STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Nicholas M. Geer, #227443, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	)	Docket No. 15-ALJ-15-0042-AP **ORDER**

RECEIVED
DEC 07 2015
SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to the appeal filed by Nicholas M. Geer (Appellant) from a decision of the South Carolina Department of Probation, Parole and Pardon Services (Department) denying him parole. Appellant filed this appeal with the Court on August 12, 2015.

FACTUAL/PROCEDURAL HISTORY

Appellant is in the custody of the South Carolina Department of Corrections. He was born on November 13, 1977. On December 30, 1994, he committed the offense of assault and battery with intent to kill (ABWIK). On June 5, 1995, Appellant appeared before a judge and was sentenced for ABWIK under the Youthful Offender Act to a term of imprisonment not to exceed six years, five of which were under probation with the remaining year suspended. On July 14, 1995, Appellant committed murder, in violation of his parole and of which he was convicted and sentenced to life imprisonment on November 14, 1995.[1] On July 13, 2015, the Parole Board (Board) informed Appellant that he was ineligible for parole pursuant to Section 24-21-640 based on his murder conviction and prior ABWIK conviction.[2]

---

[1] Appellant states in his brief that he was seventeen years old at the time of his offense (murder), conviction, and sentence. However, the Record reflects that Appellant was eighteen at the time of his conviction and sentence, as he was convicted and sentenced the day after this eighteenth birthday. Nevertheless, because it is the date of the offense and not of the conviction that this Court must consider, Appellant's error is immaterial.

[2] Based on the law at the time of Appellant's offense, he would have become eligible for parole following completion of twenty years of his sentence.

FILED
December 1, 2015
SC ADMIN. LAW COURT

On August 12, 2005, Appellant filed his Notice of Appeal with this Court on the grounds that his ineligibility for a crime he committed when he was a juvenile violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution. Appellant cited to *Miller v. Alabama*, – U.S. –, 132 S.Ct. 2455 (2012) to support his position.

JURISDICTION

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003).

DISCUSSION

Appellant argues that the Department erred in rendering him ineligible for parole. Appellant points out that he was sentenced to life imprisonment without any reference to that sentence being without the possibility of parole and did not have a separate hearing to consider the "mitigating hallmark features of youth." Appellant points out that he was seventeen years old at the time his offense was committed. Appellant also asserts that "the Parole Board is under the erroneous presumption that he was sentenced to a life without the possibility of parole." He further asserts that even had he been sentenced to life without the possibility of parole, the United States Supreme Court in *Miller*, *supra* and the South Carolina Supreme Court in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) have held that it is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Article I, Section 15 § of the S.C. Constitution for a defendant who is under the age of eighteen at the time of his or her offense to be sentenced to life imprisonment without the possibility of parole absent an individualized consideration of youth.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Liberty interests protected by the Fourteenth Amendment may arise from the Constitution itself or from an expectation or interest created by state laws or policies. *Id.*; *Hewitt v. Helms*, 459 U.S. 460, 466 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). In *Furtick*, the South Carolina Supreme Court held that "the permanent denial of parole eligibility implicates a [state-created] liberty interest sufficient to require at least minimum due process." 352 S.C. at 598, 576 S.E.2d at 149.

In this case, the sentencing court sentenced Appellant to "life," which, absent evidence to the contrary, this Court must interpret as life with the possibility of parole. The Board, in reviewing Appellant's record prior to a parole hearing, relied upon S.C. Code Ann. § 24-21-640 (Supp. 2014) in concluding that Appellant was ineligible for parole. The Department maintains that same position in its brief. The Department even acknowledges in its brief that "Appellant was not originally sentenced to life without parole, [but] was determined not to be eligible for parole due to his prior record." Section 24-21-640 states in pertinent part: "[t]he board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for prior conviction, for violent crimes as defined in Section 16-1-60." ABWIK is certainly a violent crime as defined in Section 16-1-60 at the time of Appellant's offense, as is his subsequent offense of murder.[3] However, the question here is not the nature of the crimes committed but rather the denial of the possibility of a parole to a person who was a juvenile at the time he committed the prior and subsequent offense without having first taken his youth into consideration.

The U.S. Supreme Court in *Miller* made it clear that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." 132 S.Ct. at 2464. The Court reasoned that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. Thus, though the Court did not "foreclose a sentencer's ability" to impose life without the possibility of parole on a juvenile offender, the Court required that the sentencer "take into account how children are different, and how [or to what extent] those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. Moreover, *Miller* was applied to South Carolina in *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), including the U.S. Supreme Court's definition of juvenile in these types of cases as being anyone under the age of eighteen.[4] The Court in *Aiken* also applied *Miller* retroactively in South Carolina. *Id.* at 540, 765

---

[3] Neither party appears to challenge the fact that it is Appellant's age at the time of the offense, rather than at the time of the conviction, that is pertinent to the sentencing issue in this case. But for the sake of clarity, the Court considers Appellant's age at the time of the offense to be the proper focus in determining whether he was a juvenile for sentencing purposes. *See State v. Green*, 412 S.C. 65, 86, 770 S.E.2d 424, 435 (Ct. App. 2015) (considering appellant's age "**at the time of the prior offense** . . . that led to his prior conviction" in concluding that he was a juvenile at the time of his prior offense).

[4] The Court in *Aiken* essentially abrogated the statutory definition of "juvenile" set forth in S.C. Code Ann. § 63-19-20 (2010) for purposes of cases such as this. *See Aiken*, 410 S.C. at 537 n.1, 765 S.E.2d at 574 n.1.

S.E.2d at 575 ("We conclude *Miller* creates a new, substantive rule and should therefore apply retroactively.").

The Department argues that *Miller* does not apply to the present case, because this case involved a deprivation of Appellant's parole eligibility based upon his own actions via his subsequent violation, pursuant to Section 24-21-640, rather than being based on a ruling by the sentencing court. The Department cites to *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) to support its position. In *Standard*, our Supreme Court held that it is not cruel and unusual punishment to sentence a defendant to life without the possibility of parole utilizing enhanced penalties for a burglary committed when the defendant was a juvenile so long as the defendant was tried and sentenced as an adult for the triggering offense. 351 S.C. at 204, 569 S.E.2d at 328. The Court stated that "an enhanced sentence based upon a prior most serious conviction for a crime which was committed as a juvenile does not offend evolving standards of decency so as to constitute cruel and unusual punishment." *Id.* at 206, 569 S.E.2d at 329 (emphasis omitted). However, the crucial distinction between this case and *Standard* is that Appellant was a juvenile at the time of the prior offense (ABWIK) **and** the triggering offense (murder). Therefore, the rationale underlying the decision in *Standard* is inapposite, as both offenses were committed by a juvenile in this case.[5]

As to the fact that Appellant was deprived of his parole eligibility because of his own actions rather than by the sentencing court is a difference without a distinction. The Court in *Miller* focused on the "**sentencing scheme** that mandates life in prison without possibility of parole for juvenile offenders." *Id.* (emphasis added). The Court's concern was that this precludes the sentencer from taking youth and its attendant characteristics and circumstances into account. In this case, the sentencing scheme was the Board's application of Section 24-21-640 to declare Appellant, who was a juvenile at the time of both his ABWIK and murder offenses, ineligible for parole. Regardless of whether the sentencing court or the statute took away Appellant's parole eligibility, the pertinent fact remains that Appellant's youth and its attendant characteristics and circumstances were not taken into account prior to the deprivation of his parole eligibility, and the

---

[5] The South Carolina Court of Appeals also recognized this distinction in *Green*, 412 S.C. at 86-87, 770 S.E.2d at 436 ("Although *Miller* held that mandatory LWOP sentences for juveniles violate the Eighth Amendment, . . . because Green was not a juvenile at the time he committed the current armed robbery, the policy considerations from *Miller* are inapplicable). The difference between this case and *Standard* and *Green*, though, is that Appellant was a juvenile at the time he committed both the prior offense and the triggering offense, thus implicating *Miller*.

courts have found that such deprivation is cruel and unusual punishment under the U.S. and S.C. Constitutions.

Curiously, the Department acknowledges that the S.C. Supreme Court in *Aiken* "determined that *Miller* can be applied retroactively, not allowing defendants who committed their crimes as juveniles to serve a life sentence without parole." The Department, however, argues that *Aiken* does not apply in this case, because "Appellant was not considered a juvenile when he committed the current offense" and "[h]e is currently doing a life without parole sentence due to his prior criminal actions." The Department reasons that Appellant was not considered a juvenile at the time he committed his offenses because he was seventeen at the age of his offenses. In support of this argument, the Department cites to S.C. Code Ann. § 63-19-20 (Supp. 2014) of the Juvenile Justice Code, which states that "'[c]hild" or 'juvenile' means a person less than seventeen years of age." However, in the first footnote in *Aiken*, the Court explicitly rejected that definition of "juvenile" in favor of the one set forth in *Miller*, which defines juveniles as individuals under the age of eighteen. *See Aiken*, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1. As the Department even concedes, Appellant was seventeen years of age when he committed the prior and current offenses. Therefore, Appellant was a juvenile at the time he committed those offenses.

Finally, the Department argues that "[t]he automatic application of a life without parole sentence had been determined a violation of the eighth amendment [in *Miller*] because it does not consider the character and record of the individual offender or the circumstances of the offense." The Department contends that the character and record of Appellant and the circumstances of his offense are why he is not eligible parole, because he shot two people, killing one, within a period of seven months. The Department is correct that the Court in *Miller* did cite *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (plurality opinion) as an example of a line of precedent requiring consideration of "the characteristics of a defendant and the details of his offense . . . ." *Miller*, 132 S.Ct. at 2458. However, this was only part of "the confluence of . . . two lines of precedent" that led the Court to conclude that mandatory life without parole for juveniles violated the Eighth Amendment. The other line of precedent that the Court examined and blended with the rule cited by the Department considered the "mismatches between the culpability of a class of offenders and the severity of a penalty," juveniles having a "lesser culpability." *Id.* This is why the Court adopted the requirement that a sentencer consider a juvenile offender's "youth and its attendant characteristics, along with the nature of his crime . . . ." *Id.* at

2460. It found that "mandatory life-without-parole sentences on juvenile homicide offenders . . ., by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. The Court's decision "d[id] not categorically bar a penalty for a class of offenders or type of crime" but did "mandate[] . . . that a sentencer follow a certain process – considering an offender's youth and attendant circumstances – before imposing a particular penalty."

In this case, because Appellant's youth was not taken into account before he was deprived of the possibility of parole, the deprivation violated the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.[6]

IT IS THEREFORE ORDERED that the Department's Decision is **REVERSED AND REMANDED** for further findings consistent with this Order.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

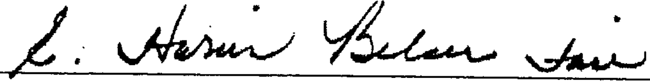
December 1, 2015
Columbia, South Carolina

---

[6] The Court certainly understands the Department's concern that Appellant committed murder within seven months of another violent crime and acknowledges that the General Assembly enacted Section 24-21-640 to **protect** society from especially violent criminals. However, that statute cannot be applied in a way that fails to take Appellant's youth and its attendant characteristics and circumstances into account. The Parole Board in this case could not have taken Appellant's youth and its attendant characteristics and circumstances into account because, by the Department's own admission, Appellant was not considered a juvenile when he committed the triggering offense, which was an error of law.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

December 1, 2015
Columbia, South Carolina

RECEIVED
DEC 07 2015
SC Court of Appeals