

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT  
Court of Common Pleas

S. Phillip Lenski, Administrative Law Judge

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Case No. 15-ALJ-15-0015-AP

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Tony Moore, Jr., #188313

*Appellant,*

v.

South Carolina Department of Probation,  
Parole and Pardon Services,

*Respondents.*

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY VIOLATED DUE PROCESS.
- II. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY IS CONTRARY TO THE OPINIONS OF *MILLER v. ALABAMA* AND *AIKEN v. BYARS*.

## STATEMENT OF THE CASE

Appellant Tony Moore, Jr., is currently serving life in prison for murder. While murder was parole eligible at the time of his conviction, prior offenses from when Moore was a juvenile now permanently bar him from any parole eligibility.

Moore was convicted of murder in 1995. 1995 Sentencing Sheets At that time, murder convicts were eligible for parole after serving a significant portion of their sentence. S.C. Code § 24-21-640 makes a person serving time for a second or subsequent conviction ineligible for parole. S.C. Code § 16-1-60 defines violent crimes.

In 1992, Moore pled guilty to accessory before the fact of assault and battery with intent to kill, assault and battery with intent to kill, and second-degree burglary. He received a Youthful Offender Act sentence not to exceed six years, which involved a short period of incarceration and supervision. 1992 Sentencing Sheets These crimes occurred when Moore was 17 years old.

The 1992 convictions make Moore ineligible for parole. Moore received a letter from the Department of Probation, Parole and Pardon Services ("Department") on February 10, 2015, declaring him ineligible for parole. Letter Denying Parole Eligibility The letter constituted a final decision of the Department.

Moore filed a notice of appeal raising the same two grounds in the Administrative Law Court as are presented in this appeal.

## ARGUMENT

### I. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY VIOLATED DUE PROCESS.

Appellant Tony Moore argues his parole ineligibility results from a violation of his due process rights. In rejecting his argument, the Administrative Law Court essentially held he was entitled to no due process, though it phrased that finding under the auspices of “minimal due process.”

In its due process finding, the Administrative Law Court opines that “[an inmate] is only entitled to ‘those minimum procedures appropriate under the circumstances and required by the Due Process clause to ensure that the state-created right is not arbitrarily abrogated.’” ALC Final Order, p.3. citing *Furtick v. S.C. Dep’t of Prob.*, 352 S.C. 594 (2003). The Court went on to find that the Department’s review and the opportunity for judicial review were all that was required to satisfy due process. *Id.* It also found there was no due process challenge as long as the law at issue gives proper notice of the conduct prohibited.

There are two problems with the Administrative Law Court’s due process analysis. It first finds, contrary to applicable precedent, there is nothing more than a minimal right to due process under these circumstances. It then mistakenly confines Appellant’s argument to “notice” and ignores “opportunity to be heard.”

The court below relied on *Furtick* to hold only a minimal level of due process is required in this case. But that is not what *Furtick* held. *Furtick* held that the permanent denial of parole eligibility implicated a liberty interest at least requiring minimal due process. *Furtick*, 352 S.C. at 598. While the Administrative Law Court holds minimal due process is the ceiling for due process in this matter, the South Carolina Supreme Court held it was the floor. The difference is critical.

In considering Moore's case, the Administrative Law Court used the very least amount of due process it felt appropriate to deem his sentence constitutional.<sup>1</sup> Under the Supreme Court of South Carolina's ruling, that small amount of due process would be a starting point, not the ending point. The United States Supreme Court case referenced by the Administrative Law Court reaches a similar finding. Pointing out the far less serious deprivations that trigger a hearing, the Supreme court suggested that denial of good time credits should also trigger a hearing. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

It is unclear what process Appellant received in this matter. The Department simply reviewed his record and denied his parole eligibility. While his appeal to the Administrative Law Court was considered, the Court simply denied it saying he deserved no more than had already been done. There was no review to constitute any particular process. Relying too heavily on the mistaken idea that minimal due process was all that was required, the court below simply failed to give Appellant any process.

As Appellant argued below, there is no question he is entitled to due process guarantees, as he has a liberty interest in his parole eligibility. *Sullivan v. S.C. Dept. of Corr.*, 355 S.C. 437, 443 (2003). Under either a strict scrutiny test or a rational relationship test, Appellant can show that the denial of parole eligibility violates substantive due process.<sup>2</sup>

The application of strict scrutiny or rational relationship turns on whether the right at stake is fundamental. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140 (2008). As stated earlier, Appellant can make a successful case under either test. Both tests are discussed.

Moore is restrained in prison. Freedom from bodily restraint is a core liberty protected by the Due Process clause. *Id.*, citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). While courts,

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<sup>1</sup> Moore does not concede he received any due process, but merely points out the Administrative Law Court held he did.

<sup>2</sup> Because the Administrative Law Court took this as a facial challenge to the law, it did not consider this argument pursuant to the limitations on its ability to consider constitutional questions.

including this one, have held that parole is a privilege as opposed to a right, parole eligibility directly implicates a fundamental right to be free from government restraint and should certainly be considered a core right protected by the Due Process clause of the United States Constitution.

Under strict scrutiny, the statute at issue must meet a compelling state interest and be narrowly tailored to accomplish that interest. The parole eligibility meets neither element of the test.

In light of Moore's age at the time of his offense, it is doubtful the State can claim a compelling interest in keeping him, and similar offenders, in prison for the rest of their life. Based on recent South Carolina and United States Supreme Court opinions discussed later, Moore's age at the time of the triggering offense for this sentencing enhancement calls into question the validity of keeping him in prison until he dies. Based on those concerns, the State's interest is not compelling.

At the same time, S.C. Code § 24-21-640 is not a narrowly tailored law. To the contrary, its reach is both broad and indiscriminate. It draws no distinction between dangerous offenders and any other type of offender. If there is a prior conviction, an offender ends up ineligible for parole. There is no individualized assessment of danger, potential recidivism, ability to be rehabilitated, or any other factors related to sentencing.

Should the Court determine parole eligibility is not a fundamental right, which Appellant does not concede, the parole statute at issue in this appeal still fails. Even under the rational relationship test, the statute does not pass constitutional muster. There is no relationship between denying certain offenders parole eligibility without engaging in some type of review of the offenders' characteristics and the governmental interest served by confining prisoners. Classifying inmates without any regard for individualized sentencing factors, especially when the result is a life sentence with no hope of parole, should be avoided as a violation of due process.

The Administrative Law Court also failed in finding Appellant received procedural due process. Procedural due process requires both notice and a meaningful opportunity to be heard.

*Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 483 (2006). The court below relied on a Fourth Circuit opinion to hold there was no proper challenge to a sentencing enhancement based on a prior conviction. *Thomas v. Davis*, 192 F.3d 445 (4th Cir. 1999).

However, *Thomas* is distinguishable from the instant case. The petitioner in *Thomas* could point out no constitutional issue with the prior convictions at issue. In this case, Appellant has an issue with his prior convictions based on his age at the time of the predicate convictions which triggered his parole ineligibility.<sup>3</sup>

Because of the binding case law discussed in the next section, Appellant's youth at the time of his prior offenses requires more than a rote review of this record. It requires an actual opportunity to address the concerns as set out in the opinions governing the sentencing of juveniles.

## II. THE DENIAL OF APPELLANT TONY MOORE'S PAROLE ELIGIBILITY IS CONTRARY TO THE OPINIONS OF *MILLER v. ALABAMA* AND *AIKEN v. BYARS*.

Appellant argued in the Administrative Law Court that he should be eligible for parole based on his age at the time of the offenses which are preventing him from parole eligibility. His argument is grounded in the Eighth Amendment to the United States Constitution, but is more specifically based on the United States Supreme Court opinion in *Miller v. Alabama* and the South Carolina Supreme Court's opinion in *Aiken v. Byars*.

Moore is being denied parole eligibility based on acts that took place when he was seventeen years old, which is considered a juvenile for constitutional purposes. Those acts have resulted in a mandatory sentence of life without parole.

The United States Supreme Court considered mandatory life sentences for juveniles in 2012. *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The *Miller* opinion recognized that a basic precept of justice in America is that punishment for a crime should be graduated and proportioned to the

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<sup>3</sup> Appellant's youth at the time of the predicate offenses is discussed in depth in the second section of the brief. To avoid making duplicative arguments, Appellant respectfully asks the Court to consider both of these arguments in conjunction.

offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). *Miller* reaffirmed the Court's prior holdings that children are constitutionally different from adults for sentencing purposes. *Miller*, 132 S.Ct. at 2464 (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)).

There are three significant gaps between children and adults that are particularly relevant to sentencing. Children lack maturity and have an underdeveloped sense of responsibility that leads to recklessness, impulsivity, and risk-taking. *Roper*, 543 U.S. at 569. Children are more susceptible to influence and have little control over the influencing factors in their lives. *Id.* Finally, a child's character is not as well-formed as an adult's, which means their actions are not as meaningful in determining "irretrievable depravity." *Id.* at 570.

*Miller* cited a number of social and scientific studies as support for the idea children should be treated differently than adults. *Miller*, 132 S.Ct at 2464-65. The United States Supreme Court has been clear there are significant constitutional implications when a sentence of life without parole is imposed on juveniles for conduct that took place when they were juveniles. South Carolina has recognized the wisdom of this position and recently adopted the reasoning in *Miller*.

In *Aiken v. Byars*, the South Carolina Supreme Court considered two questions in light of the *Miller* opinion: (1) was *Miller* retroactive; and (2) did *Miller* apply to those sentenced under a non-mandatory statutory scheme? *Aiken v. Byars*, 410 S.C. 534 (2014). The South Carolina Supreme Court held *Miller* was retroactive because it was a new substantive rule. *Id.* at 540-41. It further recognized a lifetime of incarceration without the possibility of parole triggers constitutional concerns when youth is involved. *Id.*

The Court recognized youth has constitutional significance and must be afforded adequate weight in sentencing. It was very clear in determining that *Miller* should affect South Carolina's non-mandatory sentencing scheme. The Court stated that "we profoundly disagree with the position advanced by the respondents and the dissent that the import of the *Miller* decision has

no application in South Carolina.” *Id.* at 543. The Court held there should be an affirmative requirement courts fully explore the impact of a defendant’s juvenile age on sentencing. *Id.*

The age of an offender at the time of the crimes resulting in a sentence are critical. The Administrative Law Court’s decision in this case makes an arbitrary distinction between a defendant’s age at the time of the sentence as opposed to the time of the acts driving the sentence. The Appellant argued in the court below he is ineligible for parole based on acts that took place when he was constitutionally considered a juvenile. The Administrative Law Court found this argument inaccurate, claiming Appellant was serving time for his murder conviction aggravated by prior convictions, as opposed to the prior convictions. ALC Final Order, p.4

The distinction made by the Administrative Law Court was not only arbitrary, it was contrary to the United States Supreme Court’s statement regarding its own decision in *Miller*. The United States Supreme Court recently joined South Carolina in holding *Miller* retroactive. Its opinion opened with the statement “[t]his is another case in a series of decisions involving the sentencing of offenders who were juveniles when their crimes were committed.” *Montgomery v. Louisiana*, 136 S.Ct 718, 725 (2016)(emphasis added). The statement makes it clear it is the age at the time of acts triggering the sentence that matters, not the age at the time of the actual sentencing.

The Supreme Court’s opinion bars juvenile acts from resulting in a mandatory life sentence. This is exactly what is occurring in Appellant’s case. While the Administrative Law Court held differently, a simple analysis of Appellant’s sentence and what is driving it reveals why *Miller* demands an individualized hearing in this matter, as opposed to a routine denial of parole.

Appellant Tony Moore’s sentence for murder would have resulted in parole eligibility after serving approximately 20 years of the imposed sentence. This was how a life sentence worked at the time of the imposition of Appellant’s sentence. However, Appellant’s sentence was enhanced by convictions from several years before the murder conviction, which occurred when he was a juvenile. Without the juvenile convictions, Appellant simply would not be subject to a mandatory

life sentence. Which is exactly what he is now serving. To hold that Appellant is not serving a life sentence for juvenile acts not only ignores the reality of his current sentence, it draws an arbitrary distinction between when juvenile acts trigger a mandatory life sentence.

The Supreme Court's concern with this issue is not technical, and is certainly not arbitrary. As it has repeatedly pointed out, there is an element of unfairness to warehousing people for their entire lives based on acts that take place before they are old enough to vote or legally buy cigarettes. Rather than turn a blind eye to this unfairness, the Supreme Court of the United States, as well as the South Carolina Supreme Court, have elected to address the issue head-on, effectively barring the practice of sentencing offenders to mandatory life sentences based on acts committed when they were juveniles without a hearing to determine the appropriateness of the life sentence.

The Administrative Law Court further relied on *State v. Green* as dispositive of this issue. *State v. Green*, 412 S.C. 65 (Ct.App. 2015). In *Green*, this Court considered a similar argument to the one made by Appellant. This Court held in *Green* that because the appellant in that case was not a juvenile at the time of his sentence to life in prison, *Miller* was inapplicable. *Id.* at 86-87. That holding is contrary to case law and should be reconsidered.

*Miller*, and more recently *Montgomery*, do not distinguish between an earlier juvenile act leading to an enhanced sentence of life without parole or a sentence of life without parole for that juvenile act. To make such a distinction would call into question the sincerity of those decisions: is the Court paying lip service to ideas of youth, or is it really concerned with the constitutional implications of meting out the severest of punishment for acts committed during the impetuosity of youth?

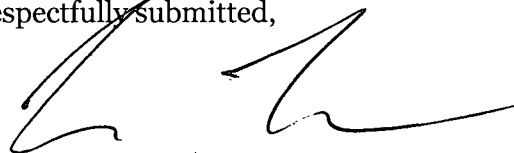
If a juvenile act causes a mandatory life sentence, barring further inquiry into the appropriateness of a sentence, there is no reason the theories behind *Miller* do not apply. Without acts committed as a juvenile, Appellant is not subject to a sentence of life without parole. Because the Appellant is not eligible for a parole hearing, his sentence is essentially a mandatory life sentence.

The decision of the Administrative Law Court was arbitrary and should be reversed. To the extent this Court is inclined to follow its decision in *Green*, that decision should also be reversed. If the basis for a life sentence is juvenile action, a mandatory life sentence is constitutionally suspect. The fact that a juvenile act was a predicate offense makes the sentence no less a concern based on the factors discussed in *Miller* and then again in *Montgomery*. The decision of the South Carolina Department of Probation, Parole and Pardon Services should be reversed and Appellant Tony Moore should be considered for parole.

#### CONCLUSION

Based on the reasoning discussed and specifically the precedent found in *Miller v. Alabama*, *Aiken v. Byars*, and *Montgomery v. Louisiana*, Appellant Tony Moore should be deemed eligible for parole. Any other result is arbitrary and contrary to the constitutional grounds discussed in this appeal.

Respectfully submitted,



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Greenville, South Carolina

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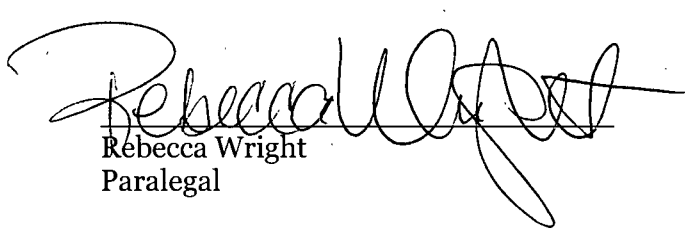
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CERTIFICATE OF SERVICE

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The undersigned counsel certifies that the attached *Initial Brief, Motion for Leave to File Out of Time, and Designation of Matter* has been served on the opposing counsel, via United States Postal Service at the following address, this 3rd day of May, 2016:

**Tommy Evans**  
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