STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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S.C. SUPREME COURT

Appeal from Charleston County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY M. ENRIQUEZ,

APPELLANT

APPELLATE CASE NO 2016-002237

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The application of Miller and Aiken to de facto life without parole sentences is not an expansion, but rather an effectuation, of their holdings.

The issue raised on appeal is whether the circuit court erred in finding that Appellant did not qualify for resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was eligible for parole after service of twenty years, where the mandatory nature of Appellant's life with parole sentence treated all adults and juveniles the same, and where the parole process in South Carolina does not provide a meaningful opportunity for release such that it is not an adequate substitute for individualized resentencing.

The United States Supreme Court held in Miller v. Alabama, 132 S.Ct. 2455, 2463 (2012), that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. Subsequently, in Aiken, our Supreme Court held that the Miller decision applies retroactively and that the imposition of life without parole sentences for juveniles without individualized consideration of youth constituted cruel and unusual punishment, even under South Carolina's discretionary sentencing scheme. 410 S.C. 534, 765 S.E.2d 572.

Respondent argues that by their plain language, Miller and Aiken apply only to juvenile homicide offenders sentenced to life without parole and not to de facto life sentences. Brief of Resp., pp. 4 and 15. Similar to Miller, the particular class before the Aiken Court was limited, being made up of fifteen inmates who were sentenced to life without parole for homicides committed as juveniles. 410 S.C. at 536-37, 765 S.E.2d at 573. However, the Aiken Court did not restrict the relief it granted to only those members of the class. Instead, the Court held that "the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, *to those similarly situated*, and

prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole." Id. at 545, 765 S.E.2d at 578 (emphasis added). The Aiken Court provided that "any 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. (emphasis added). From this broad language, it is logical to conclude that the Aiken Court did not mean to restrict its interpretation of the applicability of Miller to only those cases specifically denominated "life without parole," but rather intended to provide relief to anyone "irrevocably sentenced . . . to a lifetime in prison." Id. at 543, 765 S.E.2d at 577 (quoting Miller, *supra*).

The concept of a de facto life sentence is not novel, nor is it unique to juvenile sentencing. In State v. Kimbrough, 212 S.C. 348, 357, 46 S.E.2d 273, 277 (1948), our Supreme Court remanded for resentencing where it found: "From the evidence the jury evidently concluded that appellant should not receive the maximum punishment of life imprisonment, but the [thirty-year] sentence imposed is to all intents and purposes the equivalent of a life sentence, which is the highest punishment permitted for the most aggravated form of the crime." The United States Sentencing Commission defines a de facto life sentence as "one where the length of the sentence imposed is so long that the sentence is, for all practical purposes, a life sentence and likely was intended to be such by the judge who imposed it." Patti B. Saris, et al., U.S. Sent. Comm'n, Life Sentences in the federal system (Feb. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf. In United States v. Pileggi, 703 F.3d 675, 678 (4th Cir. 2013), the Fourth Circuit Court of Appeals referenced its prior remand for resentencing of Pileggi where the government recommended and the district court imposed "a *de facto* life sentence" of fifty years contrary to its extradition agreement with Costa

Rica that Pileggi "would not receive a penalty of death or one that requires that he spend the rest of his natural life in prison."

While not binding authority, various courts around the country have likewise found Graham[1] and Miller applicable to de facto life sentences. See, e.g., Atwell v. State, 197 So.3d 1040 (Fla. 2016) (holding that defendant's sentence of life with the possibility of parole violated the Eighth Amendment, as it effectively resembled a mandatorily imposed life without parole sentence under statutory parole process); State v. Null, 836 N.W.2d 41, 70-74 (Iowa 2013); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 135 (Wyo. 2014); Casiano v. Commissioner, 115 A.3d 1031, 1044 (Conn. 2015), *cert. denied*, 136 S.Ct. 1364 (2016); State v. Ramos, 387 P.3d 650, 659 (Wash. 2017), *as amended* (Feb. 22, 2017), *cert. pending* May 23, 2017; State v. Zuber, 152 A.3d 197 (N.J. 2017). Thus, the principles of Miller and Aiken are not limited to just those sentences specifically denominated "life without parole." Rather, as held by our Supreme Court in Aiken, Miller's holding that the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to *a lifetime in prison*" "deserves universal application." 410 S.C. at 543 (emphasis added). Defendants who are similarly situated to the offenders in Aiken include those subject to any sentence that constitutes the functional equivalent of life without parole. This interpretation is not an expansion of Aiken, but rather an effectuation of its intent.

Respondent cites Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016), for the proposition that the United States Supreme Court "specifically held states could remedy a *Miller* violation – i.e. an unconstitutional sentence – by 'permitting juvenile homicide offenders to be considered for

[1] Graham v. Florida, 560 U.S. 48 (2010) (categorically banning the imposition of life without parole upon juvenile offenders who commit non-homicide offenses).

parole' rather than re-sentencing them." Brief of Resp., p. 15. The characterization of this as a *holding* of Montgomery is inaccurate. The legal issue before the Montgomery Court was whether Miller was retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided. 136 S. Ct. at 725. The Court held that Miller announced a new substantive rule of constitutional law such that state collateral review courts were required to give the rule retroactive effect. Following its detailed explanation of that holding, the Court wrote, as dicta: "Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State ***may*** remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." 136 S. Ct. at 736 (emphasis added). The Court wrote that "[a]llowing 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." Id. "The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." Id.

As discussed more fully in the Brief of Appellant, South Carolina's parole system treats juvenile and adult offenders alike and does not provide a meaningful opportunity for release based upon demonstrated maturity and rehabilitation. See also Atwell v. State, 197 So.3d 1040, 1048 (Fla. 2016) ("Although a State's remedy to *Miller* could include a system for paroling certain juvenile offenders 'whose crimes reflected only transient immaturity—and who have since matured,' the parole system would nevertheless still have to afford juvenile offenders individualized consideration and an opportunity for release."). As a result, parole eligibility is not a sufficient substitute for resentencing in Anthony's case.

It is inadequacies in the current parole system, not any specific application in Appellant's past parole hearings, that render parole eligibility an insufficient substitute for resentencing in South Carolina.

Respondent suggests that "[t]he trial court properly rejected appellant's argument advanced during the hearing that he was serving the equivalent of a life without parole sentence because he had previously been denied parole." Brief of Resp., p. 15. This statement reflects Respondent's misunderstanding of the argument advanced both at the trial level and on appeal. It is not Anthony's two past denials of parole that render his sentence unconstitutional, though aspects of those denials do offer additional support for his argument. Rather, it is the statewide parole system that is flawed in its application to the entire population of juvenile homicide offenders, which renders Anthony's life with parole sentence the functional equivalent of a life without parole sentence.

Respondent agrees that the administrative order following Anthony's last parole denial made explicit that, at least in so far as the Administrative Law Court was concerned, "no existing United States or South Carolina authority requires the South Carolina Parole Board to consider age or immaturity in its decisions." Brief of Resp., p. 12; R. 82. Importantly, in order to be an adequate substitute for resentencing, as discussed in Montgomery, age or immaturity at the time of the crime ***must*** be considered by the parole board. 136 S. Ct. 718, 736. See Atwell v. State, 197 So.3d 1040, 1042 (Fla. 2016) ("Although the pre–1994 first-degree murder statute under which Atwell was sentenced provided for parole eligibility, it remained a mandatory sentence that treated juveniles exactly like adults and precluded any individualized sentencing consideration. The current parole process [in Florida] similarly fails to take into account the offender's juvenile status at the time of the offense, and effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by *Miller*.").

Admittedly, Anthony has not been a perfect inmate, but such is not the standard set forth in any of the applicable case law. Respondent submits that Anthony's limited disciplinary history reflects that he is not capable of change, unlikely to obey the law if released, and lacks the disposition to reform. Brief of Resp., pp. 4 and 17. Respondent asks this Court to take judicial notice of Anthony's "online inmate detail report." Brief of Resp., p. 17 n. 4. However, Rule 201(b)(2), SCRE, provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The South Carolina Department of Corrections' own website contains the following disclaimer related to the "inmate search" feature:

> SCDC offers the Internet "inmate search" feature and the toll free inmate information line 1-866-SCSAVIN (1-866-727-2846) as a public service to interested citizens. While SCDC strives to ensure accuracy of this information, it makes no guarantees as to the reliability of the data. Under no circumstances will SCDC be liable for any damages, direct or indirect, with regard to any and all information obtained through the use of this service. Please report data errors or discrepancies via E-mail to corrections.info@doc.state.sc.us.

SCDC – Inmate Search, http://www.doc.sc.gov/InmateSearchDisclaimer.html. If SCDC itself cannot guarantee the reliability of the information on its site, this can hardly be the type of source "whose accuracy cannot reasonably be questioned" in order to support the taking of judicial notice.

To the extent that this Court does consider Anthony's specific disciplinary history, it must be cognizant that "[t]he purpose of a prison disciplinary proceeding is to maintain institutional order rather than to prosecute criminal conduct." State v. Blick, 325 S.C. 636, 642, 481 S.E.2d 452, 455 (Ct.App. 1997). Because prison disciplinary proceedings are not part of a criminal prosecution, "the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S.539, 556 (1974). That said, for an inmate like Anthony, who entered the

criminal justice system as a child and has spent more years incarcerated than free, the task of accessing his disciplinary history becomes far more complex. Even so, a record of only seven infractions over a twenty-four year period is quite remarkable given the rigors of prison life.

Importantly, the hearing before Judge Mullen was neither a parole hearing nor a resentencing hearing. Rather, it was a hearing to determine the applicability of Aiken to Anthony's case and whether he was eligible for resentencing. R. 69, ll. 2-5. While institutional history is a legitimate factor to weigh in determining whether to grant parole or in the context of resentencing, it is far from the ultimate factor. In both parole and resentencing proceedings, this principle must be at the forefront: "[L]ife without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" Montgomery, 136 S.Ct. at 724. As a result, life without parole is an unconstitutional penalty for juvenile offenders whose crimes reflect the transient immaturity of youth. Id. Like the petitioner in Montgomery, Anthony "must be given the opportunity to show [his] crime did not reflect irreparable corruption; and, if it did not, [his] hope for some years of life outside prison walls must be restored." 136 S. Ct. at 736-37.

Without mandated consideration of specific criteria related to the juvenile status of the offender at the time that their crime, our parole system fails to provide a meaningful opportunity for release for Anthony and others like him. See Greiman v. Hodges, 79 F.Supp.3d 933, 945 (S.D. Iowa 2015) (finding that Graham provides a juvenile offender "with substantially more than a *possibility* of parole or a mere hope of parole; it creates a categorical entitlement to demonstrate maturity and reform, to show that he is fit to rejoin society, and to have a meaningful opportunity for release"); Atwell v. State, 197 So.3d 1040, 1042 (Fla. 2016) (finding the Florida parole system an inadequate remedy for Miller violations because it fails to take into account the offender's juvenile status at the time of the offense); Hawkins v. N.Y. State Dep't of Corr. & Cmty.

Supervision, 140 A.D.3d 34, 39 (N.Y. App. Div. 2016) (holding "[f]or those persons convicted of crimes committed as juveniles who, but for a favorable parole determination will be punished by life in prison, the Board ***must*** consider youth and its attendant characteristics in relationship to the commission of the crime at issue." (emphasis added)).

Our current parole system further fails because it allows denial solely based upon the severity of the offense. While the severity of the offense may be sufficient to deny an adult offender parole, for a juvenile offender the considerations and reasoning of the Parole Board must look beyond the circumstances of the crime to assess whether the offender has matured and rehabilitated since the time of the crime. See Hayden v. Keller, 134 F.Supp.3d 1000 (E.D.N.C. 2015), *appeal dismissed by* 667 Fed.Appx. 416 (Mem.) (4th Cir. 2016) (finding North Carolina parole process inadequate because it treats juvenile and adult offenders the same); Maryland Restorative Justice Initiative v. Hogan, 2017 WL 467731, *22 (D. Md. Feb. 3, 2017) (finding that "it is difficult to reconcile the Supreme Court's insistence that juvenile offenders with life sentences must be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation if the precept does not apply to the parole proceedings that govern the opportunity for release."). There are also concerns regarding the lack of access to counsel and funding for evaluations and investigation integral to a proper presentation to the parole board. See Diatchenko & Roberio v. Dist. Attorney for Suffolk Dist., 27 N.E.3d 349, 360-64 (Mass. 2015) (holding that in order to ensure that the opportunity for release through parole for juvenile offenders is meaningful, in connection with a petition for release before the parole board, indigent inmates must have access to counsel and access to funds for expert witnesses). Unless and until these problems with the parole system are rectified, Anthony does not have a realistic and meaningful opportunity for parole.

Appellant's original sentencing hearing did not take into account Appellant's youth and the hallmark features associated therewith, as the applicable statute provided no discretion to the Court such that Appellant's sentence was mandatorily imposed.

Respondent avers that the original sentencing judge in Anthony's case "considered the factors specifically noted by the *Miller* court as the 'hallmark features' of youth" such that "it cannot be said no court ever took into account appellant's age and its surrounding circumstances."[2] Brief of Resp., pp. 18-19. The Aiken Court explained that the problem with the original sentencing hearings was not that the judges abused their discretion, because the original sentencing courts did not have the benefit of Miller to shape their inquiries. 410 S.C. at 543, n. 8. Rather, the underlying sentencing hearings "suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by Miller." Id. The Aiken Court ruled that on resentencing the judge will have the opportunity "to exercise their discretion within the proper framework as outlined by the United States Supreme Court." Id.

Despite the mandatory nature of the sentence, plea counsel presented some evidence at sentencing, including statements from Anthony's parents. Even so, his truncated presentation fell far below the full exploration of the factors associated with Anthony's youth required by Miller and Aiken. It resembled the ordinary sentencing presentation that one would expect following any adult offender's guilty plea. Importantly though, regardless of the evidence presented, the sentence remained the same – it was a mandatory sentence of life with the possibility of parole

[2] Respondent avers that had appellant gone to trial and testified, "the State could have impeached him on his lengthy criminal history." Brief of Resp., p. 6. The basis for this assertion is one sentence in the guilty plea transcript, where the solicitor said: "Your Honor, he has a very substantial juvenile record." R. 24, ll. 14-15. Rule 609(d), SCRE, provides that evidence of juvenile adjudications are admissible for impeachment "if conviction of the crime would be admissible to attack the credibility of an adult." Without more information in the record, Respondent's contention that Anthony committed any impeachable offenses is nothing more than unfounded speculation, irrelevant to the issue before this Court.

after twenty years. S.C. Code Ann. § 16-3-20(A) (1992) ("A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years . . . ."). Had a death notice been served prior to the plea, the mandatory sentence would have been life with the possibility of parole after thirty years. S.C. Code Ann. § 16-3-20(A) (1992) (". . . provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. . . .").

The mandatory nature of the life sentence was noted repeatedly during the sentencing hearing. R. 11, l. 24 – 12, l. 1; R. 15, ll. 3-13; R. 24, ll. 10-12; R. 24, ll. 16-20; R. 25, l. 15 – 26, l. 1; R. 26, ll. 11-17; R. 29, ll. 8-10. Thus, while Judge Manning said that the sentence was an "appropriate punishment when a life is taken," the reality was that no matter what Judge Manning thought he was required by statute to impose the life sentence. R. 31, ll. 1-6. In Miller, the Supreme Court explained:

> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

567 U.S. at 474. Like the mandatory life without parole sentencing scheme discussed in Miller, the sentencing judge in Anthony's case had no discretion whether to impose the mandatory life with parole sentence.

Moreover, in Montgomery v. Louisiana, 136 S.Ct. 718, 734 (2016), the United States Supreme Court wrote: "Even if a court considers a child's age before sentencing him or her to a

lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity" rather than irreparable corruption. Subsequently, in Justice Sonia Sotomayor's concurring decision in Tatum v. Arizona, she explained:

> On the record before us, none of the sentencing judges addressed the question *Miller* and *Montgomery* require a sentencer to ask: whether the petitioner was among the very "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility . . . . It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender's age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child "whose crimes reflect transient immaturity" or is one of "those rare children whose crimes reflect irreparable corruption" for whom a life without parole sentence may be appropriate. There is thus a very meaningful task for the lower courts to carry out on remand.

137 S.Ct. 11, 12-13 (Mem.) (2016) (J. Sotomayor, concurring). Thus, both our Supreme Court and the United States Supreme Court have made clear that a pre-Miller sentencing hearing will not be saved by a review of its contents, even when it reveals some discussion of the defendant's youth. Accordingly, Anthony's original sentencing hearing did not comply with the constitutional requirements of Miller, Aiken, and their progeny.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Anthony Enriquez respectfully requests this Court vacate his life with parole sentence and remand his case for resentencing.

Laura R. Baer
Appellate Defender

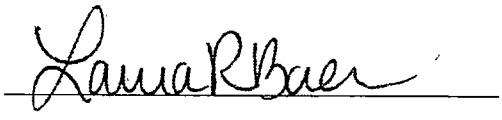
ATTORNEY FOR APPELLANT

This 15th day of November, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 15, 2017



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 15th day of November, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of November, 2017.

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