STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JAY FINLEY,

APPELLANT

APPELLATE CASE NO 2016-002480

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The application of Miller and Aiken to de facto life without parole sentences like Appellant's sentence is not an extension, but rather an effectuation, of their holdings.

The issue raised on appeal is whether the circuit court erred in finding that Appellant did not qualify for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after service of thirty years, where the mandatory nature of Appellant's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing. Specifically, the South Carolina parole system does not provide appointed counsel, does not mandate consideration of the factors enunciated in Miller v. Alabama, 132 S.Ct. 2455 (2012), and permits denial based solely upon the severity of the offense.

In Miller, the United States Supreme Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. 132 S.Ct. at 2463. Subsequently, in Aiken, our Supreme Court held that the Miller decision applies retroactively and that the imposition of life without parole sentences for juveniles without individualized consideration of youth constituted cruel and unusual punishment, even under South Carolina's discretionary sentencing scheme. 410 S.C. 534, 765 S.E.2d 572.

Respondent argues that by their plain language, Miller and Aiken apply only to juvenile homicide offenders sentenced to life without parole and not to de facto life sentences. Brief of Resp., p. 4 and pp. 15-18. Similar to Miller, the particular class before the Aiken Court was limited, being made up of fifteen inmates who were sentenced to life without parole for homicides

committed as juveniles. 410 S.C. at 536-37, 765 S.E.2d at 573. However, the Aiken Court did not restrict the relief it granted to only those members of the class. Instead, the Court held that "the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, *to those similarly situated*, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." Id. at 545, 765 S.E.2d at 578 (emphasis added). The Aiken Court provided that "any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Id. (emphasis added). From this broad language, it is logical to conclude that the Aiken Court did not mean to restrict its interpretation of the applicability of Miller to only those cases specifically denominated "life without parole."

The concept of a de facto life sentence is not novel, nor is it unique to juvenile sentencing. In State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), our Supreme Court remanded for resentencing where it found: "From the evidence the jury evidently concluded that appellant should not receive the maximum punishment of life imprisonment, but the [thirty-year] sentence imposed is to all intents and purposes the equivalent of a life sentence, which is the highest punishment permitted for the most aggravated form of the crime." The United States Sentencing Commission defines a de facto life sentence as "one where the length of the sentence imposed is so long that the sentence is, for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. In United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), the Fourth Circuit Court of Appeals referenced its prior remand for resentencing of Pileggi where the government recommended and the

district court imposed "a *de facto* life sentence" of fifty years contrary to its extradition agreement with Costa Rica that Pileggi "would not receive a penalty of death or one that requires that he spend the rest of his natural life in prison."

While not binding authority, various courts around the country have likewise found Graham[1] and Miller applicable to de facto life sentences. See, e.g., Atwell v. State, 197 So.3d 1040 (Fla. 2016) (holding that defendant's sentence of life with the possibility of parole violated the Eighth Amendment, as it effectively resembled a mandatorily imposed life without parole sentence under statutory parole process); State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 135 (Wyo. 2014); Casiano v. Commissioner, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied*, 136 S.Ct. 1364 (2016); State ex rel. Morgan v. State, 217 So. 3d 266, 274-76 (La. 2016); State v. Zuber, 152 A.3d 197 (N.J. 2017), *cert. denied* (Oct. 2, 2017); State v. Moore, 76 N.E.3d 1127 (Ohio 2016), *cert. denied* (Oct. 2, 2017); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017), *cert. denied* (Nov. 27, 2017). Thus, the principles of Miller and Aiken are not limited to just those sentences specifically denominated "life without parole." Rather, as held by our Supreme Court in Aiken, Miller's holding that the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to *a lifetime in prison*" "deserves universal application." 410 S.C. at 543 (emphasis added). Defendants who are similarly situated to the offenders in Aiken include those subject to any sentence that constitutes the functional equivalent of life without parole. This interpretation is not an expansion of Aiken, but rather an effectuation of its intent.

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[1] Graham v. Florida, 560 U.S. 48 (2010) (categorically banning the imposition of life without parole upon juvenile offenders who commit non-homicide offenses).

Respondent cites Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016), for the proposition that the United States Supreme Court "specifically held states could remedy a *Miller* violation – i.e. an unconstitutional sentence – by 'permitting juvenile homicide offenders to be considered for parole' rather than re-sentencing them." Brief of Resp., p. 15. The characterization of this as a *holding* of Montgomery is inaccurate. The legal issue before the Montgomery Court was whether Miller was retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided. 136 S. Ct. at 725. The Court held that Miller announced a new substantive rule of constitutional law such that state collateral review courts were required to give the rule retroactive effect. Following its detailed explanation of that holding, the Court wrote, as dicta: "Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State ***may*** remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 136 S. Ct. at 736 (emphasis added). The Court wrote that "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." Id. "The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." Id.

As discussed more fully in the Brief of Appellant, South Carolina's parole system does not provided for the appointment of counsel and treats juvenile and adult offenders alike by not mandating consideration of the Miller factors and permitting denial based solely upon the severity of the offense. See Brief of Appellant, pp. 33-48; see also Atwell v. State, 197 So.3d

1040, 1048 (Fla. 2016) ("Although a State's remedy to *Miller* could include a system for paroling certain juvenile offenders 'whose crimes reflected only transient immaturity—and who have since matured,' the parole system would nevertheless still have to afford juvenile offenders individualized consideration and an opportunity for release."). Notably, Respondent failed to address these specific inadequacies with the parole system in its Brief. See Brief of Resp., pp. 18-19. Our parole process does not provide a meaningful opportunity for release based upon demonstrated maturity and rehabilitation. As a result, parole eligibility is not a sufficient substitute for resentencing in Michael's case.[2]

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[2] As far as Respondent's attempt to analogize the provisions of S.C. CODE ANN. § 24-21-715 regarding "parole for terminally ill, geriatric, or permanently disabled inmates," to the Virginia statute at issue in Virginia v. LeBlanc, 137 S.Ct. 1726 (Aug. 7, 2017), Respondent inaccurately characterizes their provisions as "similar." See Brief of Resp., pp. 17-18. The Virginia statute provides:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

VA. CODE ANN. § 53.1-40.01 (West). The South Carolina statute provides for release to parole only by "the full parole board, upon a petition filed by the Director of the Department of Corrections" after issuing an order with "findings of fact that substantiate a legal and medical conclusion that the inmate is terminally ill, geriatric, permanently incapacitated, or a combination of these conditions, and does not pose a threat to society or himself." S.C. CODE ANN. § 24-21-715 (B) and (C). Notably, "geriatric" is defined by the statute as "an inmate who is seventy years of age or older and suffers from chronic infirmity, illness, or disease related to aging, which has progressed so the inmate is incapacitated as determined by a licensed physician to the extent that the inmate does not pose a public safety risk." S.C. CODE ANN. § 24-21-715(A)(2). Thus, our statute does not permit the inmate himself to apply for release and imposes the additional requirement that the inmate be in poor health.

Appellant's original sentencing hearing did not take into account Appellant's youth and the hallmark features associated therewith, as the applicable statute provided no discretion to the Court such that Appellant's sentence was mandatorily imposed.

Respondent avers that the original sentencing judge in Appellant Michael Finley's case "considered the factors specifically noted by the *Miller* court as the 'hallmark features' of youth" such that "it cannot be said no court ever took into account appellant's age and its surrounding circumstances." Brief of Resp., pp. 19-20. The Aiken Court explained that the problem with the original sentencing hearings was not that the judges abused their discretion, because the original sentencing courts did not have the benefit of Miller to shape their inquiries. 410 S.C. at 543, n. 8. Rather, the underlying sentencing hearings "suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by Miller." Id. The Aiken Court ruled that on resentencing the judge will have the opportunity "to exercise their discretion within the proper framework as outlined by the United States Supreme Court." Id.

Despite the mandatory nature of the sentence, plea counsel presented some evidence at sentencing, including statements from Michael's custodian and minister. Even so, his truncated presentation fell far below the full exploration of the factors associated with Michael's youth required by Miller and Aiken. It resembled the ordinary sentencing presentation that one would expect following any adult offender's guilty plea to a serious offense. Importantly though, regardless of the evidence presented, Michael's sentence for murder would remain the same – it was a mandatory sentence of life with the possibility of parole after thirty years. S.C. CODE ANN. § 16-3-20(A) (1992) ("A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years, provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and

(C), and a recommendation of death is not made, *the court **must** impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. . . .*" (emphasis added)).

Though Judge Pyle had some discretion in the sentences he imposed for the non-homicide offenses, the mandatory nature of the life sentence for murder was noted during the plea and sentencing hearings. Plea Tr. 7, ll. 22-25; Sent. Tr. 11, l. 4 – 12, l. 18. Thus, regardless of the weight of the mitigating evidence presented, Judge Pyle was required by statute to impose the life sentence for murder. In Miller, the Supreme Court explained:

> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

567 U.S. at 474. Like the mandatory life without parole sentencing scheme discussed in Miller, the sentencing judge in Michael's case had no discretion whether to impose the mandatory life with parole sentence.

Moreover, in Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016), the United States Supreme Court wrote: "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity" rather than irreparable corruption. Subsequently, in Justice Sonia Sotomayor's concurring decision in Tatum v. Arizona, she explained:

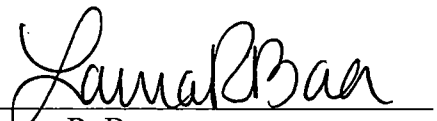
> On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility . . . . It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age

> before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. There is thus a very meaningful task for the lower courts to carry out on remand.

137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Thus, both our Supreme Court and the United States Supreme Court have made clear that a pre-Miller sentencing hearing will not be saved by a review of its contents, even when it reveals some discussion of the defendant's youth and attendant circumstances. Accordingly, Michael's original sentencing hearing did not comply with the constitutional requirements of Miller, Aiken, and their progeny.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Michael Finley respectfully requests this Court vacate his life with parole sentence and remand his case for resentencing.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of December, 2017.

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Michael Jay Finley, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of December, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of December, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .