

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 76-005890-01-FC
Hon. QIANA D LILLARD

vs.

CHARLES LEWIS,

Defendant.

_____/

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**DEFENDANT, CHARLES LEWIS's MOTION TO DISMISS FOR LACK OF
CASE FILE AND RECORDS TO COMPLY WITH THE US SUPREME COURT
REMAND FOR RESENTENCING**

NOW COMES the Defendant, CHARLES LEWIS, by and through his attorney, SANFORD A. SCHULMAN, and states in support of his Motion to Dimiss for Lack of Case File and Records to Comply with the US Supreme Court Remand for Resentencing as follows:

1 . On June 24, 2012 the United States Supreme Court issued an Opinion requiring that state courts no longer impose an automatic sentence of mandatory life on persons convicted before their 18th birthday without first considering a sentence of a term of years.

In, Miller v Alabama, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) the United States Supreme Court has held that the punishment of life in prison absent the possibility of parole for a defendant who was under the age of 18 at the time of the sentencing offense violates the Eighth Amendment's prohibition against cruel and unusual punishments. In light of Miller, the Michigan Legislature has enacted MCL 769.25, which provides a procedural framework for sentencing juvenile offenders who have committed offenses punishable by life imprisonment without the possibility of parole; this provision applied to pending and future cases. Anticipating the possibility of Miller's retroactive application for closed cases, the Legislature has also enacted MCL 769.25a, which would be triggered if the Michigan Supreme Court or the United States Supreme Court were to hold that Miller applied retroactively. And subsequently, the United States Supreme Court has held that the rule announced in Miller, which was a new substantive constitutional rule, is retroactive on state collateral review. Accordingly, MCL 769.25a took effect.

2. In August, 2012, the defendant, CHARLES LEWIS, filed a Motion for Resentencing in compliance with Miler that was granted by Judge Edward Ewell Jr. who was then sitting as a judge in the Wayne County Circuit Court Criminal Division,

3. On October 17, 2012 the Honorable Eduard Eurell, granted the Defendant's motion for resentencing.

4. MCL 769.25a(4) sets forth the governing procedure that is relevant in the instant cases, providing as follows:

(a) Within 30 days after the date the supreme court's decision [making Miller retroactive] becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.

(b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A hearing on the motion shall be conducted as provided in section 25 of this chapter.

(c) If the prosecuting attorney does not file a motion under subdivision (b), the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. [Emphasis added.]

On April 1, 2013, Assistant Wayne County Prosecutor, Jason Williams filed a notice of appeal of the the trial court's decision granting the resentencing to the Michigan Court of Appeals.

5. On August 29, 2013 the Michigan Court of Appeals issued an opinion and order reversing the trial court's decision granting the defendant a resentencing.

6. On December 29, 2013 the Michigan Supreme Court affirmed the decision of the Michigan Court of Appeal's decision

7. On February 7, 2016 the US Supreme Court granted the Writ of Certiorari and reversed the decision of the Michigan Supreme Court and remanded the case to the state court for resentencing

8. On March 24, 2016, the Michigan Supreme Court issued an order in conformity with the US Supreme Court and reversed the August 2013 decision and vacated the defendant's sentence.

9. Soon after the US Supreme Court remand, on March 2, 2016, counsel for the defendant filed a motion to compel Wayne County to produce the entire case filed for Mr. Lewis so that this Court can conduct a meaningful resentencing hearing.

10. On March 17, 2015 this Court held a hearing with attorney Felicia O'Donnor and Assistant Wayne County Prosecutor, Jason Williams to address the issue of how this court can properly and fairly conduct a resentencing of a defendant sentenced nearly forty years ago without a complete file.

11. On April 6, 2016 the court sua sponte called Deputy Wayne County Clerk, David Baxter to inquire about the whereabouts of the files and records for this case. This court was rightfully concerned that a complete file was necessary for a proper adjudication.

12. David Baxter apprised the Cour that that the files and records were lost and that over a period of two years the files were not found and were considered lost. Mr. Baxter also informed the court that an individual named Joann Gaskin uas the last person to cheak the files and records out.

13. On May 5, 2016 Joann Gaskins appeared before this Court and testified that she returned the file to the Wayne County Clerk's Office in June of 2013 and has no knowledge where any missing portions of the file might be located.

14. On May 26, 2016 this court granted defense counsel (Foley & Lardner)'s motion to withdrawl.

15. Also at the May 26, 2016 hearing this court served attorney Felicia O'Donnor arrd Assistant Wayne County Prosecutor, Jason Williams with a copy of an order issued by the Michigan Supreme Court VACATING the Defendant's sentence remanding the case for resentencing.

16. On September 6, 2015 this Court held a status conference and stated that the Court would make a final decision regarding the missing files and records on October 11, 2016.

17. The defense now moves to dismiss the pending case on the basis that this Court cannot adequately and fairly comply with the US Supreme Court order remanding this case for resentencing. To properly and fairly conduct a resentencing hearing, this court and defense counsel, must have access to all transcripts, exhibits, motions and court documents.

Typically a trial court judge at the time of sentencing will have sat through a trial and have had the opportunity to hear the testimony, watch the witnesses testify, consider the arguments of counsel and even examine the exhibits. At sentencing, a judge will consider everything that has transpired at trial as well as sentencing guidelines and a presentence report when considering a sentence that is sufficient but not greater than necessary.

18. In the case at bar, there will be no jury to decide resentencing and instead it is the sole province of this court to decide whether to impose the harshest sentence available or impose a 40 year sentence. People v. Hayes, Nos. 339543, 339544, 339547, 2018 Mich. App. LEXIS 950 (Ct. App. Mar. 27, 2018)

19. To simply ignore necessary portions of the court file would not only violate the Defendant's right to due process and compliance with the US Supreme Court's order for resentencing, but it would result in a decision that failed to examine the totality of the testimony, evidence and arguments necessary for a proper and fair consideration.

20 That amongst other items, the following is missing from the Court file making it impossible for the court to conduct a fair and complete resentencing:

- * Register of Actions 1976-1999
- * March, 20177: Most of the 1st Trial Transcripts including transcripts addressing the reason for a dismissal of the jury
- * March 23, 1977 complete transcript of 2nd trial before Judge Ollie Bivins

- * July 5, 1977 3rd trial transcripts, numerous missing pages, those pages that are included have no pagination, no voir dire transcripts
- * No records of appeal of right, appellate briefs
- * Pearson evidentiary hearing transcript
- * Transcript of plea hearing before Judget Edward Thomas and plea offer of 7-15 years
- * Resentencing hearing granting motion for resentencing in 2012 prior to contested state rules of 2014

ARGUMENT

I. WHERE THE TRIAL COURT'S FILES AND RECORDS ARE MISSING, LOST OR HAVE BEEN DESTROYED AND AS SUCH THE COURT CANNOT COMPLY WITH THE US SUPREME COURT'S ORDER REMANDING THIS CASE FOR RESENTENCING, THIS COURT SHOULD DISMISS THE CASE AND ORDER THE DEFENDANT IMMEDIATELY RELEASED ON THE BASIS THAT TO OTHERWISE PROCEED TO RESENTENCING WITHOUT A COMPLETE COURT FILE WOULD RESULT IN A VIOLATION OF THE DUE PROCESS AND OF LAW AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE (US CONST. AMENDS VI ANID XIV)

On May 24, 2016, the Michigan Supreme Court issued the following order in this case:

On order of the Court, in conformith with he mandate of the Supreme Court of the United States, the application for leave to appeal the August 29, 2013 order of the Court of Appeals is again considered. Pursuant to MCR 7.3CO5(H)(1), in lieu of granting leave to appeal, we REVERSE the order of the Court of Appeals, we VACATE the defendant's sentence for first-degree murder, and we REMAND this case to the Wayne Circuit Court for resentencing on that conviction pursuant to MCL 769.25 end 769.25a. See *Montgomery vs. Louisiala* , 577 US _; 136 S.Ct 718; 193 L Ed 599 (2016) and *Miller v Alamba*. 567 US ; 132 SCt 2455; 183 L Ed 2d 407 (2012).

The defendant is currently being held in prison without a sentence. The defendant's sentence was vacated by the Michigan Supreme Court on May 24, 2016. The defendant's current detention is unlawful because the defendant is being held in prison without a sentence and there is not a complete file that contains the pertinent records necessary for this Court to comply with the US Supreme Court order and the Michigan Supreme Court remand.

At this point it is undisputed that there is not a complete file and at best the court can only review a portion of a recreated file. Joann Gaskins testified that, she turned the files and records over to the Wayne County Clerks office in June of 2013. The files and records, however, came up missing from the Wayne County Clerk's office after they were turned over by Ms. Gaskins.

This Court should take note of the remedy prescribed by the Michigan Supreme Court in People v. Fullwood, 392 Mich. 751 (1974) where the Court in an order, sua sponte pursuant to GCR 1963, 865.1(7), held the defendant-appellant's conviction and sentence is peremptorily reversed due to the impossibility of reconstructing the lost record in this cause.

In the case of Lapeer Cty. Clerk v. Lapeer Circuit Court (In re Lapeer Cty. Clerk), 469 Mich. 146, 665 N.W.2d 452 (2003) the Michigan Supreme Court made it clear that:

Because a clerk's care and custody function is contemplated by Const 1963, art 6, § 14, as evidenced by our historical understanding of that provision, the circuit court cannot interfere with the circuit court clerk's constitutional obligation to perform that function. The custodial function, however, is a limited one. In acting as custodian of the records, the clerk is responsible for ensuring the safekeeping of the records. Having care and custody of the records, however, does not imply ownership of the records. Rather, the clerk's custodial function entails safeguarding the

records on behalf of the circuit court, and making those records available to their owner, which is the circuit court. The clerk is also obligated to make the records available to the public, when appropriate.

The Wayne County Clerks Office was responsible for the files and records. The question then becomes, can this Court hold a meaningful resentencing hearing without a full and complete file. At the resentencing hearing, the trial court must consider the factors listed in *Miller v Alabama*, 567 US 460 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated. Although “MCL 769.25 does not require the trial court to make any particular factual finding before it can impose a life without parole sentence,” *Skinner II*, ___ Mich at ___, the court must specify on the record the aggravating and mitigating circumstances it considered and the reasons supporting the sentence imposed, MCL 769.25(7).

Evidence presented at trial may be considered together with any evidence presented at the sentencing hearing. The trial court is not required to explicitly find that a juvenile is or is not “rare” or “uncommon” before it can impose Life without Parole. *Skinner II*.

The Miller majority reviewed decisions recognizing the inherent differences between juvenile and adult offenders and how these characteristics affect both the justification for and the appropriateness of imposing a life sentence without parole on a juvenile, finding, "An offender's age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed” The *Miller* majority found the imposition of a mandatory sentence to be particularly subject to

criticism. Specifically, the Miller majority proceeded to delineate the requirements for consideration when sentencing a juvenile for a homicide:

“[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.”

The Miller majority concluded "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. The Miller majority did reject, however, arguments for a categorical bar to sentencing juveniles to life in prison without parole, stating, "[W]e do not foreclose a sentencer's ability to make that

judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

The Miller majority emphasized that its decision served to mandate[] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments."

The question is simple, with the loss of files and records, can this court adequately and accurately review and consider the Miller factors in a meaningful way? The defense argues that it cannot.

Addressing the statutory sentencing schemes in various states, the US Supreme Court in *Miller* noted the following:

[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

The loss of the pertinent files and records is not subject to the harmless error test. It is a critical and structural error that will deprive the defendant of his constitutional right to due process. Indeed the Michigan Courts have spoken clearly on this issue. In the case of People v. Fullwood, 392 Mich. 751 (1974) Leave to appeal granted. On order of the Court, sua sponte pursuant to GCR 1963, 865.1(7), defendant-appellant's conviction and sentence is peremptorily reversed due to the impossibility of reconstructing the lost record in this cause. The matter was remanded to the Recorder's Court for the City of Detroit for retrial. The Court in Fullwood noted simply and succinctly that without a complete and meaningful file, an appeal could not proceed and as such the defendant was prejudiced without any fault. As such, the case was appropriately reversed.

Likewise in the case of People v. Adkins, 436 Mich. 878, 461 N.W.2d 366 (1990) Supreme Court of Michigan held that the notes of the stenographer that had been lost was unacceptable. The Michigan Supreme Court held that because the defendant had "done nothing here to compromise his position by his own misconduct, citing People v Garvin, 159 Mich App 38 (1987); People v Iacopelli, 141 Mich App 566 (1985), and the record is inadequate for meaningful appellate review and so impedes the enjoyment of the defendant's constitutional right to an appeal that the defendant's convictions must be vacated and this case remanded for further proceedings. See People v Drake, 64 Mich App 671 (1975). This case was cited in Bearpaw v. State, 803 P.2d 70, 1990 Wyo. LEXIS 149

Similarly in the case of People v. Abdella, 200 Mich. App. 473, 505 N.W.2d 18 (1993) the Michigan Court of appeals found that where the inaccurate transcription adversely affected the ability of the defendant to secure postconviction relief, and such matters have seasonably been brought to the trial court's attention, the defendant is entitled to a remedy citing the US Supreme Court case of Chessman v Teets, 354 U.S. 156, 164; 77 S Ct 1127; 1 L Ed 2d 1253 (1957)

In Chessman the United States Supreme Court noted that reconstruction of the record is one of the permissible alternatives to an complete record. In Chessman v. Teets, 354 U.S. 156, 158, 77 S. Ct. 1127, 1 L. Ed. 2d 1253 (1957), the court reporter at petitioner's trial died after having dictated a little over a third of the trial. Reconstruction of the record was subsequently conducted without the petitioner's participation and as such there was a clear due process violation.

The Court stated the following:

By no means are we to be understood as saying that the state record has been shown to be inaccurate or incomplete. All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand. Without blinking the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice, we cannot allow that circumstance to deter us from withholding relief so clearly called for. On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because

courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.

In short, this Court has the obligation to comply with the remand orders of the United States Supreme Court and the Michigan Supreme Court. In order to execute its duty in a meaningful way and to comply with the orders of the highest courts in the land, this court must conduct a meaningful resentencing premised on a record that is complete and accurate. Without the complete file, the defendant would request this Court deny the People's motion to reimpose the life sentence without parole because such a resentencing cannot be conducted.

WHEREFORE, the Defendant, CHARLES LEWIS, by and through his attorney, SANFORD A. SCHULMAN, grant the Defendant's Motion to Dimiss for Lack of Case File and Records to Comply with the US Supreme Court Remand for Resentencing for the reasons so stated herein.

Respectfully submitted,

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