STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Williamsburg County
Honorable Michael G. Nettles, Circuit Court Judge

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

RONALD HAKEEM MACK,

RESPONDENT

APPELLATE CASE NO. 2017-002441

RECEIVED
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SC Court of Appeals

RESPONDENT'S MOTION TO DISMISS APPEAL
AS INTERLOCUTORY

Respondent, through his undersigned counsel, respectfully moves to dismiss the appeal filed by the State of South Carolina based upon the following[1]:

I.

On August 24, 2010, Respondent Ronald Mack pled guilty before the Honorable Clifton Newman to one count of murder and one count of first-degree burglary, for offenses committed when Respondent was seventeen years old. He was sentenced to concurrent terms of fifty years for murder and thirty years for burglary. **(Respondent's Ex. 1, Guilty Plea Transcript).**

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[1] Pursuant to Rule 240(c)(3), SCACR, Respondent's motion is accompanied by an indexed and bound volume of the relevant documents referenced as Respondent's exhibits herein.

II.

In Miller v. Alabama, 132 S.Ct. 2455, 2475 (2012), the United States Supreme Court held that the imposition of mandatory life without parole ("LWOP") sentences for homicide offenses committed when the defendant was a juvenile violates the principle of proportionality and the Eighth Amendment's ban on cruel and unusual punishment absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing. Subsequently, in Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), *cert. denied* 135 S.Ct. 2379 (2015), a class of fifteen inmates in the South Carolina Department of Corrections ("SCDC"), who were sentenced to life without parole for various homicide offenses committed as juveniles, filed a petition in our Supreme Court's original jurisdiction seeking resentencing in light of Miller. On November 12, 2014, our Supreme Court ruled that Miller applied "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." Aiken, 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). The Court further ruled 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).

III.

On April 20, 2015, Respondent, through counsel, filed a motion for resentencing and accompanying memorandum in Williamsburg County, arguing that Mack's fifty-year sentence was a de facto life sentence such that he was eligible for resentencing under Aiken. **(Respondent's Ex. 2, Defense Motion for Resentencing and Memorandum).** The solicitor filed his response on

April 28, 2015. **(Respondent's Ex. 3, State's Response).** Respondent filed a reply on May 15, 2015. **(Respondent's Ex. 4, Defense Reply).**

On July 23, 2015, our Supreme Court issued an Order lifting the stay of Aiken following the United States Supreme Court's denial of the state's petition for writ of certiorari. The Court ordered: "Petitioners *and any other individuals affected by our holding in Aiken* may file a motion for resentencing within one year of the date of this order in the court of general sessions where he or she was originally sentenced." *S.C. Supreme Court Order, July 23, 2015* (emphasis added). On March 16, 2016, then Chief Justice Costa M. Pleicones issued an administrative order regarding the procedures to be followed statewide in the management and disposition of all motions for resentencing filed pursuant to Aiken. The Order instructed the Clerk of Court to forward a copy of the motion for resentencing to South Carolina Court Administration, following which the Chief Justice would assign the matter to a circuit court judge other than the original sentencing judge. *S.C. Supreme Court Admin. Order Mar. 16, 2016.*

On August 11, 2016, Chief Justice Pleicones issued an Order vesting the Honorable Michael Nettles with exclusive jurisdiction over Mack's motion for resentencing. *State v. Ronald Mack, Aiken v. Byars Judicial Appointment Order filed Aug. 11, 2016.* The solicitor filed another document opposing defendant's motion for resentencing on September 22, 2016. **(Respondent's Ex. 5, State's Supplemental Opposition).** A status conference was held in Williamsburg County on September 30, 2016. Judge Nettles provided the solicitor two weeks to file a formal motion to dismiss. The solicitor filed his motion to dismiss on October 5, 2016. **(Respondent's Ex. 6, State's Motion to Dismiss).** The defense filed its response in opposition to the motion to dismiss on November 4, 2016. **(Respondent's Ex. 7, Defense Opposition to Motion to Dismiss).** A hearing on the State's motion to dismiss was scheduled.

On January 13, 2017, the defense filed their notice of expert witness. **(Respondent's Ex. 8, Defense Notice of Expert)**. On February 17, 2017, a hearing was held on the State's motion, following which both parties prepared proposed orders for Judge Nettle's consideration. **(Respondent's Ex. 9, Motions Hearing Transcript)**. On May 18, 2017, the defense filed a supplemental affidavit of expert Vera Dolan, who testified at the February hearing. **(Respondent's Ex. 10, Supplemental Affidavit of Expert)**.

On June 14, 2017, Judge Nettles signed the order denying the State's motion to dismiss, which was filed by the Williamsburg County Clerk of Court on June 16, 2017. **(Respondent's Ex. 11, Order Denying State's Motion to Dismiss)**. Judge Nettles found that Aiken was applicable to both defendants sentenced to "life without parole" or a term of years that constitutes the functional equivalent of "life without parole;" that Mack's fifty-year sentence constituted a de facto life sentence such that his motion for resentencing pursuant to Aiken was proper; and that Mack's original sentencing hearing did not comply with the constitutional requirements Miller, Aiken, and their progeny. Accordingly, he ruled that Mack was entitled to a resentencing hearing.

On June 23, 2017, the solicitor mailed its motion for reconsideration, which was received by undersigned counsel's office on June 26, 2017. **(Respondent's Ex. 12, State's Motion to Reconsider)**. The defense filed a response in opposition to the State's motion on June 27, 2017. **(Respondent's Ex. 13, Defense Response to Motion to Reconsider)**. A hearing on the solicitor's motion was originally set for August 31, 2017. Due to a medical emergency,[2] the hearing was continued and reset for November 16, 2017. On the evening of November 14, 2017, the solicitor

[2] Undersigned counsel was approximately eight weeks pregnant at the time. As she was getting ready to leave her office in Columbia to attend the hearing in Kingstree, she suffered what was discovered though ultrasound to be a subchorionic hemorrhage, the symptoms of which mirrored miscarriage.

sent a "memorandum waiving the State's reconsideration hearing and in support of the State's motion for reconsideration of the court's order denying the State's motion to dismiss the motion for resentencing filed by defendant" to Judge Nettles and undersigned counsel via electronic mail, which was also sent to the Clerk for filing. **(Respondent's Ex. 14, State's Hearing Waiver and Memorandum)**. On November 15, 2017, Judge Nettles signed an order denying the State's motion to reconsider. **(Respondent's Ex. 15, Order Denying Motion to Reconsider)**. Appellant, the State, served the notice of appeal on November 22, 2017.

IV.

The denial of the prosecution's motion to dismiss and subsequent motion to reconsider does not constitute a final order. Rather, the effect of Judge Nettle's ruling is to provide Respondent Mack with a new sentencing hearing in which the resentencing court will fully explore "the mitigating hallmark features of youth" in accordance with Aiken and impose a new sentence. See Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014) ("Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances. Our General Assembly has made the decision that juvenile offenders may be sentenced to life without parole, and we honor that decision. However, *Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.").

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010). "An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 &

Supp.2009)." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (citing Ex Parte Capital U–Drive–It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006)). The strict interpretation of the appealability rules is aimed at avoiding piecemeal appeals. State v. Wilson, 387 S.C. 597, 601, 693 S.E.2d 923, 925 (2010); Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("The provisions of section 14-3-330 "have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed.").

Under section 14-3-330, the following types of judgments, decrees, and orders are directly appealable:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions ....;
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action;
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

In the State's appeal in this case, the order denying their motion to dismiss the defense's motion for resentencing was not entered in a special proceeding (subsection 3), does not involve an injunction or a receiver in the court of common pleas (subsection 4), and does not grant or refuse a new trial or strike a pleading (subsections 2b and 2c). Thus, the question is whether the order either involves the merits (subsection 1) or affects a substantial right and effectively

determines the action and prevents a judgment from which an appeal might be taken (subsection (2)(a)).

An interlocutory order is immediately appealable under subsection (1) if it "involves the merits." "An order 'involves the merits,' ... and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). "The phrase 'involving the merits' is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights." Id. at 7, 630 S.E.2d at 467-68. Here, the order granting Mack a new sentencing hearing does not determine the matter with finality; thus, it is not appealable under subsection (1).

An interlocutory order is immediately appealable under subsection (2)(a) if it affects a substantial right and the appellant cannot seek review of the current order in an appeal from the final judgment. Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995). Here, the State is not precluded from raising the issue on appeal after final sentencing. Thus, the order is not appealable under subsection (2)(a).

In State v. Byars, 79 S.C. 174, 174, 60 S.E. 448, 448 (1908), the State appealed the trial court's grant of a new trial to the defendant. Our Supreme Court stated the following:

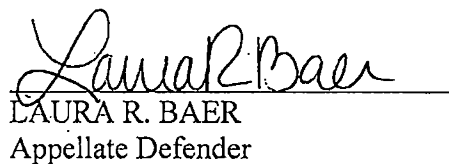
> [W]e feel ourselves unable at this time to entertain a consideration of the questions now presented. This court is confined to a consideration of questions presented after a final judgment has been rendered. This is no new question to this court, for we have held that a final judgment is essential in the hearing of an appeal. The prisoner has never been sentenced. The sentence is a final judgment.

Id. While here Mack has been previously sentenced, Judge Nettles' order found that the original sentence did not comply with the constitutional requirements articulated in Miller and Aiken

such that resentencing is required. The resentencing hearing has not yet been held and no new sentence has been imposed. Until resentencing occurs, there has not been a final judgment. Consequently, this appeal is an improper interlocutory appeal.

WHEREFORE, Respondent respectfully requests that this Court dismiss the State's appeal as interlocutory.

Respectfully submitted,



LAURA R. BAER
Appellate Defender

ATTORNEY FOR RESPONDENT

This 19th day of December, 2017.

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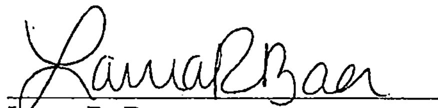
CERTIFICATE OF SERVICE

I certify that a copy of the Motion to Dismiss Appeal as Interlocutory and accompanying exhibits in the above entitled case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Ronald Mack at Leiber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 19th day of December, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 19th day of December, 2017.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2027 .

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