No. SC93153

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

LARON HART,

Appellant.

Appeal from the Circuit Court of the City of St. Louis

Twenty-Second Judicial Circuit

The Honorable John J. Riley, Judge

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Laron Hart adopts the jurisdictional statement set out in Appellant's Brief, Statement and Argument, filed on November 15, 2012 in the Missouri Court of Appeals, Eastern District and transferred to this Court. To his initial jurisdictional statement, Mr. Hart adds that the Missouri Court of Appeals, Eastern District transferred this case to this Court prior to opinion because Mr. Hart challenged on appeal the validity of a state statute and consequently, this Court has exclusive jurisdiction over Mr. Hart's appeal. Mo. Const., Art. V, §§ 3 & 11; Rule 83.01.

STATEMENT OF FACTS

Appellant Laron Hart adopts the statement of facts set out in Appellant's Brief, Statement and Argument, filed on November 15, 2012 in the Missouri Court of Appeals, Eastern District and transferred to this Court. Mr. Hart will cite to the record on appeal as follows: Trial and Sentencing Transcript, "(Tr.)"; Legal File, "(L.F.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY POINT[1]

Respondent is incorrect in arguing that the absence of a valid penalty provision in § 565.020.2 post-*Miller* does not render Mr. Hart's conviction under § 565.020 void, in arguing that this Court may, under the guise of consistency with legislative intent, rewrite § 565.020.2 to include words prescribing a constitutionally valid penalty for juveniles convicted of murder in the first degree, and in arguing that "imprisonment for life" is severable under § 1.140 from the constitutionally invalid portions of § 565.020.2. Mr. Hart is entitled to discharge from conviction of Count I of murder in the first degree and the concomitant Count II of armed criminal action. Or, in the alternative, Mr. Hart is entitled to the opportunity to avail himself of jury sentencing and resentencing on Count I to an authorized term of imprisonment for a class A felony.

State v. Rowe, 63 S.W.3d 647 (Mo. banc 2002);

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[1] Appellant Hart does not waive the allegations of trial court error presented in Points III and IV of his previously filed brief, but specifically replies to respondent's argument, addressing Points I and II of his opening brief. *Miller* is a reference to *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

State v. Harper, 510 S.W.2d 749 (Mo. App. K.C.D. 1974);

State v. Hudson, 386 S.W.3d 177 (Mo. App. E.D. 2012);

Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006);

§§ 1.140, 558.011, & 565.020.

REPLY ARGUMENT

Respondent is incorrect in arguing that the absence of a valid penalty provision in § 565.020.2 post-*Miller* does not render Mr. Hart's conviction under § 565.020 void, in arguing that this Court may, under the guise of consistency with legislative intent, rewrite § 565.020.2 to include words prescribing a constitutionally valid penalty for juveniles convicted of murder in the first degree, and in arguing that "imprisonment for life" is severable under § 1.140 from the constitutionally invalid portions of § 565.020.2. Mr. Hart is entitled to discharge from conviction of Count I of murder in the first degree and the concomitant Count II of armed criminal action. Or, in the alternative, Mr. Hart is entitled to the opportunity to avail himself of jury sentencing and resentencing on Count I to an authorized term of imprisonment for a class A felony.

Respondent, in its brief, concedes that post-*Miller*, the penalty provision in § 565.020.2, which mandates the imposition of a non-parolable life sentence for Mr. Hart, a juvenile, is unconstitutional as applied to Mr. Hart (Resp. Br. 19). Respondent, however, does not agree that the absence of a valid penalty provision in § 565.020.2 renders Mr. Hart's conviction under the statute void (Resp. Br. 19). In its brief, respondent mentions only one of the cases upon which Mr. Hart relied, *State v. Harper*, 510 S.W.2d 749 (Mo. App. K.C.D. 1974), in making his argument, but does not attempt to distinguish it (Resp. Br. 19).

Respondent has overlooked that "a conviction under an unconstitutional statute is void." *State v. Hudson*, 386 S.W.3d 177, 178 (Mo. App. E.D. 2012) (citing *State v. Burgin*, 203 S.W.3d 713, 715 (Mo. App. E.D. 2006)). It cannot form the legal basis for imprisonment. *Hudson*, 386 S.W.3d at 179. Mr. Hart is entitled to discharge or entry of judgment and sentence for murder in the second degree because the court convicted and sentenced him under an unconstitutional and unenforceable statute (App. Br. 39-40).

Respondent argues that Mr. Hart is entitled to neither, but concedes that Mr. Hart is entitled to resentencing on Count I of murder in the first degree (Resp. Br. 17, 31). It is with the range of punishment applicable on resentencing with which respondent disagrees (Resp. Br. 23-24).

Should this Court choose not to discharge Mr. Hart or enter judgment and sentence for murder in the second degree, Mr. Hart maintains the range of punishment applicable to him upon resentencing for murder in the first degree, post-*Miller*, should be that for a class A felony, ten to thirty years or a parolable life sentence (App. Br. 48-49). § 558.011.1(1), RSMo Cum. Supp. 2009. Contrary to this, respondent argues that the way to uphold § 565.020, consistent with legislative intent, is to construe or "effectively rewrite" § 565.020 to prescribe life imprisonment *or* life imprisonment without parole for juveniles convicted of first-degree murder (Resp. Br. 23-24).

Respondent, however, misses the mark. This Court cannot, under the guise of discerning legislative intent, rewrite § 565.020.2 to prescribe life imprisonment or life imprisonment without parole for juveniles convicted of murder in the first degree. *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002). The very case upon which respondent relies in making its argument for this rewrite states the court lacks the power to rewrite a statute. *Associated Indus. v. Director of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996) (stating "we have no power to rewrite the statute").

To do so would usurp the legislative function, as statute creation is "purely a legislative prerogative." *Harper*, 510 S.W.2d at 752; *Thomas v. State*, 74 S.W.3d 789, 793 (Mo. banc 2002). The Court will not act as a "super legislature." *State v. Snider*, 869 S.W.2d 188, 198 (Mo. App. E.D. 1993). Whatever this Court believes the legislature's intent is now, post-*Miller*, this Court "cannot rewrite the statute," to effectuate that intent, where it is contrary to the plain and unambiguous wording of § 565.020.2. *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 27 (Mo. App. W.D. 2011).

The primary rule of statutory construction is to give effect to the legislative intent reflected in the plain and unambiguous wording of the statute. *Winfrey v. State*, 242 S.W.3d 723, 725 (Mo. banc 2008). The plain and unambiguous wording of § 565.020.2 provides that there are only two punishments for murder in the first degree, either death or imprisonment for life without eligibility for probation or parole, two

penalties that are both unconstitutional as applied to Mr. Hart. *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Miller v. Alabama*, 132 S.Ct. 2455, 2468 (2012); § 565.020.2. Those punishments are *mandatory*, as they "*shall*" be imposed [emphasis added]. § 565.020.2.

This Court does not have the authority to rewrite § 565.020.2 to include a separate punishment for juveniles that doesn't mandate a non-parolable life sentence and that permits a parolable life sentence as a punishment. *Rowe*, 63 S.W.3d at 650. Section 1.140 has never allowed courts to insert words in statutes that were not placed there by the legislature. *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996).

It is for this very same reason that respondent's alternative argument fails. Respondent argues in the alternative, that this Court could retain the penalty of life without parole *and include* with it the penalty provision provided for a class A felony – "a term of years not less than ten years and not to exceed thirty years or life imprisonment" (Resp. Br. 26). This Court cannot include the language respondent proposes because, as previously stated, this Court cannot rewrite statutes. *Rowe*, 63 S.W.3d at 650.

Besides, no rewriting is necessary to include the penalty provision for a class A felony in § 565.020.2 if this Court excises the unconstitutional punishment provisions of § 565.020.2 from the section as Mr. Hart proposed (*see* App. Br. 48-49). If the unconstitutional punishment provisions are excised, we are left with the following

punishment for juveniles convicted of murder in the first degree: "Murder in the first degree is a class A felony," which is punishable by "a term of years not less than ten years and not to exceed thirty years or life imprisonment." § 558.011.1(1), RSMo Cum. Supp. 2009.

As an alternative to rewriting § 565.020 to conflict with its plain and ordinary language, respondent argues that yet another way to uphold § 565.020, consistent with legislative intent, would be to sever the phrase, "without eligibility for probation or parole," from § 565.020.2 to prescribe life imprisonment as the only punishment for juveniles convicted of first-degree murder (Resp. Br. 23). Respondent proposes severance as follows: "Murder in the first degree is a class A felony, and the punishment shall be ~~either death or~~ imprisonment for life ~~without eligibility for probation or parole, or release except by act of the governor . . .~~" (Resp. Br. 23).

Respondent's argument ignores that § 565.020.2's invalid requirement of no eligibility for probation or parole is inseparably connected with the imposition of a life sentence (*See* App. Br. 36). Section 1.140 provides that severance is inappropriate if: (1) "valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one"; or (2) "the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." § 1.140.

The plain language of § 565.020.2 reflects that at the time of § 565.020.2's enactment, the legislature never intended that a parolable life sentence be an available punishment for any offender convicted of murder in the first degree. The legislature implicitly invalidated the punishment of life with parole, permitted for other class A felonies, by expressly stating that murder in the first degree is a class A felony, "the punishment [for which] shall be either death or imprisonment for life without eligibility for probation or parole." §§ 558.011.1(1), RSMo Cum. Supp. 2009 & 565.020.2. "Imprisonment for life," standing alone, is incomplete and incapable of being executed in accordance with the legislative intent, reflected in this language of the statute.

In addition, nothing in the language of § 565.020.2 suggests the legislature would have prescribed only life imprisonment for juveniles had it known that *mandatory* non-parolable life sentences for juveniles were invalid. "The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, *which the Legislature would have enacted if it had known that the exscinded portions were invalid.*" *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. banc 2006) (citing *State ex rel. Audrain County v. Hackmann*, 205 S.W. 12, 14 (Mo. banc 1918)).

Had the legislature known mandatory non-parolable life sentences for juveniles were invalid, the legislature may have chosen not to *mandate* non-parolable life

sentences for juveniles, but to permit their imposition in certain circumstances.[2] The legislature could have chosen to prescribe a term of any number of years for juveniles convicted of murder in the first degree in Missouri, or it could have provided that the punishment for juveniles convicted of first-degree murder was the same as that prescribed for any other class A felony. But it does not necessarily follow that the legislature would have prescribed *only* life imprisonment for juveniles, had it known that *mandatory* non-parolable life sentences for juveniles were invalid. Consequently, under § 1.140, this Court cannot sever the phrase, "without eligibility for probation or parole," from § 565.020.2 to prescribe life imprisonment as the only punishment for juveniles convicted of first-degree murder.

This Court can, under § 1.140, however, validly sever the provisions as proposed in Mr. Hart's opening brief, making the penalty for a juvenile's conviction of first-degree murder ten to thirty years or a parolable life sentence (App. Br. 48-49).

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[2] Not even *Miller* forecloses the legislature's ability to prescribe a non-mandatory, non-parolable life sentence for a juvenile convicted of first-degree murder. *Miller*, 132 S.Ct. at 2469. Post-*Miller*, a non-mandatory, non-parolable life sentence may constitutionally be imposed pursuant to an individualized sentencing process after consideration of the juvenile's youth and any mitigating circumstances. *Id.* at 2469, 2471.

Should this Court decide to remand Mr. Hart's case for resentencing, Mr. Hart has requested the opportunity to exercise his right to jury sentencing, which he formerly waived (App. Br. 49). Respondent argues that this Court should not grant Mr. Hart this opportunity because "nothing in the record shows that [Mr. Hart] waived jury sentencing out of any sense of futility" (Resp. Br. 29). Respondent then speculates that Mr. Hart might have waived jury sentencing because he thought he would fare better in front of the judge or to avoid the State's presentation of evidence, including victim-impact evidence, in aggravation of punishment (Resp. Br. 29).

Respondent's argument ignores that pre-*Miller*, regardless whether a judge or jury decided his sentence, whether the State presented evidence in aggravation of punishment, or whether he presented evidence in mitigation, Mr. Hart could only have received a mandatory non-parolable life sentence for his conviction. Knowing that nothing can change the outcome of the sentence one will receive is an incredibly powerful disincentive to exercising one's right to jury sentencing.

Respondent glosses over this and cites *State v. Nunley*, 341 S.W.3d 611 (Mo. banc 2011) as support for its position that Mr. Hart should not have the opportunity for jury sentencing. But *Nunley* is distinguishable.

In *Nunley*, the capital defendant strategically pled guilty and waived jury sentencing because "he was afraid the jury would sentence him to death." 341 S.W.3d

at 619. But on remand for resentencing after a successful appeal, the defendant argued his initial waiver of jury sentencing was invalid based on intervening law, stating capital defendants have a right to have a jury find the circumstances necessary for imposition of the death penalty. *Id.* at 621. The intervening law, however, did not apply to defendants who pled guilty and waived their rights to a jury trial. *Id.* at 620. Also, since the record clearly showed the defendant strategically pled guilty and waived jury sentencing, the defendant's case was factually inapposite to the law upon which the defendant relied. *Id.* at 621. This Court held the waiver remained effective after the remand. *Id.* at 621-622.

Mr. Hart's case is factually inapposite to *Nunley*. Mr. Hart did not plead guilty. The record does not show that he strategically waived jury sentencing to avoid the imposition of a harsher penalty upon jury sentencing and the new law, *Miller*, clearly applies to him.

Miller, decided almost a full year after Mr. Hart's 2011 trial, has now changed the law and Mr. Hart should have the opportunity to exercise his right to jury sentencing.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Statement, Brief, and Argument, filed on November 15, 2012, and on the arguments in this Reply Brief, Appellant Laron Hart requests this Court to reverse his convictions of Counts I and II and discharge him, or in the alternative, grant the opportunity for jury sentencing and resentencing. Based on his arguments in Points III and IV, Mr. Hart requests this Court to reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06(c), I hereby certify that on Friday, March 22, 2013, a true and correct copy of the foregoing brief was e-filed with this Court. Also, a copy of the foregoing brief was sent to Evan J. Buchheim at Evan.Buchheim@ago.mo.gov the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 via Missouri Case.net. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word limitations of 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains 3,108 words.

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