

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-IA-00462-SCT

DAVID BLUE

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	02/20/2019
TRIAL JUDGE:	HON. RICHARD A. SMITH
TRIAL COURT ATTORNEYS:	CLIVE ADRIAN STAFFORD-SMITH MARVIN L. WHITE, JR. ADAM JULIUS SPICER AMANDA B. BARBOUR WILLIE DEWAYNE RICHARDSON PATRICIA ABRAHAM RODGERS ALISON PITTS PITTMAN AMANDA CLAIRE STURNIOLO
COURT FROM WHICH APPEALED:	LEFLORE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	KATHLEEN ELIZABETH CARRINGTON CHARLES ADAM BYRD JOHN C. HENEGAN
ATTORNEY FOR APPELLEE:	AMANDA CLAIRE STURNIOLO
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
DISPOSITION:	VACATED AND REMANDED - 10/08/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., MAXWELL AND GRIFFIS, JJ.

KING, PRESIDING JUSTICE, FOR THE COURT:

¶1. David Blue was convicted of capital murder when the only sentences for that crime were death or life imprisonment. Blue was sentenced to death, and his death sentence was subsequently found unconstitutional because he was both intellectually disabled and a minor

when he committed the crime. The trial court sentenced Blue to life without parole under Section 99-19-107, and Blue requested a *Miller* hearing to determine whether a life without parole sentence was appropriate. See *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). While his petition for post-conviction relief was pending before the trial court, this Court found Section 99-19-107 inapplicable to individuals for whom the death penalty was found unconstitutional. The trial court ordered a mental evaluation to help with a *Miller* determination regarding whether to sentence Blue to life or life without the possibility of parole. Blue filed an interlocutory appeal with this Court, arguing that a mental evaluation and hearing are unnecessary, because only one constitutional sentence is available: life imprisonment. The State argues that life without parole is a sentencing option because the statutory amendments that added life without parole as a sentencing option for capital murder apply to Blue. Because applying life without parole as a sentencing option to Blue would violate the prohibition against ex post facto laws, this Court vacates the trial court's order and remands the case with instructions to sentence Blue to life imprisonment.

FACTS AND PROCEDURAL HISTORY

¶2. In 1993, Blue was convicted of capital murder, sexual battery, and armed robbery for a crime that was committed in 1992. *Blue v. State*, 674 So. 2d 1184, 1192-94 (Miss. 1996), *overruled by King v. State*, 784 So. 2d 884 (Miss. 2001). He was sentenced to thirty years each for the sexual battery and armed robbery convictions. *Id.* at 1194. He was sentenced to death for the capital murder conviction. *Id.* at 1193-94. At the time of Blue's crime and

sentencing, death and life imprisonment were the only two possible punishments for capital murder. Miss. Code Ann. § 97-3-21 (Supp. 1993). The option of life imprisonment without parole was not added to the statute until 1994. H.B. 114, Reg. Sess., 1994 Miss. Laws ch. 566.

¶3. In 2002, the United States Supreme Court decided that the execution of an intellectually disabled person violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Blue filed a motion for resentencing, since his IQ was below 70. This Court remanded his case to the circuit court to determine whether Blue was intellectually disabled under *Atkins*. The circuit court found that Blue was intellectually disabled and that it must resentence him to life without parole pursuant to Mississippi Code Section 99-19-107.¹

¶4. In 2012, the United States Supreme Court held that mandatory life without parole sentences for juveniles violate the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Blue was seventeen at the time of his crime. In 2013, Blue petitioned this Court for leave to file a motion to vacate his life without parole

¹Section 99-19-107 provides,

In the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court and the court shall sentence such person to imprisonment for life, and such person shall not be eligible for parole.

Miss. Code Ann. § 99-19-107 (Rev. 2015).

sentence pursuant to *Miller*. In 2014, this Court granted Blue leave to file his motion to vacate sentence in the circuit court.

¶5. In 2015, this Court decided *Bell v. State* and *King v. State*. *Bell v. State*, 160 So. 3d 188 (Miss. 2015); *King v. State*, 165 So. 3d 1289 (Miss. 2015). In *Bell*, this Court held that Section 99-19-107 does not apply to situations “when an individual’s death sentence is rendered unconstitutional.” *Bell*, 160 So. 3d at 196. Rather, Section 99-19-107 applies “if, and only if, the United States Supreme Court or the Mississippi Supreme Court rendered a wholesale declaration that the death penalty as a sentence to anyone was unconstitutional.”

Id.

¶6. In 2017, Blue filed a Supplement to Motion for Post-Conviction Relief citing *Bell* and arguing that he had been sentenced improperly under Section 99-19-107, and that he must be sentenced to life, instead of life without parole. The State objected, arguing that the 1994 amendments to Section 97-3-21 applied to Blue. The State also moved for a mental evaluation to assist with the *Miller* determination. Blue opposed the necessity of a mental evaluation, arguing that it was unnecessary because only one permissible sentence could be imposed on Blue.

¶7. In 2019, the circuit court vacated Blue’s life without parole sentence, granted the State’s motion for mental evaluation, and determined that the matter would be reset for a jury to determine Blue’s sentence after the mental evaluation was completed. Blue petitioned this Court for interlocutory appeal, and this Court granted his petition. He argues that the trial

court erred by ordering a mental evaluation, because pursuant to *Bell* and *King*, only one permissible sentence for Blue remains: life imprisonment.

ANALYSIS

¶8. This Court “review[s] questions of law *de novo*.” *Bell*, 160 So. 3d at 189.

¶9. “Frederick Bell was convicted of capital murder in 1993[]” pursuant to the same statute under which Blue was convicted, which provides only two sentences, death and life imprisonment. *Id.* “The jury imposed the death penalty.” *Id.* Bell was subsequently declared mentally retarded and his death sentence was consequently vacated pursuant to *Atkins*. *Id.* “[T]he circuit court resentenced Bell to life without parole pursuant to Mississippi Code Section 99-19-107 and *Foster v. State*, 961 So. 2d 670 (Miss. 2007).” *Id.* Bell appealed and argued that Section 99-19-107 did not apply to his case because *Atkins* “was not a wholesale declaration that the death penalty was unconstitutional” and that “his due process rights were violated because the life without parole sentence was a retroactive imposition of changes by judicial interpretation of a criminal statute that were unexpected and indefensible.” *Id.* This Court found the first issue dispositive and declined to address Bell’s due process argument. *Id.*

¶10. We found that Section 99-19-107 only applies if the death penalty “in its entirety is rendered unconstitutional” as to anyone. *Id.* at 196. Because the death penalty has only been rendered unconstitutional as applied “to certain classes of people—minors and the mentally retarded”—Section 99-19-107 does not apply. *Id.* It therefore “does not apply when an

individual's death sentence is rendered unconstitutional." *Id.* This Court then vacated Bell's sentence of life without parole and remanded the case "for Bell to be resentenced to life, because death and life were the only two sentencing options at the time Bell was convicted and sentenced." *Id.*

¶11. Shortly thereafter, this Court decided *King*. King was convicted and sentenced to death in 1981, prior to the 1994 amendments that added life without parole as a sentencing option. *King*, 165 So. 3d at 1290. King was subsequently declared intellectually disabled, and his death sentence was vacated pursuant to *Atkins*. *Id.* The State then asked the circuit court to sentence King to life without parole. *Id.* at 1290-91. King objected, arguing

that the only sentencing options available at the time he committed the crime were death and life. He argued that the 1994 sentencing amendments which added life without parole as a sentencing option for capital murder could not properly be applied to him, because they would violate the *ex post facto* clauses of the United States and Mississippi Constitutions.

Id. at 1291. He also argued that applying Section 99-17-107 would violate his due process rights. *Id.* The circuit court sentenced King to life without parole pursuant to Section 99-17-107. *Id.* King appealed, arguing, like Bell, that Section 99-19-107 did not apply because *Atkins* was not a wholesale declaration rendering the death penalty unconstitutional and that his due process rights were violated by retroactive imposition of the sentence due to judicial interpretation of a criminal statute. *Id.* This Court found that *Bell* was applicable and found that "King must be sentenced to life, because death and life were the only two sentencing options available at the time King was convicted and sentenced." *Id.* at 1292.

¶12. The State concedes that Section 99-19-107 does not apply to Blue. It does not distinguish Blue’s case from *Bell* and *King*. However, it argues that Blue may still be sentenced to life without parole by applying the 1994 sentencing amendments to Blue’s case. In 1994, House Bill 114, among other things, amended Section 99-19-101 to include life without parole as a sentencing option for capital murder. H.B. 114, Reg. Sess., 1994 Miss. Laws ch. 566. Section 5 of the bill provided that “[t]he provisions of this act shall apply to any case in which pre-trial, trial or resentencing proceedings take place after July 1, 1994.” *Id.* The State consequently argues that life without parole is a sentencing option available at Blue’s resentencing proceeding. Blue counters that such an application of the statute would violate the ex post facto clauses of the United States and Mississippi constitutions. The State, however, insists that the circuit court must hold a *Miller* hearing.

¶13. The ex post facto clauses of the United States and Mississippi constitutions prohibit the states from passing retroactive laws. U.S. Const. art. I, § 10, cl. 1; Miss. Const. art. 3, § 16. “Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). The clauses forbid, among other things, any statute that makes the punishment for a crime more burdensome after a person commits the crime. *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S. Ct. 68, 70 L. Ed. 215 (1925). Thus, a statute cannot retroactively increase the punishment for a crime. *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 111 L. Ed. 2d 30

(1990). “[A] law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime.” *Peugh v. United States*, 569 U.S. 530, 546, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013). “A statute may violate the Ex post facto Clause ‘even if it alters punitive conditions outside the sentence . . . [or where it] substantially alters the consequences attached to a crime already completed, and therefore changes “the quantum of punishment.”’” *Puckett v. Abels*, 684 So. 2d 671, 673 (Miss. 1996) (alterations in original) (quoting *Weaver*, 450 U.S. at 32-33).

¶14. “[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” *Weaver*, 450 U.S. at 29. “The critical question is whether the law changes the legal consequences of acts completed before its effective date.” *Id.* at 31. The law must “produce[] a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509, 131 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). Thus, laws that “create[] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes[]” do not run afoul of the Ex Post Facto Clause. *Id.* In *Morales*, a law that allowed the parole board to defer parole hearings from once a year to up to once every three years if the board determined that the inmate was unlikely to attain parole during that time was found not to violate the Ex Post Facto Clause. *Id.* But laws that change parole eligibility and “effectively eliminate[] the lower end of the

possible range of prison terms[.]” have been found to violate the Ex Post Facto Clause. *Id.* at 506.

¶15. In *Puckett*, this Court applied the analyses laid out in ex post facto caselaw to a statute that changed parole eligibility. *Puckett*, 684 So. 2d 671. When the inmates committed their crimes, they were eligible for parole after serving one-fourth of their sentences, subject to some exceptions. *Id.* at 672. A new statute, which applied retroactively, required inmates to serve 85 percent of their sentence before parole eligibility was attained. *Id.* at 671. This Court determined that the new statute was retrospective because it increased the possible penalty for the crime, as it “constricts the inmate’s opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment.” *Id.* at 675 (internal quotation mark omitted) (quoting *Weaver*, 450 U.S. at 35-36). When Blue was sentenced, a life sentence carried parole eligibility after ten years. Miss. Code Ann. § 47-7-3 (Rev. 1993). A sentence of life without parole obviously constricts Blue’s opportunity to earn early release. It consequently renders the punishment for his crime more onerous than when he committed the crime, and is retrospective as applied to Blue.

¶16. The next inquiry is to analyze “whether the retroactive statute ‘produces a *sufficient risk* of increasing the measure of punishment attached to the covered crimes.’” *Puckett*, 684 So. 2d at 675 (quoting *Morales*, 514 U.S. at 509). “[T]he new law must have a direct effect on the sentence length[.]” as opposed to being a procedural change that may indirectly affect the sentence length. *Puckett*, 684 So. 2d at 676. “The first consideration in the *Morales*

review[] is the amount of prisoners the amendment will affect.” *Id.* at 677. The 1994 amendments affect all capital defendants who committed a crime before July 1, 1994, but were tried or resentenced after that date. H.B. 114, Reg. Sess., 1994 Miss. Laws ch. 566, § 5.² Further, the 1994 amendments completely eliminated the possibility of parole by making life without parole a sentencing option. As in *Puckett*, the likelihood of parole for these defendants is not remote. Additionally, “[i]n the case at hand, there was no case specific inquiry or hearing conducted before the Legislature gave these [defendants] longer sentences.” *Puckett*, 684 So. 2d at 677. The ineligibility for parole “is to be exercised automatically across the board.” *Id.* Retroactively applying the 1994 amendments to crimes committed prior to them clearly changes and increases the punishment attached to Blue’s crime by adding life without eligibility for parole as an option. Because Blue is constitutionally ineligible for the death penalty, the only available sentence remaining is life imprisonment. Accordingly, the trial court erred by ordering a mental evaluation pursuant to *Miller*, as a mental evaluation need only occur to determine whether to resentence a defendant to life or life without parole.

¶17. The State argues that the trial court must have a hearing to comport with statutory law and with this Court’s precedent regarding *Miller* before it can sentence Blue. First, Blue

²The 1994 amendments not only added life without parole as an option, they also provided that capital defendants sentenced to life were not eligible for parole for twenty years. H.B. 114, Reg. Sess., 1994 Miss. Laws ch. 566. An August 23, 2004 amendment eliminated any possibility of parole for capital defendants sentenced to life. S.B. 2003, 1st Extraordinary Sess., 1994 Miss. Laws ch. 25.

bases his argument in *Atkins*, so *Miller* procedures need not be followed. Second, this Court is not prohibiting the trial court from holding a hearing to resentence Blue if it determines a hearing is appropriate. There exists, however, only one sentence, life imprisonment, that could be imposed upon Blue at any hearing.

CONCLUSION

¶18. Applying a sentence of life without parole, a sentence not available for murder when Blue committed his crime, violates the prohibition against ex post facto laws. Accordingly, this Court vacates the trial court's order requiring a mental evaluation and hearing for *Miller* purposes and remands the case with instructions to sentence Blue to life imprisonment.

¶19. **VACATED AND REMANDED.**

**RANDOLPH, C.J., KITCHENS, P.J., COLEMAN, MAXWELL, BEAM,
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**