Miss. 2001). "Every mandatory element of proof is assigned to the prosecution. Neither the

burden of production nor the burden of proof ever shifts to the defendant." ***Id.*** (citing ***Williams v. State***, 684 So. 2d 1179, 1202 (Miss. 1996)). Just as in a death-penalty sentencing, in a ***Miller*** hearing, the burden to prove that Wharton should be sentenced to life without parole rests solely with the State. The majority improperly shifts that burden to Wharton and requires him to prove that he should *not* be sentenced to life without parole. The majority ignores that "[t]he vast majority of juvenile offenders—"'faces a punishment that the law cannot impose upon him.'"" ***Montgomery***, 136 S. Ct. at 734 (quoting ***Schriro v. Summerlin***, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)). The State instead must prove that Wharton's crime did not reflect "'unfortunate yet transient immaturity,'" ***Montgomery***, 136 S. Ct. at 734 (quoting ***Miller***, 567 U.S. at 479), but instead that Wharton fits into the category reserved for the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." ***Montgomery***, 136 S. Ct. at 734. Accordingly, I would find that Section 99-19-101 controls, would remand Wharton's case for resentencing by a jury, would reverse the trial court's judgment, and would affirm the decision of the Court of Appeals.

¶61. Further, I take issue with the trial court's ***Miller*** findings regarding Wharton's family and home environment. The trial court acknowledged that Wharton "had a difficult home life" and that Wharton had a contentious relationship with his adoptive father. However, the trial court went on to state that Wharton had been living with his grandfather since the age of fifteen or sixteen and that Wharton had therefore "extricated himself from that situation." The trial court found that this factor weighed in favor of reinstating Wharton's original

sentence of life without parole.

¶62. I disagree with the trial court's finding that Wharton's family and home environment weighed against Wharton. Although Wharton had been living with his grandfather for a short period of time, this did not erase the fact that Wharton had spent the majority of his life in a dysfunctional and abusive home. Wharton's mother, Connie Firmin, testified that Wharton's stepfather, Richard James Wharton (Jim), had a drug abuse problem and was "[v]ery volatile, abusive relationship, physically, emotionally, spiritually, any way." Firmin testified that after Wharton had moved in with his grandfather, he would continue to stay with her if Jim was not there. Firmin also described an incident that had occurred after Wharton had moved in with his grandfather during which Jim had thrown Wharton to the ground and had cracked his skull. Thus, even though Wharton had been living with his grandfather for one or two years, he continued to be subjected to an abusive family environment.

¶63. In ***Miller***, the United States Supreme Court discussed invalidating a death sentence because the trial judge did not consider evidence of the defendant's "neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) . . . ." ***Miller***, 567 U.S. at 476. The Supreme Court stated that it found "that evidence 'particularly relevant.'" ***Id.*** (quoting ***Eddings v. Oklahoma***, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). I also find Wharton's family background to be particularly relevant and do not believe that Wharton's living with his grandfather for a short period of

time erased a long history of emotional and physical abuse. In addition, the Supreme Court stated that a mandatory life-without-parole sentence "prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." ***Id.*** at 477. Therefore, the Supreme Court intended a dysfunctional and abusive home life to be a mitigating factor, not an aggravating one.

¶64. While the trial court found that this factor weighed in favor of reinstating Wharton's original sentence of life without parole, that finding is not supported by mental-health literature. "The long-standing effect of child abuse in juveniles has been well documented, and previous studies suggest a pattern of abuse and neglect as a precursor to later offending behavior in both adolescents and adults." Jason Gold, Margaret Wolan Sullivan, and Michael Lewis, *The Relation Between Abuse and Violent Deliquency: The Conversion of Shame to Blame in Juvenile Offenders*, Child Abuse & Neglect, Volume 35, Issue 7, July 2011, http://criminal-justice.iresearchnet.com/crime/domestic-violence/child-abuse-and-juvenile-delinquency/ (citations omitted). "'[R]esearch has shown that juveniles subjected to trauma, abuse, and neglect suffer from cognitive underdevelopment, lack of maturity, decreased ability to restrain impulses, and susceptibility to outside influences greater even than those suffered by normal teenagers.'" Liza Little, *Miller v. Alabama: A Proposed Solution for A Court That Feels Strongly Both Ways*, 88 S. Cal. L. Rev. 1493, 1516 (2015) (quoting Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old*

Children to Die in Prison 18 (2008), http://www.eji.org/reports/cruel-and-unusual).[9] The partial and short-term removal of a juvenile from a dysfunctional home and family environment does not erase the long-standing effect of years of dysfunction. Thus, I disagree with the trial court's finding that Wharton's family and home environment weighed in favor of resentencing Wharton to life imprisonment without parole.

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

COLEMAN, JUSTICE, DISSENTING:

¶65. I would concur with the majority's well-reasoned opinion but for one problem—it is written about some other case. The situation described by the majority, in which a petitioner's original sentence remains undisturbed until he makes a showing sufficient to vacate it under the Uniform Post-Conviction and Collateral Relief Act, would indeed require no resentencing and no resentencing jury. In the case before us today, however, the trial court granted Wharton's request—to which the State agreed—to vacate his original sentence and then resentenced Wharton without empaneling a jury as required by the sentencing statute.

¶66. The purpose of statutory interpretation is to determine the Legislature's intent from the language of a statute. The Legislature last amended Mississippi Code Section 99-19-101

[9]"In sum, the youth sentencing discount effectively forces judges to quantifiably reduce a juvenile criminal defendant's sentence when his socioeconomic status, health, or family history, demand such a reduction." *Id.* at 1517.

during the 2013 session, after the Supreme Court of the United States handed down its decision in ***Miller v. Alabama***, 567 U.S. 460 (2012), on June 25, 2012. Because the text of Section 99-19-101, as drafted and amended by the Legislature after ***Miller*** provides no exceptions to its requirement that sentencing in a capital-murder case take place before a jury, I, with respect, dissent.

¶67. When interpreting a statute, the Court's primary goal is to discern "the true meaning of the Legislature." ***Hall v. State***, 241 So. 3d 629, 631 (¶ 5) (Miss. 2018) (internal quotation marks omitted) (quoting ***Legislature v. Shipman***, 170 So. 3d 1211, 1215 (¶ 14) (Miss. 2015)). "Our duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case." ***Hall***, 241 So. 3d at 631 (¶ 5) (internal quotation marks omitted) (quoting ***Corp. Mgmt., Inc. v. Greene Cty.***, 23 So. 3d 454, 465 (¶ 26) (Miss. 2009)). Statutes should be construed in such a way that they are consistent in their application. ***Miers v. Miers***, 160 Miss. 746, 133 So. 133 (1931). Stated differently, "[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)).

¶68. The 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. Miss. Code Ann. § 99-19-101(1) (Rev. 2015). Indeed, the text reveals the intent of the Legislature to provide for jury sentencing "[i]f, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty. . . ." *Id.*

¶69. In holding today that Section 99-19-101 does not apply to a ***Miller*** resentencing for Wharton, the Court imposes an exception to the statutory right to be sentenced by a jury that is inconsistent with both the wording of the statute and the obvious intent of the Legislature to provide for jury sentencing even when the trial jury cannot reconvene. Accordingly, I would affirm the Court of Appeals.

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