

Brian Diggs #248964
Broad River Correctional Inst. MU-223-B
4460 Broad River Rd.
Columbia, SC 29210

Daniel E Shearouse
Clerk of the South Carolina
Supreme Court
P.O. Box 11330
Columbia, SC 29211
December, 9 2014

RECEIVED

DEC 12 2014

S.C. SUPREME COURT

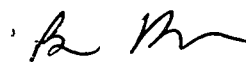
Re: Diggs v. State Case No. 2013-000285
Motion for Rehearing

Dear Mr. Shearouse:

On December 8, 2014 I submitted to you a quasi/motion address for Chief Justice Jean Toal. I am now submitting a formal motion for rehearing in support. Likewise I have provide the State with a copy and Certificate of Service along with ~~my~~ Appellate Defense

Please note this motion in your record for filing to the Supreme Court
Thank You,

With Best Regards,



Brian Diggs

cc: Appellate Defense
State Respondent

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lancaster County
Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-000285

BRIAN A. DIGGS,

Petitioner,

VS.

THE STATE

Respondent,

PETITION FOR REHEARING

Brian A. Diggs #248964
Broad River Correctional Institution
4460 Broad River Rd.
Columbia, SC 29210

PETITIONER

Petitioner motions this court seeking a Petition for Rehearing on points overlooked and misapprehended by the Court.

I

A Lancaster County grand jury indicted petitioner for murder (1995-GS-29-0189) and attempted armed robbery (1995-GS-29-0191) that were committed May 16, 1994. App. 153-156. On the date of the crime, petitioner was barely seventeen years old. App. 153-156. Petitioner was indicted on February 24, 1995.

Petitioner entered a plea of not guilty. The State sought the death penalty. App. 3. Three years after petitioner was indicted, the set the trial to begin on April 13, 1998. Petitioner was represented by Leon Banks and Jerry Sereer. App. 1. Banks was subsequently disbarred for inappropriate handling funds in capital cases. In re Banks 344 S.C. 17, 542 S.E.2d 721 (2001). John Justice and Douglas Barfield represented the State.

The Honorable Paul E. Short, Jr. was scheduled to try the case. App. 1. On the day the trial was to begin, the solicitor informed the that petitioner wished to accept a plea deal, offered some time back, in exchange for the State to withdraw it's notice of intent to seek the death penalty App 8, 11. 8-15. Judge Short accepted petitioner's plea and sentenced petitioner to life imprisonment for murder pursuant to sec. 16-3-20 (B)(C) (1993) and a consecutive ten years sentence for attempted armed robbery by interpretation of State v. Humphries, 479 S.E.2d 52 App. 44, 1. 16-45, 12.

Petitioner did not appeal. Prior to the instance action, petitioner filed two P.C.R applications App. 118-20. The Honorable Kenneth G. Goode denied petitioner's first application after a evidentiary hearing in 2003. App. 118 In 2009 the Honorable Brook P. Goldsmith denied

petitioner's second application without an evidentiary hearing.
App. 119-120.

Petitioner delivered his current P.C.R. application to the correction institution's mail room on May 5, 2011. Petitioner's application was returned by the Lancaster County Clerk because it lacked a notarized signature, which petitioner subsequently obtained on May 16, 2011. App. 70-71, App 52. The Lancaster Clerk of Court stamped petitioner's current application as "filed" on June 7, 2011. ~~On December 20, 2012~~

On July 10, 2012 The Honorable Brooke, P. Goldsmith appointed Mrs. Franklin-Best to represent the Applicant in this matter. On November 19th 2012 Attorney Franklin-Best submitted a Amended Application For Post-Conviction Relief pursuant to the retroactive effect of Miller v. Alabama 132 S.Ct. 2455, 2463 (June 25, 2012). On December 20, 2012, Judge Goldsmith denied petitioner application. App 130. On January 31, 2013, Judge Goldsmith denied petitioner Rule 59(e) motion. App. 151. The P.C.R. court did not hold a hearing on petitioner's claims.

Argument

The P. C. R. court erred in summarily dismissing petitioner's p.c.r. application; as successive and barred by the one year statute of limitations, in the wake of Miller v. Alabama, Aiken v. Byars, Graham v. Florida Roper v. Simmons individualized sentencing requirements; whereas, petitioner was erroneously sentenced pursuant to the capital sentencing statute of S.C Code sec. 16-3-20 (B)(c) (1993) after the State withdraw its notice of intent to seek the death penalty; moreover, dismissing petitioner's ineffective assistance ^{claim} during sentencing.

The P.C.R. Court was erroneous in holding that petitioner's successive and barred by the one-year statute of limitation in direct opposition to the holding in Aiken v. Byars 2014 WL 5836918 and Miller v. Alabama 132 Sct. 2455 (2012). Petitioner's application was timely amended by Attorney Franklin-Best on November 19th 2012.

This court in Aiken v. Byars held that Miller v. Alabama establishes a new substantive constitutional rule and is retroactive on collateral review which excluded certain class of defendants juveniles from specific punishment life without absent individualized consideration of youth. The record of the petitioner's plea proceeding reflect that the state had withdraw its notice of intent to seek the death penalty prior to petitioner's guilty plea as part of the deal contrived for petitioner ~~to not~~ to receive a non capital life sentence as described in §16-3-20(A)(1993) which provides a 20 year parole eligibility.

However, the trial court moved against the petitioner pursuant to the capital sentencing death penalty section 16-3-20 (B)(c) (1993) which establishes the procedures for defendant eligible for the death penalty providing a 30 year to life sentence (where the State seeks the death penalty). Petitioner received the max punishment of the 1993 law (outside of death). The trial court failed to make any individualized sentencing

determination; likewise, petitioner's counsel failed to object or to secure or provide any mitigating evidence for petitioner's sentencing.

This court held that Miller does more than bar mandatory life sentencing schemes for juveniles, it establish an affirmative requirement that court fully explore the impact of the defendant's juvenility on the sentence rendered. Aiken

The petitioner's sentence as described in the State's Return misleads this court to believe that petitioner is serving a sentence pursuant to S.C. Code sec. 16-3-20(A) (1993) 'when this is not the case'. Moreover, the State misleads this court to believe that sec. 16-3-20(B)(C) applies to non-capital murder offense. The essence and fundamental reasoning of Reper, Graham, Miller, and Aiken is to rectify the due process violations and provide equal protection procedures (retroactively) for juveniles tried and adjudicated pursuant to sentencing scheme that exposed them to adult culpability, death penalty, and life without parole. The petitioner's sentencing procession ^{was} ~~is~~ inundated with ~~the~~ violation mentioned in these Supreme Court rulings.

Assuming arguendo, that Aiken, Miller, Graham and Reper equal protection rights and due process rights only extend to S.L.W.O.P and not juveniles tried and adjudicated (via life in exchange for pleas of guilty in death penalty cases) under pre Reper schemes; petitioner is still entitled to correct parole advice from the court and attorney. Brown v. State 306 S.C. 381, 412 S.E.2d. 399 (1991) (judge's misinformation regarding parole eligibility invalidated voluntary nature of plea).

Ineffective Assistance of Counsel at Sentencing

The P.C.R. court made a hasty generalization ~~is~~ in denying petitioner's claims that counsel was ineffective at the sentencing stage of petitioner's plea.

¹ see page 4 of State return

The petitioner is prepared to show that trial counsel sought no finding at all in connection with either the guilty or sentencing phases of his capital murder trial, ^{and} failed to secure any meaningful mitigating testimony, or social history. State v. Weik Opp. No. 27421 (2014). Counsel was not effective in representing juvenile petitioner who was facing ~~execution~~ ^{execution}. Likewise, petitioner's limited understanding of the criminal justice system and the rules of the institutional actors and his youth inhibited counsel's ability to work effectively with counsel and aid in mitigation and defense. The Curtin Graham indicate that youth have difficulty in weighing long term consequences; a corresponding impulsiveness, and reluctances to trust defense counsel which all can lead to poor decisions.

In conclusion, the prior court erred as it fail to recognize that the U.S. Supreme Court would find petitioner's sentence to be unconstitutional in light of Miller, despite parole eligibility. The Supreme Court recently summarily vacated the Wyoming Supreme Court's decision in Bear Cloud v. State 275 P.3d 317 (2012). Bear Cloud v. Wyoming Sct. 2012 WL 200244 Oct 1, 2012 as the state observed "Bear Cloud did not receive a "life without parole sentence." Despite his parole, the Supreme Court ~~remanded~~ remanded the case for further consideration in light of Miller. In the wake of Aiken petitioner is entitled to a resentencing.

Respectfully submitted,

Brian Drupp

Pro se Petitioner

December 8, 2014

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LANCASTER COUNTY

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2013-000285

BRIAN A. DLGGS,

v.

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion for Rehearing was served upon Respondent by depositing the same in the South Carolina Dept. of Corrections mail room / U.S. mail, postage prepaid, addressed to Attorney for the Respondent Mary Williams, Assistant Attorney General P.O. Box 11549 Columbia, South Carolina, 29211 on this _____ day of December, 2011

SWORN to before me this

~~10th~~ day of December, 2014

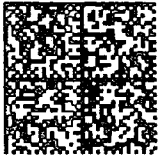
Suzanne A. Frye (L.S.)

Notary Public for South Carolina

My Commission Expires: _____

Notary Public
South Carolina

Brian Digs #248764
Broad River Correctional Inst. Mu. 223-B
4460 Broad River Rd.
Columbia, SC 29212



UNITED STATES POSTAGE
\$01.190
02 1M
0008003534
DEC 10 2014
MAILED FROM ZIP CODE 29210
PRINCE BOWEN

RECEIVED

DEC 10 2014

BRCI
MAILROOM

The South Carolina Supreme Court
Clerk of the Court Daniel F. Shearson
P.O. Box 11330
Columbia, SC 29211

LEGAL