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State v. McCleese

A.3d (2019). The same situation arises in the present case because the parties cannot locate the presentence investigation report authored for the defendant’s original sentencing in 2003. Although it is “not impossible”; *Songster v. Beard*, 201 F. Supp. 3d 639, 641 (E.D. Pa. 2016); even in cases in which only a few years have passed, “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” (Internal quotation marks omitted.) *Graham v. Florida*, supra, 560 U.S. 68. Asking sentencing judges to make this determination years after the fact might, in these cases, be asking too much.

The parole board, under P.A. 15-84, § 1, on the other hand, bases its decisions on more recent evidence and more ascertainable outcomes. Although parole and resentencing hearings share many of the same characteristics—e.g., the right to counsel, the offender’s right to make a statement and present evidence, each victim’s right to make a statement, the availability of expert testimony—the parole board relies more on evidence of actual rehabilitation and focuses more on the offender’s ability to succeed outside of prison at the most relevant moment, just before he will, potentially, be released. For example, it considers the probability that he will “remain at liberty without violating the law,” the continuing “benefits to [the offender] and society that would result from [the offender’s] release,” and the offender’s “substantial rehabilitation” P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (4). It does not overlook the value of the *Miller* factors, though. Alongside these forward-looking factors described previously, the board also considers a juvenile offender’s “age and circumstances . . . as of the date of the commission of the crime,” “remorse and increased maturity since the date of the commission of the crime,” and “efforts to overcome . . . obstacles

NOTE: These pages (333 Conn. 403 and 404) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 15 October 2019.

that such person may have faced as a child” General Statutes (Supp. 2016) § 54-125a (f) (4).¹² It considers not whether a juvenile is capable of change in the distant future but, rather, from the best possible vantage point, whether he has actually changed.

These considerations highlight a truth about the retroactive application of *Miller* that appears to animate the dissent and its frustration with our decisions in this case and in *Delgado*—that no remedy will put the defendant in the same position he would have been in if his youth had been considered when he was sentenced. In the present case, the defendant was effectively sentenced to life imprisonment, and state law did not provide an opportunity for parole for such crimes. See footnote 17 of this opinion. A sentence of life without parole improperly denies the juvenile offender of “a chance to demonstrate growth and maturity”

¹² See footnote 22 of this opinion (comparing *Miller* factors and parole eligibility factors). The dissent incorrectly states that parole eligibility under P.A. 15-84 does not require the board to give any special weight to the *Miller* factors and the diminished culpability of juvenile offenders but, rather, only permits the board to consider the *Miller* factors in determining rehabilitation. Public Act 15-84, § 1, requires the board to consider whether an inmate has demonstrated substantial rehabilitation, considering factors such as “the age and circumstances of such person as of the date of the commission of the crime” (Emphasis added.) The fact that the defendant’s age at the time of the crime is a factor in determining whether he has demonstrated substantial rehabilitation shows that this factor is not only “‘future focused,’” as the dissent contends, but also considers whether he had diminished capacity because of his age at the time of the crime. Just because his age at the time of the crime may be considered for rehabilitative purposes does not mean it cannot also be considered for culpability purposes. If there is any doubt about this, let us clear it up: the board should, for culpability purposes, consider the defendant’s age and circumstances as of the date of the commission of the crime. This is in line with the parole board’s stated policy of giving “great weight to the diminished culpabilities of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity that has been displayed when considering an offender for suitability.” State of Connecticut Board of Pardons and Paroles, Annual Report 2016–2017 (2017), available at <https://portal.ct.gov/-/media/BoPP/Legacy-Files/BoPPAnnualReport20162017forDASDigestpdf.pdf> (last visited August 23, 2019).