RECEIVED
JUL 02 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Appellate Case No. 2015-002522

NICHOLAS GEER, #227443.....RESPONDENT

v.

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

PETITION FOR WRIT OF CERTIORARI

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

Other Counsel of Record:

Zoe Jones
Emily Paavola
Justice 360
900 Elmwood Ave.
Columbia, SC 29201
(803) 765-1044

INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies that the Petition for Rehearing was timely made on May 29, 2018, and was ruled upon by the Court of Appeals on June 22, 2018.

QUESTION PRESENTED

1. Did the Court of Appeals err in deciding that the Respondent is not a subsequent violent offender due to being a juvenile at the time he committed his violent crimes?

STATEMENT OF THE CASE

On December 30, 1994, the Respondent shot Antonia Richardson in the left thigh. He was later caught, arrested and charged with the offense of assault and battery with intent to kill (ABIK). On June 5, 1995, the Respondent appeared before the Honorable Frank Eppes for this offense. Upon the conclusion of this appearance the Respondent was sentenced pursuant to the Youthful Offender Act to a term of incarceration not to exceed six years. The Appellant was later released on parole.

On July 14, 1995, while on parole, the Respondent shot Alex Medina causing his death. He was arrested and charged for the offense of murder. On November 14, 1995, the Respondent was found guilty by a jury of his peers for the offense of murder. Upon conviction he appeared before the Honorable H. Hall who sentenced him to a term of incarceration for the remainder of his natural life. At the time of the Respondent's conviction, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

When the Respondent became eligible for parole, the Petitioner conducted a mandatory investigation to determine if the Respondent was in fact eligible. During this investigation it was discovered that the Respondent was convicted of ABIK prior to the murder conviction. Due to this prior conviction for a classified violent crime, the Petitioner determined the Respondent not eligible for parole pursuant to South Carolina law. On July 13, 2015, the Respondent was notified as to his denial of parole eligibility.

Upon being denied parole eligibility the Petitioner filed a notice of appeal before the Administrative Law Court. Within this appeal the Respondent argued that due to him being a minor at the time of the offense, a sentence of life without parole should be considered cruel and unusual punishment in violation of the eighth amendment of the United States Constitution.

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge issued an opinion in which he determined the Petitioner did in fact violated the Respondent's Constitutional rights. Judge Anderson determined that due to the Respondent's age at the time the offense was committed, it would be unconstitutional to permanently deny him an opportunity to be awarded parole. The ALJ ordered this case be reversed and remanded for further findings consistent with this order.

Upon receiving this decision the Petitioner decided to file a notice of appeal before the South Carolina Court of Appeals. The Petitioner argued that each of the prior cases dealing with a life sentence of a juvenile without the possibility of parole are not identical to the present case. In the present case the Respondent committed a previous violent crime which according to South Carolina law makes the denial of parole eligibility mandatory. Therefore, the denial of parole was lawful pursuant to South Carolina law. The Court of Appeals decided that the ALC was correct and affirmed their decision. A petition for rehearing was filed and denied by the Court of Appeals. This Petition for Writ of Certiorari follows.

ARGUMENT

1. **The Court of Appeals erred in deciding that the Respondent is not a subsequent violent offender due to him being a juvenile when he committed his violent crimes.**

The Petitioner submits that in accordance with rule 242(b), SCACR there are novel and important reasons for this court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter.

The Petitioner submits that the Court of Appeals misapprehended its determination that the Respondent cannot be denied parole eligibility due to his youth at the time he committed these offenses. The Respondent argued and the Court of Appeals accepted that any lifetime denial of parole eligibility for a juvenile violates the eighth amendment of the United States Constitution.

The United States Constitution specifically states, "excessive bails should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII

The South Carolina Supreme Court reviews three factors in assessing proportionality of the sentence for Eighth Amendment purposes: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals; and, (3) sentences for the same crime in other jurisdictions. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003). Within their ruling the lower courts relied on the South Carolina Supreme Court case of *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), who relied on United States Supreme Court case of *Miller v. Alabama,* 132 S.Ct. 2455 (2012). In these cases the court ruled that an individual who committed the offense of murder as a juvenile cannot be sentenced to life without the possibility of parole.[1] The Petitioner argues that these opinions do not apply to the instant case. The Petitioner will also argue that the courts never addressed the fact that the General Assembly has clearly wished for an individual who is serving a second classified violent offense not to be allowed parole.

When the Court of Appeals made their determination they failed to mention the statute that allows no inmate serving a sentence for a subsequent violent conviction parole eligibility. The lower courts only looked at the age of the offender and automatically applied the *Aiken* and *Miller* decisions. However at the time the Respondent committed his crimes 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(2014)(emphasis added)

---

[1] In South Carolina a person is considered an adult pass the age of seventeen. S.C. Code Ann. §63-19-20 (2014); however, in *Aiken*, the Court determined that since *Miller* extends to defendants under eighteen for the purpose of that opinion, juveniles are to be individuals under eighteen. *Aiken*, at 537 n.1

It is clear within the statute that **any prisoner** serving a subsequent sentence for a classified violent offense cannot appear before the Parole Board. The Respondent was on parole for ABIK then committed the offense of murder, both classified as violent crimes.[2] The statute clearly states that, "The Parole Board must not grant, nor is parole authorized to any prisoner." To allow parole for the Respondent the court essentially rewrites the statute due to it being clear that any prisoner who have committed a subsequent violent offense cannot be allowed parole eligibility.

The court never addressed the certainty of this statute. The General Assembly made it clear, any prisoner who has committed a second violent offense will not be eligible for parole. The fault of the life sentence without parole is not that of the courts, legislature, nor the Department, but that of the Respondent himself. This element is not found in any other opinion used by the lower court to justify their decision. In each of the other cases a life without parole sentence was given by the sentencing Judge, it had nothing to do with any prior offenses committed by the offender.

The Appellant submits that the lower court has misapprehended and overlooked a major element regarding the parole of an individual in South Carolina. In this state parole eligibility is determined by statute, and not the courts. At no point may a judge order an inmate to be eligible for parole if the statute does not allow 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 in *Aiken v. Byers,* and its United States Supreme Court's equivalent, *Miller v. Alabama,* decided that it is unconstitutional to sentence a minor to a life sentence without the possibility of parole. Neither case relates to an individual being denied parole due a prior act of criminal violence. The Respondent was not given a life sentence without parole. The

[2] 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).

Respondent was only denied parole eligibility due to his prior violent actions occurring before the murder conviction. The prior violent conviction clearly denies parole eligibility as well as reveal the Respondent's potential dangerousness. The *Miller* and *Aiken* decisions determined that before a life without parole sentence can be administered to a minor, a hearing on the future dangerousness must be conducted. The future dangerousness has already been determined in this case due to the Respondent's prior convictions. This statute exist in order for multiple violent offenders not be given parole eligibility.

Within the Court of Appeals 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 the lower court. The lower Courts only accepted the reasoning of the ALC, who also never addressed the statute.

The holding in the *Miller* and *Aiken* decisions requires the sentencing court 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 court could not sentence a defendant to anything lesser or greater. However, the offender was

allowed parole upon the service of twenty years. The Respondent would have been parole eligible if not for his own prior offenses.

The lower court overlooked the statute that relates to this cause of action. It is clear by the statute no prisoner in the situation as the Respondent are allowed to appear before the Board. Even if they happen to appear, the Board is not allowed to grant parole. The Petitioner is also of the position that the lower court has not considered the differences between the *Miller, Aiken, and Montgomery* decisions 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 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.

The Petitioner's request this honorable court to grant this writ. The Petitioner feels they have revealed ample reasoning for the Court to review the decisions of the lower court. The Appellate Court rules specifically state:

> The following while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) Where substantial constitutional issues are directly involved; and (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 (b)SCALC

This matter is a clear question of law that the Petitioner argues which has not yet been addressed by the lower court. It is clear that the statute does not allow **any prisoner** with a subsequent violent

offense parole eligibility. This conflict with their decision and the statute was never answered by any of the lower court decisions. So the Petitioner wishes this be resolved by this court.

CONCLUSION

The Court of Appeals failed to address the statute that does not allow parole eligibility for an individual serving a second violent conviction. There is a clear novel question of law involving a substantial constitutional issue. Therefore, the Petitioner respectfully requests this court grant this writ of certiorari and review the decision of the Court of Appeals.

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
June 27, 2018

RECEIVED

JUL 02 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III

Unpublished Opinion No.: 20182-UP-216
Submitted February 1, 2018-Filed May 23, 2018

NICHOLAS GEER, 227443 .....RESPONDENT,

v.

SCDPPPS,.....PETITIONER.

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Petition for Writ of Certiorari,* dated June 27, 2018 on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record this 28th day of June, 2018:

Zoe Jones, Esquire
Emily Paavola, Esquire
Justice 360
900 Elmwood Ave, Suite 200
Columbia, South Carolina 29201

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

Dawn K. Nichols
Executive Assistant

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