THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 15-ALJ-0042-AP

Appellate Case No. 2015-002522

Nicholas Geer, #227443.....RESPONDENT

v.

South Carolina Department of Probation, Parole and
Pardon Services,.....APPELLANT

PETITION FOR REHEARING

The Appellant, the South Carolina Department of Probation, Parole and Pardon Services respectfully petitions this Court for rehearing pursuant to Rule 221(a), SCACR. The Appellant hereby seeks a rehearing on the grounds that this Court may have misapprehended or overlooked several crucial points in affirming the Administrative Law Court (ALC) decision.

Specifically, the Appellant submits this Court may have misapprehended its determination that the Respondent should be allowed parole eligibility due to his offense being committed while he was a juvenile. The Appellant argues that while this Court made this determination, it failed to discuss the current statute regarding a subsequent violent offender. This statute reveals that the General Assembly clearly wished no inmate to be eligible for parole who has a prior conviction of a crime classified as violent. The ALC and this Court strictly just looked at the age of the offender

at the time the offense was committed and automatically applied prior Court decisions. However, there exist differences between the present case and those prior decisions.

The facts in this case are not in dispute. The Respondent committed the offense of Assault and Battery with intent to kill (ABIK) a violent offense as defined in Section 16-1-60, on December 30, 1994. He appeared before the Court and received a sentence pursuant to the Youthful Offender Act (YOA). While on parole, on July 14, 1995, the Respondent shot and murdered an individual. He was later sentenced to a period of incarceration for the remainder of his natural life with parole eligibility after twenty years incarceration.

At the time the Respondent committed his second violent offense, South Carolina law specifically stated:

> The [parole] board must not grant, 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.

S.C. Code Ann. §24-21-640 (Supp. 2014)(emphasis added).

It is clear within this statute that **any prisoner** serving a second sentence for a classified violent crime cannot be granted parole. The Respondent was on parole for the crime of ABIK when he committed the offense of murder both classified as violent offenses.[1] The Respondent was denied parole pursuant to South Carolina law which was the intent of the General Assembly. Through this statute the General Assembly has ordered not to allow anyone serving a second violent offense parole eligibility. The statue clearly states that, "The Parole Board must not grant, nor is parole authorized to any prisoner." To allow parole for this individual the Court would be essentially rewriting the statute, or ignoring it. The General Assembly wished no prisoner be allowed parole

[1] For purposes of definition under South Carolina law, a violent crime includes the offenses of murder (Section 16-3-10); assault and battery with intent to kill (Section 16-3-620) S.C. Code Ann. §16-1-60 (2002).

eligibility upon the conviction of a second violent offense. The cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature. *State v. Cannon*, 336 S.C. 335, 520 S.E.2d 317 (1999). This Court never discussed the certainty of this statute. The General Assembly has made it clear, any prisoner who has committed a second violent offense will not eligible for parole. The fault of the life sentence without parole is not that of the Court, legislature, nor the Department, but of the Respondent himself. But not for the previous violent conviction he would be eligible for parole. That is not the case in all of the previous decisions relied upon by the ALC and this Court. Each of the other cases the life sentence was given by the sentencing Court as a mandatory sentence due to the crime committed and not due to any prior offenses. This is not so in the present case.

The Appellant submits that this Court may have misapprehended or overlooked that in South Carolina, parole eligibility is determined by statute, and not by the Court. At no point may a judge order an inmate to be parole eligible if the statute does not allow for it. "The question of parole eligibility is separate and independent from the Court's authority to sentence an offender." *State v. McKay,* 300 S.C. 113, 115, 386 S.E.2d 623 (1989).

This Court's decision and the decision of the ALC relies upon *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller,* the United States Supreme Court decided that it is unconstitutional to sentence a minor to a life sentence without the possibility of parole. The South Carolina equivalent, *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 527 (2014) made the identical ruling. Neither case relates to an individual being denied parole due to a prior act of criminal violence. The Respondent was not given a sentence of life without parole. In the present case the Respondent is only being denied parole due to his prior violent offense. A prior violent conviction clearly denies parole eligibility for a subsequent violent conviction pursuant to South Carolina law.

Within this Court's decision is the case of *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016) where the United States Supreme Court ruled:

> A state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing 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.

Montgomery, at 736.

This case allows a juvenile parole eligibility on an offense not allowing parole. In the present case, the statute clearly does not allow an individual serving an additional violent offense parole eligibility. This absolution in the statute was never addressed by this Court. This Court only accepted the reasoning of the ALC, who also never addressed the statute.

The holdings in *Miller* and *Aiken* require the sentencing judge to make an on-the-record finding of "the impact of the defendant's juvenility on the sentence rendered" without addressing the South Carolina rule that the judge cannot make parole eligibility determinations. *Aiken*, at 410 S.C. at 543, 765 S.E.2d at 577. Prior to 1996, the sole sentence for murder was life. The judge could not sentence a defendant to anything lesser or greater.

The Appellant argues that this Honorable Court overlooked the statute that relates to this cause of action. It is clear by the statute that no prisoner in the situation as the Respondent must be allowed to appear before the Board, and even if they happen to appear, the Board is not allowed to grant parole. The Appellant is also of the position that this Court has not considered the differences between the *Miller, Aiken,* and *Montgomery* cases and the present case. It is obvious that these decisions related to a person initially sentenced to a lifetime term of imprisonment without the possibility of parole. This is not the situation in the present case. The Respondent in

this case would be eligible for parole but not for the prior crime he committed. The statute is clear, no prisoner is allowed parole who is currently serving a second sentence of a violent crime. To allow Parole is tantamount to completely changing or ignoring the statute.

This decision was made without the benefit of a hearing. The Court certainly has the authority to make a decision without oral arguments. However, Appellant request this Honorable Court to reconsider this case and allow a hearing so arguments can be made before this Court. If the Court does not wish to allow a hearing, the Appellant requests that the statute and differences between this case and others be considered.

CONCLUSION

The Appellant is of the opinion that this Court may have overlooked some matter relating to the statute that applies to a subsequent violent offender, and the prior decisions mentioned within the Court's decision. The Appellant wishes the Court rehear this case in order to reconsider the above referenced arguments, and possibly schedule a hearing so this case can be argued on the merits.

Respectfully submitted,

Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Columbia, South Carolina
May 29, 2018

RECEIVED
MAY 31 2018
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 15-ALJ-0042-AP

Appellate Case No. 2015-002522

Unpublished Opinion No.2018-UP-216
Submitted February 1, 2018 – Filed May23, 2018

NICHOLAS M. GEER, #227443.....RESPONDENT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES ..... APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Appellant, certify that I have served a copy of the *Petition for Rehearing*, dated May 29, 2018, on Respondent by depositing the same in the United States mail, postage prepaid, this 29th day of May, 2018, addressed to him:

Nicholas M. Geer, #227443
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols,
Executive Administrative Assistant

S. C. Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

State of South Carolina
Department of Probation, Parole and Pardon Services

HENRY McMASTER
Governor

JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

May 29, 2018

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: Nicholas Geer v. SCDPPPS

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the *Petition for Rehearing* dated May 29, 2018, along with proof of service in the above referenced case.

Thank you for your cooperation in this matter.

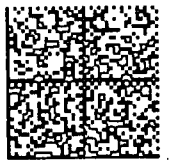
Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn

Enclosures

cc: Nicholas Geer



U.S. POSTAGE PITNEY BOWES

ZIP 29205 $ 002.47⁰
02 1W
0001388679 MAY. 30. 2018

State of South Carolina
Department of Probation, Parole, and Pardon Services
2221 DEVINE STREET, SUITE 600, POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250

RECEIVED
MAY 31 2018
SC Court of Appeals

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201