

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
Honorable Ralph King Anderson, III, Presiding
C/A No.15-ALJ-0042-AP

Appellate Case No.2015-002522

Nicholas M. Geer -- Respondent,

-Vs-

S.C. Department of Probation, Parole
and Pardon Service -- Appellant,

INITIAL BRIEF OF RESPONDENT

OTHER COUNSEL OF RECORD:

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Respondent, pro-se

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STATEMENT OF THE CASE

Respondent (Nicholas M. Geer) is presently confined in the South Carolina Department of Corrections serving a "[life]" sentence. Respondent was born November 13, 1977, thus rendering him a "juvenile" at the time the offense was committed.

On December 30, 1994, Respondent was arrested for the offense assault and battery with intent to kill (ABWIK). On June 5, 1995, Respondent was sentenced under South Carolina's Youthful Offenders Act to a term of imprisonment, not to exceed six (6), years, five (5) of which were [under probation] with the remaining year suspended.

On July 14, 1995, Respondent committed the offense of murder, thus violating his (YOA) probation for the prior offense, and sentenced to "life" imprisonment on November 14, 1995 for the murder. Noting that South Carolina law provided that an individual serving a "life" sentence for murder [would be] eligible for parole following the completion of twenty (20) years of that sentence.

On July 1, 2015, Respondent was notified and reviewed by the South Carolina Department of Probation, Parole and Pardon Services in accordance with parole eligibility procedures, after which, Respondent was informed he would receive a notice of the hearing date thirty (30) days prior to his scheduled parole hearing October 11, 2015.

On July 13, 2015, the Parole Board informed Respondent that he was not eligible for parole pursuant to S.C. Code §24-21-640, based on his murder conviction and the prior ABWIK conviction.

On August 12, 2015, Respondent appealed his [parole ineligibility] for a crime he committed when he was a "juvenile" on the grounds it violates the Eighth Amendment to the United States Constitution and Article I, §15 of the South Carolina Constitution. Respectfully relying on Miller v. Alabama, ___U.S.___, 132 S.Ct. 2455 (2012) and the South Carolina Supreme Court's decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (S.C. 2014) in support of his position.

After receiving full briefing from both parties the Honorable Ralph King Anderson, III, Chief Administrative Law Judge issued a decision [reversing] the Department's decision for further discussions and findings. Judge Anderson found the Appellant did violate Respondent's eight amendment rights by denying him parole eligibility. (emphasis original). Judge Anderson correctly concluded that due to Respondent's age [at] the time of the offenses, it would be "unconstitutional" to permanently deny Respondent an opportunity to be awarded parole. In reaching this decision Judge Anderson ordered the case to be [reversed and remanded] for further findings consistent with the order.

After receiving Judge Anderson's order the Appellant filed a timely notice of appeal with this Court. Within the appeal, the Appellant alleges the ALC erred in remanding the case, arguing that each of the prior cases pertaining to a sentence of juveniles to a life sentence without the possibility of parole is not identical to the present case. Respondent asserts that in each of those cases the juvenile was sentenced to life without the possibility of parole. Appellant advances the proposition that because Respondent committed a previous

violent crime, this fact reveals his dangerousness and therefore "no need" exists to have a separate hearing to determine any future dangerousness." Appellant's Brief at 2.

However, Respondent submits the Appellant's assertion is an error and contrary to the Miller supra Court's reasoning. (emphasis supplied and original). Respondent submits that he was in fact a "juvenile" at the time the offense was committed and parole was available to him after the service of 20-years. However, regardless of the nomenclature used once that parole eligibility was removed under any circumstances the Respondent undeniable [a] "juvenile" serving life without parole and thus the underlying sentence would violate the Eighth Amendment consistent with the Miller supra and Aiken supra Court's sound reasoning. Therefore, the ALC correctly reversed and remanded this case for further findings.

ARGUMENT

I.

THE ALC CORRECTLY REVERSED THE DECISION OF APPELLANT DENYING RESPONDENT PAROLE ELIGIBILITY DUE TO HIS AGE AT THE TIME HE COMMITTED THE OFFENSES.

The ALC correctly ruled that since Respondent was a "juvenile" when [both] offenses were committed, requiring Respondent to serve a "life" sentence without the possibility of parole is cruel and unusual punishment and thereby unconstitutional. The ALC disregarded the Appellant's assertion that Respondent is being deprived of his parole eligibility because of his own actions rather than by the sentencing court and is a difference without distinction. The Appellant argued that Miller, supra does not apply to Respondent's case, because

the instant case involved a deprivation of Respondent's parole eligibility based on his own actions, via a subsequent violation, pursuant to §24-21-640, rather than being a ruling by the sentencing court, while relying on State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). However, Respondent submits the ALC correctly determined and disregarded Appellant's assertion by finding a "crucial distinction" between the instant case and Standard supra. Specifically, that Respondent was a "[juvenile]" at the time [both] offenses were committed, the prior (ABWIK), and the triggering offense (murder) and therefore the ALC concluded the rationale underlying the decision in Standard supra, is inopposite, as both offenses in the instant case were committed by a juvenile. (emphasis original).

The ALC found that regardless of whether the sentencing court or statute took away Respondent's parole eligibility, the pertinent facts still remains that Respondent's youth and it's attendant circumstances were not taken into consideration prior to the deprivation of his parole eligibility and courts have found that such deprivation is cruel and unusual punishment under the U.S. and S.C. Constitutions.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." In Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012), the U.S. Supreme Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole, and that the mandatory penalty schemes at issue prevented the

sentencing authority from considering the difference between adult and juvenile offenders before imposing a life sentence without the possibility of parole, such is the case here. The Miller Court made it clear that a "mandatory life-without-parole sentences for juveniles violates the Eighth Amendment" 132 S.Ct. at 2464. The Court reasoned that such mandatory penalties by their nature preclude a sentencer from taking account of an offender's age and wealth of characteristics and circumstances attendant to it." Id at 2467.

The Miller Court also said that a "court" may sentence a juvenile to life without parole after an individualized hearing, 132 S.Ct. at 2469. There has been no hearing in the instant case.

The Appellant takes the off-cited proposition that "no hearing needs to be held simply because Respondent committed a previous violent crime." Appellant's Brief at 2. This is not what the Miller Court intended.

Moreover, Miller was applied to South Carolina in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) and Miller was found to apply retroactively, 410 S.C. 534, 540, 765 S.E.2d 572, 575 ("We conclude Miller creates a new, substantive rule and should therefore apply retroactively").

The Byars Court found that Miller is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution. The Byars Court found that Miller does more than ban mandatory life sentencing schemes for juveniles, it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence

rendered.

In Byars the Court said as evidence in the record, although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by Miller where the factors of youth are carefully and thoughtfully considered, stating Miller holds the Constitution requires more. This statement deserves universal application. The Byars Court found the absence of this level of inquiry into the characteristics of youth produce a facially unconstitutional sentence, such as in the instant case.

The Byars Court said that in their view, whether a sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole [is] entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment. Id.

The Miller Court focused on the sentencing scheme that mandatorily imposes life imprisonment without the possibility of parole for juvenile offenders." In the instant case the sentencing scheme [was] the Parole Board's application of §24-21-640 to declare Respondent, who was a juvenile at the time [both] his ABWIK and murder offense, ineligible for parole. The fact still remains that Respondent's youth and its attendant characteristics and circumstances were not taken into consideration [prior] to the deprivation of his parole eligibility. The ALC was correct in reversing and remanding for further consideration in this matter.

CONCLUSION

WHEREFORE, based on the foregoing reasons, the ALC's ruling reversing the Department's decision and remand for further findings should be upheld or in the alternative remand with instructions for new sentencing hearing, or any relief this Court deems appropriate in the interest of justice.

Respectfully Submitted,

/s/ Nicholas Geer
Nicholas M. Geer

Respondent, pro-se

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S.C. Department of Probation, Parole
and Pardon Service -- Appellant,

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served true and correct copies of the enclosed Respondent's Initial Brief on the parties whose names and addresses appear below. By placing the aforesaid documents in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 22, day of Feb, 2016.

Those Served:

Honorable Jenny Kitchings
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Respectfully Submitted,

/s/ Nicholas M. Geer
Nicholas M. Geer

Respondent, pro-se

Sworn to and Subscribed Before

Me this 22nd day of February, 2016

Nancy C. Merchant
NOTARY PUBLIC
My Comm. Expires 1-23-2027

Receipt of Legal Correspondence
Verification

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SC Court of Appeals

This is to verify that legal correspondence addressed to the following :


Honorable Jenny Kitchings
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was received in the Perry Correctional Mailroom on February 22, 2016. This correspondence was sent out in the secured institutional mailbag containing interdepartmental and interagency mail on the same date.

Mr. Geer informed me that his deadline was last week, however, due to circumstances beyond his control (institutional lock down), he was unable to come to the mailroom and send out this correspondence any earlier than today.

N.C. Merchant 
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February 22, 2016

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