



## AlaFile E-Notice

01-CC-1983-003916.00

Judge: TERESA T PULLIAM

To: JAFFE RICHARD STEPHEN  
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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT CRIMINAL COURT OF JEFFERSON COUNTY,  
ALABAMA

STATE OF ALABAMA V. KINDER RICHARD DAVID  
01-CC-1983-003916.00

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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA  
BIRMINGHAM DIVISION**

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1983-003916.00
	)	
KINDER RICHARD DAVID	)	
Defendant.	)	

**ORDER**

**Procedural History**

The Defendant filed a Petition for Relief from Judgment pursuant to Rule 32, asserting that his mandatory Life Without Parole (LWOP) sentence for the commission and conviction of a capital offense when he was 17 years old in June of 1984 was unconstitutional under the United State's Supreme Court's decision in Miller v. Alabama, 132 S. Ct. 2455 (2012). In response, the State filed a Motion to Dismiss, asserting that Miller was not retroactive to cases on collateral review. This Court subsequently granted a joint motion to stay these proceedings, pending the resolution of the retroactive question to be decided by the U. S. Supreme Court. On January 25, 2016 , the Supreme Court of the United States held in Montgomery v. Louisiana, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016), that "Miller announced a substantive rule that is retroactive in cases on collateral review." Id. at \*11. Accordingly, "Miller's prohibition on mandatory life without parole for juvenile offenders " is now applicable to all cases such as the Petitioners', wherein a juvenile was sentenced to mandatory life without parole, regardless of when the conviction became final. Id. The State of Alabama, by and through the Attorney General agreed and so stipulated that Rule 32 relief was due to be granted in this case, given the unconstitutional sentence of mandatory LWOP for this juvenile defendant. Therefore, this Court granted the Rule 32

relief and set the unconstitutional LWOP sentence aside on February 9, 2016.

Following the appointment of qualified capital counsel and the required mitigation and discovery process, a re-sentencing hearing took place on October 25, 2016. Prior to the hearing, a new and updated pre-sentence investigation was ordered and report was submitted to the Court. ADA Joe Roberts was present with the victim's family for the State, and attorneys Richard Jaffe and Don Colee were present with the Defendant. The State presented the transcript of the original trial and sentencing proceedings which were marked and admitted into evidence, along with all the original trial exhibits admitted into evidence by Judge James Hard, the trial judge in this case. ADA Joe Roberts called the following witnesses: 1. Mr. Chuck Leonard, 2. Ms. Susan Harris, 3. Mr. Marty Burke, and 4. Dr. Anthony Bedsole. The Defendant's Exhibits were admitted into evidence, and the Defendant called the following witnesses: 1. Sgt. Theresa Widener, 2. Mr. Gregory Moore, 3. Ms. Karean Helton, 4. Mr. Lyle Headrick, 5. Ms. Cindy Tucker, 6. Ms. Hazel Kinder, and 7. Ms. Trina Kinder.

This Court was not the trial judge in this case, however, has now had the opportunity to read all transcripts of the proceedings in this case and relevant portions of the Co-Defendant's proceedings as well. The Court has reviewed all the physical evidence presented in this case and all exhibits, which have been admitted for purposes of this re-sentencing hearing, and those which were considered by Judge James Hard at the time of the original sentence. The Court has reviewed the entire case file, including all previous motions, rulings, exhibits and orders in this case. This Court considers all of the above as relevant and significant evidence for purpose of sentencing here.

### **Application of the Law**

The Alabama Supreme Court in its' holding in Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013), has mandated the sentencing court consider fourteen specific factors when re-sentencing a defendant, whose LWOP sentence has been set aside as unconstitutional under Miller. They are as follows:" 1. the juvenile's chronological age at the time of the offense, and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; 2. the juvenile's

diminished culpability; 3. the circumstances of the offense; 4. the extent of the juvenile's participation in the crime; 5. the juvenile's family , home and neighborhood environment; 6. the juvenile's emotional maturity and development; 7. whether familial and /or peer pressure affected the juvenile; 8. the juvenile's past exposure to violence; 9. the juvenile's drug and alcohol history; 10. the juvenile's ability to deal with the police; 11. the juvenile's capacity to assist his or her attorney; 12. the juvenile's mental -health history; 13. the juvenile's potential for rehabilitation; 14. and any other relevant factor related to the juvenile's youth." Ex parte Henderson, at 1284.

This Court must also consider the United States Supreme Court case of Montgomery v. Louisiana, No. 14-280, 2016 WL280758 ( U.S. Jan. 25, 2016) wherein, the court held that Miller was to be applied retroactively to cases such as this one. According to the Court in Montgomery, " Miller did ( in essence) bar life without parole, ... for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility". Montgomery at 17.

### **Findings of Fact**

In light of the case law cited by the Alabama Supreme Court in Henderson, the Court makes the following findings concerning the fourteen "Henderson" factors this Court must consider in making this re-sentencing determination:

1. The Defendant was 17 years of age at the time of this offense. Based upon all of the evidence presented about this Defendant's background and his environment at the time of the offense, this Court finds no evidence that he did not possess " the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences " ; all attributable characteristics of juveniles according to the decision in Henderson. The co-defendant shooter, Duren, was 21 years old, an adult.
2. The Defendant 's age of 17 at the time of the offense reflects a " diminished culpability ". In Miller, the U. S. Supreme Court discussed this "diminished culpability" of juvenile offenders as follows \_"... according to *Roper, Graham, and* this decision

about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty (LWOP) will be uncommon". Miller ,132 S. Ct. at 2469.

3-4. The Court gives great weight , in consideration of the circumstances of the offense, and the extent of the juvenile's participation in the crime, to the findings made by the trial /sentencing judge in his original sentencing order. On 9-21-84 Judge Hard made the following findings:

"THE COURT:...The evidence is uncontroverted that Duren was the actual killer; Kinder being seated in the vehicle moments before and during the shooting. I believe I stated earlier that in preparation for this occasion, I have reviewed my notes from Kinder's trial, I have listened to my reporter's tapes of Mr. Leonard's testimony and Kinder's testimony. I have reviewed portions of Duren's transcript provided to me by Judge Garrett. I have reviewed the records from Family Court that were referred to today about Kinder. I have read and studied recent Alabama appellate cases dealing with accomplice liability and death cases. And, of course, I have heard the testimony today. It is my conclusion that for purposes of punishment only, that Duren is the more culpable killer than Kinder. That though Duren so richly deserves to die in the electric chair, Kinder, in my judgment does not. I hold that the mitigating circumstances, no significant history of criminal activity, age, Kinder's role as the accomplice versus being the actual killer, outweigh the circumstances of the capital offense being committed during the course of the robbery-kidnapping.

Vol. VII, R. 1093-95.

While the Defendant Kinder clearly and admittedly played an active role in the robbery/kidnapping element of this capital crime, Judge Hard plainly found the Defendant's role to be one of an accomplice ONLY, when it came to the murder component of the capital case. The Defendant has consistently maintained in statements to law enforcement and in testimony at trial that he did not know the Co - Defendant Duren, who shot the victim in this case, was going to shoot either Mr. Leonard or Miss Bedsole. Duren's attorney, Rory Fitzpatrick, in a sworn affidavit actually confirms that his client at all times from approximately 1987 up to the time of his execution, insisted, that "none of the plans were made by Kinder." Duren maintained that he" did not tell Kinder that he was going to shoot the victims. Instead, he told

Kinder, that he had done so after the fact". Duren told this attorney that Kinder had told him there " was no need to shoot the victims, and that the victims would not be able to identify Duren and himself, that they should leave the victims tied up in their car." ( See Fitzpatrick Affidavit- # 5 and # 8)

Not only did Judge Hard believe the Defendant's testimony at the trial concerning his role in the commission of the offense, but the lead investigator, Detective Eddie White, testified that he too, believed that Defendant Kinder was telling the truth concerning his participation in the crime. ( R. 623). This Court also gives great weight to the affidavit of Circuit Judge Sandra Storm, who presided over the transfer hearing in the Family Court and heard the evidence in this case at the time. She found that "Kinder's role was minor in the homicide, in the sense that his role was mainly as an accomplice to David Duren, who was the perpetrator of the homicide. She found Kinder to be a "follower and not a leader." ( See Affidavit of Sandra Storm)

Though there was some testimony at the re-sentencing hearing here that Defendant Kinder was giving orders to Defendant Duren during the commission of the offense, in a Probation Memo of Officer Frank Whatley submitted to Judge Hard thirty two years ago, he reported a contrary account of the evidence. According to Officer Whatley, after he had reviewed both the transcript of the transfer hearing at Family Court, and the transcript of the preliminary hearing in this case , he found no testimonial evidence that Kinder was giving orders to Duren.( See Probation Memo dated 9-19-84 to Judge Hard in trial record at 1192) In fact, before Judge Hard made his findings in his final sentencing order, he stated in his order that he went back and listened again to the testimony at trial of Mr. Leonard and Mr. Kinder. ( See page 4 of this order exert) Again, Judge Hard heard all the testimony at the trial and considered all of the testimony mentioned here, (except the affidavits) and found ,for sentencing purposes, Defendant Kinder to have played the minor role in the homicide, between the two co-defendants. This finding is important, given the analysis in the Montgomery, Miller, and Henderson cases.

5. This Court adopts the findings of Judge Hard, noted in his sentencing order, and considers all court documents concerning the Defendant's family, home and

neighborhood environment at the time of the offense. This Court also considers the testimony at the re-sentencing hearing of the Defendant's mother, Hazel Kinder, his sister, Karen Helton, and the letter of the Defendant's concerning his life, admitted as an exhibit. Also relevant here is the original probation investigation report, which includes a report from the Defendant 's juvenile probation officer and a report from Dr. Shealy, who testified at trial. The circumstances of the childhood and adolescence of this Defendant certainly led to an unstable family life. Until the age of 13, the Defendant traveled across the country, living in tents with his mother ,six older siblings and a stepfather, who worked for a carnival.

The Defendant never knew his real father or had a male role model in his life. His mother was an inconsistent source of discipline and guidance. He was sent to DYS to pay restitution for vandalism at a school at the age of 16, where he lived until approximately five weeks prior to the commission of this offense. He never finished the tenth grade, and according to Dr. Shealy, scored at the low end of the average range of intelligence. Dr. Shealy also found him to be significantly depressed, with anxiety and " weak identity which has resulted in his idealization of older male role models." ( See original Probation Report at 1196 in record.)

At the time of the offense, the Defendant was living at the home of a girl from his work at Ms. Weiners in Birmingham, so he didn't have to take the bus everyday from Childersburg, where his family lived. It was during this time that he met the co-defendant Duren, who was 21 years old. Duren moved into the same place that Kinder was living , and they began smoking marijuana together. Kinder then stopped going to work. ( See Defendant's letter exhibit) Prior to this association with Duren, Judy Goodwin, who was the Defendant's Probation Officer at Family Court, said the Defendant was one of the "hardest working kids that they had ever had in her eight years of service with the department.( See original Probation Report at R-1198) She further stated that the Defendant was one of the" more passive young men that she had ever known and couldn't visualize him ever willingly harming anybody." Id

Both Judge Hard and Judge Storm found the Defendant's environment and family background to be a mitigating consideration in this case. "Kinder was a person of low self esteem, who grew up impoverished with no father or male role model in his life and

was a follower, not a leader." ( Judge Storm's Affidavit)

6. The Defendant's emotional maturity and development must also be considered by this court under Henderson. That is precisely what Judge Hard did in his original sentencing order in 1984. "Not only is chronological age a mitigation factor to be considered but "also must the background and mental and emotional development of a youthful defendant be duly considered in sentencing". ( Sentencing order, citing Eddings v. Oklahoma, 102 SCt. 869( 1982) in record at 1222) All of the previous findings apply here as well. Judge Hard considered the Defendant's background and mental and emotional maturity and development to be a mitigating circumstance, as did Judge Storm. Both judges considered the testimony at that time of his former probation officer from Family Court, Judy Goodwin, who described Kinder as being" one of the more passive young men that she had ever known and she couldn't visualize him ever willingly harming anybody. " ( See Probation Report in record at 1198)

Again, Kinder is described as a follower and not a leader. There is no need to repeat the findings made in Roper and Graham, concerning the mental and emotional underdevelopment of a juvenile offender, but Miller is founded upon the same premise, that " children are constitutionally different from adults for purposes of sentencing. " (Montgomery at 15)

7. Whether familial and/or peer pressure affected the juvenile is also a factor for this Court to consider in re-sentencing. Again, this Court looks to the record of the facts at the time. What was considered by Judge Hard from the testimony of witnesses who testified at that time of trial and sentencing? All the evidence from the exhibits he considered at the time of the original sentence was imposed are also pertinent to this factor. Because of the lack of a male role model in the Defendant's life, his low self esteem and description as passive and a follower, all evidence mentioned above, there is no evidence to contradict the Defendant's statement that he was fixated on older males. It is clear from the evidence presented in the probation officer's background investigation, that Kinder's juvenile offenses were committed with peers. Not until he was released from DYS custody, without guidance from family or services from

probation, did he begin to abuse drugs with a new set of peers, including the 21 year old co-defendant Duren. According to Kinder, and from the beginning, he claimed that it was the co-defendant's idea to rob someone to get money to buy more drugs with. It was only after living away from DYS and family that Kinder lost his job and stayed unemployed, when otherwise, he had always worked and been described as " a good worker" while at the work release in Roebuck. ( Probation Report in record at 1198)

One of the differences between adults and juveniles set forth in Roper, is that children are "vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime -producing settings". (Id at 569-570) While the Defendant here was certainly capable of walking away from the environment he found himself living in at that time, this Court does find this a factor to be considered here.

8. The Court does not find any evidence of violence in Kinder's background applicable here. Judge Hard considered this to be a mitigating factor in his sentencing decision. The Court does note, however, Kinder's assertions in his letter of some limited emotional and physical abuse in the home by his mother and step father and a violent relationship with his older brother in which he claims he was sexually victimized. This relationship, or lack of a positive, loving relationship with his brother, is certainly consistent with his growing up without any guidance from a positive male role model. His lack of a violent record or background is also consistent with his original version of his actions and Duren's version later made in statements to his attorney, that the Defendant did not intend or know that anyone was going to get hurt. Detective Eddie White, the lead detective in this case, also believed Kinder's version of the facts, ( as opposed to Duren's version when Duren's case was pending, who put the blame on Kinder) and testified under oath to this opinion at the preliminary hearing. The Court also finds his probation officer, Judy Goodwin 's statements to the Probation Officer in preparation of his report to Judge Hard to be significant. She called him "one of the more passive young men she has ever known" and couldn't ever "visualize him ever willingly harming anybody". ( R. 1198)

9. There is no evidence of a drug or alcohol history of the Defendant until after he was released from DYS, and work release and moved in with a female from work, her husband and the co-defendant, Duren. The Defendant stated to the Probation Officer that he was smoking a lot of marijuana during this time and that, as a result, he lost his job, and did little else. A neighbor who lived across from the apartment where Kinder and Duren were living, confirmed that "all the people in Apt. 9 were standing or sitting out front smoking pot on the day this offense was committed".( See Probation Report at record on 1197) The Defendant does not use drug usage as an excuse for his actions on the night of the crime, but does say he was "slightly under the influence of drugs and alcohol."( See Report at 1195)

10. The Defendant cooperated fully with the police from his arrest forward. He confessed to the robbery/kidnapping component of the capital offense from the beginning. Again, when asked at the preliminary hearing under oath, " Q -Was his appearance one of sincerity in the sense of wanting to tell you everything he could as best he could? Detective Eddie White answered " I think he was telling the truth at that point, yes sir. Detective White also testified that there were three detectives in the room at the time with this 17 year old juvenile, this was the only point he had spoken to him, and that Kinder had spoken in a soft voice. ( Record at 623) The Defendant testified at trial to the same version of the facts given to Detective White. Judge Hard obviously considered this in his finding as a mitigating circumstance that the Defendant acted as an accomplice only, in the murder component of the capital case. Judge Sandra Storm, who heard the evidence presented at the transfer hearing, also called the Defendant a follower, and his role in the homicide to be " minor". ( See Storm Affidavit)

11. The Defendant's ability to assist counsel at trial does not appear to be a factor here. There is no evidence that he was not capable of assisting his attorney. In fact, Mr. Richard Jaffe, who was his trial counsel and one of the attorneys appointed here makes no such claim.

12. The Defendant 's mental health history has previously been addressed in number 5. of this order, however, the Court will readdress this limited evidence here. Dr. Shealy, who testified at the trial, and whose findings were discussed in the probation report, finds no evidence of a mental disease or defect, but severe depression and anxiety. He also found the Defendant to suffer from low self esteem and considered his IQ to be at the low end of the average intelligence scale. The Defendant's alcohol and drug abuse history and on the day of the crime, did not rise to the level to negate a specific intent or of an illness and the Court does not consider it here as evidence of any mental health history.

13. The " juvenile's potential for rehabilitation" is the only Henderson factor that this Court is clearly in a better position to determine, than was Judge Hard at the time he imposed the original sentence in this case. This Court has reviewed over thirty plus years of Department of Corrections records of the Defendant and finds only one infraction of "working outside the gate". Otherwise the Defendant's record is disciplinary free. The Court has also reviewed thirty -five certificates of achievement in a broad range of self help classes the Defendant has completed while in DOC. While in DOC the Defendant has obtained his G.E.D, and teaches other inmates who are studying for the G.E.D.,as well. He achieved a Trade School Diploma in furniture refinishing, and graduated from Gadsden State Community College with an A.S. Science Degree, while maintaining a G.P.A of 3.5. In 1994 his progress towards rehabilitation was described by the supervisors of New Outlook Therapeutic Community as follows:

"We are truly encouraged by Mr. Kinder's sincere dedication toward self-improvement and positive change. We believe Mr. Kinder will continue to strive for and display in the future, a high level of moral standards. His current sentence is Life Without Parole. However, should that ever change we feel he has gained the skills necessary to lead a drug-free, crime-free, productive life in society should he ever be afforded that opportunity. " ( DOC Certificates admitted as Exhibit B)

Other DOC personnel testified in Court at the re-sentencing hearing that the Defendant has continued to progress in his rehabilitation from 1994 to present day. Sgt. Theresa Widner was a guard at St. Clair Correctional Facility, where

the Defendant is an inmate from 1996-2005. During that time she never had any problems with the Defendant, and remembers him to have earned placement in the faith based Honors Dorm. Placement in the Honors Dorm is determined through a screening process by the Chaplain of the prison.

Gregory Moore, retired from DOC after 32 years and placed at the Honor Dorm, testified that the Defendant " basically always obeyed the rules and was mannerable. " He never had an incident where " he had to correct him or do any disciplinary action against him". ( Unofficial transcript by court reporter) He testified that the Honor Dorm was " self governed", and that the cells were kept open. The Defendant kept his room " neat and tidy". Mr. Moore also worked in the Alabama Correction Industries office within the prison with the Defendant. The Defendant's job of clerk included doing the inmate payroll, typing, filing and record keeping. Mr. Moore testified that the Defendant made application with the Warden of St. Clair, who made the decision to place him in the ACI office.

Cynthia Tucker also worked with the Defendant in ACI, and testified that she has worked closely in the same office with the Defendant for over two years. She called him a " good co-worker and progressive thinker". She also described him as " even keeled to me, even-tempered, ... humble, ... seems very honest". She admitted that she had a preconceived notion that "prisoners" all found " jail house religion" , but in the Defendant's case, she would have to rescind that opinion. She testified that " he is one that I believe, believes." She has observed him reading his Bible whenever there is any down time in the office. She also described him as "calm" and fair, and "looked up to by the other inmates." (Unofficial transcript). She believes his skills in the accounts receivable area would transfer to the private sector, as does Mr. Lyle Hedrick, who also testified in the re-sentencing hearing.

Mr. Hedrick is employed by Alabama Correctional Industries and is actually, the Defendant's supervisor. Mr. Hedrick testified that the Defendant began working in the ACI office with him in 1998. For almost twenty years, Mr. Hedrick has worked in the same office with the Defendant on a daily basis, and describes him as a diligent and excellent worker, with a positive attitude. He has never had

any problems with the Defendant and said he was " a very good inmate." ( Unofficial transcript)

Finally, Mr. Johnny Rogers testified by videotape as the Defendant's former refinishing instructor from Gadsden State. Mr. Rogers is now retired and 83 years old. He taught this class at the prison for many years. Not only did the Defendant graduate from his program, but practiced as his aide in class for years. According to Mr. Rogers, the Defendant stood out from all the students he ever had, which were many. Mr. Rogers described the Defendant as a kid who was like a "whipped dog", and a "follower," when he first arrived. He grew, however, in Mr. Roger's eye to be a trusted assistant in charge of taking care of dangerous tools. " He never became a product of the environment" , according to Mr. Rogers. He testified that the Defendant had a "true Christian way" about him. He completed his testimony at the re-sentencing hearing by stating that he would have no hesitation in giving the Defendant his address, would love having him as a neighbor, and would love to go to church with him. ( Unofficial transcript)

In summary, the evidence offered to prove the Defendant's " potential for rehabilitation " is overwhelming, with no evidence of the Defendant being "permanently incorrigible".

14. " All other evidence relevant to the juvenile's youth" is covered in factors #1-#13 factors here.

### **Conclusion**

The Court has considered all the fourteen factors set forth in Ex parte Henderson by the Alabama Supreme Court and applied the law as set forth in Henderson, and the law as set forth by the United States Supreme Court in both Miller and Montgomery. While all the findings made above concerning the Henderson factors are significant to this Court, the findings made over thirty years ago by the trial judge, that are listed in Judge Hard's original sentencing

order as mitigating factors, are extremely important in this Court's decision as well. "1. No significant history of criminal activity, 2. Age of defendant at the time of the commission of the crime, and 3. Kinder's role as an accomplice as opposed to being the actual killer." (R.1222)

The evidence presented relevant to the Defendant's " potential for rehabilitation " is also particularly significant under the law set forth in Henderson, Montgomery and Miller. This law now mandates that this Court consider it here. There is uncontradicted evidence of over thirty years of effort by the Defendant towards rehabilitation in this case, with no reason for the Defendant to have believed his effort would make any difference in his sentence of LWOP. The Court, therefore, finds that there is no evidence that this Defendant is "permanently incorrigible" as Montgomery emphasized, is required proven, before this Court should impose a sentence of Life Without Parole in this juvenile capital case. To the contrary, a " potential for rehabilitation" has been clearly proven by the Defendant here, with no evidence presented otherwise. This Court must, therefore, follow the present law and sentence the Defendant to a sentence of LIFE. Mr. Richard Jaffe, Mr. Don Colee and ADA Joe Roberts were consulted, and agreed to the Court issuing this sentence by written order without appearances at a court setting. Clerk is to forward this sentencing order to the Alabama Department of Corrections with an amended transcript in this case.

Done this the 31st day of July, 2017.

**/s/ TERESA T PULLIAM**  
**CIRCUIT JUDGE**

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