STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No. 2016-002480

The State, Respondent,

v.

Michael Jay Finley, Petitioner.

RETURN TO PETITION FOR REHEARING

On July 17, 2019, this Court properly affirmed the trial court's decision denying Appellant's resentencing motion pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), and *Miller v. Alabama*, 567 U.S. 460 (2012). The Court affirmed the ruling following a thorough analysis applying the facts of Appellant's case to both state and federal law. Contrary to Appellant's assertions in the petition for rehearing, the Court did not misapprehend or overlook any relevant facts or law applicable in this case, particularly recent South Carolina Supreme Court precedent analyzing juvenile sentencing. Accordingly, this Court should deny the petition.[1]

Appellant contends the Court "incorrectly interpreted *Miller* and *Byars* to limit the prohibition of life sentences imposed on juveniles to only de jure life without parole sentences," and maintains the Supreme Court's recent holding in *State v. Slocumb*, 426 S.C. 297, 827 S.E.2d

[1] The Court ordered a return to the petition for rehearing by letter dated August 2, 2019. *See* Rule 221(a), SCACR (providing that no return may be filed unless requested by the appellate court).

148 (2019), was in error. (Rehrg.Pet.p.3). The Court properly applied state and federal law to find Appellant's sentence "differs significantly" from those at issue in previous resentencing cases in which the juvenile offenders received sentences of life *without* the possibility of parole because Appellant has the opportunity for release given his sentence of life *with* parole.[2] *State v. Finley*, Op. No. 5665, at p.34 (S.C. Ct. App. filed July 17, 2019) (Shearouse Adv. Sh. No. 29). As properly analyzed by this Court, our Supreme Court chose not to extend protections to juveniles serving any sentence other than life without parole, such as Appellant's sentence which allows for parole eligibility. *See Slocumb*, 426 S.C. at 314-15, 827 S.E.2d at 157 (declining to extend relief for non-homicide juvenile offenders serving *de facto* life sentences, holding it does not violate the Eighth Amendment). Critically, the Court held in *Slocumb* it was unwilling to extend United States Supreme Court precedent related to juvenile sentencing beyond their "explicit holding[s]" until given the authority to do so. *Id.* at 299, 306, 827 S.E.2d at 149, 152-53. Following a discussion about specific juvenile sentencing cases and general Supreme Court jurisprudence, the Court explained:

> The *Roper* [*v. Simmons*, 543 U.S. 551 (2005)]-*Graham* [*v. Florida*, 560 U.S. 48 (2010)]-*Miller* trilogy has resulted in much confusion and conflicting opinions in ascertaining the reach of the Eighth Amendment in the sentencing of juveniles. . . . Courts have struggled in good faith in trying to determine the manner in which juveniles may be constitutionally sentenced. We are one of those courts. Rather than predict what the Supreme Court may or may not do, we believe the proper course is to respect the Supreme Court's admonition that lower courts must refrain from extending federal constitutional protections beyond the line drawn by the Supreme Court.

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[2] Notably, this Court cannot overrule Supreme Court precedent and must apply the decisions as decided. *See Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same."). Accordingly, this Court did not misapprehend any law where the opinion applied the relevant precedent as determined by the Supreme Court.

Id. at 313, 827 S.E.2d at 156.

This Court carefully considered *Slocumb* and other relevant precedent to correctly determine the holdings do not extend protection to juvenile offenders such as Appellant serving a life *with* parole sentence for murder. As properly found by this Court, Appellant received the sentence the Supreme Court deemed sufficient to remedy an unconstitutional sentence and is eligible for release. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016) (offering parole eligibility as a solution to states tasked with re-litigating cases where a juvenile received mandatory life without parole, explaining states could remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them). Our Supreme Court in *Slocumb* also signaled parole eligibility was a solution to remedy a *Miller* violation. *See Slocumb*, 426 S.C. at 313-14, 827 S.E.2d at 156-57 (discussing juvenile sentencing statutes enacted in states such as Iowa which provide juvenile offenders "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and detailing the bill introduced in South Carolina which provides, among other things, parole eligibility for juvenile homicide offenders after twenty-five years). This Court found Appellant was "not a member of the class of offenders contemplated by our precedent" and correctly denied relief. *Finley*, Op. No. 5665, at p.35.

Appellant also argues the Court erred in finding the issue of whether his future parole eligibility offered a meaningful opportunity for release was not ripe for review. (Rehrg.Pet.pp.2-3). As noted by this Court, Appellant is not eligible for release until August 11, 2022. *Finley*, Op. No. 5665, at p.30 n.5. As asserted in Respondent's brief, the argument Appellant is entitled to resentencing because he *might be* denied parole was properly rejected by the trial court because, beginning in August 2022, the proper sentencing authority will consider evidence

presented by Appellant to determine whether he is eligible for release. *See James v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 376 S.C. 392, 396, 656 S.E.2d 399, 401 (Ct. App. 2008) ("[A]n inmate has a liberty interest in gaining access to the parole board, although there is no protected right to parole."). Appellant's sentence affords him the continuous attempt to obtain release by demonstrating to the proper authority rehabilitation, maturity, and growth. *See* S.C. Code Ann. § 24-21-640 ("The board must carefully consider the record of the prisoner before, during, and after imprisonment."); *see also State v. Calhoun*, 222 So. 3d 903, 907 (La. Ct. App. 2017) ("He has a chance at parole, but he will have to earn it. This scheme is reasonable and satisfies *Miller*."). Beginning in 2022, and every two years thereafter, the parole board will consider evidence presented by Appellant to determine whether he is eligible for release. Nothing guarantees anyone the right to parole or release. By statute, the parole board may only grant release if the inmate "has shown a disposition to reform," he will probably obey the law and "lead a correct life" in the future, his conduct led to "a lessening of the rigors of his imprisonment," the "interest of society will not be impaired" by the inmate's release, and if he has obtained employment. S.C. Code Ann. § 24-21-640. Examining the board's manual shows it can also examine any other factors it "may consider relevant." *See* DPPPS South Carolina Board of Paroles and Pardons Policy and Procedure Manual, (June 2017), p.27, https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf (providing other criteria the board can consider including the inmate's criminal history and risk to the community, general attitude, health, adjustment while confined, employment history, and "[a]ny other factors that the Board may consider relevant") (Parole Board Manual).

Critically, these are the exact types of criteria the Fourth Circuit recently considered and

found provide a meaningful opportunity for release. *Bowling v. Director of Va. Dep't of Corr.*, 920 F.3d 192, 198-99 (4th Cir. 2019). In *Bowling*, the appellant alleged the parole board violated the constitution when it processed his applications because it was not specifically required to consider age-related characteristics unique to juvenile offenders. *Id.* at 194. In a published opinion, the court declined "to find that juvenile-specific Eighth Amendment protections extend to juvenile homicide offenders sentenced to life with parole" or "to find that those protections extend beyond sentencing proceedings." *Id.* at 197. Explaining its reasoning, the Fourth Circuit stated:

> Significantly, the Supreme Court has placed no explicit constraints on a sentencing court's ability to sentence a juvenile offender to life with parole. The Court has not yet gone so far as to require that juvenile offenders be released from prison during their lifetime. *See Graham*, 560 U.S. at 75, 130 S.Ct. 2011. ("A State is not required to guarantee eventual freedom to a juvenile offender . . ."). That is to say, the Court "[did] not foreclose" the possibility that "the rare juvenile offender whose crime reflects irreparable corruption" could be sentenced to life without parole. *Miller*, 567 U.S. at 479-80, 132 S.Ct. 2455. Rather, the Supreme Court required that, before sentencing a juvenile to life without parole, sentencing courts "take into account how children are different." *Id.* at 480, 132 S.Ct. 2455.

Id.

While declining to extend *Miller*'s protections beyond a sentencing proceeding, the Fourth Circuit explained it was not persuaded appellant's parole proceedings fell below the standard established in *Graham* and *Miller*. *Id.* at 198-99. The court found the parole board considered whether appellant's release "would be compatible with public safety and the mutual interests of society" and appellant, whether his "character, conduct, vocational training, and other developmental activities during incarceration reflect the probability" he will lead a law-abiding life in the community and "live up to all the conditions of parole," appellant's "personal history,"

his institutional adjustment, change in attitude, appellant's release plans, his evaluations, "impressions gained . . . by the parole examiner," and any other information provided by appellant. *Id.* at 198. The Fourth Circuit found the factors allowed the parole board "to fully consider the inmate's age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then, and account for the concern at the heart of *Graham* and *Miller*: 'that children who commit even heinous crimes are capable of change.'" *Id.* (citing *Montgomery*, 136 S.Ct. at 736); *see also State v. Scott*, 416 P.3d 1182, 1187 (Wash. 2018) (finding the statutory grant of parole eligibility remedied any constitutional issues with Scott's "de facto" life sentence for offenses committed as a juvenile, rejecting the argument the parole process was inadequate because "it does not provide for consideration of a defendant's diminished capacity due to attributes of youth," and noting the Supreme Court in *Montgomery* expressly approved of a Wyoming parole-eligibility statute that also did *not* require consideration of factors related to youth as part of a parole determination).

Appellant's life sentence includes parole eligibility which is a meaningful way by which he can attempt to obtain release during his lifetime and is not cruel and unusual under the Eighth Amendment. Regardless, this Court properly acknowledged the issue of whether the parole process is constitutionally adequate is not ripe for review in Appellant's case because the board has not yet had the opportunity to consider any evidence presented by Appellant about his "disposition to reform" and that he will obey the law if he is released from prison. *Finley*, Op. No. 5665, at p.31 n.7; *see also* Parole Board Manual, p.20 (providing during a parole hearing, the prisoner has the opportunity to present evidence and have up to three witnesses speak on his behalf). Appellant has failed to demonstrate any fact or case law which was either overlooked or misapprehended by the Court. Rehearing is not warranted in this case. Therefore, this Court

should deny the petition and affirm its original decision finding Appellant was not entitled to resentencing.

CONCLUSION

For all of the foregoing reasons, Respondent requests the panel deny the petition for rehearing.

Respectfully submitted,

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August 12, 2019.

STATE OF SOUTH CAROLINA
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R. Scott Sprouse, Circuit Court Judge

THE STATE,

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CERTIFICATE OF SERVICE

I, Sherrie Butterbaugh, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing by depositing two (2) copies of the same in the United States mail, addressed to her attorney of record: Victor R. Seeger, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

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

This 12th day of August, 2019.

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ATTORNEY FOR RESPONDENT

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August 12, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Michael Jay Finley*
Appeal from Greenville County
Appellate Case No. 2016-002480

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and six (6) copies of the *Return to Petition for Rehearing* in the above-referenced case, together with the *Certificate of Service*.

Thank you for your assistance in this matter.

Sincerely,

Sherrie Butterbaugh,
Assistant Attorney General

SB:dmd
Enclosures
cc: Victor R. Seeger, Esq. (w/three copies of encls.)
The Honorable W. Walter Wilkins, Solicitor 13th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)