IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEJOYNAY FERGUSON,	:	
	:	
Defendant—Below,	:	
Appellant	:	
	:	
v.	:	No. 223, 2021
	:	
	:	
	:	
STATE OF DELAWARE	:	
	:	
Plaintiff—Below,	:	
	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

Nicole Walker, Esquire [#4012]
Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorney for Appellant

DATE: February 24, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions:

I. THE JUDGE VIOLATED 19-YEAR-OLD DEJOYNAY'S DUE PROCESS RIGHTS WHEN HE FAILED TO CONSIDER HER MITIGATION ARGUMENTS REGARDING HER YOUTH, AMENABILITY TO REHABILITATION AND MENTAL HEALTH BEFORE HE IMPOSED SENTENCES UPON HER THAT: ARE WHOLLY RETRIBUTIVE IN NATURE; ARE SIGNIFICANTLY MORE SEVERE THAN THE PRESUMPTIVE SENTENCES AND THE STATE'S RECOMMENDED SENTENCES; AND INCLUDE THE MOST SEVERE SENTENCE AVAILABLE IN DELAWARE.

The State agrees that a "judge must have an open mind for receiving all information related to the question of mitigation."[1] It further acknowledges that a sentence reflects a closed mind if it is "based on preconceived bias" and when the judge failed to consider "the character of the defendant."[2] Finally, the State also agrees with DeJoynay that this Court must reverse a sentence that reflects a closed mind.[3] Yet, the State falls into the same trap as the judge by ignoring DeJoynay's character and, instead, focusing solely on the nature of the crimes.[4] The State's extensive review of this material echoes the same error the sentencing judge made – consideration of the severity of the aggravating factors *to the exclusion* of consideration of the mitigating factors.

The State's recitation of the judge's decision does nothing to support its contention that he carefully considered DeJoynay's mitigating factors and argument.

---

[1] State's Ans. Br. at 29 (internal quotation marks omitted).
[2] *Id.*
[3] *Id.*
[4] Worthy of note is the fact that the State includes in its appendix an extensive amount of information from police reports, which are not part of the record. B1-54.

It is clear that the judge repeatedly addressed the unique and shocking nature of the circumstances surrounding the offense.[5] He did say he found what he believed to be a "d[earth] of materials indicating . . . inter-generational abuse or great privations for her growing up."[6] And, he did mention letters from DeJoynay's friends and family. However, he gave no indication what value he placed on those letters (mitigation, aggravating or neither). What is also very clear is that the judge failed to address any mitigating factors in his decision.[7]

As the State acknowledges, the judge was required to consider the "character of the defendant" and to "have an open mind for receiving all information related to the question of mitigation."[8] Thus, the glaring absence in the record of the judge's consideration of evidence that was both quantitatively and qualitatively more significant to mitigation than letters of support from family and friends speaks volumes about the judge's closed mind. For example, he did not even mention Dr. Kooney-Coss's lengthy forensic report that contained a mental health diagnosis and facts regarding DeJoynay's age, remorse, and rehabilitation. He also failed to mention her undisputed lack of a criminal record.

---

[5] State's Ans. Br. at pp. 32-35.
[6] Op. Br. at 26-27 (addressing A255-56).
[7] State's Ans. Br. at pp. 32-35.
[8] *Id.* at 29. (internal quotation marks omitted).

The State suggests that the question of whether the judge had a closed mind is settled by the fact that he heard the oral presentation of the mitigation material. But our State requires not just open ears, but an open mind. In *Bailey v. State*, this Court made clear that the matter does not end just because defense counsel and the defendant each have the opportunity to speak at sentencing.[9] Rather, a closed mind is evinced by "indication[s] that the judge either failed to permit . . . counsel to make the appropriate arguments on [their client's] behalf *or failed to weigh the evidence fairly*."[10]

The State's repetitive claim that the record reflects that the judge had an open mind rings hollow in that the State conspicuously fails to specify where the record purportedly does so.[11] On the other hand, it is true that many of DeJoynay's mitigation arguments were contested below by the State.[12] But, that fact is not an indicator that mitigation was considered by the judge; to the contrary, the judge's silence on the mitigators in the face of two very different pictures painted by the

---

[9] *Bailey v. State*, 450 A.2d 400, 405 (Del. 1982) (reversing sentence when record showed judge heard the mitigation but was not open to it).
[10] *Ortiz v. State*, 878 A.2d 461 (Del. 2005) (emphasis added).
[11] *See, e.g.,* State's Ans. Br. at pp. 31, 32, 35.
[12] *Compare* Op. Br. at pp. 7-8 (describing DeJoynay's acceptance of responsibility); A195 ("she pled guilty at the earliest possible opportunity."); A172 (describing DeJoynay's sincere attempt to understand her own conduct); *with* State's Ans. Br. at p. 19 (noting DeJoynay initially denied involvement); *id.* at 12 n. 4 ("Ferguson *claimed* that she did not mean to kill I.T," and that claim was contrary to the video evidence.") State's Ans. Br. at p. 23 (relying on PSI to suggest DeJoynay focused on herself instead of the impact she had on the infants and their families).

parties, (a remorseful teenager in the process of rehabilitation versus an individual who shirked responsibility of her actions choosing, instead, to selfishly "focus on how unhappy she was"), suggests the mitigators were of no moment to the judge. Silence on the individual mitigating factors suggests they were not considered, as opposed to carefully considered and decided. Because the judge failed to consider these factors, he sentenced DeJoynay with a closed mind and her sentence must be vacated.

The State's "proportionality" discussion misses the significance of the judge's failure to consider defense counsel's *Miller*[13] argument raised below. In *Miller*, the Court concluded that "[b]y making youth (and all that accompanies it) irrelevant to imposition of th[e] harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."[14] Defense counsel raised DeJoynay's youth (19 years old) as a mitigating factor. In support of that mitigator, counsel argued that, while *Miller* applies the scientific principles in a mandatory sense to those who are under the age of 18, the *Miller* principles should apply to DeJoynay- a young adult- in assessing her character for purposes of sentencing. This argument was supported by case law, facts, and the doctor's forensic report. Yet, the judge failed to address this legal argument or make any factual findings related to that argument.

---

[13] *Miller v. Alabama*, 567 U.S. 460, 479 (2012).
[14] *Miller*, 567 U.S. at 479.

Even if this Court does not find any other basis for reversal, it must reverse based solely on the judge's abuse of discretion in failing to make any finding of facts or conclusions of law with respect to defense counsel's *Miller* argument.[15] This Court "mandates that a judge make factual determinations and supply a legal rationale for a judicial decision as a matter of law."[16]

The acceptance of the argument for applying the *Miller* principles to a young adult continues to grow. Since the filing of DeJoynay's Opening Brief, the Appellate Court of Illinois noted that its supreme court has acknowledged that young adults—"at least those who were 20 years of age or younger at the time of their crimes" were permitted to "rely on the evolving neuroscience and societal standards underlying the rule in *Miller*" in challenging their sentences.[17] A "young-adult offender may be able to demonstrate, through an adequate factual record, that his or her own specific characteristics were so like those of a juvenile that imposition of a life sentence absent the safeguards established in *Miller* was "cruel, degrading, or so wholly

---

[15] The State concedes that the standard of review in this case is abuse of discretion. State's Ans. Br. at p. 27.

[16] *Holden v. State*, 23 A.3d 843, 846 (Del. 2011).

[17] *People v. Wilson*, 2022 WL 333631 (Ill. App. (1st) 2022) (citing *People v. Thompson*, 43 N.E.3d 984 (Ill. 2015) (noting that a defendant, who was 19 years old at the time of his crime, could not bring such a claim for the first time on direct appeal but was "not necessarily foreclosed" from asserting it in postconviction proceedings); *People v. Harris*, 120 N.E.3d 900 (Ill. 2018) (holding that an as-applied, youth-based sentencing claim of a defendant who was 18 at the time of his crime is appropriate).

disproportionate to the offense that it shocks the moral sense of the community[18] That is precisely what DeJoynay did in this case. The doctor, after an extremely lengthy report, summarized her findings as follows:

> Ms. Ferguson's behavior may not seem logical to an average functioning adult, but to a 19-year-old teenager who had no childrearing experience and no coping skills; although she instinctually knew that it was not a good choice, she did not realize just how bad of a choice it was. That is exactly what the research on juvenile and emerging adult brain development shows. From an adult perspective, she was reckless and impulsive. She overestimated the value of the immediate benefits and underestimated the likelihood and seriousness of future potential ramifications. Ms. Ferguson was concrete in her thinking and did not apply learning from one situation to the next. She showed difficulty regulating her emotions and tolerating frustration. While Isabella's death was a tragedy, how it occurred is understandable from a developmental perspective. Ms. Ferguson's neurological immaturity can also be seen in her initial response to finding Isabella not breathing and in her nonchalant attitude when at the police station.[19]

Yet, the judge ignored these facts, defense counsel's argument based on these facts and made no decision on the record as to whether *Miller* should apply to DeJoynay in this case.

DeJoynay challenged the process by which her sentence was imposed, and, in doing so, she pointed out that her sentence was exceptional in regard to numerous metrics.[20] One would expect a judge who imposes the harshest punishment available

---

[18] *People v. Wilson*, 2022 WL 333631 (Ill. App. (1st) 2022) (citing *People v. Klepper*, 917 N.E.2d 381 (2009)).

[19] A185.

[20] Op. Brief at 35 ("the sentences range from probation to 35 years of incarceration. Significantly, not one resulted in a natural life sentence, despite every other defendant

in our state on a teenager, to provide some insight into how much weight, if any, her age, remorse, rehabilitation, mental health diagnosis, and absence of a criminal record were given. This is especially so when that sentence exceeds guidelines, what the State's recommendation, and the request by the victims' families. The failure to even mention mitigation is best explained by the judge's failure to consider it, and the State has not suggested an alternative explanation.[21]

---

being older than DeJoynay."); *id.* at 30-31 ("despite the doctor's extensive recitation of scientific research as applied to her assessment of DeJoynay and despite defense counsel's legal analysis as to the application of that scientific research via *Miller*- the court made no reference to this argument, the psychological evaluation or to DeJoynay's youth").

[21] In addressing DeJoynay's legitimate concerns regarding "exactly what was actually reviewed by the judge," the State does not dispute that there is no docket indicating a filing of: (1) Dr. Cooney-Koss's psychological evaluation, which defense counsel submitted to the judge and presentence investigator's office on April 15, 2021, and (2) defense counsel's June 24, 2021 letter to the court providing another copy of Dr. Cooney-Koss's psychological evaluation and letters from Ferguson, her friends, and family. State's Ans. Br. at p.36. Significantly, the State fails to address the fact that, according to the Clerk of this Court, as of October 19, 2021, none of these documents actually are contained in the file. A188.

CONCLUSION

For the reasons and upon the authorities cited herein, DeJoynay Ferguson's sentences must be vacated and remanded for reconsideration by a different judge.

Respectfully submitted,

\s\Nicole M. Walker
Nicole Walker, Esquire [#4012]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5121

\s\Elliot Margules
Elliot Margules, Esquire [#6056]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5141

Attorneys for Appellant

DATE: February 24, 2022