STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi L. Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

Eric D. McCall,

APPELLANT

Appellate Case 2017-000800

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

When Appellant was 19 years old at the time of the offense, did the circuit court erred in summarily dismissing Appellant's motion for resentencing based solely on his chronological age?

STATEMENT OF THE CASE

Appellant was indicted by the Berkeley County Grand Jury for Murder and Carjacking. On November 16, 1998 Appellant was called to trial before the Honorable Markley Dennis and a jury. R. 1. Appellant was represented by Percy Beauford. R. 1. The State was represented by Brent Gray and Thad Doughty. R. 1.

At the conclusion of the trial, Appellant was found guilty of all charges. Appellant was sentenced life imprisonment for murder and twenty-five years for carjacking. R. 258-259.

Petitioner appealed his conviction. Petitioner's appeal was dismissed. Remittitur was received by the circuit court on June 14, 2000.

On May 31, 2016, Appellant filed a Motion for Resentencing pursuant to *Aiken v. Byars*[1] and *Miller v. Alabama.*[2] R. 280. The State moved for summary dismissal. R 281-290.

On March 24, 2017 the Honorable Kristi Harrington heard the State's motion for summary dismissal. R. 264, ll. 3-4. After a brief argument, Judge Harrington granted the State's motion for summary dismissal. R. 277 ll. 23-24. This appeal follows.

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[1] *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014).

[2] *Miller v. Alabama*, 567 U.S. 460 (2012).

ARGUMENT

I. When Appellant was 19 years old at the time of the offense, the circuit court erred in summarily dismissing Appellant's motion for resentencing based solely on his chronological age.

Relevant Facts

At the time this brief is written, Appellant is thirty-nine years-old. Appellant has been locked-up for over half of his life for the killing of Kevin Keyes on February 23, 1998. R. 2; 258-259; 264, ll. 5-10.

On February 23, 1998, Appellant was a nineteen year-old kid. Earlier in his teens, Appellant had had gotten a girl pregnant, and then got married "too young." R. 165, ll. 17-25. He was having problems with his young wife and had moved to Charleston. Appellant would testify that he and his wife had "a lot of growing up to do." R. 165 , ll. 20-21. An acquaintance who testified a trial described the nineteen year-old as "playful." R. 161, 15-25.

Prior to the shooting, Appellant and Von Killingbeck were talking about stealing Keyes' car. R 78, l. 17—79, l. 5 . Keyes offered to give Appellant and Killingbeck a ride. R. 169, l. 24—170, l. 3. During that drive, Killingbeck pulled out a gun and shot Keyes. Appellant also pulled his gun which discharged. R. 171, ll. 8-22.

Appellant was convicted on November 18, 1998. The Court sentenced him to life imprisonment for the Murder. R. 289. On May 31, 2016, Appellant filed a motion for resentencing pursuant to *Aiken v. Byars* and *Miller v. Alabama*. R. 280. The State moved for summary dismissal. R.281-290.

On March 24, 2017 the Honorable Kristi Harrington heard the State's motion for summary dismissal. R. 264, ll. 3-4. Appellant argued that *Miller* was not a bright line test.

R. 265 ll. 20-21. Additionally, Appellant stated, "there is no rational basis to not apply those hallmarks of youth to someone over the age of 18." R. 270, ll. 1-3. Moreover Appellant argued that it would offend the Eighth Amendment and the Fourteenth Amendment not to consider the hallmarks of you. R. 267, l. 22—270, l. 21.

The Court found the following:

> I do not find -- and, again, I made, I believe, abundantly clear throughout the process of this hearing, that this is the appropriate vehicle for which you may do that.
>
> Again, my very strict reading of *Aiken v. Byars* was expansive only to the age of 18 . The Court articulated all of the rationale that you want me to consider in *People v. House*[3]. It has been marked as Court's Exhibit Number 1. I'm granting the State's motion to dismiss. I do not believe that Mr. McCall is the defendant with which *Aiken v. Byars* was intended to provide relief. Note your exception to my ruling.

R. 277, l. 13—278, l. 1.

The Circuit Court erred because denying Appellant and individual analysis of youth describe in *Miller* violates the Eighth Amendment.

The Eighth Amendment to the United States Constitution bars "cruel and unusual punishments." U.S. Const. amend VIII. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. … The Amendment 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, 100-101 (1958). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (*quoting Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

In 2005, the Supreme Court established a categorical ban on the death penalty for

juveniles by relying on social science research suggesting that young people have a lessened culpability. *Roper v. Simmons*, 543 U.S. 551, 569-75 (2005). The Court found that young people are different from fully developed adults because of the following: (1) they are immature and have "an underdeveloped sense of responsibility;" (2) they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) their characters are "not as well formed" as adults. *Id.* at 569-70 (internal citations omitted). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Five years later, the United States Supreme Court held life sentences for non-homicide crimes committed while the defendant was under the age of eighteen violated the Eighth Amendment to the United States Constitution. *Graham*, 560 U.S. at 74-76. The *Graham* Court found that juvenile non-homicide offenders must be given a meaningful opportunity to obtain release. *Id.* at 82.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court continued the evolution of Eighth Amendment jurisprudence. The Court extended the reasoning of *Roper* and *Graham* by holding that a mandatory sentence of life without parole for juvenile homicide offenders also violates the Eighth Amendment's prohibition on cruel and unusual punishment. However, *Miller*, did not create a categorical prohibition, but instead, found that the hallmarks of youth should be considered as mitigating when sentencing. In fact, the *Miller* opinion recognized that the chronological age is not the sole mitigating factor to be considered. "'[J]ust as the chronological age of

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[3] *People v. House*, 72 N.E.3d 357, 2015 IL App (1st) 110580.

a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful Appellant be duly considered' in assessing his culpability." *Miller*, 567 U.S. at 476 (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). While "A juvenile is not absolved of responsibility for his actions," his transgressions are "not as morally reprehensible as that of an adult." *Graham*, 560 U.S. at 68 (internal citations omitted).

"[Y]outh is more than a chronological fact." *Miller*, 567 U.S. at 476 (quoting *Eddings*.). Young people lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." *See id.* at 471. Therefore, in considering the appropriate sentences for young people the courts should look at the following:

> In addition to the chronological age of an individual, Court must examine their emotional development and the "hallmarks of youth." (1) the chronological age of the offender and the hallmark features of youth, including immaturity, impetuosity, and failure to appreciate the risks and consequence; (2) the family and home environment that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the incompetencies associated with youth—for example, the offender's inability to deal with police officers or prosecutors (including on a plea agreement) or the offender's incapacity to assist his own attorneys; and (5) the possibility of rehabilitation.

Aiken, 410 S.C. at 544, 765 S.E.2d at 577 (internal quotations omitted). Young People have "diminished culpability and greater prospects for reform," and therefore, "they are less deserving of the most severe punishments." *See Graham*, 560 U.S. at 68.

Earlier this year, The United States District Court in Connecticut granted §2255 habeas to a 18 year-old's *Miller* claim. *Cruz v. United States*, No. 11-CV-787 (JCH), (D.

Conn. Mar. 29, 2018).[4] Cruz was 18 years and 20 weeks old at the time of his crimes.

In *Cruz*, the Government argued that *Miller*, was a bright line test that prohibited a *Miller* type sentencing hearing to defendants under 18 years old at the time of the crime. This was the same position taken by Judge Harrington in Appellant's case. R. 266, ll. 13-18.

However, the *Cruz* court found the following:

> **The Government argues nonetheless that *Miller* drew a bright line at 18 years old, which prevents this court from applying the rule in *Miller* to an 18-year-old.** *See* Post-Hr'g Mem. in Opp. at 8; *see also Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (recognizing that the line may be over- and under-inclusive, but stating nonetheless that "a line must be drawn"). **However, in so arguing, the Government fails to recognize that there are different kinds of lines.** By way of illustration, in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), the Supreme Court held that the death penalty was unconstitutional for offenders under the age of 16. *Id.* at 838. It was not until *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), rev'd by *Roper*, 543 U.S. at 574, however, that the Supreme Court held that the Eighth Amendment did not prohibit the execution of offenders ages 16 to 18. Id. at 380. In *Stanford*, the Court did not say that the ruling it set forth was found in the *Thompson* holding. Indeed, *Stanford* was not redundant of *Thompson* because the line drawn in *Thompson* looked only in the direction of offenders under the age of 16 and found them to be protected by the Eighth Amendment. *Thompson's* line did not simultaneously apply in the other (i.e. older) direction to prohibit the Eighth Amendment from protecting those over the age of 16. In contrast, *Stanford's* line did.
>
> This distinction between the type of line drawn in *Thompson* and the type of line drawn in *Stanford* is reflected in the difference in the Supreme Court's treatment of these two cases in *Roper v. Simmons*. In deciding that the death penalty was unconstitutional as applied to offenders under the age of 18, the *Roper* Court considered itself to be overturning *Stanford*, but not *Thompson*.

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[4] Appellant is cognizant of Rule 268, SCACR. However, Appellant would submit that Rule 268, SCACR is not violated by citing unpublished federal opinions. Unpublished federal opinions are embraced by the Federal Courts. *See* Rule 32.1, FRAP.

> *Compare Roper*, 543 U.S. at 574 ("*Stanford v. Kentucky* should be deemed no longer controlling on this issue."); with *id.* ("In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18."). If the Government's argument that the line drawn in *Miller* prevents this court from applying its rule to an 18-year-old were correct, the same logic applied to the line drawn in *Thompson* would have required *Roper* to overturn *Thompson* rather than relying on and endorsing it. The language in *Roper*, however, makes clear that the court endorsed, rather than overturned, *Thompson*. *See Roper*, 543 U.S. at 574.
>
> In drawing the line at 18, then, *Roper*, *Graham*, and *Miller* drew lines similar to that in *Thompson*, protecting offenders that fall under the line while remaining silent as to offenders that fall above the line. In the case of mandatory life imprisonment without parole, no Supreme Court precedent draws a line analogous to that in *Stanford*. **Therefore, while this court recognizes that it is undoubtedly bound by Supreme Court precedent, it identifies no Supreme Court precedent that would preclude it from applying the rule in *Miller* to an 18-year-old defendant.**

Cruz.

In finding that Cruz was entitled to resentencing, the Court examined legislative enactments, the use of life without parole sentences, and trends. The court noted, "that very few of the courts that declined to apply *Miller* to 18-year-olds had before them a record of scientific evidence comparable to the one that this court now has before it." *Cruz*.

A State Court in Illinois has also considered whether a *Miller* hearing was necessary for a nineteen-year-old inmate. In ruling that the nineteen-year-old was entitled to a resentencing hearing, the court noted the following:

> Rather, we find the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary, especially in the case at bar. Recent research and articles have discussed the differences between young adults, like Appellant, and a fully mature adult. "Research in neurobiology and developmental

> psychology has shown that the brain doesn't finish developing until the mid-20s, far later than was previously thought. Young adults are more similar to adolescents than fully mature adults in important ways. They are more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings."

House.

Much like in *House*, Appellant was nineteen at the time of his crime. Appellant should be provided the opportunity to be heard on how his young age may mitigate the crime. *See Roper* 543 U.S. at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]."). However, the circuit court summarily dismissed Appellant's Motion for Resentencing relying solely on his chronological age. The circuit court refused to consider any other hallmark of youth. The circuit court erred in granting the summary dismissal because Appellant was not given the chance to develop what role youth played in his crime. *Cf. Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (In discussing the standard for summary dismissal in a PCR the court noted, "[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief."). Therefore, Appellant's case should be remanded for a hearing on his Motion for Resentencing.

Refusal to provide Appellant a *Miller* Resentencing hearing would violate the Equal Protection Clause because there is no rational basis to treat a nineteen-year-old differently than a seventeen-year-old.

Equal protection under U.S. Const. Amend. XIV requires "all persons similarly situated to be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (*citing Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

The *Miller* decision did not categorically deem life without parole sentences unconstitutional for youthful offenders rather it provided youthful offenders the additional protection of an individualized sentencing hearing. The Equal Protection Clause of the Fourteenth Amendment would require all similarly situated defendants to have that same protection.

As stated by the opinion of the court in *House*, there is no rational basis to find that a seventeen-year-old should receive a *Miller* hearing but a nineteen-year-old should not. Therefore, to summarily dismiss Appellant's request for a *Miller* hearing would be a denial of his right to equal protection.

CONCLUSION

For the foregoing reasons Appellant respectfully requests that this Court remand the case for a full resentencing hearing.

Respectfully submitted,

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This 23rd day of April, 2019.