STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 15-ALJ-0042-AP

Appellate Case No. 2015-002522

NICHOLAS M. GEER, #227443.....RESPONDENT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES ..... APPELLANT

INITIAL BRIEF OF RESPONDENT

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1. **Did the Court err in reversing the decision of the Appellant denying the Respondent parole eligibility due to his age when he committed these offenses?**

STATEMENT OF THE CASE

On December 30, 1994, the Respondent shot Antonia Richardson in the left thigh. He was later caught, arrested and charged with the offense of assault and battery with intent to kill (ABIK). On June 5, 1995, the Respondent appeared before the Honorable Frank Epps for this offense. Upon the conclusion of this appearance the Respondent was sentenced under the youthful offender act to a term of incarceration not to exceed six years.

On July 14, 1995, the Respondent shot Alex Medina causing his death. He was arrested and was charged with the offense of murder. On November 14, 1995, the Respondent was found guilty by a jury of his peers for the offense of murder. Upon conviction he appeared before the Honorable H. Hall who sentenced the Respondent to a term of incarceration for the remainder of his natural life. At the time the Respondent committed this offense South Carolina law allowed a person sentenced to life for murder parole eligibility upon the service of twenty years.

When the Respondent became eligible for parole the Appellant conducted a mandatory investigation to determine parole eligibility. During this investigation it was discovered that the Appellant was previously convicted of ABIK, an offense classified as violent. Therefore, pursuant to South Carolina law the Appellant was not eligible for parole. On July 13, 2015, the Appellant was notified that due to his prior conviction of an offense classified as violent he is not eligible for parole.

Upon receiving notice of his denial of parole eligibility, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Respondent argued that due to his youth at the time of the commission of these offenses, a sentence of life without parole should be considered cruel and unusual in violation of the eighth amendment of the United States Constitution.

The Appellant argued that the Respondent committed an offense classified as violent, while being previously convicted of a classified violent offense, so he was rightfully denied parole eligibility. It was the opinion of the Appellant that since the Respondent was not initially sentenced to life without parole, but was determined ineligible due to this own actions, this punishment cannot be considered cruel and unusual. There was no Eighth Amendment violation in the denial of his parole eligibility.

Upon receiving briefs from both parties establishing their arguments, the Honorable Ralph King Anderson, III, Chief Administrative Law Judge issued his opinion. Within his decision Judge Anderson determined that the Appellant did violate the Respondent's eighth amendment rights by denying him parole eligibility. Judge Anderson determined that due to the Respondent's age at the time of these offenses, it would be unconstitutional to permanently deny him an opportunity to be awarded parole. The ALC ordered this case be reversed and remanded for further findings consistent with the order.

Upon receiving Judge Anderson's decision the Appellant filed a notice of appeal before this Court. Within this appeal the Appellant alleges that the ALC erred in remanding this case. The Appellant argues that each of the prior cases pertaining to a sentence of a juvenile to a life sentence without the possibility of parole is not identical to the present case. In each of these cases the juvenile was sentenced by the Court to a life sentence without the possibility of parole. No prior actions of the juvenile caused him not to be eligible for parole. In the present case the Respondent committed a previous violent crime, this fact revealed his dangerousness. Therefore, no need existed to have a separate hearing to determine any future dangerousness. The fact he shot someone just months prior to the commission of this murder, revealed his mindset and his danger to society. The denial of parole eligibility was lawful pursuant to South Carolina law. The General

Assembly's intent was for those who commit prior violent crimes not to allowed parole due to their danger to society. The denial of parole followed South Carolina law and was not in violation of the United States Constitution. The Appellant's brief supporting their argument follows.

ARGUMENT

1. **The ALC erred in determining that the Respondent is entitled to parole eligibility due to his age at the time he committed the offense.**

The ALC ruled that since the Respondent was seventeen when he committed the crime of murder requiring him to serve a life sentence without the possibility of parole is cruel and unusual and thereby unconstitutional. The United States constitution specifically states, "excessive bails should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The South Carolina Supreme Court reviews three factors in assessing proportionality of the sentence for Eighth Amendment purposes: (1) the gravity of the offense compared to the harshness of the penalty: (2) sentences imposed on other criminals; and, (3) sentences for the same crime in other jurisdictions. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003). Within his ruling the ALC relied on the South Carolina Supreme Court Case of *Aiken v. Byars,* 410 S.C. 534, 765 S.E.2d 572 (2014), who relied on United States Supreme Court case of *Miller v. Alabama,* 132 S.Ct. 2455 (2012). In these cases the Court ruled that an individual who committed the offense of murder as a juvenile cannot be sentenced to life without the possibility of parole.[1] Within *Aiken* and the opinion of the ALJ, the youth of the Respondent should be considered due to the fact the characteristics of youth, and the way they weaken rationales of punishment can render a life without parole sentence disproportionate. *Miller,* at 2466. In both *Aiken* and *Miller* the Court

[1] In South Carolina a person is considered an adult pass the age of seventeen. S.C. Code Ann. §63-19-20(Supp. 2014); however, in *Aiken,* the Court determined that since *Miller* extends to defendants under eighteen for the purpose of that opinion, juveniles are to be individuals under eighteen. *Aiken,* at 537 n. 1

determined that a life without parole sentence cannot be given until the youth and mental state of the Defendant at the time the crime was committed is considered. The Appellant argues that in each of these cases the original sentence was a life without parole sentence that is not the fact in the present case. The Respondent was denied parole due to his prior actions, which not only follows the will of the General Assembly; but, puts his future dangerousness in consideration due to the prior violence he has previously committed.

The Respondent committed the offense of murder while having a previous conviction on his record for the offense of ABIK, both are classified as violent.[2] Pursuant to South Carolina law, an inmate serving a sentence for a violent offense cannot be allowed to become eligible for parole. Section 24-21-640 of the South Carolina Code of Laws specifically state:

> The [parole] board must not grant, nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.

S.C. Code Ann. §24-21-640 (Supp. 2014).

In determining whether an offender is a subsequent violent offender, the subsequent crime must have been committed after June 3, 1986, and classified as violent at the time of its commission. The prior crime can be committed at any time including after the offense date of the subsequent crime, because the focus is on the date of sentencing not the date of commission.

There are exceptions however, if the subsequent crime was committed between January 1, 1994 and January 12, 1995, the prior crime must have been classified as violent at the time the subsequent crime was committed. With the exception of this window, there exists no ex post facto violation where an inmate is treated as a subsequent violent offender, based in part on a prior

[2] For purposes of definition under South Carolina law, a violent crime includes the offenses of murder (Section 16-3-10);....Assault and Battery with intent to kill (Section 16-3-620) S.C. Code Ann. §16-1-60(Supp. 1986).

conviction which was not defined as violent on the date the prior crime was committed. *Sullivan v. State*, 331 S.C. 479, 504 S.E.2d 110 (1998); see also, *Phillips v. State*, 331 S.C. 482, 504 S.E.2d 111 (1998). This Court also decided that a prior violent offense committed in another state will not preclude a prisoner from parole eligibility. *See, State v. Hinton*, 357 S.C. 327, 592 S.E.2d 335 (2005). It is clear by the reading of the statute a prisoner with a prior violent offense cannot be granted parole. The General Assembly through the statute has ordered the Parole Board not to grant an individual with a prior violent conviction parole. "The Parole Board must not grant," is clearly a part of the statute. The Court never denied the Respondent parole through sentencing. But for his prior violent conviction, the Respondent would have been eligible for parole. It is clear that the legislature did not wish a person in the Respondent position to remove the initial ABIK offense. To allow the Respondent parole this Court would be essentially rewriting the statute, and creating new law.

The Respondent had a prior South Carolina offense of ABIK when he was convicted of murder. The Respondent committed this murder on July 14, 1995. This conviction fails to fall within the above referenced dates to be considered a violation of ex post facto. None of the above referenced exceptions applies to the present case; therefore, the Respondent is a subsequent violent offender. The ruling by the ALJ relies strictly on his youth at the time he committed the offense. The ALJ is of the opinion his future dangerousness was never considered prior to the denial of parole eligibility, which is unconstitutional. It is the opinion of the Appellant that his record alone reveals the Respondent's future dangerousness. The cases used in the ALC's decision does not apply to the present case.

In all of the decisions relating to this matter the defendant was initially sentenced to life without parole. When the Defendant initially received this sentence, there were no further actions

on his behalf causing him not to be eligible for parole, *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, (2010)(sixteen year old committed armed robbery sentenced to life without parole); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)(Defendant committed murder at age seventeen, sentenced to death); *Atkins v. Virgina,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(Mentally ill defendant sentenced to death for a conviction of murder); *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)(Defendant committed murder in 1974 was diagnosed as mentally ill, still sentenced to death); *Miller v. Alabama,* 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)(fourteen year old sentenced to death due to a conviction of murder.) In each of these cases the Sentencing Court sentenced the Defendant to life without the possibility of parole, or death. That was a part of the sentence applied as soon as the Defendant was sentenced, regardless of his prior actions or record. None of that was taken into account prior to being sentenced to death or life without parole. In the present case the Respondent was convicted of shooting a person in the leg just seven months prior to the murder conviction. This reveals his propensity for violence and his treat to the community. It should not be considered indecent for the General Assembly wishing an individual this dangerous to be away from society for the remainder of his life. A decent society protects the innocent from violence. A mature society may determine that this requires removing those guilty of the most heinous murders from its midst, both as protection for its other members and as a concrete expression of its standards of decency. *Miller,* at 2478 (Roberts, J. dissenting).

The ALJ's decision decided that this case does not equate to *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002). In *Standard,* the South Carolina Supreme Court ruled that lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment. *Standard*, at 329. The ALJ

determined that due to the fact the defendant in *Standard* was not a juvenile when he committed both offenses it does not apply to the present case, the Appellant disagrees. The Appellant argues that the fact the Respondent was a juvenile during both convictions is not relevant. What is relevant, is whether the denial of parole eligibility is graduated and proportioned to the crime and the offense. *Miller,* at 2458. In *Miller,* and the corresponding cases, the Court ruled that applying a life sentence to a juvenile offender is unconstitutional due to the fact a "mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.*, at 2468. The Respondent was given a sentence under the Youthful Offender Act for ABIK which is an indeterminate sentence not to exceed six years.[3] The Appellant was given a minor sentence for a violent offense, due to his youth at the time he committed this offense. The youth and immaturity was already taken into consideration when he received this youthful offender sentence. Once released from incarceration the Respondent at the age of seventeen should realize the consequences of committing another violent offense. However, he commits a murder almost immediately upon release from custody. The denial of parole eligibility in this particular case does not subject the Respondent to excessive sanctions; therefore, not a violation of the eighth amendment.

The Respondent committed this offense on July 14, 1995, his date of birth is November 13, 1977. So he committed this murder some four months shy of his eighteen birthday. Not much can change in maturity in a four month time frame. The basic reasoning in *Miller* that a juvenile should not be given a mandatory life sentence without parole is due to the lack of maturity of a juvenile. In *Miller,* the Defendant was fourteen at the time of the offense. He was not seventeen

[3] If the offender is under the age of twenty-one, without his consent, sentence the youthful offender indefinitely to the custody of the department for treatment and supervision pursuant to this chapter until discharged by the division, the period of custody not to exceed six years. S.C. Code Ann. §24-19-50(Supp. 1996).

on the verge of turning eighteen within a few months, and who had just committed a prior violent offense. The second violent offense should deny him parole eligibility as intended by the General Assembly. The cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature. *State v. Cannon,* 336 S.C. 335, 520 S.E.2d 317 (1999). The reasoning that individuals who have committed prior violent offenses are not entitled to parole because it has been revealed through their actions the propensity to commit violent acts, and their dangerousness to society at large. There exists no need for a court or board to determine any danger that may be posed by the Respondent, that has been established by the Respondent's actions himself. Unlike *Miller, Aiken,* and their progeny, the Respondent had a record revealing his dangerousness, this did not have to be discovered by the Courts. In these cases the Courts established that the Eighth Amendment allows the Court to inquire about the youth of the Defendant in order to discover his mindset because of their "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and headless risk-taking." *Miller*, at 2458, *quoting, Roper* at 569. These cases do not say these harsh penalties cannot be imposed, just that youth and immaturity must be considered prior to the sentence. The the Court in *Miller* clearly concluded:

> *Graham, Roper* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Miller, at 2473.

Due to his prior conviction the characteristics of the Appellant has already been displayed before the Court, and though his actions he has caused himself a denial of any future release from incarceration. Parole is a privilege[4] that has been denied through his actions and not the Courts. Since it is clear in the statute that an individual such as the Respondent who have committed multiple violent offense shall not be allowed the privilege of parole, the Appellant respectfully request the decision of the ALC be reversed.

CONCLUSION

Based on the foregoing reasons the Appellant argues that the ALC erred in its ruling on behalf of the Respondent. The Appellant respectfully request this Honorable Court reverse the decision of the ALC.

Respectfully submitted,

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Columbia, South Carolina
January 4, 2016

[4] Parole is a privilege not a right. *Sullivan v. S.C. Dept. of Corrections,* 355 S.C. 437, 586 S.E.2d 124 (2004).

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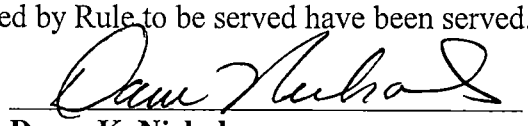
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES ..... APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Appellant and Designation of Matter* dated January 4, 2016, on Respondent this 4th day of January, 2016, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Nicholas Geer, 227443
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

I further certify that all parties required by Rule to be served have been served.



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January 4, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: Nicholas Geer v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original of the *Initial Brief of Appellant* and *Designation of Matter*, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: Nicholas Geer, #227443
Robert Dudek, Chief Appellate Defender

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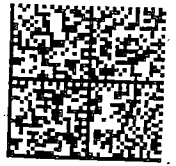

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