

IN THE
SUPREME COURT OF LOUISIANA
NEW ORLEANS

No. 2013-KP-1163

STATE OF LOUISIANA, RESPONDENT
v.
HENRY MONTGOMERY, APPLICANT

ORIGINAL MOTION IN SUPPORT OF REMAND WITH INSTRUCTIONS, FROM THE RULING OF THE UNITED STATES SUPREME COURT, DOCKET NUMBER 14-280, REVERSING AND REMANDING FOR FURTHER PROCEEDINGS, REVERSING THE RULING OF THE LOUISIANA SUPREME COURT, DOCKET NUMBER 2013-KP-1163, THE CASE HAVING BEEN PREVIOUSLY TRANSFERRED FROM THE FIRST CIRCUIT COURT OF APPEAL, 2013-KW-0442, AND FROM THE 19TH JUDICIAL DISTRICT, PARISH OF EAST BATON ROUGE, DOCKET NUMBER 48-489, SECTION II, HON. RICHARD ANDERSON, JUDGE PRESIDING

Original Motion in Support of Remand with Instructions,
Filed on behalf of the State of Louisiana

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MOTION FOR REMAND WITH INSTRUCTIONS

On January 25, 2016, the United States Supreme Court reversed this Court's decision in *State v. Montgomery*, 2013-1163 (La. 06/20/14), 141 So.3d 264, *cert. granted*, 135 S.Ct. 1546, 191 L.Ed.2d 635 (2015), *and rev'd and remanded*, -- U.S. --, -- S.Ct. --, -- L.Ed.2d --, 2016 WL 280758 (2016). The Supreme Court found *Miller v. Alabama*¹ retroactive, applying it to cases that have already become final on direct review. *See Montgomery*, 2016 WL 280758, at *11. The United States Supreme Court's instructions included a remand of the case to this Court: "The judgment of the Supreme Court of Louisiana is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." *Id.* at *16.

The State respectfully requests that this Court remand this case with instructions that *Montgomery* be resentenced pursuant to La. C.Cr.P. art. 878.1. By some estimates, there may be approximately 200 murderers seeking to be resentenced. *See Brief of Amici Curiae State of Michigan and 15 Other States in Support of Respondent, Montgomery v. Louisiana*, 2015 WL 5169098, at *15, *1AAA, n. 17 (2015) (alleging that approximately 202 persons will be affected by this ruling). The State suggests that some litigants may be confused as to whether La. C.Cr.P. art. 878.1 would apply to those persons affected by the United States Supreme Court's ruling because this Court in *State v. Tate* ruled that La. C.Cr.P. art. 878.1 would operate prospectively only. 2012-2763 (La. 11/05/13), 130 So.3d 829, 841-44.

A close reading of *Tate* shows, however, that La. C.Cr.P. art. 878.1 will apply to *Montgomery* and those similarly situated to him. The relevant paragraphs state in part:

Reading the Act plainly, we find Article 878.1 provides a new procedure by which a hearing shall be conducted prior to sentencing in any case where a juvenile "offender *is* to be sentenced to life imprisonment for a conviction of first degree murder ... or second degree murder." As directed by our rules of statutory construction, we interpret the use of the present tense of the verb "to be," *i.e.*, "is," rather than the past—"was"—or past perfect—"has been"—tenses, as clearly indicative of legislative intent to apply the statute prospectively only...

* * *

Accordingly, we logically conclude neither La.Code Crim. Proc. art. 878.1 nor La.Rev.Stat. § 15:574.4(E)(1) apply to *Tate* or similarly situated defendants because they have already been sentenced for their homicide convictions and no judicial determination has been made that they are entitled to parole eligibility pursuant to the newly enacted Article 878.1.

Id. at 843-44 (emphasis in original and citations omitted).

¹ 567 U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Because this Court is bound to vacate Montgomery's sentence by virtue of the United States Supreme Court's opinion, now Montgomery "is to be sentenced to life imprisonment for a conviction of first degree murder... or second degree murder." La. C.Cr.P. art. 878.1. Montgomery's previous sentence, including parole ineligibility, has no effect and he is now entitled (in the present tense, so to speak) to the judicial determination of eligibility for parole consideration provided by La. C.Cr.P. art. 878.1.

Further, there is no doubt as to what the Louisiana Legislature intended to happen under these circumstances.

Evidence of legislative intent further supports our interpretation. In the House Committee on Criminal Justice, Pete Adams, Executive Director of the Louisiana District Attorneys Association, and Dana Kaplan, Executive Director of the Juvenile Justice Project of Louisiana, testified the bill was a carefully negotiated compromise and, as part of that compromise, the bill was written to apply prospectively only, leaving the question of *Miller's* retroactivity to the courts. Thus, Pete Adams testified: "One of the issues that is not addressed in the bill that we're concerned about is retroactivity. We agreed not to address this in the bill. We believe that the statute on its face is prospective only but of course the courts will make that decision whether they are constitutionally required to be applied retroactively. *If the courts decide that the law should be applied retroactively, that is for those already in jail, then this statute will be the vehicle by which those already in jail would gain access.* I would just kind of conclude there." Dana Kaplan concurred: "We also concur with the decision to not have the legislation comment on retroactivity because that's a matter that the courts themselves will decide."

Id. at 844, n. 5 (emphasis added).

This matter is ripe for decision and would alleviate considerable confusion across the State. The position of this case is similar to what this Court faced in *State v. Bazile*, 2012-2243 (La. 05/07/13), 144 So.3d 719, 734-35. This Court must remand for further proceedings and a remand without any instruction will not address the procedure by which the retroactivity ordered by the United States Supreme Court will be accomplished. *See id.* The issue is fit for decision. In addition, refusing to provide this instruction will create a hardship for the attorneys and judges in this State who seek to quickly effectuate the order of the United States Supreme Court.

The statute at issue, La. C.Cr.P. art. 878.1, was passed after this Court granted writs in *Tate* but before its decision. The question regarding the retroactivity of the statute (as opposed to the decision in *Miller v. Alabama* itself) was dealt with by this Court in the first instance, presumably for the sake of judicial efficiency and the interest of justice. *Compare* La. Legis.

2013 Reg. Sess. Act 239, § 2 (approved June 12, 2013); *with State v. Tate*, 2012-2763 (La. 04/19/13), 111 So.3d 1023 (granting writs about two months prior to the enactment of the statute). These same interests are present here and the State respectfully requests this Court to give the Court below the instruction that Montgomery is to be sentenced pursuant to La. C.Cr.P. art. 878.1.

PRAYER

The State, respectfully requests that this Court vacate Montgomery's sentence, in accordance with the United States Supreme Court's opinion, and remand this case to the trial court with the instruction that Montgomery is to be sentenced pursuant to La. C.Cr.P. art. 878.1.

Respectfully submitted,

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VERIFICATION, AFFIDAVIT, AND CERTIFICATE OF SERVICE


I certify that all of the information contained in this Motion, is true and correct to the best of my knowledge. I further certify that a copy of this Motion has been mailed, by United States Mail or Federal Express, postage prepaid, to all known counsel of record, the trial judge, and the clerk of court, on 1/29/16, as follows:

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Colin Clark
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SWORN TO AND SUBSCRIBED before me, Notary Public, on this 29th day of January, 2016, in and for East Baton Rouge Parish, Louisiana.

 Bar roll # 34074
NOTARY PUBLIC SIGNATURE AND BAR ROLL/NOTARY NUMBER

Brett Sandifer
NOTARY PUBLIC PRINTED NAME

at death
DATE OF EXPIRATION OF COMMISSION

