

IN THE SUPREME COURT OF MISSOURI

No. SC91006

STATE OF MISSOURI
Respondent

v.

ANTONIO ANDREWS
Appellant

On Appeal from the Circuit Court of the City of Saint Louis
Twenty-Second Judicial Circuit
The Honorable Presiding Judge Dennis Schaumann

REPLY BRIEF OF APPELLANT ANTONIO ANDREWS

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JURISDICTIONAL STATEMENT

Appellant, Antonio Andrews, adopts and incorporates the jurisdictional statement in his opening brief.

STATEMENT OF FACTS

Appellant adopts and incorporates the statement of facts in his opening brief.

POINTS RELIED ON

Appellant adopts and incorporates the points relied on in his opening brief.

REPLY ARGUMENT

I. Section 211.071 RSMo violates both Apprendi and the Eighth Amendment because the statute subjects juveniles to a mandatory sentence of life without the possibility of parole.

Pursuant to sections 211.071 and 565.020 RSMo, Appellant (“Andrews”) was sentenced to a mandatory term of life imprisonment without the possibility of probation or parole (“LWOP”) for having been convicted of first-degree murder. Andrews was subjected to this sentence pursuant to his adult certification. The State argues that a sentence of LWOP for juveniles does not violate the Eighth Amendment under Roper v. Simmons, 543 U.S. 551 (2005) and Florida v. Graham, 130 S.Ct. 2011, 2030 (2010), and further that the Sixth Amendment protections carved out in Apprendi v. New Jersey, 530 U.S. 466 (2000) do not apply to juvenile certification hearings in Missouri.

A. *The Eighth Amendment*

In arguing that a sentence of LWOP for a juvenile convicted of murder does not violate the Eighth Amendment, Respondent notes, correctly, that in Florida v. Graham, 130 S.Ct. 2011, 2030 (2010), the Court distinguished homicide from nonhomicide offenses in determining that a

sentence of LWOP on nonhomicide offenses categorically violates the Eighth Amendment (Resp. Br. 39). However, as explained in more detail below, the Graham Court was not faced with a statutory scheme that mandated LWOP for a homicide offense. *See* sections 211.071 and 565.020 RSMo. It is the mandatory nature of the sentence which makes it unconstitutional¹.

Respondent further cites Burnett v. State, 311 S.W.3d 810 (Mo. App. E.D. 2009) in support of its argument. However, Burnett is distinguishable from this case. In Burnett, the court of appeals held that a 60-year sentence imposed on a 15 year old did not violate the Eighth Amendment. Id. In Burnett, the defendant pled guilty to child kidnapping, first-degree assault, forcible sodomy, and attempted forcible rape. Id. at 811. At sentencing:

[T]he plea court stated that it had received the presentence investigation, as well as a report from the Missouri Division of Youth Services (DYS), letters written on [defendant's] behalf,

¹Appellant does not assert that the mandatory imposition of LWOP on an adult offender is unconstitutional in this brief, only that imposed on a juvenile offender by certification under § 211.071.

and victim impact statements written by Victim and Victim's mother. [Defendant] offered the testimony of Brent Buerck, the DYS senior program administrator who had assessed Movant and determined that DYS would accept Movant into its dual-jurisdiction program.

Id. at 812. After hearing evidence, argument, and reading the reports, the court in its discretion determined the appropriate sentence to be 60 years.

Id. at 813. Not only did the plea court consider a great deal of information before deciding on a sentence, but a 60-year sentence does not preclude the possibility of parole for Mr. Burnett. Id. at 812-13.

Respondent additionally cites cases from other jurisdictions to support its argument that a mandatory sentence of LWOP for a juvenile convicted of murder does not violate the Eighth Amendment (Resp. Br. 42-43). To the extent that these cases may serve as persuasive to this Court, each was decided before Graham, and thus the courts only interpret Roper. Moreover, in State v. Allen, 958 A.2d 1214 (Conn. 2008), cited by Respondent, the Supreme Court of Connecticut, in upholding a sentence of LWOP for a juvenile convicted of homicide, noted concern in doing so:

We recognize that the overwhelming majority of countries around the world do not permit the imposition of a mandatory life sentence on a person under the age of eighteen; and that the Supreme Court indicated in Roper that international practices are relevant to this constitutional question. Moreover, we agree that the large number of juveniles serving life sentences in the United States as compared to those few other countries that permit such a sentence raises deeply troubling questions. The courts are in consensus, however, that the United States Supreme Court clearly has signaled that such a sentence does not violate the eighth amendment. The delineation between juveniles and adults for purposes of prosecution and punishment is a public policy determination reserved to the legislative branch of government, except where constitutional principles apply. The eighth amendment affords heightened significance to the “diminished culpability” of juveniles, but the reasoning of Roper does not extend to the present case (internal citations omitted).

Id. at 584.

These concerns were addressed by the Supreme Court in Graham, which extended the reasoning in Roper to apply to LWOP sentences. Graham, 130 S.Ct. 2011. While the Graham Court only addressed LWOP for nonhomicide offenses, the Court relied on the difference between juveniles and adult offenders, stating, “An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” Id. at 2031. Graham's holding creates a categorical rule to protect juveniles from LWOP in nonhomicide offenses, but does not suggest that a *mandatory* sentence of LWOP would not violate the protections afforded to juveniles under the Eighth Amendment. A mandatory sentence of LWOP does not “take defendants' youthfulness in to account at all” and is thus “flawed.” Id.

Because Andrews' sentence of LWOP was mandatory under section 565.020 due to his certification under section 211.071, the sentencing judge could not consider any factors for this juvenile defendant, including his age, maturity, capacity for rehabilitation, etc. The mandatory nature of LWOP in Missouri as applied to certified juveniles violates the letter and

spirit of Roper and Graham, which tell us that juveniles are categorically less culpable for the same crimes that, if committed by an adult, might warrant the ultimate punishment.

B. *Apprendi*

Respondent argues that Apprendi does not apply to a certification hearing in Missouri because: (1) it is not a criminal proceeding, (2) the purpose of the juvenile code is not the criminal prosecution of juveniles, but rehabilitation of “erring youths”, and (3) the focus of a juvenile certification hearing is the determination of which court has jurisdiction, not fact-finding which would increase the statutory maximum punishment (Resp. Br. 25-26, 27, 28). These arguments overlook the function and effect of a certification hearing, particularly when a juvenile is charged with first-degree murder and will face a mandatory sentence of LWOP if convicted.

First, the purpose of the juvenile code in a large sense may be to protect juveniles from the criminal justice system, explaining why juveniles are not entitled to jury trials (*See* Resp. Br. 35); however, a certification hearing is not a simple proceeding within the juvenile system, but a hearing to determine whether to exclude the juvenile from the protection of the system. *See* §211.071 RSMo. Thus the overall purpose of

the juvenile code cannot be ascribed to certification hearings, rather these hearings must be viewed as quasi-criminal and adversarial in nature.

Furthermore, while the purpose of a certification hearing may be to determine which court has jurisdiction over a defendant, the effect of the hearing, in cases of first-degree murder, is to predetermine the sentence to be given to the juvenile if found guilty of the charge. In other words, in cases such as this, the fact-finding at the certification hearing is comparable to the fact-finding in a sentencing phase because certification ensures that if convicted, a juvenile will be sentenced to life without the opportunity for parole regardless of his age or any mitigating factors that may be relevant to the appropriate sentence. § 565.020 RSMo. The facts relevant at a certification hearing are:

- (1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
- (2) Whether the offense alleged involved viciousness, force and violence;

- (3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted;
- (4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
- (5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;
- (6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;
- (7) The age of the child;
- (8) The program and facilities available to the juvenile court in considering disposition;
- (9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court; and
- (10) Racial disparity in certification.

Section 211.071.6 RSMo. The certification statute goes on to recognize a juvenile is entitled to rights at the hearing, e.g. an attorney and to be present at the hearing, and requires the juvenile court to provide written findings of fact. § 211.071.7 RSMo.

Apprendi applies to such findings as those made at a juvenile certification hearing when the findings enhance the range of punishment. *See State v. Clark*, 197 S.W.3d 598 (2006); Ring v. Arizona, 536 U.S. 584 (2002). In Ring, the Court found that allowing a court rather than a jury to find the aggravating factors required for imposition the death penalty violated the Sixth Amendment. The facts at issue in Ring included whether:

- (1) The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable;
- (2) The defendant was previously convicted of a serious offense, whether preparatory or completed;
- (3) In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in

addition to the person murdered during the commission of the offense;

(4) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(5) The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner;

(7) The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail;

(8) The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense;

(9) The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older;

(10) The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

Id. at 593.

These findings are comparable to those delineated in Missouri's certification statute. While the findings occur at different stages in the proceedings, the effect of affirmative findings is the same – to increase the punishment. *See Ring*, 536 U.S. at 595; § 565.020, § 211.071. The findings made by a judge at a certification hearing, while not directly determining guilt on the offense charged, do require a determination of “facts”, some of which involve the offense alleged, e.g. sections (1)-(3), and these findings do predetermine a juvenile's sentence if he is charged with first-degree murder. *See* § 565.020.

Therefore, Apprendi does apply to a certification hearing of a juvenile charged with first-degree murder, where findings made by a judge rather than facts proved beyond a reasonable doubt to a jury enhance the sentence the juvenile faces.

CONCLUSION

Andrews requests this Honorable Court reverse the trial court's judgment and sentence, and remand to the trial or juvenile court for proceedings not inconsistent with this Court's ruling.

Respectfully Submitted:

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 13th day of October, 2010, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Mr. Evan Buchheim of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antiqua 13-point font. The word-processing software identified that this brief contains 1,980 words. Also, the enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found to be virus-free.

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