

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

v.

MICHAEL JAY FINLEY,

APPELLANT

APPELLATE CASE NO 2016-002480

Appeal from Greenville County

Honorable R. Scott Sprouse, Circuit Court Judge

Opinion No. 5665

PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rule 221(a), SCACR, counsel for Michael Jay Finley petitions the Court for rehearing and respectfully submits that this Court misapprehended the holding in Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), and erred when it held Petitioner's argument that a parole hearing in South Carolina does not offer a meaningful opportunity for release under Miller was not ripe for judicial review.

In Miller, the United States Supreme Court held that the imposition of a life without parole sentence on a juvenile defendant violated the Eighth Amendment's protections against

cruel and unusual punishment because, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty.” Miller, 567 U.S. at 471, 489. The Miller Court cited Graham v. Florida, 560 U.S. 48, 75 (2010), and held that a juvenile defendant *must* be afforded, “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” Miller, at 479. Therefore, before a court can sentence a juvenile to life without parole, the sentencing court must conduct an individualized hearing where it considers the offender’s age and maturity. Id. at 477 – 480.

In Aiken, the South Carolina Supreme Court held that the holding in Miller applied retroactively and explicated considerations that a sentencing court must consider before imposing a life without parole sentence for a juvenile. Aiken, at 544, 765 S.E.2d at 577. The sentencing court *must* consider: the age of the offender; the family and home environment of the offender; the circumstances of the homicide offense; the “incompetencies” associated with youth; and the possibility of rehabilitation. Id.

In its published opinion in this case, this Court held Petitioner was not entitled to resentencing pursuant to Miller and Byars because “although [Petitioner] received a mandatory life sentence for murder as a juvenile offender, the circuit court’s sentence afforded Finley parole eligibility after the sentence of thirty years’ imprisonment.” State v. Finley, Op. No. 2016-002480 (S.C. Ct. App. filed July 17, 2019) (Shearhouse Adv.Sh. No. 29 at 27). Therefore, Petitioner’s sentence was qualitatively different from the sentences imposed in Miller and Byars because Petitioner’s sentence had the possibility of parole which gave him a “meaningful opportunity for release.”

This Court also held that Petitioner’s argument that his upcoming parole hearing does not offer a meaningful opportunity for release was not ripe for review. Petitioner argued that the

opportunity for parole does not create a meaningful opportunity for release in the Miller context because the parole hearing does not afford the inmate with the same protections as a Miller hearing. Specifically, in a parole hearing there is no appointed counsel for the inmate and the parole board is not *mandated* to consider Petitioner's "youth and its attendant characteristics." Miller, at 465. However, this court held that since Petitioner has not had his parole hearing yet, his argument that the parole hearing would not offer him a meaningful opportunity for release was not ripe for review. See State v. Tucker, 376 S.C. 412, 420-21, 656 S.E.2d 403, 407-08 (Ct. App. 2008)

This Court incorrectly interpreted Miller and Byars to limit the prohibition of life sentences imposed on juveniles to only de jure life without parole sentences. Petitioner is aware of the opinion in State v. Slocumb, 426 S.C. 297, 426 S.E.2d 297 (2019), but respectfully argues the holding in Slocumb, that only de jure life without parole sentences imposed on juvenile defendants violate the Eighth Amendment, is not in line with Miller and Graham. Slocumb, at 306, 827 S.E.2d at 152.

The holdings in Miller and Byars require the sentencing court to hold a hearing for the defendant to show evidence of how "youth and its attendant characteristics" should make a lesser sentence "more appropriate" before the life sentence is imposed. Miller, at 465. That procedure is in place to ensure the juvenile defendant has a meaningful opportunity for release prior to the sentence being imposed. Miller, at 479.

Moreover, during a Miller hearing the defendant is entitled to the entire gamut of Sixth Amendment protections. Petitioner's future parole hearing does not provide the same opportunity for release as a Miller hearing. The parole process and the considerations involved in

determining whether to grant an inmate parole are explained in the S.C. Code Ann. 24-21-640 and the factors listed in the Department of Probation, Parole, and Pardon Offenses manual.

The parole board manual recognizes there are very little procedural due process protections at a parole hearing. SCBPP Manual, p. 20. A parole hearing does not *require* the parole board to consider Petitioner's youth and its attendant characteristics, as a Miller hearing would, nor does a parole hearing provide an appointed attorney. Id.; S.C. Code Ann. 24-21-640. Consequently, Petitioner's opportunity for a parole hearing in South Carolina does cure the wrongful process by which his life sentence was imposed in violation of Miller because it does not provide a meaningful opportunity for release.

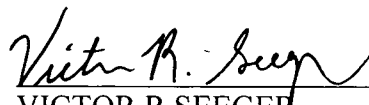
While a parole hearing "can" operate as a "meaningful opportunity for release" it does not *always* suffice to substitute for a Miller hearing. Montgomery v. Louisiana, ___ U.S. ___, 136 S.Ct. 718, 734-735 (2016). In South Carolina the parole process does not offer a meaningful opportunity for release in the Miller context because the parole board is not *required* to consider Petitioner's "youth and its attendant characteristics" and Petitioner is not entitled to the same Sixth Amendment protections at the parole hearing as he would have been had a proper Miller hearing been conducted, most importantly his right to counsel. Miller, at 465.

This Court also erred when it held Petitioner's argument that a South Carolina parole hearing did not provide sufficient protections to be a meaningful opportunity for release in the Miller context was not ripe for review. Petitioner's argument was ripe for review because we know what Miller required, a mandatory hearing to determine how "youth and its attendant characteristics" affected Petitioner's behavior, and we know that Petitioner's future parole hearing is not required to meet that standard. Miller, at 465. Therefore, Petitioner does not need to go through his future parole hearing for his argument that the opportunity for a parole hearing

did not substitute for a Miller hearing to be ripe for judicial review. Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 143 (1974) (internal citations omitted). “Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.” Id.

Therefore, Petitioner was entitled to a Miller hearing where there would be a *required* examination of his “youth and its attendant characteristics” before being sentenced to life in prison, and his argument that a South Carolina parole hearing does not offer a meaningful opportunity for release was ripe for judicial review. Miller, at 465. Rehearing should be respectfully granted on this issue.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Victor R. Seeger". The signature is written in black ink and is positioned above a horizontal line.

VICTOR R SEEGER
Appellate Defender

This 1st day of August, 2019.

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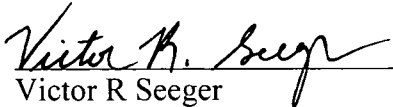
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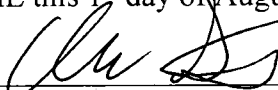
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Michael Jay Finley, #198062, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 1st day of August, 2019.



Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of August, 2019.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 26, 2019