

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from the Administrative Law Court

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 15-ALJ-0042-AP

RECEIVED

MAY 27 2016

SC Court of Appeals

NICHOLAS GEER, 227443,

RESPONDENT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES,

APPELLANT.

Appellate Case No. 2015-002522

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE1

ARGUMENT3

 I. The ALC Correctly Reversed the Decision of Appellant Denying Respondent Parole
 Eligibility Due to His Age at the Time he Committed the Offenses. 3

CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455 (2012) 2, 3, 4, 5

STATE CASES

Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) 2, 3, 4, 5

State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VII *passim*

S.C. Const. art. I, § 15 1

STATUTES

S.C. Code Ann. § 24-21-640 1, 3, 5

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 on 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 of assault and battery with intent to kill (ABWIK). On June 5, 1995, Respondent was sentenced under South Carolina’s Youthful Offender 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 was sentenced to “life” imprisonment on November 14, 1995 for the murder. At that time, 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. R. p. 1.

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. Respondent respectfully relies

on *Miller v. Alabama*, 567 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 (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 Eighth Amendment rights by denying him parole eligibility. R. p. 21. 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. R. p. 21.

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 8.

However, Respondent submits the Appellant's assertion is in error and is contrary to the *Miller* Court's reasoning. 132 S.Ct. 2455. 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 parole eligibility was removed, under any circumstances the Respondent undeniably became a juvenile serving life without parole and thus

the underlying sentence would violate the Eighth Amendment consistent with the *Miller* and *Aiken* Courts' 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. R. p. 19. The Appellant argued that *Miller*, 132 S.Ct. 2455, 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 Section 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). Appellant's Brief at 6-7. However, Respondent submits the ALC correctly determined and disregarded Appellant's assertion by finding a "crucial distinction" between the instant case and *Standard*, 351 S.C. 199, 569 S.E.2d 325. Specifically, that Respondent was a juvenile at the time both offenses were committed, the prior offense (ABWIK), and the triggering offense (murder), and therefore the ALC concluded the rationale underlying the decision in *Standard*, 351 S.C. 199, 569 S.E.2d 325, is inapposite, as both offenses in the instant case were committed by a juvenile. R. p. 19.

The ALC found that regardless of whether the sentencing court or statute took away Respondent's parole eligibility, the pertinent fact still remains that Respondent's youth and its 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. *Miller*, 132 S.Ct. at 2460; *Aiken*, 410 S.C. at 540-41, 765 S.E.2d at 575-76.

The Eighth Amendment to the United States Constitution provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In *Miller v. Alabama*, 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 . . . mandatory penalty schemes at issue prevent[] the sentencing authority from considering the differences between adult and juvenile offenders before imposing a sentence of life without parole”—such is the case here. *Aiken*, 410 S.C. at 542, 765 S.E.2d at 576; *Miller*, 132 S.Ct. at 2463-69. The *Miller* court made it clear that “mandatory life without parole for juveniles violates the Eighth Amendment.” 132 S.Ct. at 2473. 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.

The *Miller* Court also said that a court may sentence a juvenile to life without parole after an individualized hearing. *Id.* at 2467-69. 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*, and *Miller* was found to apply retroactively. 410 S.C. at 540, 765 S.E.2d at 575 (“We conclude *Miller* creates a new, substantive rule and should therefore apply retroactively.”).

The *Aiken* 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 *Aiken* 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.” *Id.*, 410 S.C. at 543, 765 S.E.2d at 577.

In *Aiken*, the Court said “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. *Id.*, 410 S.C. at 543, 765 S.E.2d at 577. This statement deserves universal application. The *Aiken* court found the “absence of this level of inquiry into the characteristics of youth produce[s] a facially unconstitutional sentence” such as in the instant case. *Id.*, 410 S.C. at 543-44, 765 S.E.2d at 577.

The *Aiken* 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.*, 410 S.C. at 544, 765 S.E.2d at 577.

The *Miller* Court focused on “sentencing schemes that mandate life-without-parole sentences for juveniles.” 132 S. Ct. at 2484. In the instant case the sentencing scheme was the Parole Board's application of Section 24-21-640 to declare Respondent, who was a juvenile at the time of 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 in to 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 remanding for further findings should be upheld or in the alternative remanded with instructions for a new sentencing hearing, or any relief this Court deems appropriate in the interests of justice.

Respectfully submitted,

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May 26, 2016

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true copy of the Respondent's Final Brief in the above referenced case has been served upon counsel for appellant by depositing one copy of the same in the United States Mail, first-class postage pre-paid, addressed as follows:

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This 26 day of May, 2016.



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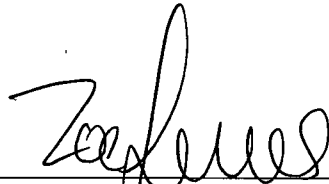
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CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that this final brief complies with Rule 211(b), SCACR. Counsel has corrected typographical errors, misspellings, and citation errors that occurred as a result of the *pro se* nature of this brief.

This 26 day of May, 2016.



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