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

NICHOLAS GEER, 227443,

RESPONDENT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES,

APPELLANT.

Appellate Case No. 2015-002522

SUPPLEMENTAL BRIEF OF RESPONDENT

ZOE JONES
Justice 360
900 Elmwood Ave. Suite 200
Columbia, SC 29201
(803) 765-1044
zoe@justice360sc.org

EMILY PAAVOLA
Justice 360
900 Elmwood Ave. Suite 200
Columbia, SC 29201
(803) 765-1044
emily@justice360sc.org

Pro Bono Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

Respondent (Nicholas M. Geer) is presently confined in the South Carolina Department of Corrections serving a life sentence for a conviction of murder. Respondent was 17 years old at the time of the crime.[1] R. p. 16.

On December 30, 1994, prior to the offense at issue, Respondent was arrested for a separate incident. Respondent was charged with assault and battery with intent to kill (ABWIK), and 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. R. p. 16.

On July 14, 1995, the offense at issue occurred.[2] On November 14, 1995, Respondent was convicted of murder and sentenced to life imprisonment. 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. R. p. 16.

On July 13, 2015, twenty years after the offense occurred, Appellant, the South Carolina Department of Probation, Parole and Pardon Services, notified Respondent that he was not eligible

---

[1] Respondent was born on November 13, 1977, thus rendering him a juvenile at the time the offense occurred, on July 14, 1995.

[2] Based on undersigned counsel's review of the record, Respondent shot the victim in the midst of an altercation over a drug deal gone wrong. Respondent's trial counsel, Robert Gamble, was later suspended from the practice of law for "habitually neglect[ing] his duties as Circuit Defender for the Anderson County Public Defender's Office . . . [,] allowing misuse of County and State funds for personal gain and . . . improperly supervising and approving fraudulent or exhorbant [sic] expense reimbursements." *In re Gamble*, 405 S.C. 436, 437, 748 S.E.2d 219 (2013), reinstatement granted, 414 S.C. 580, 780 S.E.2d 263 (2015).

for parole under S.C. Code Ann. § 24-21-640. Appellant stated that Respondent was ineligible for parole because of Respondent's prior ABWIK conviction.[3] R. p. 1.

On August 12, 2015, Respondent appealed his parole ineligibility on the grounds that it violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution because Respondent was a juvenile at the time of the offense and was never afforded an individualized sentencing hearing. R. p. 17. 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 Appellant's decision. Judge Anderson held that Appellant did violate Respondent's Eighth Amendment rights by denying him parole eligibility. R. p. 21. Judge Anderson concluded that due to Respondent's age at the time of the offenses and that Respondent did not receive the required individualized sentencing hearing, it would be unconstitutional deny Respondent the possibility of release. R. p. 21. After receiving the Administrative Law Court's (ALC) order, the Appellant filed a timely notice of appeal with this Court.

ARGUMENT

I. Respondent has effectively been sentenced to life without parole.

Under Appellant's application of Section 24-21-640 to this case, Respondent is effectively serving a life sentence without the possibility of parole. Respondent was convicted of murder for

[3] The pertinent part of S.C. Code Ann. § 24-21-640 provides that "[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 a prior conviction, for violent crimes as defined in Section 16-1-60." ABWIK is a violent crime as defined by S.C. Code Ann. § 16-1-60.

an offense committed when he was 17 years old. Respondent received a sentence of life imprisonment. Under that "life" sentence, Respondent would be eligible for parole after completing 20 years of his sentence. R. p. 16. However, once Respondent became eligible for parole in 2015, he was informed by the Parole Board that, pursuant to S.C. Code Ann. § 24-21-640, he was ineligible for parole because of his prior conviction for assault and battery with intent to kill (ABWIK), also committed when he 17 years old. R. p. 16.

Appellant acknowledges that under *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455 (2012), life without parole sentences for juveniles are barred absent an individualized sentencing hearing. Appellant's Brief at 7. However, appellant argues that *Miller* does not apply to the case at issue because Respondent received his effective life without parole sentence "through his actions" and not by a sentencing court. Appellant's Brief at 6, 9. As noted by the Administrative Law Court (ALC), "the fact that [Respondent] was deprived of his parole eligibility because of his own actions rather than by the sentencing court is a difference without a distinction." R. p. 19. The ALC held that what matters is that the sentencing scheme precludes the possibility of parole without a sufficient hearing, regardless of whether that scheme is the result of a statute or a sentencing court. R. p. 19. Thus, as the ALC held, Respondent is serving a sentence of life imprisonment without the possibility of parole, without ever having been afforded an individualized sentencing hearing, in violation of the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution. R. p. 21.

II. Both the United States Supreme Court and the South Carolina Supreme Court have set forth specific constitutional considerations in the case of a juvenile facing life without parole.

In 2012, the Supreme Court of the United States determined in *Miller v. Alabama*, that states are precluded from imposing life without parole sentences on juvenile offenders without

first holding an individualized sentencing hearing. 132 S.Ct. at 2475. And this year, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), the Court reaffirmed the importance of the protections granted in *Miller* by declaring the holding in that case to be "a new substantive rule that, under the Constitution, must be retroactive," and effectively ordered new sentencing proceedings for hundreds of individuals who had been sentenced to mandatory life without parole as juveniles. These cases were grounded in one core Eighth Amendment principle: "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464.

The Court in *Miller* explained that all of its recent holdings regarding juveniles hinged on the constitutional maxim that juveniles have both "diminished culpability and greater prospects for reform" and are thus "'less deserving of the most severe punishments.'" *Id.* (quoting *Graham v. Florida*, 560 U.S. 58, 68 (2010)). The lessened culpability and possibility of rehabilitation are grounded in three constitutionally significant differences between juveniles and adults:

- Children are less mature and developed than adults, leading to "recklessness, impulsivity, and heedless risk-taking," *id.*;
- Children are more "vulnerable . . . to negative influences and outside pressures," and have "limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings," *id.* (internal quotations omitted);
- Children's actions are "less likely to be evidence of irretrievable depravity" because "a child's character is not as well formed as an adult's" and "his traits are less fixed," *id.* (internal quotations omitted).

These differences, *Miller* noted, result in part from a consistently growing body of social science and neuroscience research conclusively establishing that: a) only a small percentage of adolescents who commit crimes, even serious crimes, "'develop entrenched patterns of problem behavior,'" *id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)), and, b) there are

fundamental differences between the brains of juveniles and adults in areas "'involved in behavior control.'" *Id.* at 2464-65 (quoting *Graham*, 560 U.S. at 68). Because the brains of juveniles are not "fully mature in regions and systems related to higher executive functions such as impulse control, planning and risk avoidance," juveniles have a constitutionally different level of moral blameworthiness and, for that reason, the penological justifications for any criminal punishment—deterrence and retribution—are inconsistent with juvenile life without parole sentences. *Id.* at 2464 n.5 (quoting Brief of the American Psychological Association et al.). The same characteristics that make this category of offenders less culpable necessarily mean that "'an irrevocable judgment about a [juvenile] offender's value and place in society,' [is] at odds with a child's capacity for change." *Id* at 2465.

In *Aiken v. Byars*, the South Carolina Supreme Court embraced the reasoning of the United States Supreme Court that "youth has constitutional significance" and "must be afforded adequate weight in sentencing." 410 S.C. at 542-543, 765 S.E.2d at 576. After examining the sentencing hearings in cases where juveniles were sentenced to life without parole in this State in light of these decisions, the South Carolina Supreme Court concluded that the Eighth Amendment to the United States Constitution required that they be resentenced. The key defect in South Carolina's sentencing practices noted in *Aiken* was the failure to "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. Notably, the South Carolina Supreme Court vacated the sentences of defendants not only with mandatory sentences of life without parole, but also defendants who had received discretionary sentences of life without parole, thus reaffirming the need for an individualized sentencing hearing where life without parole for a juvenile is even a possibility.

III. Respondent may not be sentenced to life without parole unless he has received an individualized sentencing hearing.

Appellant argues that there was (and remains) no need to hold an individualized sentencing hearing for Respondent. Appellant's Brief at 2. That is true if—but only if—Respondent is eligible for parole. If he does not have a meaningful opportunity for release, however, then the jurisprudence of both the United States Supreme Court and the South Carolina Supreme Court mandate that Respondent must receive an individualized sentencing hearing at which the "hallmark features" of youth are to be considered. *Miller*, 132 S.Ct at 2468; *Aiken*, 410 S.C. at 543-44, 765 S.E.2d at 577. The *Aiken* Court, taking into consideration the rationale in *Miller*, set forth five key factors that must be measured when juvenile life without parole is a possible sentence:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence";
>
> (2) the "family and home environment" that surrounded the offender;
>
> (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him;
>
> (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and
>
> (5) the "possibility of rehabilitation."

410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 132 S.Ct. at 2468).

Appellant argues that because of his prior offense, Respondent proved he was dangerous and thus no hearing was necessary. Appellant's Brief at 2. This overly simplistic view ignores a host of relevant considerations including that both offenses were committed when Respondent was

a juvenile. Furthermore, an individualized hearing for a juvenile facing life without parole considers more than just future dangerousness. That Respondent had a prior violent offense is just one factor of many to take into consideration—in fact, multiple petitioners granted relief in *Aiken v. Byars* had prior violent offenses, however, those offenses do not negate the need for an individualized sentencing hearing. *See* Brief of Petitioners at 2-5, *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014) (No. 2012-213286).

Appellant argues further that an individualized sentencing hearing was not required because Respondent was just shy of his eighteenth birthday when he committed this offense. Appellant's Brief at 7-8. Again, this argument is in error. *Miller* and *Aiken* clearly consider the factors of youth to apply to all persons under the age of 18, whether they are 14 years old, or 17 years old. *Miller*, 132 S.Ct. at 2460; *Aiken*, 410 S.C. at 537 n.1, 765 S.E.2d at 573 n.1. Studies show that the entire adolescent period is characterized by the type of immaturity, impulsivity, and inability to weigh consequences recognized in *Miller* and *Aiken*. [4]

Appellant relies on *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325 (2002) to support its position. Appellant's Brief at 6-7. *Standard*, however, does not apply to the facts at issue. In *Standard*, the South Carolina Supreme Court held that a juvenile conviction could qualify as a triggering offense under South Carolina's two strikes law (which mandates life without parole). *Standard*, 351 S.C. at 206, 569 S.E.2d at 329. Standard was convicted of a "most serious offense" as a juvenile and sentenced as an adult. Some years later, once he was an adult, Standard

[4] Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN AND COGNITION 160, 162 (2010) ("From this perspective, middle adolescence (roughly 14–17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And, in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.").

committed a second most serious offense and was sentenced to mandatory life without parole under S.C. Code Ann. § 17-25-45. *Id.*, 351 S.C. at 201, 569 S.E.2d at 326-27. As noted by the ALC, "the rationale underlying the decision in *Standard* is inapposite," because unlike Standard, Respondent was a juvenile at the time of both the ABWIK and murder offenses. R. p. 19. Thus *Miller* and *Aiken*, and not *Standard*, control here.

In sum, Appellant argues that "the fact the Respondent was a juvenile during both convictions is not relevant." Appellant's Brief at 7. In actuality, the fact that Respondent was a juvenile is the single most constitutionally relevant fact in this case under both the United States and South Carolina Constitutions, and his age at the time of the offense requires that the decision of the Administrative Law Court be affirmed. For the reasons noted above, Respondent may not be sentenced to life without parole without an individualized sentencing hearing. Thus, the ALC correctly ruled that the decision of Appellant to deny Respondent the possibility of parole must be reversed. To comply with the federal and state constitutions, Respondent must either be allowed the possibility of parole, or he must be re-sentenced and receive and individualized sentencing hearing.

CONCLUSION

WHEREFORE, for the foregoing reasons, the ALC's ruling reversing the Department's decision and remanding for further findings should be affirmed or in the alternative Respondent should be remanded to the court of General Sessions with instructions to hold a re-sentencing hearing in accordance with *Aiken v. Byars*.

Respectfully submitted,

By: _____
ZOE JONES
Justice 360

900 Elmwood Ave. Suite 200
Columbia, SC 29201
(803) 765-1044
zoe@justice360sc.org

EMILY PAAVOLA
Justice 360
900 Elmwood Ave. Suite 200
Columbia, SC 29201
(803) 765-1044
emily@justice360sc.org

Pro Bono Counsel for Respondent

June 9, 2016

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

NICHOLAS GEER, 227443,

RESPONDENT,

V.

SOUTH CAROLINA DEPARTMENT OF
PROBATION, PAROLE AND PARDON SERVICES,

APPELLANT.

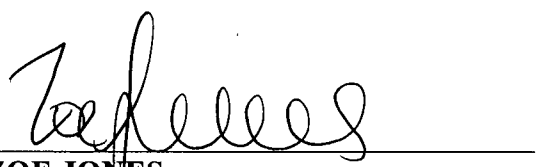
Appellate Case No. 2015-002522

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true copy of the Respondent's Supplemental 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:

Tommy Evans, Jr.
Assistant General Counsel
South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, SC 29250

This 9 day of June, 2016.



ZOE JONES
Justice 360
900 Elmwood Ave. Suite 200

Columbia, SC 29201
(803) 765-1044
zoe@justice360sc.org

EMILY PAAVOLA
Justice 360
900 Elmwood Ave. Suite 200
Columbia, SC 29201
(803) 765-1044
emily@justice360sc.org

Pro Bono Counsel for Respondent