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NOTES

TO KILL (OR IMPRISON FOR LIFE) A JUVENILE: THE IMPLICATIONS OF *U.S. V. UNDER SEAL* REGARDING THE PROPER USE AND EXERCISE OF JUDICIAL DISCRETION FOR SENTENCING A JUVENILE OFFENDER

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I. INTRODUCTION

The killing of a mockingbird, in the Pulitzer Prize winning novel *To Kill a Mockingbird*, was emblematic of the destruction of innocence. The songbird, in the literary piece, embodied a purity that brought harm to no one and should not be killed.¹ A child or adolescent reflects that same innocence and that wholesomeness invokes an earnest protection from harm. However, what if that mockingbird or adolescent harms another? Does the law seek to shelter the now “juvenile” from the retributive hand of justice? *U.S. v. Under Seal*² engages this matter from the purview of the legislative intent and constitutional jurisprudence.

The severability of unconstitutional provisions within statutes to punish the criminal acts of juveniles was an issue of first impression for the Court.³ Previous Supreme Court decisions have only prohibited juveniles from being sentenced to death⁴ and mandatory life without parole⁵. In this matter, the Government sought to prosecute a juvenile for murder in aid of racketeering under 18 U.S.C. § 1959 (a)(1), by severing or excising the statute to permit punishment under an inapplicable crime.⁶ The appellate court held

* J.D./MBA candidate, North Carolina Central University, 2017; B.A., Morehouse College, Philosophy, 2009. I dedicate this case note to my grandmother and best friend, Barbara Reagor. She devoted her time, energy, resources, and inexhaustible love to ensure I was afforded every opportunity for advancement. She always tells me, “Remember who you are and whose you are,” and that message continues to guide my decisions and future endeavors. God has blessed my life and this case note is a reflection of her contributions to my accomplishments.

1. NELLE H. LEE, *TO KILL A MOCKINGBIRD* 128 (1960).
2. *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016).
3. *Id.* at 721.
4. *Id.* at 719.
5. *Id.*
6. *Id.* at 720.

that it is impermissible to use excision to combine the penalty provisions for two distinct criminal acts.⁷ In sum, the Court found the Government's proposal to be an impermissible judicial rewriting of the statute's murder penalty provision.⁸ Courts are provided the discretion to interpret legislative intent when determining the applicability of the law to a set of facts, but it cannot rule in a manner that would alter the overall purpose or punishment set forth by the statute.⁹

The following case note will discuss the effect the *Under Seal* decision will have on subsequent cases involving criminal acts charged against a juvenile. Secondly, the note will discuss how the decision in *Under Seal* limits the potential abuse of the principle of severability to prosecute crimes generally. Finally, the note will briefly discuss the implications retroactivity will have on previous convictions.

II. THE CASE

In this matter, the Government is seeking an appeal from a denied motion to transfer the juvenile defendant for prosecution as an adult.¹⁰ Defendant was a few months shy of his eighteenth birthday; Defendant allegedly participated in a gang related murder.¹¹ The Government sought to prosecute Defendant for murder in aid of racketeering under 18 U.S.C. § 1959 (a)(1).¹² This statute provides that whomever, while engaged in a racketeering activity (organized crime), murders another individual will be punished by death or life imprisonment; and for kidnapping, by imprisonment for any term of years or life.¹³ The Government filed a delinquency information and certification against Defendant and simultaneously moved to transfer him for prosecution as an adult for murder in aid of racketeering.¹⁴ The district court concluded that although factors were present to support the transfer, granting the motion would be unconstitutional.¹⁵ The court explained that it did not have the discretion to sentence a defendant to less than the statutory mandatory minimum life sentence for a violation of §1959(a) for murder.¹⁶ Court precedent held imposing a mandatory life sentence on a juvenile, like

7. *Under Seal*, 819 F.3d at 724.

8. *Id.*

9. *See id.* ("The penalty enacted for the kidnapping-based offense cannot simply be interchanged with and applied to the murder-based offense, as these are two wholly separate means of violating § 1959 with distinct elements.")

10. *Under Seal*, 819 F.3d at 717.

11. *Id.* at 718.

12. *Id.*

13. *Id.* at 720.

14. *Id.* at 718.

15. *Id.*

16. *Id.*

the Defendant, to be constitutionally prohibited.¹⁷ Lastly, the district court rejected the Government's argument that §1959(a)(1) could be excised to permit a sentence of a term of years for a juvenile offender.¹⁸ The court reasoned that it had no authority under §1959(a)(1) to impose a sentence other than the mandatory minimum provided by the statute required for murder.¹⁹

The appellate court did not only review the district court's statutory and constitutional rulings related to the decision to deny the motion to transfer, but also whether the denial was an abuse of discretion.²⁰ On appeal, the Government contended that the impermissible punishments can be excised from §1959(a)(1), leaving intact language for the separate criminal act of kidnapping in aid of racketeering, which would authorize a term of years up to a discretionary maximum sentence of life.²¹ The appellate court held the Government's proposal contravened the principals governing both severance and due process.²² Furthermore, the Government's proposed act treads into the legislative role of articulating the authorized penalties for criminal conduct.²³ The appellate court reasoned that Defendant cannot be prosecuted for murder in aid of racketeering because his conviction would require the court to impose an unconstitutional sentence against a juvenile.²⁴ The appellate court affirmed the district court's decision, holding that the district court did not err in denying the Government's motion to transfer Defendant for prosecution as an adult.²⁵ In sum, the court found the Government's proposal was an impermissible judicial rewriting of the statute's murder penalty provision.²⁶

III. BACKGROUND

The Juvenile Justice and Delinquency Prevention Act²⁷ ("Act") provides a foundation for the legal discussion within this case. The act states that a "juvenile" is a person who has not reached the age of eighteen.²⁸ The act permits a juvenile, 15 years of age or older, to be transferred to adult status for prosecution if they are alleged to have committed certain violent crimes,

17. *Under Seal*, 819 F.3d at 718-19.

18. *Id.* at 719.

19. *Id.*

20. *Id.* at 720-21.

21. *Id.* at 721.

22. *Id.* at 723.

23. *Id.*

24. *Id.* at 728.

25. *Under Seal*, 819 F.3d at 728.

26. *Id.* at 724.

27. 18 U.S.C. § 5031 (2016).

28. *Id.* at § 5031.

such as murder²⁹. The district court has the authority to grant the transfer if, after a hearing, there is a finding by a preponderance of the evidence that it would be in the interest of justice.³⁰ The court must consider the defendant's age, social background, the nature of the alleged offense, and the juvenile's prior delinquency record.³¹ However, satisfying these elements does not ensure the transfer, prosecution, or sentencing of a juvenile. The Supreme Court's interpretation of the U.S. Constitution has provided guidance regarding the constitutionality of sentencing juveniles.³²

The Eighth and Fourteenth Amendments of the United States Constitution have been interpreted by the Supreme Court to prohibit sentencing a juvenile to the death penalty.³³ The Eighth Amendment prohibits cruel and unusual punishment and applies to the States through the Due Process Clause of the Fourteenth Amendment.³⁴ In *Roper v. Simmons*, the Court interpreted how the death penalty would be a disproportionate, cruel and unusual punishment if applied to a juvenile.³⁵ The death penalty's purpose is to promote retribution and deterrence of capital crimes by prospective offenders.³⁶ The Court in *Roper* explained the evolution of its prior decisions regarding the execution of a juvenile offender and how such a punishment would "offend civilized standards of decency."³⁷ The Court stated that the last execution of a juvenile offender under the age of 16 was performed in 1948 to demonstrate the rarity and the antiquated nature of the practice.³⁸ Furthermore, the Court opined, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."³⁹ The Court reasoned that "a lack of maturity" and an "underdeveloped sense of responsibility found in youth more often than in adults" are acceptable rationales for a juvenile's criminal behavior.⁴⁰ Furthermore, the Court reasoned that juveniles are more vulnerable or susceptible to peer pressure⁴¹, have less experience and control over their own environment,⁴²

29. 18 U.S.C. § 5032 (2016).

30. *Under Seal*, 819 F.3d at 718.

31. *Id.*

32. *Id.* at 719 (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 723 (2016)).

33. *Under Seal*, 819 F.3d at 719 (citing *Roper v. Simmons*, 543 U.S. 551 (2005)).

34. *Roper*, 543 U.S. at 560.

35. *Roper*, 543 U.S. at 560-61 (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

36. *Roper*, 543 U.S. at 571 (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

37. *Id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

38. *Id.* at 561 (citing *Thompson*, 487 U.S. at 832-833).

39. *Id.* at 561 (quoting *Thompson*, 487 U.S. at 835).

40. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 359-362 (1993)).

41. *Id.* at 568 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982)).

42. *Id.* at 568; see Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014

and their character is not as well formed compared to an adult.⁴³ The Court concluded that these characteristics compared to an adult offender substantiated an Eighth Amendment prohibition of the death penalty on a juvenile under the age of 18.⁴⁴

The Court also held that the Eighth Amendment prohibited juvenile offenders who commit murder from being sentenced to mandatory life without parole.⁴⁵ *Miller v. Alabama* examined how a mandatory life sentencing scheme for a juvenile is considered “cruel and unusual punishment” under the Eighth Amendment. In this case, a 14-year-old was charged with capital felony murder in the course of arson.⁴⁶ The lower court granted removal of the defendant from juvenile status to being sentenced as an adult.⁴⁷ The charged crime carried a mandatory minimum punishment of life without parole.⁴⁸ The lower court held that life without parole was “not overly harsh when compared to the crime” and the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment.⁴⁹

The Court decided in *Graham v. Florida* that life without parole violates the Eighth Amendment when imposed on juvenile non-homicide offenders.⁵⁰ The Court in *Miller* examined the precedent established regarding categorical bans on sentencing practices based on the culpability of the juvenile and the severity of the penalty.⁵¹ The Court has established in *Roper* and in *Graham* that children are constitutionally different from adults for the purposes of sentencing.⁵² Juveniles are deemed by the Court to have a diminished culpability and greater prospects for reformation, making them “less deserving of the most severe punishments.”⁵³ However, *Miller* did limit this theory by asserting that a juvenile offender whose crimes reflect irreparable corruption may be sentenced to life without parole.⁵⁴ The Court in *Miller* further extended the rationale provided in *Graham* to forbid a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.⁵⁵ It was held that such a scheme poses a great risk of

(2003) (“As legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.”).

43. *Roper*, 543 U.S. at 570; see generally E. Erikson, *Identity: Youth and Crisis* (1968).

44. *Roper*, 543 U.S. at 571.

45. *Under Seal*, 819 F.3d at 718 (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012)).

46. *Miller*, 132 S. Ct. at 2461.

47. *Id.* at 2462.

48. *Id.* at 2463.

49. *Id.*

50. *Id.* (citing *Graham v. Florida*, 560 U.S. 48 (2010)).

51. *Id.* at 2463 (citing *Graham*, 560 U.S. at 61).

52. *Id.* at 2464.

53. *Id.*

54. *Under Seal*, 819 F.3d at 719.

55. *Miller*, 132 S. Ct. at 2469.

disproportionate punishment when youth and its embodied characteristics are disregarded.⁵⁶

The Court in *Montgomery v. Louisiana* gave the *Miller* holding a retroactive effect.⁵⁷ A retroactive effect would permit juvenile offenders sentenced, before the *Miller* decision, to life imprisonment without parole an opportunity to be reheard under a collateral review (an attack on the judgment).⁵⁸ The Court reasoned that the retroactive effect does not require a “relitigation” of sentences or convictions in every case where a juvenile offender received mandatory life without parole.⁵⁹ The Government would have to find a remedy that would not force a juvenile whose crimes reflect only transient immaturity, and who have since matured, to serve a disproportionate sentence in violation of the Eighth Amendment.⁶⁰

In *Under Seal*, the Government argued to sever or excise the unconstitutional portions of the statute in question, so the remaining portions may be applied.⁶¹ When a court determines that a statute contains unconstitutional provisions, it has the authority to “try to limit the solution to the problem” by considering the possibility of “sever[ing] its problematic portions while leaving the remainder intact.”⁶² The purpose of the principle of severance is to eliminate unconstitutional provisions of the current statute without completely invalidating the entire statute.⁶³ The Supreme Court articulated, “[u]nless it is evident that the Legislature would have not enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”⁶⁴ The objective is to ensure that the severance of the statute does not impact the congressional intent and remains “fully operative as law.”⁶⁵ However, if the “balance of the legislation is incapable of functioning independently,” then severance is not permissible.⁶⁶ Furthermore, a void in the statutory language cannot be filled by looking to other offenses.⁶⁷

56. *Id.*

57. *Montgomery*, 136 S. Ct. at 736.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Under Seal*, 819 F.3d at 719.

62. *Id.* at 721 (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006)).

63. *Id.*, see also *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 438 (4th Cir. 2007).

64. *Under Seal*, 819 F.3d at 722 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

65. *Under Seal*, 819 F.3d at 722 (quoting *Brock*, 480 U.S. at 684).

66. *Id.* (quoting *Brock*, 480 U.S. at 685).

67. *Under Seal*, 819 F.3d at 725.

The Government in *Under Seal* proposes a penalty provision that would differ from the intent of the Legislature which would counter the Constitution's guarantee of due process. A person must receive fair notice of the conduct that will subject him to punishment and the severity of the penalty the government may impose.⁶⁸ The right to a fair warning may be unlawfully omitted by an "unforeseeable and retroactive" judicial severability analysis resulting from the excision of one penalty provision for the application of another.⁶⁹

Roper, Graham, Miller, and Montgomery cohesively reflect the evolution of criminal juvenile sentencing. A juvenile cannot be sentenced to death or a life sentence without parole because it would violate the Eighth Amendment of the Constitution as "cruel and unusual punishment."⁷⁰ The principle of severability was a matter of first impression for the court in *Under Seal*.⁷¹ The decision provides another consideration that needs to be made when sentencing a juvenile offender for a heinous crime.

The appellate court in this matter appropriately followed the Court's legislative history of juvenile sentencing. The court correctly prohibited the principle of severance when the action will ultimately change or alter the legislative intent or primary purpose of the statute. If the Court permitted the application of severance or excision, as proposed by the Government in this matter, it would endow the judiciary with a power of creating laws exclusively provided to the legislative branch of government. Furthermore, if the judiciary is provided this type of power, statutory law could be modified by prosecutors throughout the county to successfully convict and sentence to a desired result. Lastly, the Court must address the issue of retroactivity created by the *Miller* decision.

IV. ANALYSIS

A. *Judiciary Authority Limitations*

Laws are created and amended by Congress and are interpreted by the judiciary to enforce the congressional intent of the statute. The powers of the branches of government are clearly defined and divided. The Government, in *Under Seal*, proposed to sever unconstitutional provisions of a statute to permit a constitutional punishment of an unrelated crime. The

68. *Id.* at 726 (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996)).

69. *Id.* at 727; see generally *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) ("Deprivation of the right to fair warning . . . can result . . . from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face . . .").

70. See generally *Roper*, 543 U.S. at 571; *Graham*, 560 U.S. at 48; *Miller*, 132 S. Ct. at 2460; and *Montgomery*, 136 S. Ct. at 736.

71. *Under Seal*, 819 F.3d at 721.

Court properly denied this application because it would extend judiciary discretion beyond its power into authority exclusively granted to the legislature. The judiciary cannot create new laws or modify them in manner that would alter or invalidate the law of the legislature. Limiting the breadth of severability and its overall application in *Under Seal* ensures prosecutors will remain within due bounds of the judiciary power regarding statutory interpretation.

B. Preventing an Abuse of Government Prosecutor Power

The goal of every prosecutor in the country is to put guilty criminals in prison. The prosecution applies statutory law to facts to ensure a judicial conviction and subsequently sentence the violating offender to an applicable punishment. A prosecutor should not be given the ability to sever unconstitutional punishment provisions within a statutory law only to assert punishments of an inapplicable crime within the same law. This action would not only be a miscarriage of justice but it would create a disparate impact on sentencing throughout the country. This type of action would promote higher conviction rates and infringe on the legislative purpose the statute was created to serve. The appellate court in *Under Seal* appropriately limited the Government's ability to sever the applicable statute in a way that would punish a criminal juvenile offender outside of the congressional intent.

C. Retroactivity of Miller

The *Miller* decision created a retroactivity of sentencing on collateral review that will have future implications on the decisions prior to *Miller*. The appellate court in *Under Seal* did not completely address the implications of the retroactivity of *Miller* due to its inapplicability within the facts of the case. However, the *Under Seal* decision further defines the protections afforded to criminal juvenile offenders sentenced to death or mandatory life without parole. Any criminal juvenile offenders, sentenced prior to the *Miller* decision, to death or life without parole will seek collateral review of their judgment in reliance to the rationale in *Under Seal*. The issue of retroactive remedies for now unconstitutional sentencing of juvenile offenders, if left in its current state, will become problematic for lower courts.

The Supreme Court must now ensure that lower courts apply the substantive rule provided in *Miller* when resentencing matters of retroactivity. The decision in *Miller* clearly established that a juvenile cannot be sentenced to life imprisonment without parole. The Court's holding requires consideration of defendant's age and whether the crime reflects transient immaturity

to determine if sentencing is within the protection of the Eighth Amendment. Former juvenile offenders should have the right to have information that was unavailable at the initial hearing brought before the court. The Supreme Court of Louisiana must release the now 70-year-old Henry Montgomery, who was sentenced at 17-years-old to an automatic life without parole. The Court has an opportunity to free an individual who has served a sentence that extended beyond the promotion of retribution and deterrence of capital crimes by juvenile offenders. States have a responsibility to effectively demonstrate the retroactive impact of *Miller* by reducing sentences or providing opportunities for parole. Mr. Montgomery and individuals similarly situated are owed a debt by our United States Government: to be provided the Constitutional protection they are rightly entitled.

V. CONCLUSION

The *Under Seal* decision further defines the sentencing of juvenile offenders. *Under Seal* establishes the parameters for the utilization of severance and excision when eliminating unconstitutional provisions of a statute. *Under Seal* can be used to further support retroactive resentencing or the inclusion of parole provisions to a life sentence. The decision represents another case that solidifies the Constitutional protections provided to juvenile offenders from “cruel and unusual punishments” under the Eighth Amendment.