UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0814

September Term, 2015

MARCUS WILLIAM TUNSTALL

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: June 28, 2016

In 1991, Marcus William Tunstall, appellant, was convicted by a jury, sitting in the Circuit Court for Prince George's County, of three counts of first-degree murder and other offenses, crimes he committed when he was seventeen years old. For the three murders, he was sentenced to three consecutive terms of life imprisonment, without the possibility of parole. Thereafter, his convictions were affirmed by this Court. *Marcus William Tunstall v. State of Maryland*, No. 1132, September Term, 1991 (filed June 5, 1992).

More than twenty years after Tunstall was sentenced to multiple terms of life imprisonment without parole, the United States Supreme Court, in *Miller v. Alabama,* 567 U.S. ____, 132 S.Ct. 2455, 2460 (2012), held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" While the Supreme Court did "not foreclose a sentencer's ability" to impose a life sentence without parole "in homicide cases," it did declare that the sentencer must "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S.Ct. at 2469.

In 2015, Tunstall, relying on *Miller*, filed a motion to correct an illegal sentence claiming that his life sentences without the possibility of parole were unconstitutional. After the circuit court summarily denied that motion, without a hearing or an explanation, Tunstall noted this appeal. In the meantime, the Supreme Court decided *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), in which it held that *Miller* applies retroactively.

For the reasons to be discussed, we reverse the circuit court's denial of Tunstall's motion to correct his sentences to life without parole and remand for further proceedings consistent with this opinion.

BACKGROUND

Tunstall admitted, to the police, to committing, with accomplices, a series of "drug-related robberies" during which he shot a total of three individuals. In its decision affirming Tunstall's convictions, this Court summarized the murders as follows:

> The first murder, which was part of a drug-related robbery, was accomplished by forcing the victim to lie prone on the floor and then shooting him in the back of the head, through a pillow that muffled the sound of the shot. The second and third murders occurred a block away and within minutes of the first murder. These two murders were also part of a drug-related robbery; they were committed in the same manner as the first one, that is, the victims were forced to life prone on the floor and then shot in the back of the head, through a blanket that muffled the shots.

Tunstall v. State, No. 1132, September Term, 1991, slip op. at 7-8.

A sentencing hearing was held on July 12, 1991. Defense counsel objected to the State's recommendation of a sentence to life without parole, asserting that such a sentence for a juvenile was "unconstitutional." And, if such a sentence could be imposed, then the jury, according to defense counsel, should make the decision, but only after considering "mitigating and aggravating factors and determining that the aggravating factors outweigh the mitigating factors" – a procedure similar to that required, at that time, before the death

penalty could be imposed. The State maintained that no such "procedure" was required before imposing a life sentence without parole.

In advocating for a sentence less harsh than life without parole, defense counsel noted that Tunstall was "only 17 years of age" and was in the company of an "older person, an adult basically exercising some influence on a 17 year old" and the murders were not "planned." While acknowledging that Tunstall had "made a terrible mistake in a very short period of time," he asserted that "we know that juveniles do that, as they lack the "maturity and judgment" of adults.

Defense counsel urged the court to consider whether Tunstall had "any possibility of rehabilitation or redemption" and maintained that, if there was some "substantial chance of rehabilitation," "a lesser sentence" would be appropriate. After declaring that Tunstall was "a very earnest and serious young man," who knows "right from wrong," defense counsel asserts that Tunstall spent "his days at jail studying and thinking about life and thinking about values," that Tunstall had completed high school and intended to obtain his college degree while in prison, and that, in his opinion, Tunstall would "turn out to be someone who is a positive person, who believes in the right kind of values."

In imposing sentence, the sentencing judge stated that he was "not unmindful of the fact that [Tunstall] was young," but the judge did not otherwise address his age or maturity, or – in any meaningful way – Tunstall's capacity for rehabilitation. Rather, the court focused

on the fact that "three young men were killed execution style." The court then addressed the "purposes" of sentencing, stating:

> With respect to rehabilitation, I don't know how you rehabilitate someone who a jury has found to have killed three people. Deterrence. Deterrence will come about. If you are not in society so you can't possibly do it. Whether it will send a message to those out here who may do the same thing, I don't know, Mr. Tunstall, because I think a message was sent to people who threw rocks at automobiles, but I found out that somebody else wanted to do it, and people never get messages until they are standing before the court. With respect to the punishment part of it, I think punishment is obviously appropriate. **More important in this case, sir, the only thing that is really appropriate is retribution**[.]

(Emphasis added.)

The court then sentenced Tunstall for the murders to three terms of life imprisonment without parole, which were to run consecutive to each other.

DISCUSSION

The Contentions

Tunstall, in reliance on *Miller, supra,* asserts that his sentences to life without parole violate the Eighth Amendment to the United States' Constitution because the sentencing court "failed to consider [his] youth" prior to imposing sentence, "much less consider that his youth counseled against such a harsh penalty." The State agrees with Tunstall that his sentences to life without parole should be vacated and this case remanded for re-sentencing in accordance with the Supreme Court's decisions in *Miller, supra,* and *Montgomery, supra*.

On the other hand, Beverly Burnette, the mother of one of the murder victims and a "victim representative," filed a brief in opposition asserting: (1) that Tunstall's sentences to life without parole are not "inherently illegal" and accordingly, his challenge could not be raised in a motion to correct an illegal sentence, and (2) even if properly challenged, the circuit court did not err in denying the motion to correct the sentences because the sentencing court, in fact, "heard arguments related to mitigation," including that Tunstall "was influenced by an adult co-defendant" and that he "was 17 when he executed the three victims." Ms. Burnett maintains that the sentencing court considered Tunstall's potential rehabilitation but, having observed his demeanor at trial and sentencing, and having "weighed the presentencing report" (indicating, among other things, that Tunstall exhibited no remorse for the crimes), determined that "rehabilitation was not possible." Accordingly, Ms. Burnett urges this Court to affirm the circuit court's denial of Tunstall's motion to correct an illegal sentence.

The Motion To Correct The Sentences

Rule 4-345(a) provides that a "court may correct an illegal sentence at any time." Under Maryland jurisprudence, to challenge a sentence pursuant to a Rule 4-345(a) motion, the illegality must "inhere" in the sentence itself. *Chaney v. State,* 397 Md. 460, 466 (2007) (Relief under Rule 4-345(a) is "limited to those situations in which the illegality inheres in the sentence itself, *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was

imposed and, for either reason, is intrinsically and substantively unlawful."). Ms. Burnett maintains that, if there is any illegality here, it was merely procedural and hence the sentences are not inherently illegal and do not merit consideration on a motion to correct an illegal sentence. *See Tshiwala v. State*, 424 Md. 612, 619 (2012) ("[W]here the sentence imposed is not inherently illegal, and where the matter complained of is a procedural error, the complaint does not concern an illegal sentence for purposes of Rule 4-345(a).").

First of all, we hold that Tunstall's challenge was the proper subject of a motion to correct an illegal sentence because he claims his sentences are inherently illegal, as they were unconstitutional under *Miller*, a case decided by the Supreme Court years after Tunstall was sentenced. In the context of a death sentence, the Maryland Court of Appeals has observed that "a sentence may be reviewable under Rule 4-345(a) where a United States Supreme Court decision, promulgated after sentencing, announces a new judicial interpretation of a constitutional provision that brings into question the validity of the statute on which the sentence is based." *Miles v. State*, 435 Md. 540, 545 (2013). Similarly, in *Baker v. State*, 389 Md. 127, 134 (2005), the Court of Appeals noted that, "[w]here a decision in an unrelated case rendered by the U.S. Supreme Court, following imposition of the death sentence in a given Maryland case, supplied a new judicial interpretation of a constitutional provision that might support an argument that an alleged error of constitutional dimension may have contributed to the imposition of the death sentence in that given case," a motion

to correct an illegal sentence "was a proper vehicle to raise the new constitutional argument." *Id.* at 134 (citations omitted).

In *Montgomery, supra*, the Supreme Court described its *Miller* holding as a "substantive rule of constitutional law," 136 S.Ct. 736, and held that, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.* at 729.[1] In other words, *Miller* dealt with substantive, not procedural, law. As such, we conclude Tunstall's Rule 4-345(a) motion was an appropriate vehicle for challenging the constitutionality, and hence the legality, of his sentences to life without parole.

The Miller and Montgomery Decisions

As noted, the *Miller* Court did "not foreclose a sentencer's ability" to impose a life sentence without parole" for juveniles convicted of murder, but it stated that, before

[1]Like Tunstall, Montgomery had challenged his sentence, years after its imposition, by way of a motion to correct an illegal sentence filed in the state criminal case. 136 S.Ct. at 726. Louisiana law provides that "[a]n illegal sentence may be corrected at any time by the court that imposed the sentence." La. Code Crim. Proc. Ann., Article 882. As in Maryland, this procedure "'is primarily restricted to those instances in which the *term* of the prisoner's sentence is not authorized by statute or statutes which govern the penalty' for the crime of conviction.'" *Montgomery,* 136 S.Ct. at 726 (quoting *State v. Mead*, 165 So.3d 1044, 1047 (2014)). Thus, in Louisiana, generally "prisoners must raise Eight Amendment sentencing challenges on direct review." *Id.* (citation omitted). "Louisiana's collateral review courts will, however, consider a motion to correct an illegal sentence based on a decision of [the U.S. Supreme] Court holding that the Eighth Amendment to the Federal Constitution prohibits a punishment for a type of crime or a class of offenders." *Id.* at 726-727 (citations omitted).

imposing such a sentence, the sentencer must "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S.Ct. at 2469. In short, the Supreme Court stressed that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 2465. The Supreme Court noted that "children are constitutionally different from adults for the purposes of sentencing" because "juveniles have diminished culpability and greater prospects for reform" and, as such, "'they are less deserving of the most severe punishments.'" *Id.* 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2026 (2010)).

In holding that *Miller* applies retroactively, the Supreme Court in *Montgomery*, summarized the import of the *Miller* decision:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the "distinctive attributes of youth." **Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "'unfortunate yet transient immaturity.'"** Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

136 S.Ct. at 734 (internal citations omitted) (emphasis added).

To comply with *Miller,* the *Montgomery* Court stated:

> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller's* substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

136 S.Ct. at 735 (citation omitted).

Analysis

Although the State agrees with Tunstall that *Miller* and *Montgomery* mandate that his life sentences without the possibility of parole be vacated and the case be remanded for re-sentencing, Ms. Burnett asserts that is unnecessary because the sentencing court, in fact, "heard arguments related to mitigation," including that Tunstall "was influenced by an adult co-defendant" and that he "was 17 when he executed the three victims." She further maintains that the sentencing judge determined that "rehabilitation was not possible."

Although the sentencing judge did indicate it was "not unmindful of the fact that [Tunstall] was young," the judge did not specifically address his age and if, or how, his youth may have influenced his criminal actions. Nor did the judge determine Tunstall's prospect for reform. As to that, the judge merely stated that he did not "know how you rehabilitate someone who a jury has found to have killed three people." Instead, the sentencing judge clearly focused on retribution, noting that "the only thing that is really appropriate" in sentencing Tunstall "is retribution." The Supreme Court, however, has observed that, in

sentencing a juvenile, "'the case for retribution is not as strong with a minor as with an adult.'" *Miller, supra,* 132 S.Ct. 2465 (quoting *Graham, supra,* 130 S.Ct. at 2028) (further quotation omitted)).

In short, the record is devoid of any indication that the sentencing court considered whether Tunstall was one of those "rare juvenile offenders[s] who crime reflects irreparable corruption" warranting a sentence of life without parole or whether, instead, his crimes "reflect[ed] the transient immaturity of youth." As the Supreme Court in *Montgomery* reminds us, "*Miller* require[s] that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison," 136 S.Ct. at 726 (quoting *Miller,* 132 S.Ct. at 2469), and failure to do so renders a sentence to life without parole unconstitutional. There was no such consideration in Tunstall's case. Accordingly, we reverse the circuit court's denial of Tunstall motion to correct an illegal sentence, vacate his life sentences without the possibility of parole, and remand the case for re-sentencing in light of the *Miller* and *Montgomery* decisions.

Re-Sentencing

Neither *Miller* nor *Montgomery* provide much guidance to the sentencing court upon remand for re-sentencing. As noted, however, the Supreme Court in *Mongomery* did state that a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole

from those who may not." 136 S.Ct. at 735 (quoting *Miller*, 132 S.Ct. at 2460).[2] The *Miller* Court suggested that, before a sentence of life without parole is imposed, the sentencer consider the offender's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's "family and home environment," and the offender's "participation in the conduct and the way familial and peer pressures may have affected him." 132 S.Ct. at 2468. Moreover, the sentencer must take into consideration the offender's "'heightened capacity for change' before condemning him or her to die in prison." *Montgomery,* 136 S.Ct. at 726 (quoting *Miller*, 132 S.Ct. at 2469).

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY DENYING MOTION TO CORRECT AN ILLEGAL SENTENCE REVERSED. SENTENCES TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR RE-SENTENCING. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

[2] The Supreme Court in *Montgomery* also noted that, in "[g]iving *Miller* retroactive effect," a new sentencing hearing is not necessarily required in every case. 136 S.Ct. at 736. Rather, the Supreme Court suggested that a State "may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.* That option, it seems, is one for the legislature to consider.