

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Anderson County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MATTHEW THOMAS PICKENS, JR.

APPELLANT

APPELLATE CASE NO 2017-001687

ANDERS BRIEF OF APPELLANT

RECEIVED
FEB 08 2018
SC Court of Appeals

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the resentencing court erred in dismissing Appellant's motion for resentencing filed pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, 135 S.Ct. 2379 (2015)?

STATEMENT OF THE CASE

On April 5, 1988, the Anderson County Grand Jury returned indictments against Appellant Matthew Pickens for first-degree burglary, first degree criminal sexual conduct, assault and battery of a high and aggravated nature (“ABHAN”), and criminal conspiracy. R. 31 – 38. Pickens was just seventeen years old on the date of the alleged offenses.

Following a trial before the Honorable Thomas J. Ervin, the jury convicted Pickens of the indicted offenses. See R. 39. On September 21, 1988, Judge Ervin sentenced Pickens to a life sentence for first degree burglary, a consecutive thirty year term for first degree criminal sexual conduct, a concurrent ten year term for ABHAN, and a concurrent five year term for conspiracy. R. 31, R. 33, R. 35, 37. Prior to its amendment in 1995, which became effective January 1, 1996, a life sentence for first degree burglary was punishable by fifteen years to life imprisonment, “provided, that no person convicted of burglary in the first degree shall be eligible for parole except upon service of not less than one-third of the term of the sentence.” See 1985 South Carolina Laws Act 159 (H.B. 258); 1995 South Carolina Laws Act 83 (H.B. 3096).

Pickens was not successful in his direct appeal or on collateral review. See R. 39 – 42. In 2002, Pickens was released from prison on parole. Following subsequent convictions for check fraud and goods by false pretenses, Pickens was reincarnated in 2006 and his parole was revoked. R. 18; R. 23 – 25.

On September 11, 2015, Pickens filed a motion for resentencing pursuant to our Supreme Court’s decision in Aiken v. Byars, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), *cert. denied*, 135 S.Ct. 2379 (2015), and request for appointment of counsel. R. 1 – 10. 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 July 18, 2016, Chief Justice Pleicones filed an Order vesting exclusive jurisdiction over Pickens' case to the Honorable Perry H. Gravely. R. 11. On July 29, 2016, Pickens filed an additional Motion for Resentencing, enclosing an affidavit from the victim. R. 13 – 17. In response, the State filed a Motion to Dismiss the motion for resentencing on October 20, 2016. R. 18 – 19.

On June 22, 2017, Pickens appeared for a hearing on the State's motion to dismiss before Judge Gravely. Pickens was represented by Jennifer Johnson, and the State was represented by assistant solicitor Al Means. R. 20. On August 3, 2017, Judge Gravely filed an Order dismissing Pickens' motion for resentencing. Judge Gravely ruled that Aiken was not applicable to Pickens because "the original sentence imposed was not the sentence described in *Aiken*, and Petition[er] is not currently incarcerated directly pursuant to the original sentence." R. 30.

This appeal follows.

ARGUMENT

The resentencing court erred in dismissing Appellant’s motion for resentencing filed pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, 135 S.Ct. 2379 (2015).

The resentencing court erred both in finding that Pickens is not “incarcerated directly pursuant to” the original life sentence imposed in 1988 and in finding that our Supreme Court’s decision in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, 135 S.Ct. 2379 (2015), is narrowly applicable to only sentences denominated “life without the possibility of parole.” As an initial matter, S.C. Code Ann. § 24-21-680 provides that upon issuance of a warrant or citation charging a violation of parole, “a final determination must be made by the board as to whether the prisoner’s parole should be revoked *and whether he should be required to serve any part of the remaining unserved sentence.*” (emphasis added). Thus, while it is a parole violation that led to Picken’s re-incarceration, the sentence he is currently serving is life for the burglary conviction. The resentencing judge’s finding otherwise is an error of law.

The scope of Aiken is a more complex matter that can only be properly understood with consideration of the United States Supreme Court cases that came before it. The Eighth Amendment to the United States Constitution, applicable to the states under the Fourteenth Amendment, provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend VIII; U.S. Const. amend XIV; see also S.C. Const. art. I, § 15. The United States Supreme Court has found that because the words of the Eighth Amendment are not precise and their scope is not static, it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958).

The twenty-first century has seen significant development in the area of Eighth Amendment jurisprudence, especially with respect to juvenile offenders. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court categorically banned the imposition of the death penalty upon juvenile offenders who were under the age of eighteen at the time of the crime. In Graham v. Florida, 560 U.S. 48 (2010), the Court categorically banned the imposition of life without parole upon juvenile offenders who committed non-homicide offenses. Similar to its reasoning in Roper, the Graham Court's conclusion was based upon the limited culpability of juvenile non-homicide offenders, the severity of life without parole sentences, and the lack of any penological theory adequate to justify such a sentence. 560 U.S. at 68-75. "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. at 69. Regarding severity, the Court noted that life without parole is the second most severe punishment permitted by law, and, like the death penalty, deprives the offender of his liberty "without giving hope of restoration." Id. at 69-70. For a juvenile, the Court found that a sentence of life without parole is "an especially harsh punishment" because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." Id. at 70. While Graham does not require a guarantee of release for a youthful offender convicted of a non-homicide crime, such defendants must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 71.

Two year later, the United States Supreme Court filed its opinion in Miller v. Alabama, 567 U.S. 460 (2012), holding that the imposition of mandatory life without parole ("LWOP") sentences against juvenile homicide offenders 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. The Court wrote:

Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

567 U.S. at 489.

In *Aiken v. Byars*, 410 S.C. 534, 545, 765 S.E.2d 572, 578 (2014), *cert. denied*, 135 S.Ct. 2379 (2015), our Supreme Court held that the principles enunciated in *Miller* were retroactively applicable to the discretionary imposition of life without parole sentences for juveniles convicted of homicide offenses and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole. The *Aiken* Court ruled: “[A]ny 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.* Following denial of the state’s petition for writ of certiorari to the United States Supreme Court, the *Aiken* Court filed an order lifting its stay of *Aiken* and instructing: “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).

While Pickens was not sentenced to “life without parole,” he is similarly situated to the petitioners in *Aiken* because his sentence is the functional equivalent of life without parole. Notably, Pickens’ life with parole sentence was imposed pursuant to a discretionary statutory sentencing scheme that provided a range of fifteen years to life for first degree burglary. See

1985 South Carolina Laws Act 159 (H.B. 258). Thus, Pickens received the harshest penalty available under the law for his offense. At the time of Pickens' sentencing, Roper, Graham, Miller, and their progeny had not yet been decided. Consequently, the sentencing judge was without guidance regarding the lessened culpability of juvenile offenders, which makes them less deserving of the most severe punishments. See Graham v. Florida, 560 U.S. 48, 68 (2010) (citing Roper, 543 U.S., at 569); Aiken, 410 S.C. at 544 n. 8, 765 S.E.2d at 577 n. 8 (noting that the sentencing judge's did not commit an abuse of discretion, though the prior hearings "suffer[ed] from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*," because the sentencing courts did not have the benefit of *Miller* to shape their inquiries). Because none of his offenses were homicide, the Eighth Amendment requires that Pickens be provided with "some meaningful opportunity for release based on demonstrated maturity and rehabilitation." See Graham, 560 U.S. at 75.

Pickens' prior release on parole, followed by his re-incarceration for violating that parole, does not change this analysis. Pickens served approximately fourteen years incarceration before being released on parole. He entered the prison system as a child and spent the entirety of his twenties trying to survive there rather than developing the important life skills that would make him a responsible member of society. Nonetheless, he was successful on parole for four years before he was returned to prison following his conviction for petty crimes. Pickens has spent just over an additional twelve years in prison as of time of this writing, resulting in the total service thus far of twenty-six years incarceration, all for an offense committed at seventeen years old.

In Montgomery v. Louisiana, 136 S.Ct. 718, 725 (2016), the United States Supreme Court suggested, as *dicta*, that one means of remedying a Miller violation may be to permit

juvenile offenders to be considered for parole, rather than by resentencing them. However, South Carolina's existing parole process and procedures do not provide a meaningful opportunity for release because they permit the denial of parole based solely upon the seriousness of the underlying offense and lack any mandate for juvenile specific considerations. See S.C. Code Ann. § 24-21-640; see, e.g., Greiman v. Hodges, 79 F.Supp.3d 933 (S.D. Iowa 2015) (denying motion to dismiss where the petitioner alleged that the parole board summarily denied him parole based solely on the seriousness of his offense and failed to take into account his youth and demonstrated maturity and rehabilitation); Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), *appeal dismissed by* 667 Fed.Appx. 416 (Mem.) (4th Cir. 2016) (holding North Carolina parole process did not provide meaningful opportunity for release where there was no distinction between juvenile and adult offenders, there was no notice and opportunity for the offender to be heard regarding maturity and rehabilitation, and data reflected unusually low parole rates for juvenile offenders); Atwell v. State, 197 So.3d 1040 (Fla. 2016) (finding life with parole sentence violated the Eighth Amendment, as it effectively resembled a mandatorily imposed life without parole sentence under Florida's statutory parole process, which gave no consideration to the diminished culpability of juvenile offenders). In light of the inadequacies of our parole process, the only meaningful opportunity for release that currently exists for Pickens is through judicial resentencing. Accordingly, the resentencing judge erred in dismissing Pickens' motion for resentencing.

CONCLUSION

Based on the foregoing, Appellant Matthew Pickens respectfully requests that this Court reverse the dismissal of his motion for resentencing and remand his case for a de novo resentencing hearing as provided in Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), *cert. denied*, 135 S.Ct. 2379 (2015).



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of February, 2018.

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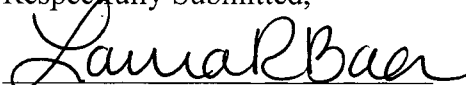
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Thomas Pickens states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's hearing before Judge Perry H. Gravely, which was held on June 22, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Matthew Thomas Pickens.

Respectfully Submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

This 8th day of February, 2018.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Motion for Resentencing and Motion for Appointment, filed Sept. 11, 2015;
- (2) Supreme Court Order Specially Assigning the Honorable Perry H. Gravely;
- (3) Second Motion for Resentencing, filed July 29, 2016;
- (4) State's Motion to Dismiss;
- (5) Transcript of Hearing held June 22, 2017 (entirety);
- (6) Order of Dismissal;
- (7) True-billed indictment(s) and sentencing order(s);
- (8) Direct Appeal Opinion, No. 90-MO-137 (S.C. Ct. App. filed Sept. 28, 1990); and
- (9) Direct Appeal Remittitur

I certify that this designation contains no matter which is irrelevant to this appeal.



Laura R. Baer
Appellate Defender

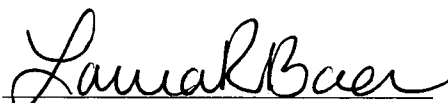
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February 8, 2018

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Laura R. Baer
Appellate Defender

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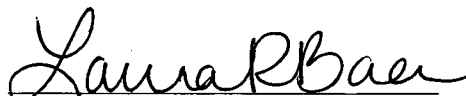
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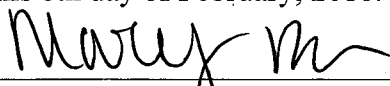
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Matthew Thomas Pickens, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 8th day of February, 2018.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2018.

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